296 N.C. App.—No. 1 Pages 1-158

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 4, 2025

MAILING ADDRESS: The Judicial Department
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OF
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[1] Died 20 January 2025.

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COURT OF APPEALS

CASES REPORTED

FILED 1 OCTOBER 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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ACCOMPLICES AND ACCESSORIES

Accessory after the fact—robbery—breaking and entering—sufficiency of evidence—The State presented substantial evidence from which the jury could find defendant guilty of accessory after the fact to robbery with a dangerous weapon and accessory after the fact to felonious breaking or entering, charges arising from defendant's knowledge of and aiding after the fact of a home robbery in which the principal robber stuffed two backpacks full of coins and silver stolen from a safe in the home. Evidence showed that defendant admitted to being present with three other people as plans were being discussed to rob a specific home; after the robbery, defendant picked up two of the others and they discussed where the principal robber had hidden the backpacks; and defendant later aided in locating, moving, and concealing the backpacks. **State v. Villarreal, 136.**

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Failure to serve notice of appeal—no appearance in appeal—no waiver of service—In a proceeding to modify child support, the appellate court did not have jurisdiction to consider the father's appeal from the trial court's entry of a protective order, sought by three business entities in which the mother had an ownership interest and from whom the father had subpoenaed documents, where the father failed to serve his notice of appeal on the entities or their counsel and the entities did not waive that failure of service by participating without objection in the appeal. **Crenshaw v. Crenshaw, 1.**

Preservation of issues—juror qualification—failure to challenge—no prejudice—no structural error—In a prosecution for multiple sexual offenses, defendant failed to preserve for appellate review his argument that, because four jurors empaneled on his jury had served on a jury in a separate case earlier the same day, they were not qualified to serve as jurors in defendant's trial pursuant to N.C.G.S. § 9-3 (which lists as a requirement that a prospective juror not have "served as a juror during the preceding two years"). Defendant neither availed himself of his recourse for the alleged statutory violation by challenging the jurors for cause, nor exhausted his peremptory challenges, a necessary precondition for demonstrating prejudice. Further, without a showing of prejudice, defendant's argument that the trial court committed structural constitutional error also failed. Finally, assuming arguendo that the issue had been properly preserved, defendant failed to show that he was deprived of a fair trial. **State v. Reber, 114.**

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Award of attorney fees—notice sufficient—statutory finding made—no abuse of discretion—The appellate court affirmed the trial court's award of attorney fees to the mother in an amount less than half of what she requested after determining that: (1) the father had notice that the issue of attorney fees would be considered at a hearing on the mother's motion to modify child support because the motion included a request for attorney fees and, further, the father made no objection on notice grounds when the mother introduced evidence regarding her attorney fees; (2) the trial court's finding of fact that the father initiated a frivolous action or proceeding supported an award of attorney fees to the mother under N.C.G.S. § 50-13.6; and (3) the court did not abuse its discretion in regard to the amount of the award in light of the parties' respective financial circumstances. **Crenshaw v. Crenshaw, 1.**

Child support—modification—determination of gross income—competent evidence—In a proceeding to modify child support, the trial court did not err in determining the mother's gross income for child support purposes where each challenged finding of fact addressing the mother's income and expenses—particularly those concerning financial assistance and gifts provided to the mother and the parties' children by the mother's family—and the court's child support calculations were supported by competent evidence; even if that evidence might have supported other findings, matters of credibility and weight could not be second-guessed on appeal. **Crenshaw v. Crenshaw, 1.**

Support—date of modification—retroactive increase—no abuse of discretion—In a proceeding to modify child support, the trial court did not abuse its discretion in ordering the father to pay increased child support retroactive to 1 January 2022 rather than to the filing date of either party's motion to modify child support—9 October 2020 for the father's motion for a decrease on grounds that two of the parties' three children had graduated from high school and turned eighteen or

14 January 2021 for the mother's motion for an increase based on changed circumstances in the form of the father's increased income and the remaining minor child's increased needs—where there was a legal basis to increase the father's obligation from the date of the mother's motion and the court set the later effective date of the modification as a compromise in light of the competing motions. **Crenshaw v. Crenshaw, 1.**

Support—modification—reasonable needs of the child—no abuse of discretion—In a proceeding to modify child support, the trial court did not abuse its discretion in relying on the father's evidence rather than the mother's evidence as to the reasonable needs of the parties' child, even though the mother provided most of the care for the child, because determinations regarding credibility and the weight to be accorded evidence were reserved solely for the trial court. **Crenshaw v. Crenshaw, 1.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Stormwater drainage into private property—breach of drainage easements—prior federal action—causation issue already litigated—In a case about flood-related damages to private property during Hurricane Matthew, where dams located on four amenity lakes owned by plaintiff-homeowners' associations overtopped and caused the lakes to drain, after which defendant-city's drainage system discharged stormwater from neighboring properties into the now-dry lakebeds, the trial court properly dismissed plaintiffs' claim seeking relief for the overtopping of the dams on the theory that defendant breached certain drainage easements. Plaintiffs had previously raised a constitutional takings claim in federal court, which resulted in a final judgment holding that plaintiffs failed to show that defendant's actions caused the dams to overtop. Thus, where the causation issue was dispositive for the breach-of-easements claim, the entire claim was precluded under the doctrine of collateral estoppel. **Devonwood-Loch Lomond Lake Ass'n, Inc. v. City of Fayetteville, 26.**

Stormwater drainage into private property—quantum meruit—prior federal action—causation issue—collateral estoppel—In a case about flood-related damages to private property during Hurricane Matthew, where dams located on four amenity lakes owned by plaintiff-homeowners' associations overtopped and caused the lakes to drain, after which defendant-city's drainage system discharged stormwater from neighboring properties into the now-dry lakebeds, the trial court properly dismissed plaintiffs' claim seeking relief for the overtopping of the dams under the principle of quantum meruit. Plaintiffs had previously raised a constitutional takings claim in federal court, which resulted in a final judgment holding that plaintiffs failed to show that defendant's actions caused the dams to overtop. Thus, where the causation issue was dispositive for the quantum meruit claim, the entire claim was precluded under the doctrine of collateral estoppel. **Devonwood-Loch Lomond Lake Ass'n, Inc. v. City of Fayetteville, 26.**

CONSTITUTIONAL LAW

Effective assistance of counsel—failure to file motion to suppress cell phone search—lack of prejudice—In a prosecution for multiple sexual offenses, defendant's counsel did not render ineffective assistance by failing to file a motion to suppress evidence obtained from defendant's cell phone pursuant to a search warrant. Defendant could not establish prejudice from his counsel's failure where, because probable cause existed to support the issuance of the warrant—based on a report from the victim that defendant had sent her nude photos and texts containing sexual

Equitable distribution—challenged finding—not a mere recitation of testimony—not reserving an issue for later hearing—One portion of a challenged finding of fact in an equitable distribution order was not impermissible as a mere restatement of testimony by plaintiff, but rather reflected the court's consideration of that evidence and its determination that one of plaintiff's credit cards had been used after the date of separation without her knowledge or permission. A second portion of the same finding of fact—stating that plaintiff could petition the court to reconsider distribution of the marital property as to that credit card debt if plaintiff's efforts to obtain a remedy from the credit card company failed—was not an impermissible reservation of that issue for a later hearing, but rather only stated plaintiff's existing right under the General Statutes. **Kaylor v. Kaylor, 80.**

Equitable distribution—classification—marital property—affidavit as competent evidence—In an equitable distribution proceeding, the trial court did not err in classifying a piece of real property as marital where plaintiff listed the real property as marital property in her equitable distribution inventory affidavit, which the trial court accepted as a verified pleading to be used as substantive evidence—without objection, as defendant did not appear in person or through counsel at the equitable distribution trial. Accordingly, the affidavit was competent evidence supporting the court's classification. **Kaylor v. Kaylor, 80.**

DOMESTIC VIOLENCE

Protective order—harassment—surveillance and tracking—lack of legitimate purpose—The trial court did not err by entering a domestic violence protective order based on its findings of fact that defendant harassed plaintiff by: accessing security cameras inside the marital home to observe plaintiff, their children, and others; hiring a private investigator to follow and report on plaintiff and people she interacted with; placing a tracker on plaintiff's car; and, in particular, communicating to plaintiff about the information he had gathered on her activities. Competent evidence supported the trial court's determination that there was no legitimate purpose to defendant's actions and that those actions caused plaintiff to be in fear of continued harassment rising to the level of substantial emotional distress. **Moorhead v. Moorhead, 90.**

Protective order—harassment—surveillance and tracking—support for conclusion of domestic violence—In its domestic violence protective order, the trial court did not err by concluding that defendant committed an act of domestic violence against plaintiff based on the court's findings of fact—supported by competent evidence—that defendant used information gathered from security cameras inside the marital home, a tracking device placed on plaintiff's car, and a private investigator to inform plaintiff of his knowledge of her movements and activities, which caused plaintiff fear and anxiety and constituted harassment. **Moorhead v. Moorhead, 90.**

Protective order—knowing violation—sufficiency of evidence—In a prosecution for violating a domestic violence protective order (DVPO) entered against defendant on behalf of his ex-wife and her family, the trial court properly denied defendant's motion to dismiss the charge where the State produced sufficient evidence that defendant knowingly violated the DVPO when he entered a restaurant where his ex-wife's eldest daughter worked, yelled at her upon seeing her there, and, after being asked to leave, placed a photograph on her vehicle in the parking lot. Although defendant claimed that he went to the restaurant without knowing that the

daughter would be there, the fact that he made contact with her once he had identified her was enough to show a DVPO violation. **State v. Washington, 145.**

Protective order—surrender of firearms—threats of suicide—statutory mandate—In its domestic violence protective order, the trial court did not err by following the statutory mandate in N.C.G.S. § 50B-3.1(a) to require defendant to surrender his firearms after the court found as fact—supported by competent evidence—that defendant had previously made threats of suicide. **Moorhead v. Moorhead, 90.**

Protective order—threats of suicide—sufficiency of evidence—In its domestic violence protective order, the trial court's finding of fact that defendant made previous threats to commit suicide at the time the parties' marriage was ending was supported by competent evidence, including plaintiff's allegations and defendant's acknowledgment that he may have made the threats while drinking but did not remember them; therefore, the finding was conclusive on appeal. **Moorhead v. Moorhead, 90.**

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Sovereign immunity—assault by teacher—failure to specifically allege waiver—dismissal proper—In a civil action brought by a public middle school student and her grandmother (plaintiffs) against a teacher and the county school district arising from a teacher's physical assault of the student in a classroom, the trial court's dismissal pursuant to Civil Procedure Rule 12(b)(2) of tort claims against the district on sovereign immunity grounds was affirmed where plaintiffs failed to specifically plead waiver of sovereign immunity by the district, such as through the purchase of insurance that would indemnify it for the allegedly tortious acts. **K.H. v. Dixon, 62.**

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Investigation into trespass—consent to search vehicle—reasonableness of seizure—evidentiary support—The trial court properly denied defendant's motion to suppress evidence of illegal drugs found in his car where the court's findings of fact were supported by competent evidence and where the findings, in turn, supported the court's conclusions of law that defendant was not unreasonably seized when he consented to a search of his vehicle. Defendant was seized when the law enforcement officer who responded to a report of a suspicious vehicle on private property asked for defendant's and his passenger's driver's licenses, and then kept those licenses as the cars drove back down a trail to meet a backup officer (which was a reasonable safety measure under the circumstances since the second officer's car was unable to drive up the trail). The officer's reasonable suspicion of criminal activity was not dispelled by defendant's denial that he knew he was on private property where defendant and the passenger were fidgety and acting nervous and where the officer discovered that the passenger had an outstanding warrant for her arrest. Thus, the seizure had not been unreasonably extended when the officer asked defendant if he had anything illegal in the car—to which defendant responded, "you're welcome to look"—and, therefore, defendant's consent was not per se involuntary. **State v. Jackson, 99.**

Warrantless search of vehicle—probable cause—odor of marijuana and other circumstances—In a prosecution on drugs and weapons charges arising from the discovery of contraband during the warrantless search of defendant's vehicle after

issue for appellate review; and the attorney's failure prejudiced the mother because, had counsel timely moved to dismiss the petition, the trial court would have dismissed it (or reversibly erred in failing to do so). **In re M.B.S., 56.**

WATERS AND ADJOINING LANDS

Negligent stormwater drainage—collateral estoppel—statute of limitations—governmental immunity—inverse condemnation as exclusive remedy—In a case about flood-related damages to private property during Hurricane Matthew, where dams located on four amenity lakes owned by plaintiff-homeowners' associations overtopped and caused the lakes to drain, and where defendant-city's drainage system discharged stormwater from neighboring properties into the now-dry lakebeds both before and after the overtopping occurred, the trial court erred in dismissing plaintiffs' negligence claim against the city. First, to the extent that plaintiffs sought relief for damages allegedly caused by post-overtopping stormwater drainage, the judgment in a prior federal action did not preclude plaintiffs from bringing their negligence claim in state court. Second, plaintiffs' claim was not time-barred where the alleged negligence—specifically, the dumping of stormwater into the dry lakebeds after the dams overtopped—fell within the three-year limitations period. Third, the defense of governmental immunity was unavailable to defendant, since state law classifies stormwater management as a proprietary municipal function. Finally, inverse condemnation was not an exclusive remedy barring plaintiffs' right to bring an action in tort for property damage. **Devonwood-Loch Lomond Lake Ass'n, Inc. v. City of Fayetteville, 26.**

Stormwater drainage into private property—negligence per se—improperly dismissed—In a case about flood-related damages to private property during Hurricane Matthew, where dams located on four amenity lakes owned by plaintiff-homeowners' associations overtopped and caused the lakes to drain, and where defendant-city's drainage system discharged stormwater from neighboring properties into the now-dry lakebeds both before and after the overtopping occurred, the trial court erred in dismissing plaintiffs' claim of negligence per se (alleging violations of N.C.G.S. § 160A-311 and local ordinances by defendant) to the extent that it was not precluded under collateral estoppel principles by a prior federal judgment on plaintiffs' constitutional takings claim. The claim fell within the applicable statute of limitations; governmental immunity was unavailable to defendant, since state law classifies stormwater management as a proprietary municipal function; and inverse condemnation was not an exclusive remedy barring plaintiffs' right to bring an action in tort for property damage. **Devonwood-Loch Lomond Lake Ass'n, Inc. v. City of Fayetteville, 26.**

Stormwater drainage into private property—nuisance—improperly dismissed—In a case about flood-related damages to private property during Hurricane Matthew, where dams located on four amenity lakes owned by plaintiff-homeowners' associations overtopped and caused the lakes to drain, and where defendant-city's drainage system discharged stormwater from neighboring properties into the now-dry lakebeds both before and after the overtopping occurred, the trial court erred in dismissing plaintiffs' nuisance claim against the city to the extent that it was not precluded under collateral estoppel principles by a prior federal judgment on plaintiffs' constitutional takings claim. The claim fell within the applicable statute of limitations; governmental immunity was unavailable to defendant, since state law classifies stormwater management as a proprietary municipal function; and

inverse condemnation was not an exclusive remedy barring plaintiffs' right to bring an action in tort for property damage. **Devonwood-Loch Lomond Lake Ass'n, Inc. v. City of Fayetteville, 26.**

Stormwater drainage into private property—trespass—improperly dismissed—In a case about flood-related damages to private property during Hurricane Matthew, where dams located on four amenity lakes owned by plaintiff-homeowners' associations overtopped and caused the lakes to drain, and where defendant-city's drainage system discharged stormwater from neighboring properties into the now-dry lakebeds both before and after the overtopping occurred, the trial court erred in dismissing plaintiffs' trespass claim against the city to the extent that it was not precluded under collateral estoppel principles by a prior federal judgment on plaintiffs' constitutional takings claim. The claim fell within the applicable statute of limitations; governmental immunity was unavailable to defendant, since state law classifies stormwater management as a proprietary municipal function; and inverse condemnation was not an exclusive remedy barring plaintiffs' right to bring a trespass claim. **Devonwood-Loch Lomond Lake Ass'n, Inc. v. City of Fayetteville, 26.**

WORKERS' COMPENSATION

Average weekly wage—calculation—appropriate method—"fair and just" result—In a worker's compensation case, where a union member (plaintiff) suffered injuries while working as a journeyman pipefitter for a subcontractor (defendant) on a construction project, the Industrial Commission's calculation of plaintiff's average weekly wage using Method 3 under N.C.G.S. § 97-2(5) (listing five calculation methods, ranked in order of preference) was affirmed. The Commission properly determined that Method 3—which applies to employees who worked for less than 52 weeks—applied to plaintiff, who had worked on the construction project for nine and a half weeks, and provided the best approximation of what plaintiff would have earned in his employment at the time of his injury. Further, because of the Commission's unchallenged findings showing that plaintiff could have continued earning wages indefinitely doing the same or similar work but for his injury, the use of Method 3 was "fair and just" to both parties. **Taylor v. Southland Indus., Inc., 149.**

N.C. COURT OF APPEALS
2025 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	13 and 27
February	10 and 24
March	17
April	7 and 21
May	5 and 19
June	9
August	11 and 25
September	8 and 22
October	13 and 27
November	17
December	1

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

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ALEXANDER F. CRENSHAW, PLAINTIFF
v.
KELLY H. CRENSHAW, DEFENDANT

No. COA23-799

Filed 1 October 2024

1. Appeal and Error—failure to serve notice of appeal—no appearance in appeal—no waiver of service

In a proceeding to modify child support, the appellate court did not have jurisdiction to consider the father's appeal from the trial court's entry of a protective order, sought by three business entities in which the mother had an ownership interest and from whom the father had subpoenaed documents, where the father failed to serve his notice of appeal on the entities or their counsel and the entities did not waive that failure of service by participating without objection in the appeal.

2. Child Custody and Support—child support—modification—determination of gross income—competent evidence

In a proceeding to modify child support, the trial court did not err in determining the mother's gross income for child support purposes where each challenged finding of fact addressing the mother's income and expenses—particularly those concerning financial assistance and gifts provided to the mother and the parties' children by the mother's family—and the court's child support calculations were supported by competent evidence; even if that evidence might have supported other findings, matters of credibility and weight could not be second-guessed on appeal.

3. Child Custody and Support—support—date of modification—retroactive increase—no abuse of discretion

In a proceeding to modify child support, the trial court did not abuse its discretion in ordering the father to pay increased child support retroactive to 1 January 2022 rather than to the filing date of either party's motion to modify child support—9 October 2020 for the father's motion for a decrease on grounds that two of the parties' three children had graduated from high school and turned eighteen or 14 January 2021 for the mother's motion for an increase based on changed circumstances in the form of the father's increased income and the remaining minor child's increased needs—where there was a legal basis to increase the father's obligation from the date of the mother's motion and the court set the later effective date of the modification as a compromise in light of the competing motions.

4. Child Custody and Support—support—modification—reasonable needs of the child—no abuse of discretion

In a proceeding to modify child support, the trial court did not abuse its discretion in relying on the father's evidence rather than the mother's evidence as to the reasonable needs of the parties' child, even though the mother provided most of the care for the child, because determinations regarding credibility and the weight to be accorded evidence were reserved solely for the trial court.

5. Child Custody and Support—award of attorney fees—notice sufficient—statutory finding made—no abuse of discretion

The appellate court affirmed the trial court's award of attorney fees to the mother in an amount less than half of what she requested after determining that: (1) the father had notice that the issue of attorney fees would be considered at a hearing on the mother's motion to modify child support because the motion included a request for attorney fees and, further, the father made no objection on notice grounds when the mother introduced evidence regarding her attorney fees; (2) the trial court's finding of fact that the father initiated a frivolous action or proceeding supported an award of attorney fees to the mother under N.C.G.S. § 50-13.6; and (3) the court did not abuse its discretion in regard to the amount of the award in light of the parties' respective financial circumstances.

Appeal by plaintiff and cross-appeal by defendant from order entered 6 December 2022 by Judge Christy T. Mann in District Court, Mecklenburg County. Heard in the Court of Appeals 20 February 2024.

Plumides, Romano, & Johnson, P.C., by Richard B. Johnson, for plaintiff-appellant/cross-appellee.

Dozier Miller Law Group, by Robert P. Hanner, II, for defendant-appellee/cross-appellant.

STROUD, Judge.

Plaintiff appeals from the trial court's Protective Order and order modifying child support. As Plaintiff did not properly serve the non-party appellees who obtained the Protective Order with the notice of appeal, we dismiss that part of Plaintiff's appeal. As to the Modification Order, the trial court's findings were supported by competent evidence. Defendant filed a cross-appeal from the Modification Order, and the trial court's findings challenged by Defendant were also supported by competent evidence and the trial court did not abuse its discretion in determining the minor child's reasonable needs and the effective date of modification. Finally, Plaintiff's appeal and Defendant's cross-appeal regarding the trial court's award of attorney fees both fail as the trial court properly awarded fees based on North Carolina General Statute Section 50-13.6 and the trial court did not abuse its discretion in setting the amount of fees Plaintiff must pay. We therefore dismiss Plaintiff's appeal as to the Protective Order and affirm the trial court's Modification Order.

I. Factual and Procedural Background

Plaintiff ("Father") and Defendant ("Mother") were married in 2001 and separated in 2011. During their marriage, they had three children: two daughters born in 2002 and one son born in 2007. In 2011, Father filed a complaint with claims for custody, child support, equitable distribution, post-separation support and alimony, and attorney fees; Mother filed an answer and counterclaims for each of the same claims. On 4 December 2012, the trial court entered an order on Child Custody, Child Support, Alimony, and Equitable Distribution ("2012 Order"). Although this extensive order addressed many issues as relevant to this appeal, the 2012 Order granted primary custody of the three children to Mother and visitation on a specific schedule to Father. Overall, Father had visitation about 134 nights each year while Mother had the remaining 231 overnights. Father's child support was calculated under the North Carolina child support guidelines, using Worksheet B for "joint or shared physical custody." Father was ordered to pay Mother monthly child support of $1,741.42 starting as of 1 October 2012; he was also ordered to pay retroactive child support back to 1 December 2011.

On 16 January 2018, the trial court entered a Consent Order on custody and child support, resolving Mother's motions to modify both custody and child support. Mother was awarded "primary care, custody and control" of the three minor children. Father was allowed visitation "only at the discretion of" Mother. Father was ordered to continue to pay child support under the 2012 Order.

On 9 October 2020, Father filed a Motion to Modify Child Support ("Father's Motion"). Father alleged "there has been a substantial change of circumstances" justifying modification of child support as the parties' two older children had "turned 18 years old and graduated from high school."

On 14 January 2021, Mother also filed a Motion to Modify Child Support ("Mother's Motion"). Mother alleged "a substantial and material change in circumstances supporting an increase" in Father's child support obligation. Specifically, she alleged that since entry of the 2012 Order, the son's expenses and Father's income and ability to pay had all substantially increased.

On 29 January 2021, Autobell Car Wash, Inc., Howco, Inc., and CAH Holdings, LLC ("the Entities") filed an "Objection to Subpoena, Motion for A Protective Order and Motion for an Award of Expenses to Include Attorney's fees" in response to a subpoena issued by Father to "Autobell Car Wash, Inc.; Howco, Inc.; and CAH Holdings, LLC" requesting documentation of income paid to Mother for 2017, 2018, 2019, and 2020. They alleged the information requested was "in part, not relevant or reasonably calculated to lead to discovery of admissible evidence;" the information could be obtained from Mother and the request was made "for the purpose of harassment, intimidation and to cause unnecessary expense" to the Entities who were not parties to the action; and the subpoenas subjected the Entities to "undue burden and expense," were unreasonable and oppressive, and were issued for an improper purpose, "such as to cause unreasonable expense to the [E]ntities."

On 30 June 2021, Mother filed a "Motion for Deviation from North Carolina Child Support Guidelines," alleging the existence of the parties' motions to modify child support and that "the application of guideline child support would otherwise be unjust or inappropriate" and the court should set child support under North Carolina General Statute Section 50-13.4(c).

On 18 November 2021, Father filed a Motion to Compel Mother to respond to his interrogatories and request for production of documents. He alleged Mother had objected to his requests for "corporate or partnership tax returns for any business entity in which [she has] a five percent" interest for 2017 through 2020. On 16 December 2021, Mother

filed her Response to Father's Motion to Compel. She responded to the allegations of the Motion to Compel and also alleged a "second Defense" of "res Judicata," alleging that the 2012 Order made detailed findings of fact regarding the formation, operation, and ownership of the three Entities and Mother's role in each. Specifically, the 2012 Order found that CAH Holdings, LLC was formed as part of Mother's father's estate plan for the benefit of his three children, including Mother; its purpose was to "acquire and develop car wash sites to rent to Autobell Car Wash, Inc." "Mother ha[d] absolutely nothing to do with the management and operation of CAH Holdings, LLC." She received only a K-1 each year from CAH Holdings, LLC. The 2012 Order also found "Mother is employed on a part-time basis with Autobell Car Wash, Inc. in their marketing department. [She] is not an officer of the company nor is she involved in any day to day management decisions" but "[t]hese decisions are made by her father, Charles A. Howard, II." Howco, Inc. was formed by Mother's grandfather and father and it "sold automated car wash machinery to other car wash companies." Mother alleged she had provided her personal income tax returns and K-1 forms from Autobell Carwash, Inc. to Father but she did not have access to the "corporate tax returns" of CAH Holdings, LLC and Autobell Car Wash, Inc. She alleged these findings regarding her "ownership interest and status" with CAH Holdings, LLC and Autobell Car Wash, Inc. were already established and alleged res judicata as an affirmative defense to Father's discovery requests and Motion to Compel. She also requested issuance of a protective order and an award of attorney fees.

Also on 16 December 2021, Autobell Car Wash, Inc. and CAH Holdings, LLC filed an "Objection to Subpoena, Motion for Protective Order and Motion for Award of Expenses to include Attorney's Fees." They alleged Father had issued subpoenas to them for "any and all corporate tax returns of those [E]ntities for 2017, 2018, 2019, and 2020[.]" They alleged the subpoenas were issued to Charles H. Howard, III and "if such a person exists, he is not an owner, stockholder or employee of" either entity. In addition, they alleged the 2012 Order had already established Mother's role in the Entities and that she had already provided her tax information to Father.

On 30 December 2021, Father filed a Motion to Compel Autobell Car Wash, Inc. and CAH Holdings, LLC to provide the subpoenaed documents. He alleged that he had received Mother's income tax returns and K-1s for 2017-2020. In 2019, "her adjusted gross income was approximately $869,000.00, of which $671,157.00 was K-1 income." Her income for 2020 had dropped almost $700,000.00 from 2019 to 2020. He

alleged Mother "is a 37% owner of Autobell Car Wash Inc., and a 33% owner of CAH Holdings, LLC and the corporate returns are relevant to her income."

On 31 January 2022, the trial court held a hearing on Father's Motions to Compel discovery from Mother and subpoenaed documents from Autobell Car Wash Inc. and CAH Holdings, LLC as well as Mother's and the Entities' motions for protective orders and attorney fees opposing the production of corporate tax returns for 2017, 2018, 2019, and 2020. On 22 February 2022, the trial court entered an Order denying Father's motion to compel; allowing Mother's motion for protective order; and holding open motions for attorney fees filed by Mother, Autobell Car Wash Inc., and CAH Holdings, LLC. The trial court noted its findings in the 2012 Order which found Mother had an ownership interest in the Entities but she "has absolutely nothing to do with the management" of CAH Holdings, LLC and was "employed on a part-time basis with Autobell[.]" The trial court also found that "the court made detailed findings in the Order entered on December 4, 2012 so that the issue would not come up again and require relitigating." Thus, the trial court found the "requested tax returns are not relevant to child support" based on the prior litigation of "Mother's income and involvement" in the Entities. The trial court concluded that Father "is collateral[ly] estopped from requesting these documents for the purpose of relitigating child support."

On 25 April 2022, Father served a notice of deposition on Mother to be held on 11 May 2022. On 2 May 2022, Mother filed an "Objection to the Deposition of [Mother] as well as any other discovery in this action and Motion for Protective Order." She alleged Father had already done "extensive discovery" including one set of interrogatories, one request for production of documents, and "numerous [s]ubpoenas to [her] employer as well as other individuals related to [Mother's] employment with a family business." She alleged she had already produced "extensive discovery" to Father including "tax returns, bank records, and literally hundreds of documents relating to her income, expenses and needs of support for the" remaining child of the parties. She also alleged Father "has stated on prior occasions that one of his goals in his persistent and relentless litigation is to cause financial hardship to [Mother] and the expenditure of unreasonable sums" by her and her family to defend the litigation. She requested a protective order to prevent further discovery, including the deposition.

On 6 May 2022, Father filed a "Reply and Motion to Compel" in response to Mother's Objection to her deposition. He alleged that "this

is a non-guideline child support matter" and a deposition would not be unreasonable or burdensome and would lead to discoverable information. He also noted that Mother's discovery responses "are now over one year old and need to be supplemented."

On 9 May 2022, Father served a second request for production of documents. Mother obtained an enlargement of time to respond to 8 July 2022. Mother also served a second request for production of documents on Father on 11 May 2022, and he obtained an enlargement of time to respond to 11 July 2022.

On 18 July 2022, the trial court held a hearing on Father's motion to compel Mother's deposition. On 30 September 2022, the trial court entered an order allowing Father's motion. On 29 September 2022, Mother also noticed a deposition of Father for 11 October 2022. On the same date, Father noticed a deposition of Mother for 11 October 2022.

On 3 November 2022, the trial court held a hearing on both Father's and Mother's motions to modify child support. The trial court's Modification Order was entered on 6 December 2022. The trial court incorporated its findings from the 2012 Order regarding Mother's interests in the three Entities. It also found that these findings "remain unchanged . . . except for the fact that all [E]ntities are now consolidated under one parent company." The Modification Order noted the facts regarding income, custodial time, and child support at the time of the 2012 Order. The Modification Order then included detailed findings regarding Mother's income; Mother's and the child's monthly expenses; Father's income and expenses; the estates of the parties; the parties' standards of living; Mother's homemaker contributions, particularly addressing her care of the remaining minor child since the parties' separation; changes in circumstances; child support calculations; child support arrearages; Mother's request for attorney fees; and expert witness fees. Ultimately, the trial court denied Father's motion to decrease child support and ordered Father to pay child support of $2,230.00 per month effective as of 1 January 2022. The trial court also ordered Father to pay Mother's attorney fees in the sum of $15,000.00. On 28 December 2022, Father filed a notice of appeal from the 22 February 2022 Protective Order and the 6 December 2022 Modification Order. On 5 January 2023, Mother filed notice of cross-appeal from the Modification Order only.

II. Father's Appeal of Protective Order

[1] We will first address Father's appeal of the Protective Order. Mother notes that Father's notice of appeal of both orders, including the February 2022 Protective Order, was served only upon Mother's

counsel; there is no indication it was served upon the Entities or their counsel. The Entities have not appeared in this case on appeal. We must therefore consider whether we have jurisdiction to consider Father's appeal as to the Protective Order.

Rule 3(e) of the North Carolina Rules of Appellate Procedure states "[s]ervice of copies of the notice of appeal may be made as provided in Rule 26." N.C. R. App. P. 3(e). Further, Rule 26(b) states "[c]opies of all items filed by any party shall, at or before the time of filing, be served on all other parties to the appeal." N.C. R. App. P. 26(b). Rule 26 also provides requirements on the manner and proof of service in detail. *See* N.C. R. App. P. 26(c)-(d). Our Supreme Court has recognized "failure to serve the notice of appeal was a defect in the record analogous to failure to serve process" but "a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal[.]" *Hale v. Afro-American Arts Intern.*, *Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993).

There is no indication in the record that Father served his notice of appeal of the Protective Order on counsel for the Entities[1], and the Entities have not participated in this appeal in any way. Although the Entities were not parties to the child support case between Mother and Father, they are non-party appellees as to the Protective Order.

The Protective Order on appeal was entered in response to two Objections to Subpoena, Motion for Protective Order and Motion for an award of Expenses to include Attorney's fees. The motions for Protective Order were based on Rule 45(c)(3) of the North Carolina Rules of Civil Procedure. The first was filed by counsel for Autobell Car Wash, Inc., Howco, Inc., and CAH Holdings, LLC on 29 January 2021 in response to a subpoena issued on 15 January 2021. The second was filed by counsel for Autobell Car Wash, Inc. and CAH Holdings, LLC on 16 December 2021 in response to subpoenas issued on 8 and 14 December 2021. On 30 December 2021, Father filed a Motion to Compel a response by all three Entities and a notice of hearing upon the Motion to Compel; he served this Motion to Compel and Notice of Hearing for 31 January 2022 only upon counsel for the three Entities, not on Mother's counsel. Mother's counsel then set a hearing on her Motion for Protective Order on the same date. The competing Motions for Protective Order and Motion to Compel were all heard on 31 January 2022, with counsel for Mother,

1. There is also no indication in the record that the Protective Order itself was served on counsel for the Entities.

Father, and the three Entities all appearing. The trial court issued the Protective Order on 22 February 2022.

Rule 45(c) of the North Carolina Rules of Civil Procedure is entitled "Protection of Persons Subject to Subpoena," and this title is an accurate description of the rule. N.C. Gen. Stat. § 1A-1, Rule 45 (2023). This rule sets out the procedure for a non-party who has been subpoenaed to seek protection from the court if they believe there is a legal basis for objection to the subpoena. *See* N.C. Gen. Stat. § 1A-1, Rule 45(c)(3) ("Written objection to subpoenas."). Although Mother owns a substantial interest in CAH Holdings, LLC and a very small interest in Autobell Car Wash, Inc.,[2] there is no dispute that the Entities are separate legal entities from Mother. *See Geoghagan v. Geoghagan*, 254 N.C. App. 247, 250, 803 S.E.2d 172, 175 (2017) ("We recognize that BBPI is wholly owned by Plaintiff and Defendant, and the subsidiary LLCs are, in turn, owned by BBPI. However, a corporation, even one closely held, is recognized as a separate legal entity even when its members are engaged in litigation which is personal in nature. And as with a corporation, our courts are not free, for the sake of convenience, to completely ignore the existence of a legal entity, such as an LLC." (citations, quotation marks, ellipses, and brackets omitted)). Had the trial court denied the Motion for Protective Order to the Entities, they would have had a right to appeal that order, whether immediately based on the demonstration of a substantial right or after entry of the Modification Order. *See* N.C. Gen. Stat. § 7A-27(b) (2023) ("[A]ppeal lies of right directly to the Court of Appeals in any of the following cases: . . . (2) From any final judgment of a district court in a civil action. (3) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that does any of the following: a. Affects a substantial right."). And if this Court were to reverse the Protective Order, our action would directly affect the interests of the Entities, not of Mother. The Entities are non-party appellees as to the appeal of the Protective Order only.

It is well-established that the notice of appeal must be served upon the parties to an appeal. As discussed above, filing of the notice of appeal is jurisdictional, but service of the notice of appeal on an appellee can be waived if an appellee participates "without objection in the appeal." *Hale*, 335 N.C. at 232, 436 S.E.2d at 589 ("The basis for the dismissal was that while the record on appeal contained the proper notice

2. At the time of the hearing, the evidence indicated that in 2021, Autobell Holdings, Inc. was created as "a successor to Autobell Car Wash, Inc." as a "legal entity holding company put in place on top of Autobell Car Wash, Inc."

of appeal, nothing in the notice shows that plaintiff was given notice of the appeal through service as required by Appellate Rule 26(b). The majority concluded that this was a jurisdictional defect which both the parties and the court were powerless to remedy. Judge Wynn, dissenting, concluded that failure to serve the notice of appeal was a defect in the record analogous to failure to serve process. Therefore, a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal, as did the plaintiff here. Judge Wynn concluded that plaintiff had thereby waived service of the notice of appeal and that the Court of Appeals had jurisdiction of the appeal and should consider the case on its merits. For the reasons given in Judge Wynn's dissenting opinion, we reverse the decision of the Court of Appeals dismissing defendants' appeal and remand the case to that court for consideration on the merits." (citations, quotation marks, ellipses, and brackets omitted)).

Here, the Protective Order on appeal was entered upon the request of and for the protection of the Entities and the order addresses only their rights. They are non-party appellees as to the Protective Order but the notice of appeal of the Protective Order was not served upon their counsel, nor have any of the documents in this appeal been served upon their counsel. They have not appeared in this appeal, so they have not waived the right to be served with the notice of appeal. *See id*.

We are well aware that Mother was represented by Robert P. Hanner II before the trial court, and the Entities were represented by David M. McCleary, and these attorneys were in the same law firm. But Mother and the Entities each were represented by separate counsel; the fact they were in the same law firm does not change our analysis. Nor can we disregard the legal status of the Entities and the requirement for notice of the appeal and the opportunity to participate by filing a brief to respond to Father's appeal. Mother's appellee brief on the Protective Order addresses primarily her own arguments, as she also filed a response to Father's motion to compel and raised her own issues in her own motions, but she does not purport to address the legal arguments the Entities may well have raised if they had participated in this appeal. Although some of those arguments are apparent to us, we cannot address them *sua sponte* without proper notice to the Entities, the parties affected by the Protective Order. We must therefore dismiss Father's appeal as to the Protective Order only as we do not have jurisdiction to consider this appeal where the non-party appellees directly affected by the Protective Order were not served and there is no indication they had

notice of this appeal. However, Father's appeal as to the Modification Order was properly served upon Mother, and we have appellate jurisdiction to consider both the appeal and cross-appeal of that order.

III. Determination of Mother's Gross Income

[2] Father next contends the trial court erred "in determining [Mother's] gross income for child support and when it increased child support." Father has conflated several arguments, so we will attempt to address each one. First, he contends that twelve findings of fact are not supported by competent evidence. Most of the challenged findings address Mother's income and a few address expenses and the child support calculation:

> 15. Defendant/Mother's affidavit and her testimony at trial was that she had combined gross wages and salaries from Autobell Car Wash, Inc. and HOWCO, Inc. of $6,971.00 per month and expected a bonus of approximately $20,000.00 for the current year or $1,666.67 per month for a combined monthly gross income of $8,637.67.
>
> 16. After deducting monthly amounts of federal income taxes of $911.59; state income taxes of $182.00; social security (FICA) of $611.74; Medicare of $143.07; medical insurance of $292.06; and life insurance of $369.79, her net monthly income from wages is $6,127.44.
>
> 17. Defendant/Mother's 2020 tax return was introduced into evidence and shows total income of $177,993.00 and taxable income of $139,089.00.
>
> . . . .
>
> 19. Mr. Truitt testified that the W-2 wages reported on Defendant/Mother's 2020 tax return consisted of her salary from Autobell Car Wash, Inc. and HOWCO, Inc., as testified by Defendant/Mother, plus additional sums that were advanced to or on her behalf by Autobell Car Wash, Inc. consisting of country club expenses at Carmel Country Club, Charlotte, North Carolina; personal expenses relating to the automobile operated by Defendant/Mother; and medical insurance benefits.
>
> 20. Defendant/Mother did not include this additional income on her Affidavit of Financial Standing but on the other side of the coin, did not claim those expense[s] on her Affidavit of Financial Standing.

21. Defendant/Mother's 2021 tax return was also introduced into evidence and shows total income of $243,846.00.

22. Accountant Chris Truitt also testified that the W-2 wages reported on Defendant/Mother's 2021 tax return consisted of her salary from Autobell Car Wash, Inc. and HOWCO, Inc., as testified by Defendant/Mother, plus additional sums advanced to or on her behalf by Autobell Car Wash, Inc. consisting of country club expenses; personal expenses related to the automobile operated by the Defendant/Mother; and medical insurance benefits.

23. Defendant/Mother did not include this additional income on her Affidavit of Financial Standing but on the other side of the coin, did not claim those expenses on her Affidavit of Financial Standing.

24. The total income figure of $243,846.00 also includes positive capital gains of $173,348.00 and negative passthrough income of $172,475.00. For purposes of calculating ongoing child support, the Court finds that Defendant/Mother's annual income is $243,846.00 per annum or $20,320.00 per month.

. . . .

27. Mr. Parris contributes the sum of $2,000.00 per month toward the expenses related to the residence, which Defendant/Mother has subtracted from the shared family expenses, leaving a total of $6,867.90 per month, which is attributed one-half to her and one-half to the minor child [Sam]. The Court finds that this results in a shared family expense of $8,867.90 - $2,000.00 = $6,867.90 pro rated $3,433.95 to Defendant/Mother and $3,433.95 to the minor child [Sam].

. . . .

31. Defendant/Mother acknowledges that she has insufficient monthly income to meet all of the expenses set forth in her Affidavit of Financial Standing and that she receives, from time to time, some financial assistance from her parents to meet her and her son's monthly needs and expenses.

. . . .

59. The Court calculates child support for purposes of this Order as follows:

> Plaintiff/Father's total gross income: $18,475.00/month
>
> Defendant/Mother's total gross income: $20,320.00/month
>
> Total combined income: $38,795.00/month
>
> Plaintiff/Father's percentage share of total income: $18,475.00 ÷ $38,795.00 = 48%
>
> Defendant/Mother's percentage share of total income: $20,320.00 ÷ $38,795.00 = 52%
>
> Plaintiff/Father's ongoing child support obligation: .48% x reasonable needs and expenses of the minor child of $4,646.00 = $2,230.00 per month

. . . .

65. Defendant/Mother filed her Motion requesting an increase in Plaintiff/Father's child support obligation on or about January 14, 2021. This Order increases the Plaintiff/Father's obligation to provide child support for the remaining minor child by the sum of $488.58. Typically, the increase in child support would be retroactive to the filing of this Motion on January 14, 2021, but as a compromise, the Court will order the increase in child support of $488.58 retroactive to January 1, 2022.

Father does not make any specific argument as to some of the challenged findings of fact but has merely listed them in his brief. Thus, these findings are binding upon this Court. *See In re K.H.*, 281 N.C. App. 259, 266, 867 S.E.2d 757, 762 (2022) ("Unchallenged findings of fact are deemed supported by the evidence and are binding on appeal." (citation omitted)).

Father's argument addresses primarily the findings regarding Mother's income in Findings No. 19 through 24. Father contends these findings are not supported by the evidence and that the trial court "abused its discretion when it failed to include numerous bank deposits into [Mother's] bank accounts that were over and above her regular W-2 income." He contends Mother was paid substantial amounts from her family or the Entities which she described as either gifts or loans

from her family, but these amounts were not reflected in her W-2 income and the trial court failed to consider these regular payments as part of Mother's income for purposes of child support.

Mother admitted she received substantial assistance from her family and the evidence she received funds substantially in excess of her W-2 income was unrefuted. For example, in 2018, her father gave her a "personal loan" for $383,000.00 for a down payment on the purchase of her residence, although there was no promissory note for the loan. She still had not sold her former residence when she purchased the new home, so her parents paid the mortgage on her former residence for about six months, until it was sold. Her father paid for half of the cost to purchase a new 2023 Honda HRV for Sam, and she paid half.

Using Mother's bank records, Father presented evidence that Mother deposited about $400,000.00 into her bank account in 2021, although only $62,247.64 of this amount was her net income from her paychecks from Autobell Car Wash, Inc. and Howco Inc. as shown by her W-2 forms. Mother paid out about $377,000.00 from her bank accounts through September 2022, and counsel asked Mother about this number. Mother testified the excess deposits in her bank accounts did not come from her family, although she acknowledged her family "help[ed] out" with her expenses, "[b]ought clothes for the kids. I mean, all kinds of stuff." Mother stated "[a]nd there's a lot of times that I can't afford a lot of things that I have to pay for, so[.]" The trial court noted Mother had mentioned the college tuition for the two older children, and clarified, "I'm talking about [Sam]." Mother explained that she was paying tuition for the older children, so "I'm paying that, so that takes away the money that I have at home. So, yeah, there is a – there's a deficit there. It's expensive. So, yeah, they do pay for whenever I need to[.]" Mother testified she did not know an average amount her family paid for her or Sam's expenses, and they did not give her cash, but

> they would pay something for me like a bill, or buy something that he needs or buy something that -- for me, that I need. Like a -- the girls need a new MacBook, so. One of them is breaking, so they were going to buy the new MacBook. Things like that.

She did not know if this happened monthly, but testified that "[s]ure, I mean, things come up every month." But she testified that none of the deposits in her bank accounts came from her family.

In addition to assistance from her family, the evidence shows the Entities paid various expenses for Mother. Mother acknowledged in her

testimony that the Entities paid for her personal car expenses, including the car, gas, maintenance, inspection "and all those things"; her personal use of the airplane; attorney fees; nanny expenses; and country club expenses. Mother stated she did not include these expenses on her Affidavit of Financial Standing. Although Sam was 15 years old at the time of the hearing, the Entities still paid about $27,000.00 per year to her nanny to stay with him when she was working or out of town overnight. For 2021, these payments from the Entities for Mother's expenses totaled $233,149.00. Mother testified that these payments by the Entities were treated as income to her and she had to pay taxes on these amounts. However, Mother also testified that she got regular distributions from the Entities to pay taxes. These distributions were not necessarily the amount of Mother's taxes, but since she and her two siblings had an equal interest in the Entities, the amount would be based upon the highest tax liability of the three of them. Thus, she may get a greater amount than actually needed for her own taxes or it may be equal to her taxes. In general, Mother made substantially larger deposits to her bank accounts than the amounts she received based upon her income tax returns or paychecks. Although she testified her current husband paid her $2,000.00 per month for fixed household expenses, the evidence tended to show she received far more than this from the Entities or her family.

But despite this evidence of Mother's receipt of various types of income, gifts, or other financial assistance from various sources, Father has failed to demonstrate the trial court did not consider these payments in determining Mother's income. The findings instead demonstrate the trial court considered these factors. Findings Nos. 19 and 21 address the evidence of payment of country club expenses, personal expenses for her automobile, and medical insurance benefits. Finding No. 31 notes that Mother "acknowledges that . . . she receives, from time to time, some financial assistance from her parents to meet her and her son's monthly needs and expenses."

We review findings of fact only to determine if they are supported by competent evidence. *See Midgett v. Midgett*, 199 N.C. App. 202, 206, 680 S.E.2d 876, 879 (2009) ("This Court's review of a trial court's findings of fact is limited to whether there is competent evidence to support the findings of fact, despite the fact that different inferences may be drawn from the evidence." (citation and quotation marks omitted)). "The trial court, as the fact finder, is the sole judge of the credibility and weight to be given to the evidence, and it is not the role of the appellate court to substitute its judgment for that of the trial court." *In re H.B.*, 384 N.C.

484, 492-93, 886 S.E.2d 106, 112-13 (2023) (citations and quotation marks omitted). Even if the evidence could support different or additional findings, under this standard of review, we cannot "second-guess the trial court's credibility determination[.]" *In re A.B.C.*, 374 N.C. 752, 761, 844 S.E.2d 902, 909 (2020) (citations omitted). The trial court's findings regarding Mother's income are supported by the evidence.

IV. Date of Modification of Child Support

[3] We will next address Mother's first issue on her cross-appeal of the Modification Order: "Did the trial court err when it ordered [Father] to pay child support retroactive to 1 January 2022, instead of to the date either party filed their Motion to Modify Child Support?"

Father's Motion was filed on 9 October 2020, based on the fact that two of the parties' three children had attained the age of 18 and graduated from high school. According to North Carolina General Statute Section 50-13.4(c), Father's obligation to pay child support as to the two older children had terminated. *See* N.C. Gen. Stat. § 50-13.4(c) (2023). But despite this provision, Father properly filed a motion to modify child support based upon the two older children attaining age 18, since he would have been required to continue to pay child support as ordered in 2012 without a modification since he still had the obligation to pay support for one child. In *Craig v. Craig*, this Court addressed this situation:

> Child support obligations ordered by a court terminate upon the child reaching age eighteen, unless the child is otherwise emancipated prior to reaching age eighteen or the trial court in its discretion continues to enforce the payment obligation after the child reaches age eighteen and while the child is in primary or secondary school. N.C.G.S. § 50-13.4(c) (1987). However, when one of two or more minor children for whom support is ordered reaches age eighteen, and when the support ordered to be paid is not allocated as to each individual child, the supporting parent has no authority to unilaterally modify the amount of the child support payment. The supporting parent must apply to the trial court for modification. N.C.G.S. § 50-13.7(a) (1987) (support for minor child may be modified or vacated at any time upon motion in the cause and a showing of changed circumstances.). *See Brower v. Brower*, 75 N.C.App. 425, 433, 331 S.E.2d 170, 176 (1985) (husband had no authority to unilaterally

> reduce support payments where one of two children, for whom support was ordered without allocation by child, reached age eighteen). Thus, until such an application for modification is made by the supporting parent, and as long as at least one child for whom the support was ordered remains a minor, the full amount of the support obligation not allocated by child remains enforceable and continues to accrue and vest as it becomes due.

103 N.C. App. 615, 618-19, 406 S.E.2d 656, 658 (1991) (quotation marks and ellipses omitted).

Mother's Motion was filed on 14 January 2021. She alleged that the child's expenses and needs had substantially increased since 2012 and Father's income had increased. Mother's Motion was based upon a substantial change of circumstances. *See Johnston Cnty. ex rel. Bugge v. Bugge*, 218 N.C. App. 438, 440-41, 722 S.E.2d 512, 514 (2012) ("Pursuant to N.C. Gen. Stat. § 50-13.7(a) (2011), a trial court is authorized to modify a child support order at any time upon a motion in the cause by an interested party and a showing of changed circumstances. Modification of an order requires a two-step process. First, a court must determine whether there has been a substantial change in circumstances since the date the existing child support order was entered. The trial court only moves to the second step if the court finds there has been a substantial change in circumstances." (citation and quotation marks omitted)).

The effective date of a modification of child support may be limited by North Carolina General Statute Section 50-13.10:

> (a) Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties either:
>
> (1) Before the payment is due[.]

N.C. Gen. Stat. § 50-13.10(a)(1) (2023).

Father's Motion was properly filed immediately upon the two older children attaining age 18 and graduating from high school, so his child support obligation after filing of the motion was subject to retroactive

modification back to the date of the motion. Here, the earliest possible date of modification was 1 November 2020.

Child support cannot generally be retroactively increased back to a date before the filing of a motion to increase child support, but this case does not deal with a "retroactive" modification. A retroactive modification is a change to an obligation made effective even before any motion to modify has been filed. *See Hill v. Hill*, 335 N.C. 140, 143-44, 435 S.E.2d 766, 768 (1993) ("Orders which modify alimony or support payments effective as of the date of the petition or subsequent thereto but prior to the date of the order of modification are not subject to the criticism that they have retroactive effect which destroys vested rights. This is true because the modification and the whole proceeding in which it is made are referable to the date of the filing of the petition and any change effective as of that date cannot be said to be retroactive." (citations omitted)).

Thus, the range of potential modification was set by the parties' motions. The earliest potential date of modification was therefore 1 November 2020, based upon Father's Motion.[3] His obligation could clearly be *decreased* effective 1 November 2020 based on his motion, but it is not clear it could be *increased* retroactively back to 1 November, since no motion to increase had been filed and his motion was based on two of the three children attaining age 18. The relevant date for an increase in child support is 14 January 2021, based on Mother's Motion. Certainly by the filing of Mother's Motion, there was a legal basis to modify child support effective on that date, either by an increase or decrease.

The trial court did not use either of those dates but instead made the modification effective as of 1 January 2022. The trial court made this finding as to the date of the modification:

> 65. Defendant/Mother filed her Motion requesting an increase in Plaintiff/Father's child support obligation on or about January 14, 2021. This Order increases the Plaintiff/Father's obligation to provide child support for the remaining minor child by the sum of $488.58. Typically, the increase in child support would be retroactive to the filing of this Motion on January 14, 2021, but as a compromise, the Court will order the increase in child support of $488.58 retroactive to January 1, 2022.

3. The older children's 18th birthday was in October so his 1 October payment would have been the last child support payment due for those children.

We review the trial court's ruling as to the effective date of the modification for an abuse of discretion. *See Barham v. Barham*, 127 N.C. App. 20, 30, 487 S.E.2d 774, 780-81 (1997), *aff'd*, 347 N.C. 570, 494 S.E.2d 763 (1998) ("Defendant next contends the trial court erred by failing to make its increase in child support effective as of the date of her motion filed on 15 July 1994. We disagree. Although a trial court has the discretion to modify a child support order as of the date the petition to modify is filed, it is not required to do so. The trial court did not abuse its discretion by not making its order modifying child support effective as of the date of defendant's motion." (citations and quotation marks omitted)).

> Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.

Ferguson v. Ferguson, 238 N.C. App. 257, 260, 768 S.E.2d 30, 33 (2014) (citations omitted).

Mother contends the trial court's decision to make the modification effective on 1 January 2022 was unreasonable because it had "already modified the amount to be lower than [Mother] had requested, so making it effective later than it could have been prejudiced [Mother] even more; the decision was certainly not a 'compromise' that 'split the difference.' " But the fact that a decision is more or less favorable to one party or the other is not the standard for an abuse of discretion.

Mother focuses on the trial court's statements during rendition of the Modification Order to argue that the date was "random" and thus she claims it was "unsupported by reason." After discussing the decision to deviate from the child support guidelines and the amount of child support set, the trial court then addressed the effective date:

> THE COURT: Can I pick a -- can I pick a different date for it to be effective? Can I -- I know I can pick November 1, 2020. Can I pick -- and I can pick January -- or February 1, 2021, I can do that.
>
> FATHER'S COUNSEL: I think it's your discretion ---
>
> THE COURT: Can I pick any other -- like a random time?

> FATHER'S COUNSEL: I believe it's your discretion. —
>
> THE COURT: I was kind of thinking that I would set it at the $2,230 a month and make it effective January 1st of this year, sort of splitting the difference on that. Do you all want me to remind you how I got to $2,230?

Although the trial court used the word "random," the selection of the effective date was not arbitrary or unsupported by reason in the context of this complex child support case. As the trial court noted during the rendition, this was an unusual child support case in many ways, and she considered these factors in deciding to deviate from the child support guidelines and in setting the child support obligation. Father had been paying child support at a lower amount based on a shared custody arrangement established in 2012 but the custodial arrangement had changed with Mother having full custody and Father spending minimal time with the children as of 2018. The trial court noted Father's Motion was filed just a few days after the two older children turned 18 and Mother's Motion was filed later, demonstrating to this Court the trial court understood the relevance of the dates of each motion to modify. The trial court addressed the changes in income over the years, particularly as to Mother's income, noting "some anomalies based on the sort of unique business structure that they have," as well as the "worldwide pandemic and slowdown" resulting in people not washing their cars because they weren't driving their cars.

The trial court's use of the word "compromise" in Finding No. 65 does not demonstrate that the selection of the date was unreasonable or arbitrary. Mother argues the trial court should have extended the increase in support one or two years further back, depending on which motion date is used. Father asked to reduce child support for the entire time. The date selected by the trial court meant that Father's Motion as of 1 November 2020 was effectively denied, as he continued to have the obligation to pay the same amount as set in the 2012 Order until 1 January 2022. Mother's Motion was allowed but the effective date was later than she asked. The date selected by the trial court could be described as a "compromise," but it is a reasonable compromise within the discretion of the trial court considering the competing motions and the circumstances of this case. Mother has not shown the trial court abused its discretion in the selection of the effective date for the child support modification.

V. Reasonable Needs of the Child

[4] Mother contends the trial court abused its discretion by relying on Father's evidence as to the reasonable needs of the child instead of relying on her evidence. Mother claims that since she cares for Sam most of the time and Father has had far less interaction with Sam in recent years, her evidence as to his reasonable needs and expenses is more reliable. Notably, Mother does not challenge any of the trial court's findings of fact as unsupported by the evidence; she contends only that the trial court should have made different findings based upon her evidence instead of Father's evidence. She argues that the trial court did not make any findings about why it relied more upon Father's evidence than upon her evidence. In other words, as to the reasonable needs of the child, Mother makes the same argument Father made as to Mother's income: my evidence was better and the trial court should have relied on it.

Mother argues the trial court should have given more weight to her evidence and considered her more credible on the facts regarding Sam's needs and expenses. But it is well-established that the trial court is the sole judge of the weight and credibility of the evidence. *See In re H.B.*, 384 N.C. at 492-93, 886 S.E.2d at 112-13. The trial court could have relied upon Mother's evidence regarding Sam's expenses, and upon Father's evidence regarding Mother's income, in which case Mother's income would have been substantially higher than the trial court actually found and Father's child support would likely be lower. Or the trial court could have found all of one party's evidence to be credible and rejected all the other party's evidence. All those approaches are within the trial court's discretion and the fact that the trial court's findings result in a lower (or higher) child support amount than one party requested does not render the trial court's findings an abuse of discretion. Here, it appears the trial court may have relied on Father's evidence as a better basis to determine Sam's reasonable needs and expenses because Mother's lifestyle was so dramatically beyond the ability of most people to sustain; indeed, Mother could not sustain it herself without substantial assistance from her family. The trial court acted well within its discretion in making its findings regarding Sam's reasonable needs.

VI. Attorney Fees

[5] Father's appeal and Mother's cross-appeal both address the trial court's award of $15,000.00 in attorney fees to Mother. Father argues that the trial court erred in awarding fees because he did not have notice that the trial court would be addressing this issue and because it

did not make the findings of fact required to award attorney fees under North Carolina General Statute Section 50-13.6; Mother argues the trial court abused its discretion by awarding less than half of the attorney fees she sought to recover.

The trial court awarded Mother $15,000.00 in attorney fees related to the modification of child support. She requested $38,414.50 including $36,687.50 in fees and $1,727.00 in costs. We will first address Father's argument as to notice. Mother's Motion filed on 14 January 2021 included a request for an award of attorney fees. This motion was properly noticed for hearing. Mother presented evidence regarding her attorney fees at the hearing; Father did not raise any objection based upon a lack of notice of a hearing on this claim. Father's argument as to notice is without merit. *See Thomas v. Burgett*, 265 N.C. App. 364, 380-81, 852 S.E.2d 353, 364-65 (2019) ("This case is readily distinguishable from *Allen* in that Mr. Burgett had adequate notice and frequent opportunities to address the trial court regarding Ms. Thomas' legal expenses. Throughout the litigation, Mr. Burgett and his attorney were notified by Ms. Thomas and the trial court regarding the issue of attorney's fees. Mr. Burgett chose not to object to Ms. Thomas' motion for attorney's fees during the July hearing. Mr. Burgett did not notify the trial court or Ms. Thomas' attorney of any objection to the amended affidavit filed and served at the trial court's request. Mr. Burgett argues that he had no opportunity to be heard after the requested amount was amended by Ms. Thomas' attorney. Yet in his brief, Mr. Burgett concedes that Ms. Thomas' counsel did serve his counsel with a copy of the amended affidavit. Mr. Burgett's attorney had eight days to contest anything within that amended affidavit but failed to act on it. Moreover, unlike *Allen*, the trial court only ordered Mr. Burgett to pay a portion, rather than the entirety, of Ms. Thomas' attorney's fees. Accordingly, we hold that the trial court did not deprive Mr. Burgett of his opportunity to be heard." (citations, quotation marks, brackets, and footnotes omitted)).

The trial court made the following findings of fact related to the award of attorney fees:

> 66. Plaintiff/Father has filed not less than five Motions to reduce his child support obligation subsequent to the Court's Order of December 4, 2012 [ ], none of which have been granted by the Court.
>
> 67. Both Plaintiff/Father and Defendant/Mother have conducted exhaustive discovery in this case and it should have been apparent to the Plaintiff/Father that the evidence

> would not support Plaintiff/Father's Motion for a decrease in child support and would support the Defendant/Mother's Motion for an increase in child support.
>
> 68. Defendant/Mother filed her Motion to increase child support in good faith and at the time of the filing of the Motion, Plaintiff/Father was paying an inadequate amount of child support.
>
> 69. The pursuit of said Motions by the Plaintiff/Father were in fact frivolous in nature and has resulted in substantial expenses to Defendant/Mother to include employment of an expert accounting witness and substantial sums for attorney's fees.
>
> 70. Defendant/Mother is therefore entitled to a reasonable award of attorney's fees from Plaintiff/Father as provided for herein.

The trial court ordered fees based upon North Carolina General Statute Section 50-13.6:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; *provided however*, *should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.*

N.C. Gen. Stat. § 50-13.6 (2023) (emphasis added).

Father first contends that the trial court erred by failing to make findings regarding Mother's acting in good faith and having insufficient means to defray the expenses of the suit and his refusal to furnish adequate support under the circumstances at the time of the institution of the proceeding. Father also contends that Findings Nos. 66, 67, and 69

are "non-relevant," although he does not challenge them as unsupported by the evidence.

Father's argument fails to appreciate that the trial court did not order him to pay attorney fees due to Mother's inability to pay her own fees or her need for child support. The trial court ordered him to pay because he "initiated a frivolous action or proceeding." Findings Nos. 66, 67, and 69 are relevant as they address this reason for the award of attorney fees. Father repeatedly sought to reduce his child support without success and conducted "exhaustive discovery," and although it should have been obvious to him that his child support would increase based upon changes in circumstances since 2012 when the child support amount was initially set, he continued to seek reduction. Father's contention that the trial court either "misinterpreted" North Carolina General Statute Section 50-13.6 or had a "desire to sanction [him]" is entirely baseless. *See Wiggins v. Bright*, 198 N.C. App. 692, 695-96, 679 S.E.2d 874, 876-77 (2009) (stating North Carolina General Statute Section 50-13.6 "grants the trial court authority and discretion to award attorney's fees as appropriate under the circumstances due to the frivolous nature of a plaintiff's action or proceeding" and that the trial court was *also* "authorized under N.C. Gen. Stat. § 50-13.6 based on the findings that [the] defendant was proceeding in good faith . . . and does not have sufficient means to defray the costs and expenses of this matter" (citation, quotation marks, and brackets omitted)); *see also Doan v. Doan*, 156 N.C. App. 570, 575-76, 577 S.E.2d 146, 150 (2003) ("It is true, as plaintiff argues, that the statute has been interpreted as requiring that the court specifically make two findings of fact: (1) the party seeking the award of fees was acting in good faith; and (2) that party has insufficient means to defray the expense of the suit. However, in this case, we need not reach plaintiff's argument that the district court's findings on this issue were unsupported by the evidence, because the trial court also found as justification for an award of attorney's fees that plaintiff's initiation of this custody and support action was without merit, baseless and frivolous." (citation and quotation marks omitted)).

In her cross-appeal, Mother contends the trial court abused its discretion by ordering less than half of her attorney fees incurred. North Carolina General Statute Section 50-13.6 allows the trial court to award attorney fees as "deemed appropriate under the circumstances." N.C. Gen. Stat. § 50-13.6. The trial court acted well within its discretion in awarding $15,000.00. *See Robinson v. Robinson*, 210 N.C. App. 319, 337, 707 S.E.2d 785, 798 (2011) ("[T]he amount of attorney's fees to be awarded rests within the sound discretion of the trial judge and

is reviewable on appeal only for abuse of discretion." (citations and quotation marks omitted)). Mother clearly did not actually need child support from Father, nor did she actually need assistance in paying attorney fees. In fact, she testified that the Entities paid her attorney fees for her. The trial court considered the parties' respective financial circumstances overall in making this determination. And again, the fact that Mother got less than she asked for does not render the trial court's ruling an abuse of discretion, any more than its ruling that Father should pay more than he wanted to pay.

VII. Conclusion

As Father's appeal of the Protective Order was not properly served on the Entities, we dismiss Father's appeal of the Protective Order. As to the Modification Order, the trial court's findings of fact regarding Mother's income are supported by competent evidence and Father's challenges to the findings are without merit. Finally, the trial court did not abuse its discretion in determining Sam's reasonable needs, determining the effective date of modification, and awarding Mother $15,000.00 in attorney fees. Thus, we dismiss Father's appeal as to the Protective Order and affirm the Modification Order.

DISMISSED IN PART; AFFIRMED IN PART.

Chief Judge DILLON and Judge STADING concur.

DEVONWOOD-LOCH LOMOND LAKE ASSOCIATION, INC., ET AL., PLAINTIFFS
v.
CITY OF FAYETTEVILLE, DEFENDANT

No. COA23-768

Filed 1 October 2024

1. Collateral Estoppel and Res Judicata—stormwater drainage into private property—breach of drainage easements—prior federal action—causation issue already litigated

In a case about flood-related damages to private property during Hurricane Matthew, where dams located on four amenity lakes owned by plaintiff-homeowners' associations overtopped and caused the lakes to drain, after which defendant-city's drainage system discharged stormwater from neighboring properties into the now-dry lakebeds, the trial court properly dismissed plaintiffs' claim seeking relief for the overtopping of the dams on the theory that defendant breached certain drainage easements. Plaintiffs had previously raised a constitutional takings claim in federal court, which resulted in a final judgment holding that plaintiffs failed to show that defendant's actions caused the dams to overtop. Thus, where the causation issue was dispositive for the breach-of-easements claim, the entire claim was precluded under the doctrine of collateral estoppel.

2. Statutes of Limitation and Repose—stormwater drainage into private property—inverse condemnation claim—federal tolling provision—claim still time-barred

In a case about flood-related damages to private property during Hurricane Matthew, where dams located on four amenity lakes owned by plaintiff-homeowners' associations overtopped and caused the lakes to drain, and where defendant-city's drainage system discharged stormwater from neighboring properties into the now-dry lakebeds both before and after the overtopping occurred, the trial court properly dismissed plaintiffs' inverse condemnation claim. Although the judgment in a prior federal action did not preclude plaintiffs from litigating issues relating to the post-overtopping stormwater drainage, the claim was time-barred under N.C.G.S. § 40A-51(a), since the "project involving the taking" (here, the installation of the city's drainage system) occurred well outside the 24-month limitations period. Even under the tolling provision of 28 U.S.C. § 1367(d), which pauses the statute of limitations for state

claims while a federal court is exercising supplemental jurisdiction over them, the filing date of the state action was about eight months too late.

3. Waters and Adjoining Lands—negligent stormwater drainage —collateral estoppel—statute of limitations—governmental immunity—inverse condemnation as exclusive remedy

In a case about flood-related damages to private property during Hurricane Matthew, where dams located on four amenity lakes owned by plaintiff-homeowners' associations overtopped and caused the lakes to drain, and where defendant-city's drainage system discharged stormwater from neighboring properties into the now-dry lakebeds both before and after the overtopping occurred, the trial court erred in dismissing plaintiffs' negligence claim against the city. First, to the extent that plaintiffs sought relief for damages allegedly caused by post-overtopping stormwater drainage, the judgment in a prior federal action did not preclude plaintiffs from bringing their negligence claim in state court. Second, plaintiffs' claim was not time-barred where the alleged negligence—specifically, the dumping of stormwater into the dry lakebeds after the dams overtopped—fell within the three-year limitations period. Third, the defense of governmental immunity was unavailable to defendant, since state law classifies stormwater management as a proprietary municipal function. Finally, inverse condemnation was not an exclusive remedy barring plaintiffs' right to bring an action in tort for property damage.

4. Waters and Adjoining Lands—stormwater drainage into private property—negligence per se—improperly dismissed

In a case about flood-related damages to private property during Hurricane Matthew, where dams located on four amenity lakes owned by plaintiff-homeowners' associations overtopped and caused the lakes to drain, and where defendant-city's drainage system discharged stormwater from neighboring properties into the now-dry lakebeds both before and after the overtopping occurred, the trial court erred in dismissing plaintiffs' claim of negligence per se (alleging violations of N.C.G.S. § 160A-311 and local ordinances by defendant) to the extent that it was not precluded under collateral estoppel principles by a prior federal judgment on plaintiffs' constitutional takings claim. The claim fell within the applicable statute of limitations; governmental immunity was unavailable to defendant, since state law classifies stormwater management as a proprietary municipal function; and inverse condemnation was not

an exclusive remedy barring plaintiffs' right to bring an action in tort for property damage.

5. Waters and Adjoining Lands—stormwater drainage into private property—nuisance—improperly dismissed

In a case about flood-related damages to private property during Hurricane Matthew, where dams located on four amenity lakes owned by plaintiff-homeowners' associations overtopped and caused the lakes to drain, and where defendant-city's drainage system discharged stormwater from neighboring properties into the now-dry lakebeds both before and after the overtopping occurred, the trial court erred in dismissing plaintiffs' nuisance claim against the city to the extent that it was not precluded under collateral estoppel principles by a prior federal judgment on plaintiffs' constitutional takings claim. The claim fell within the applicable statute of limitations; governmental immunity was unavailable to defendant, since state law classifies stormwater management as a proprietary municipal function; and inverse condemnation was not an exclusive remedy barring plaintiffs' right to bring an action in tort for property damage.

6. Waters and Adjoining Lands—stormwater drainage into private property—trespass—improperly dismissed

In a case about flood-related damages to private property during Hurricane Matthew, where dams located on four amenity lakes owned by plaintiff-homeowners' associations overtopped and caused the lakes to drain, and where defendant-city's drainage system discharged stormwater from neighboring properties into the now-dry lakebeds both before and after the overtopping occurred, the trial court erred in dismissing plaintiffs' trespass claim against the city to the extent that it was not precluded under collateral estoppel principles by a prior federal judgment on plaintiffs' constitutional takings claim. The claim fell within the applicable statute of limitations; governmental immunity was unavailable to defendant, since state law classifies stormwater management as a proprietary municipal function; and inverse condemnation was not an exclusive remedy barring plaintiffs' right to bring a trespass claim.

7. Collateral Estoppel and Res Judicata—stormwater drainage into private property—quantum meruit—prior federal action—causation issue—collateral estoppel

In a case about flood-related damages to private property during Hurricane Matthew, where dams located on four amenity

lakes owned by plaintiff-homeowners' associations overtopped and caused the lakes to drain, after which defendant-city's drainage system discharged stormwater from neighboring properties into the now-dry lakebeds, the trial court properly dismissed plaintiffs' claim seeking relief for the overtopping of the dams under the principle of quantum meruit. Plaintiffs had previously raised a constitutional takings claim in federal court, which resulted in a final judgment holding that plaintiffs failed to show that defendant's actions caused the dams to overtop. Thus, where the causation issue was dispositive for the quantum meruit claim, the entire claim was precluded under the doctrine of collateral estoppel.

Judge TYSON concurring in part and dissenting in part.

Appeal by Plaintiffs from order entered 14 March 2023 by Judge William R. Pittman in Cumberland County Superior Court. Heard in the Court of Appeals 21 February 2024.

The Law Office of Matthew I. Van Horn, P.L.L.C., by Matthew I. Van Horn, and Edmisten & Webb Law, by William W. Webb, Jr., for plaintiffs-appellants.

Poyner Spruill LLP, by Keith H. Johnson and Stephanie L. Gumm, and Fayetteville City Attorney's Office, by Lachelle H. Pulliam, for defendant-appellee.

MURPHY, Judge.

Where a plaintiff alleges that a defendant municipality engaged in acts supporting a claim of inverse condemnation, inverse condemnation is only exclusive of other remedies to the extent the other remedies either are, in substance, themselves claims for inverse condemnation or arise in topic areas where our courts have said that inverse condemnation is the exclusive remedy. Otherwise, ordinary claims for damages to real property remain available to a plaintiff alongside inverse condemnation pursuant to N.C.G.S. § 40A-51(c). Here, where portions of Plaintiffs' claim alleging negligence, negligence *per se*, nuisance, and trespass in the form of damage to property did not allege inverse condemnation in substance and were not otherwise barred by statute of limitations, governmental immunity, or collateral estoppel, the trial court's dismissal of those portions of Plaintiffs' claims was improper.

BACKGROUND

This case concerns the flooding of several lakes during Hurricane Matthew, the resulting damage from which Plaintiffs allege the city is responsible. Specifically, Plaintiffs allege that, during Hurricane Matthew, dams located on four amenity lakes owned by Plaintiffs overtopped, causing the lakes to drain. As a result, not only did Plaintiffs lose their lakes and dams, but the city's drainage system, which had previously discharged into the amenity lakes, also began discharging stormwater directly onto the now-dry lakebeds.

Claiming that Defendant City of Fayetteville was responsible for the damage to the amenity lakes, Plaintiffs brought claims in the U.S. District Court for the Eastern District of North Carolina ("E.D.N.C.") for violations of 42 U.S.C. § 1983 and takings under the Fifth Amendment, as well as seven state law claims for breach of easements, inverse condemnation, negligence, negligence per se, nuisance, trespass, and quantum meruit. However, the U.S. District Court entered an order on 6 August 2021 granting summary judgment to Defendant on the federal claims, declining to exercise supplemental jurisdiction over the seven state claims and dismissing the state claims without prejudice. In entering the order, the federal court reasoned, in relevant part, that summary judgment was appropriate as to the federal takings claim because there was no interpretation of the evidence under which Defendant had caused the dams to overtop:

> The case concerns four lakes and dams that the four plaintiff homeowners' associations ("HOAs") own. The lakes were created by placing dams on tributaries to the Cape Fear River and impounding the waters. Private landowners constructed all four dams before 1961. The private landowners built the dams for recreational purposes, and the North Carolina Department of Environmental Quality ("NCDEQ") lists the dams as "amenity" dams[.]
>
> The City annexed Devonwood-Loch Lomond in 1996 and annexed the other three HOA properties in 2005. The City maintains infrastructure to manage stormwater. Stormwater drains into and passes through the four dams and lakes. Several regulations, including the Stormwater Ordinance, regulate the City's stormwater infrastructure. The City also holds a federal National Pollutant Discharge Elimination System ("NPDES") permit, which authorizes the City to discharge stormwater from its separate storm sewer system ("MS4") into State waters.

In October 2016, Hurricane Matthew hit Fayetteville, North Carolina. Hurricane Matthew generated up to 11.22 inches of rain over a twenty-four-hour period, and 7.39 inches of rain over a six-hour period, in the relevant watersheds. Hurricane Matthew was significantly more intense than the "100-year storm," which is 8.41 inches in twenty-four hours and 6.04 inches in six hours.[]

During Hurricane Matthew, all four of the relevant dams overtopped, meaning that flood waters rose above the crest of each dam. Three dams (Devonwood-Loch Lomond, Upper Rayconda, and Arran Lake) breached and lost the ability to impound water. Thus, the lakes returned to their natural state, with the tributaries meandering through the lakebeds. The fourth dam, Strickland Bridge Road, did not breach but suffered severe damage.

The State classifies the four dams as small, "high hazard dams," meaning that they must be able to withstand a storm generating one-third of the "probable maximum precipitation" ("1/3 PMP") over a six- or twenty-four-hour period in the area. Even though Hurricane Matthew exceeded the 100-year storm, it did not exceed 1/3 PMP. The dams did not meet the 1/3 PMP standard when Hurricane Matthew struck.

Freese and Nichols, an engineering consulting firm specializing in water resources, conducted hydrologic modeling of the four relevant watershed sub-basins. Hydrologists study the movement, distribution, and management of water. Methodologies include projecting the rise and peak of stormwater in a waterway under storm conditions and accounting for land use conditions in the watershed affecting the rate and volume of stormwater runoff. Hydrologists can use hydrologic modeling to model the rate and volume of stormwater based on historical land use conditions.

Freese and Nichols used hydrologic modeling to determine how high the water would have risen if Hurricane Matthew had occurred at an earlier date. In doing so, Freese and Nichols accounted for stormwater runoff in watersheds above the dams and the amount of impervious surfaces in the watersheds in the years for which it ran models.

Freese and Nichols produced a hydrologic model showing what would have happened if Hurricane Matthew had occurred in 1961, shortly after the four dams were constructed and before significant urbanization in the watersheds above the dams. The model showed that all four dams would have overtopped in 1961 even if no urbanization had occurred in the watersheds between 1961 and 2016.

Freese and Nichols also ran hydrologic models showing what would have happened if Hurricane Matthew had occurred in 1996 (when the City annexed Devonwood-Loch Lomond) and 2005 (when the City annexed the other three communities). The models showed that all four dams would have overtopped in 1996 or 2005 even if no urbanization had occurred between annexation and 2016. The models also showed that the four dams did not meet 1/3 PMP at the time of annexation.

Freese and Nichols produced a hydrologic model for 2016, which predicted what actually occurred—all four dams overtopped. Together, the models showed that the increase in stormwater generated in the water basins above the dams between annexation and 2016 was negligible and that the majority of stormwater runoff due to urbanization occurred before the City annexed the four properties.

. . . .

For a flood-based taking, a plaintiff needs to "present evidence comparing the flood damage that actually occurred to the flood damage that would have occurred if there had been no government action at all." *St. Bernard Par. Gov't* [*v. United States*, 887 F.3d 1354, 1363-68 (Fed. Cir. 2018)] (plaintiffs failed to show causation where they merely alleged that the government's construction and operation of a channel led to flood damage during Hurricane Katrina, but failed to provide a baseline against which to compare the government's actions). When evidence indicates that flooding would have damaged the property even absent government action, a plaintiff fails to state a takings claim. *See. e.g.*, *Sanguinetti* [*v. United States*, 264 U.S. 146, 149-50 (1924)] (plaintiff failed to state a takings claim where property flooded before the

government built the canal); *cf.* [*United States v. Archer*, 241 U.S. 119, 132 (1916)]. Put simply, a plaintiff must show that governmental action proximately caused the property damage. *See St. Bernard Par. Gov't*, 887 F.3d 1363-68.

. . . .

In *St. Bernard Parish Government*, [the] plaintiffs alleged that the government's operation of a municipal system led to flood damage during a hurricane, but plaintiffs failed to provide a baseline against which to compare the government's actions. *See St. Bernard Par. Gov't*, 887 F.3d at 1363-68. As in *St. Bernard Parish Government*, [P]laintiffs in this case fail to compare "the flood damage that actually occurred to the flood damage that would have occurred if there had not been government action at all." *Id.*

As discussed, "takings liability must be premised on affirmative government acts." *Id.* at 1361-62 & n.4 (collecting cases) . . . . In the flooding context, "the theory that the government failed to maintain or modify a government-constructed project may state a tort claim, [but] it does not state a takings claim." [*Id.*] . . . . Thus, for example, a government's negligence or failure to maintain sewage or drainage systems resulting in flooding does not create a federal takings claim. . . .

. . . .

Even viewing the record in the light most favorable to [P]laintiffs, [P]laintiffs fail to present evidence concerning the source or causation of siltation or debris accumulation, its relationship to flooding, or an affirmative act by the City. Plaintiffs also fail to offer an expert rebuttal contesting Rutledge's testimony. Thus, even viewing the record in the light most favorable to [P]laintiffs, [P]laintiffs fail to create a genuine issue of material fact concerning whether the dams would not have overtopped but for the City's actions. In contrast, the City has presented uncontradicted expert testimony showing that the dams would have overtopped even absent government action. . . . Accordingly, no genuine issue of material fact exists.

. . . .

> 'The City argues that judicial economy weighs in favor of the court exercising supplemental jurisdiction over [P]laintiffs' state law claims. In support, the City notes that the case has been pending for approximately three years, the parties engaged in substantial discovery, and the court has invested significant resources. The City also argues that the absence of causation evidence is similarly fatal to [P]laintiffs' state law claims. . . . .
>
> Plaintiffs' remaining claims involve seven hotly contested and unsettled issues of state tort law. Moreover, although the parties have engaged in extensive discovery, they will be able to use that discovery in state court. Accordingly, after balancing the relevant factors, the court declines to exercise supplemental jurisdiction over [P]laintiffs' remaining state law claims. . . . Thus, the court dismisses without prejudice [P]laintiffs' state law claims.

On 16 September 2022, Plaintiffs filed the instant complaint against Defendant in Superior Court, bringing only the state claims that were previously dismissed without prejudice: breach of easements, inverse condemnation, negligence, negligence *per se*, nuisance, trespass, and *quantum meruit*. The complaint alleged that the manner in which the city conducted its stormwater drainage led to the overtopping of the dams and the subsequent dumping of stormwater onto the now-dry lakebeds.

Defendant moved to dismiss each claim under Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure, citing collateral estoppel and a number of claim-specific reasons for the dismissal:

> (1) All of Plaintiffs' claims are barred by collateral estoppel because the U.S. District Court for the Eastern District of North Carolina conclusively determined a dispositive issue (causation) that forecloses each of Plaintiffs' claims and cannot be relitigated in this second action. *See* Order on Summary Judgment, *Devonwood-Loch Lomond Lake Association, Inc., et al. v. City of Fayetteville*, No. 5:18-CV-270 (E.D.N.C.) (August 6, 2021)[.] . . .
>
> (2) In addition, all of Plaintiffs' claims fail for independent, claim-specific reasons:
>
> a. Count 1 (breach of easement), Count 3 (negligence), Count 4 (negligence per se), Count 5 (nuisance), Count 6

(trespass), and Count 7 (quantum meruit/unjust enrichment) fail to state a claim because Plaintiffs' exclusive remedy for an alleged deprivation of the use of their property by a governmental entity with the power of eminent domain is an inverse condemnation claim.

b. Count 2 (inverse condemnation) is barred by the statute of limitations.

c. Count 3 (negligence), Count 4 (negligence *per se*), Count 5 (nuisance), Count 6 (trespass), and Count 7 (quantum meruit/unjust enrichment), which seek to impose liability for the City's exercise of a governmental function, are barred by governmental immunity. Accordingly, subject-matter jurisdiction and personal jurisdiction for these claims is lacking and, likewise, Plaintiffs have failed to state a claim.

d. Count 3 (negligence) and Count 4 (negligence *per se*), Count 5 (nuisance), Count 6 (trespass), and Count 7 (quantum meruit/unjust enrichment) also fail to state a claim because, contrary to the complaint, well-settled North Carolina common law does not impose a legal obligation on municipalities to upgrade privately owned dams to withstand catastrophic storms such as Hurricane Matthew, the hurricane that caused the property damage for which Plaintiffs seek compensation from the City.

e. Count 4 (negligence *per se*) fails to state a claim because the statues, ordinances, and regulations that Plaintiffs rely on for this claim do not provide a private right of action to private parties who are dissatisfied with a municipality's stormwater management efforts.

After further briefings from both Plaintiffs and Defendant, the trial court granted Defendant's motion to dismiss with prejudice in a one-page order entered 14 March 2023 "based upon Rules 12(b)(1), (b)(2), and (b)(6)." Plaintiffs timely appealed.

ANALYSIS

Plaintiffs argue Defendant's motion to dismiss should have been denied. Given the brevity of the trial court's order granting Defendant's motion to dismiss, Plaintiffs have attempted to address multiple possible bases for the trial court's dismissal order on appeal. Specifically, Plaintiffs ask us to consider whether the Superior Court complaint was barred by collateral estoppel; whether, for purposes of their claims that are not

inverse condemnation, inverse condemnation is their exclusive remedy; whether any claims were time-barred; and whether governmental immunity shields Defendant from liability.[1] Bearing these possible bases for dismissal in mind, we consider which, if any, of Plaintiffs' claims were properly dismissed, reviewing the issues de novo. *Lea v. Grier*, 156 N.C. App. 503, 507 (2003).

A. Breach of Easements

[1] In their complaint, Plaintiffs state their first claim for relief, breach of easements, as follows:

> **FIRST CLAIM FOR RELIEF**
>
> Breach of Easements
>
> 52. The allegations contained in Paragraphs 1 - 51 of the Verified Complaint are realleged and incorporated herein by reference as if fully set forth herein.
>
> 53. The City and the City's Public Works Commission are grantees and [] Plaintiffs are grantors of the easements identified above and incorporated herein by reference. When the easements were granted to the City and the City's Public Works Commission by [] Plaintiffs, the City

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1. Plaintiffs also argue the trial court erred in failing to make findings of facts and conclusions of law in its order. It bases this argument on *Gilbert Engineering Co. v. City of Asheville*, which it cites for the proposition that, "[t]o dismiss an action under Rule 12(b)(2), the trial court must '(1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising on the facts found; and (3) enter judgment accordingly.'" *Citing Gilbert Eng'g Co. v. City of Asheville*, 74 N.C. App. 350, 364, *disc. rev. denied*, 314 N.C. 329 (1985).

However, what *Gilbert* actually states is that, "*[i]n cases where the trial judge sits as the trier of facts*, he is required to (1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising on the facts found; and (3) enter judgment accordingly." *Id.* (emphasis added). Here, Plaintiffs have not argued that the trial court's order is factually defective with respect to any particular issue; rather, their reply brief makes clear that their argument is predicated entirely on a generalized objection to the absence of jurisdictional factfinding given the trial court's invocation of Rule 12(b)(2). As the trial court was not acting as the trier of fact, *Gilbert* is inapplicable.

Furthermore, the only readily identifiable basis for a dismissal under Rule 12(b)(2) in this case is governmental immunity, which is technically an issue of personal jurisdiction. *Torres v. City of Raleigh*, 288 N.C. App. 617, 620 (2023) ("This Court has consistently stated that a denial of governmental immunity should be classified as an issue of personal jurisdiction under Rule 12(b)(2)."). And, when governmental immunity is at issue, specific findings of fact and conclusions of law by the trial court are not required unless specifically requested by a party. *Id.* at 622-23. Plaintiffs did not request any such findings here.

> provided [] Plaintiffs with zero or nominal consideration in exchange for the easements.
>
> 54. The City has materially and continually breached the terms and spirit of the easements by acts and omissions resulting in the City's failure to maintain, improve, inspect, repair, or replace when necessary the equipment and other improvements installed in and on the properties encumbered by the easements.
>
> 55. The City has utilized the easements excessively and with a lack of regard for the cumulative impact on stormwater retention across and within [] Plaintiffs' property.
>
> 56. The City's material breach of the terms and spirit of the easements entitles [] Plaintiffs to compensatory damages for the damages caused by the City's acts and omissions.
>
> 57. Plaintiffs are entitled to and hereby demand compensatory damages in an amount exceeding $75,000[.00], the exact amount to be determined at trial.
>
> 58. Alternatively or in conjunction with an award for compensatory damages, [] Plaintiffs are entitled to and hereby request a judgment by the Court ordering that the easements be terminated or modified to reflect the parties intentions and the scope of the City's use. This conduct has rendered the easements and installations thereon to be in decrepit condition and through their excessive use has caused the failure and destruction of the Plaintiffs' property, lakes, and dams.

This claim, by its own terms, refers to the allegedly excessive use or overburdening of the drainage easements and alleged failure by the city to maintain the lakes' surrounding infrastructure, seeking relief for the overtopping of the dams.

However, in the now-dismissed federal case, the U.S. District Court E.D.N.C. determined that no material issue of fact existed concerning whether Defendant caused the dams to overtop. Under such circumstances, we apply the doctrine of collateral estoppel. "Under the doctrine of collateral estoppel, or issue preclusion, a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different

cause of action between the parties or their privies." *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 414 (1996) (marks omitted).

> A party asserting collateral estoppel is required to show that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both the party asserting collateral estoppel and the party against whom collateral estoppel is asserted were either parties to the earlier suit or were in privity with parties.

Id. (marks omitted). "Moreover, the doctrine of collateral estoppel applies only to an issue of ultimate fact determined by a final judgment." *State v. Macon*, 227 N.C. App. 152, 157, *disc. rev. denied*, 367 N.C. 238 (2013); *see also State v. Edwards*, 310 N.C. 142, 145 (1984) ("Under the doctrine of collateral estoppel, an issue of ultimate fact, once determined by a valid and final judgment, cannot again be litigated between the same parties in any future lawsuit.").

Plaintiffs argue that "the issues raised by the state-law claims in the subject appeal are not the same as the federal takings claim involved in the federal action"; that their "state-law claims were not actually litigated in the federal action"; and that "any references in the federal court's [o]rder concerning the merits of a state-law claim were not 'necessary and essential' to the court's judgment on the federal takings issue." However, for the reasons explained more fully below, we remain unconvinced by these arguments and hold that collateral estoppel does apply to this issue.

Although Plaintiffs argue that the issues are not the same as those addressed in the federal order and that the state law claims were not actually litigated, the law of collateral estoppel does not, as Plaintiffs argue, depend on the underlying legal standards being argued. Plaintiffs' attempts to distinguish the law of takings from the law governing its state law claims is therefore inapposite; collateral estoppel is a doctrine applicable to "issue[s] of ultimate fact[.]" *Macon*, 227 N.C. App. at 157; *Edwards*, 310 N.C. at 145. The underlying legal issues only affect its applicability insofar as they color the expression of the trial court's factual determinations—for example, when the subsequent action involves a burden of proof at odds with the burden under which the findings in the first were made. *Cf. Bishop v. Cnty. of Macon*, 250 N.C. App. 519, 523 (2016) (emphases in original) (marks omitted) ("[E]ven if the subsequent action is based on an entirely different *claim*, collateral estoppel bars "the subsequent adjudication of a previously determined

issue."); *but see In re K.A.*, 233 N.C. App. 119, 127 (2014) (declining to apply collateral estoppel to findings in a prior action made under the preponderance of the evidence standard to a subsequent action that used the clear and convincing standard).

Here, the U.S. District Court unambiguously determined the issue of causation with respect to the takings claim despite the fact that it dismissed the claim on both the basis that Plaintiffs failed to allege affirmative acts and that the undisputed evidence established Defendant was not the cause of the dams' breakage:

> Even viewing the record in the light most favorable to [P]laintiffs, [P]laintiffs fail to present evidence concerning the source or causation of siltation or debris accumulation, its relationship to flooding, or an affirmative act by the City. Plaintiffs also fail to offer an expert rebuttal contesting Rutledge's testimony. Thus, even viewing the record in the light most favorable to [P]laintiffs, [P]laintiffs fail to create a genuine issue of material fact concerning whether the dams would not have overtopped but for the City's actions. In contrast, the City has presented uncontradicted expert testimony showing that the dams would have overtopped even absent government action. . . . Accordingly, no genuine issue of material fact exists.

The absence of causation was one of two bases used by the U.S. District Court to support its order granting summary judgment, but that does not negate the fact that the issue was "actually litigated and necessary to the judgment[.]" *Tucker*, 344 N.C. at 414, and therefore indeed dispositive. We must, therefore, acknowledge its preclusive effect. Were we to hold otherwise, a trial court's use of multiple dispositive lines of reasoning in an order would strip the *entire* order of preclusive effect under a collateral estoppel analysis, turning the doctrine on its head.

Plaintiffs also argue that the U.S. District Court's conclusions as to causation are not preclusive because the court explicitly left Plaintiffs' remaining claims for resolution in state court, believing them to depend on "hotly contested" and "unsettled" matters of North Carolina law. Whatever the rationale of the U.S. District Court, though, we are bound by its reasoning as to causation; and we, in our review, find the issue of causation dispositive as to the breach of easements claim—as well as Plaintiffs' other claims arising from Defendant's alleged role in the overtopping of the dams. Nothing in the U.S. District Court's ruling

declining to exercise jurisdiction over Plaintiff's state claims makes its conclusions as to causation any less necessary to the resolution of the claims it *did* address, and those conclusions do, therefore, carry preclusive effect.

Resolution of the summary judgment motion in the federal case relied upon that court's determination that the city did not cause the dams' breakage. As Plaintiffs' breach of easements claim concerns the dams' breakage and not any subsequent dumping onto the dry lakebed, we need not consider any further arguments to determine that the trial court properly dismissed this entire claim, as it was fully precluded by the federal order.

B. Inverse Condemnation

[2] Plaintiffs state their second claim for relief, inverse condemnation, as follows:

> **SECOND CLAIM FOR RELIEF**
>
> Inverse Condemnation // North Carolina General Statute §§ 40A-51 and 40A-3(b)(4)
>
> 59. The allegations contained in Paragraphs 1- 58 of the Verified Complaint are realleged and incorporated herein by reference as if fully set forth herein.
>
> 60. The City has unlawfully appropriated [] Plaintiffs' property for stormwater drainage. This action has been initiated within twenty four (24) months of the date of the taking of the affected property. A memorandum of this action is being filed with the Cumberland County, North Carolina register of deeds in accordance with N.C.G.S. § 40A-51(b).
>
> 61. The acts and omissions by the City []resulted in a taking and/or damage of Plaintiffs' property. This unlawful taking by the City of the Plaintiffs' property has and continues to negatively impact [] Plaintiffs' property and will continue to negatively impact the Plaintiffs' property into the future.
>
> 62. The City is not permitted to take [] Plaintiffs' property without just compensation to [] Plaintiffs. The City's acts and omissions resulting in an unlawful taking has caused damage to [] Plaintiffs' property and has caused the Plaintiffs' property to decrease in value.

> 63. The City, through its acts and omissions, failed to prevent foreseeable damage to [] Plaintiffs' property.
>
> 64. The City's failure to compensate [] Plaintiffs[] for the damages to their property or to remedy the unlawful and decrepit stormwater management system has caused the Plaintiffs, composed of a relatively small percentage of City of Fayetteville residents, to bear the burden of costs and repairs which is a burden that should fall on the public and funds for public use as a whole.
>
> 65. The City's acts and omissions have caused the Plaintiffs to suffer damages to their Property and homes.
>
> 66. Plaintiffs are entitled to compensatory damages for inverse condemnation against the City in an amount [] exceeding $75,000[.00], the exact amount to be determined at trial. In addition, the Plaintiffs are entitled to a recovery of all reasonable attorney's fees they have incurred as a result of this action.

Unlike the breach of easements claim, Plaintiffs' claim for inverse condemnation, as expressed in their complaint, appears to concern both the past discharge of stormwater into Plaintiffs' lakes and the current and future discharge of stormwater onto Plaintiffs' now-dry lakebed. To the extent any portion of Plaintiffs' inverse condemnation claim concerns the allegation that Defendant caused the dams to overtop, our reasoning in section A of this opinion would have rendered dismissal of that portion of this claim appropriate. *See supra* Part A. Meanwhile, the dumping of stormwater onto the dry lakebed, which was not contemplated in the federal court's order finding lack of causation, carries no preclusive effect.

Nevertheless, even with respect to the post-overtop discharge of stormwater, Plaintiffs' inverse condemnation claim *is* barred by statute of limitations. Under N.C.G.S. § 40A-51(a), a plaintiff may assert a claim for inverse condemnation against a state actor "within 24 months of the date of the taking of the affected property or the completion of the project involving the taking, whichever shall occur later." N.C.G.S. § 40A-51(a) (2023). Here, the "project," for limitations purposes, could only plausibly refer to the installation of the drainage system in 1961, placing the date of the completion of the project well outside the limitations period. *Peach v. City of High Point*, 199 N.C. App. 359, 370-71 (2009) (marks omitted) (holding that, while "the completion of the project in accordance with section 40A-51(a) does not necessarily equate to the completion of

construction[,]" the completion of the project is derived from the end date of any inspection and repair on the construction), *disc. rev. denied*, 363 N.C. 806 (2010). Nor do we accept Plaintiffs' contention that the entirety of Defendant's wastewater management system could plausibly be considered a single, indefinitely ongoing "project" for limitations purposes—were that so, claims arising from any ongoing government endeavor would, practically speaking, never be barred.

Moreover, the "taking," for purposes of the post-hurricane dumping onto Plaintiffs' dry lakebeds, occurred during Hurricane Matthew in October 2016[2]—which, for purposes of our analysis, we will treat as 17 October 2016.[3] Even taking into account the tolling period under 28 U.S.C. § 1367(d) during the pendency of the federal case, *see* 28 U.S.C. § 1367(d) (providing for the tolling of state claims' statutes of limitations while a federal court is exercising supplemental jurisdiction over them), the tolling period of 8 June 2018 to 6 August 2021—the dates of the filing of the federal complaint and entry of the federal dismissal order, respectively—places the filing date of the state action on 16 September 2022 approximately eight months outside the allowable 24-month period.[4] Accordingly, Plaintiffs' inverse condemnation claim was barred by the limitations period in N.C.G.S. § 40A-51(a).

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2. We have held that, for purposes of limitations in flood-based inverse condemnation actions, the taking itself takes place when flooding occurs, not when the structure causing the flooding is put into place. *Lea Co. v. N. Carolina Bd. of Transp.*, 308 N.C. 603, 629 (1983) ("As we have previously pointed out, the plaintiff's claim for relief for inverse condemnation did not arise until injury had been inflicted to its property by excess flooding directly resulting from the defendant's structures.").

3. Though Plaintiffs do not specify the exact date of the overtopping in their complaint, we take judicial notice of the fact that Hurricane Matthew affected the Caribbean and southeastern United States between 28 September 2016 and 9 October 2016, with the latest recorded cresting of the Cape Fear River occurring 17 October 2016. National Weather Service, *Hurricane Matthew in the Carolinas: October 8, 2016* (Aug. 21, 2024, 12:08 PM), https://www.weather.gov/ilm/Matthew; *see also* N.C.G.S. § 8C-1, Rule 201(b)(2) (2023) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); *State v. Bucklew*, 280 N.C. App. 494, 505 (2021) ("[W]eather reports from the National Weather Service are a result of data gathered by the National Weather Service and thus typically are documents of indisputable accuracy.").

4. Our "pausing" approach to the application of 28 U.S.C. § 1367(d) reflected in this analysis is, we note, at odds with the approach taken by previous panels of this court. In fact, in *Huang v. Ziko*, we specifically rejected the idea that a plaintiff would be entitled when the federal action was dismissed to the time remaining under the state statute of limitations at the time the federal action was commenced, describing such an interpretation as "untenable" and "contrary to the policy in favor of prompt prosecution of legal claims":

> As the parties recognize, "filing an action in federal court which is based on state substantive law . . . toll[s] the statute of limitations while that action is pending." *Clark v. Velsicol Chemical Corp.*, 110 N.C. App. 803, 808[] . . . (1993), *aff'd per curiam*, 336 N.C. 599[] . . . (1994). The parties agree that plaintiff's federal action was no longer pending for the purpose of tolling the statute of limitations when the United States Court of Appeals reached its decision on 7 December 1995. *See Clark*, 110 N.C. App. 803[] . . . (holding that because a petition for writ of certiorari to the United States Supreme Court is not an appeal of right, the federal action is not alive for the purpose of tolling the statute of limitations while a decision to allow or deny such a petition is pending). However, the parties disagree as to whether plaintiff had additional time to file his complaint in state court after the United States Court of Appeals reached its decision.
>
> Plaintiff contends that once the federal action was no longer pending, the time for filing his complaint in state court should have been extended for the portion of the three-year limitations period that had not been used when he filed the federal action. Since less than a year and a half had passed when plaintiff filed his federal action, he would have had more than a year and a half after 7 December 1995 to file his complaint in state court.
>
> Plaintiff's contention is untenable. The rule which plaintiff would have this Court adopt is contrary to the policy in favor of prompt prosecution of legal claims. Furthermore, such a rule is contrary to the general rule that "[i]n the absence of statute, a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice as to him[.]" 51 Am. Jur. *Limitation of Actions* § 311 (1970). In this case, no statute or rule provides for the exclusion of the time during which the federal action was pending from the limitations period.

Huang v. Ziko, 132 N.C. App. 358, 360-61 (1999); *see also Harter v. Vernon*, 139 N.C. App. 85, 89-90, *disc. rev. denied*, 353 N.C. 263 (2000), *cert. denied*, 532 U.S. 1022 (2001).

However, since *Huang* was decided, the U.S. Supreme Court has held in *Artis v. District of Columbi*a, 583 U.S. 71, 74, 80-82 (2018), that, contrary to our prior practice, 28 U.S.C. § 1367(d) *does* require a "pausing" approach. There, the U.S. Supreme Court discussed the trend among exceptions to statutes of limitations to adopt either a "pausing" approach or a "grace period" approach:

> First, the period (or statute) of limitations may be "tolled" while the claim is pending elsewhere.[] Ordinarily, "tolled," in the context of a time prescription like § 1367(d), means that the limitations period is suspended (stops running) while the claim is *sub judice* elsewhere, then starts running again when the tolling period ends, picking up where it left off. *See* Black's Law Dictionary 1488 (6th ed. 1990) ("toll," when paired with the grammatical object "statute of limitations," means "to suspend or stop temporarily"). This dictionary definition captures the rule generally applied in federal courts. See, *e.g.*, *Chardon v. Fumero Soto*, 462 U.S. 650, 652, n. 1[] . . . (1983) (Court's opinion "use[d] the word 'tolling' to mean that, during the relevant period, the statute of limitations ceases to run").[] Our decisions employ the terms "toll" and "suspend"

C. Negligence

[3] Plaintiffs state their third claim, negligence, as follows:

THIRD CLAIM FOR RELIEF

Negligence

67. The allegations contained in Paragraphs 1- 66 of the Verified Complaint are realleged and incorporated herein by reference as if fully set forth herein.

68. The City has been negligent, reckless, willful, and wanton in one or more of the following ways:

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interchangeably. For example, in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538[] . . . (1974), we characterized as a "tolling" prescription a rule "suspend[ing] the applicable statute of limitations," *id.*, at 554[] . . . ; accordingly, we applied the rule to stop the limitations clock, *id.*, at 560-561[] . . . .[] We have similarly comprehended what tolling means in decisions on equitable tolling. See, *e.g.*, *CTS Corp. v. Waldburger*, 573 U.S. [1, 9] (2014) (describing equitable tolling as "a doctrine that pauses the running of, or 'tolls' a statute of limitations" (some internal quotation marks omitted)); *United States v. Ibarra*, 502 U.S. 1, 4, n. 2[] . . . (1991) *(per curiam)* ("Principles of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped.").

In lieu of "tolling" or "suspending" a limitations period by pausing its progression, a legislature might elect simply to provide a grace period. When that mode is adopted, the statute of limitations continues to run while the claim is pending in another forum. But the risk of a time bar is averted by according the plaintiff a fixed period in which to refile. A federal statute of that genre is 28 U.S.C. § 2415. That provision prescribes a six-year limitations period for suits seeking money damages from the United States for breach of contract. § 2415(a). The statute further provides: "In the event that any action . . . is timely brought and is thereafter dismissed without prejudice, the action may be recommenced within one year after such dismissal, regardless of whether the action would otherwise then be barred by this section." § 2415(e).[] . . . .

Artis v. District of Columbia, 583 U.S. 71, 74, 80-82 (2018). In answering the statutory question, the United States Supreme Court held both that "toll," as used in 28 U.S.C. § 1367(d), specifically refers to the pausing approach and that 28 U.S.C. § 1367(d) remains enforceable, even as against state policy, via the Necessary and Proper Clause of the U.S. Constitution. *Id.* at 82-90.

In light of this clarification, we apply 28 U.S.C. § 1367(d) as a pausing provision, notwithstanding our prior holding in *Huang*.

> a. In failing to maintain, upgrade, or inspect its MS4, which the City utilizes to discharge the City's stormwater on the Plaintiffs' property.
>
> b. In failing to upgrade its MS4 to accommodate the cumulative impact of increased and inadequately supervised development of residential and commercial property upstream from [] Plaintiffs' property, and discharging the stormwater from the same residential and commercial developments onto [] Plaintiffs' property.
>
> c. In collecting stormwater in various drainage bases onto areas not owned by the City or on public land and draining the stormwater onto the Plaintiffs' property knowing that the drainage of the stormwater onto the Plaintiffs' property would cause significant damage to the Plaintiffs' property.
>
> [d]. Discharging stormwater on the Plaintiffs' property causing flooding and damage to [] Plaintiffs' property.
>
> 69. In North Carolina, municipalities have a duty to maintain their stormwater drainage systems and are liable for the negligent maintenance of stormwater drainage systems.
>
> 70. As a direct and proximate result, the Plaintiffs have suffered damages to their property, their homes and through the diminution of the value of their property.
>
> 71. Plaintiffs are entitled to compensatory damages in an amount [] exceeding $75,000[.00], the exact amount to be determined at trial.

As expressed, this claim involves both the past discharge of stormwater into Plaintiffs' lakes and the continuing discharge of stormwater onto Plaintiffs' now-dry lakebed since the dams' breach; thus, as with the previous claim, we examine only the post-breach dumping in light of the preclusive effect of the federal court order. *See supra* Part A.

With respect to the non-precluded aspects of this claim, under N.C.G.S. § 40A-51(c), "[n]othing in this section [codifying the right to claim inverse condemnation] shall in any manner affect an owner's common-law right to bring an action in tort for damage to his property." N.C.G.S. § 40A-51(c) (2023). While Defendant points us to cases in which we have held that inverse condemnation operates exclusively of other

remedies in tort, our research reveals that such cases have universally either dealt with instances where the tort claims sounded in inverse condemnation in substance or applied to specific factual circumstances. *See*, *e.g.*, *Cape Fear Pub. Util. Auth. v. Costa*, 205 N.C. App. 589, 596 (2010) (marks omitted) ("[O]ur courts have repeatedly held that the exclusive remedy for failure to compensate for a 'taking' is inverse condemnation . . . ."); *Smith v. City of Charlotte*, 79 N.C. App. 517, 521 (1986) (emphasis added) ("It has been established that they no longer have any private common law actions for damages in trespass or nuisance *in municipal airport overflight cases*; their sole remedy is inverse condemnation."). However, the general rule remains that remedies for damages in tort remain available to landowner plaintiffs. *See* N.C.G.S. § 40A-51(c) (2023); *Howell v. City of Lumberton*, 144 N.C. App. 695, 700 (2001) ("[I]f a common-law action for negligence by defendant would otherwise be available to plaintiff, it is preserved under N.C.G.S. § 40A-51(c) and not preempted by the inverse condemnation statute.").

Here, Plaintiffs have alleged, in relevant part, that Defendant was negligent in "[d]ischarging stormwater on the Plaintiffs' property[,] causing flooding and damage to [] Plaintiffs' property." This is "an action in tort for damage to [Plaintiffs'] property[,]" N.C.G.S. § 40A-51(c) (2023); it is not, either in form or substance, a claim for inverse condemnation. We therefore hold that the availability of inverse condemnation does not bar Plaintiffs' negligence claim as to the discharge of stormwater onto the lakebed.

Nor was this claim barred by the applicable statute of limitations. As alleged, the dumping of stormwater onto Plaintiffs' dry lakebeds is a discrete instance of negligence, and it necessarily arose at the time of and subsequent to the dams overtopping, emptying the lakes. Unlike inverse condemnation, negligence is subject to a three-year—not two-year—statute of limitations. *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 45 (2003) (citing N.C.G.S. § 1-52(5) (2003)), *disc. rev. denied*, 358 N.C. 235 (2004). While the analysis in the previous section demonstrates that Plaintiffs' claim was brought more than two years after the dams' overtopping, it was brought within the allowable three-year period for negligence claims. *See supra* Part B.

Finally, governmental immunity did not bar this claim. "Governmental immunity covers *only* the acts of a municipality or a municipal corporation committed pursuant to its governmental functions. Governmental immunity does not, however, apply when the municipality engages in a proprietary function." *Est. of Williams ex rel.*

Overton v. Pasquotank Cnty. Parks & Recreation Dep't, 366 N.C. 195, 199 (2012). Under N.C.G.S. § 160A-311, stormwater management is a quintessentially proprietary municipal function. *See* N.C.G.S. § 160A-311 (2023) (defining electricity, water, and gas provision; wastewater and solid waste management; cable television; and parking, airports, and public transportation as "public enterprise[s]" alongside stormwater management); *see also Pulliam v. City of Greensboro*, 103 N.C. App. 748, 751-52 (categorizing two public enterprises under N.C.G.S. § 160A-311—airport management and sewer services—as proprietary rather than governmental functions), *disc. rev. denied*, 330 N.C. 197 (1991).

Accordingly, the trial court erred in dismissing the portion of the negligence claim concerning Defendant's post-overtop discharging of stormwater.

D. Negligence Per Se

[4] Plaintiffs state their fourth claim, negligence *per se*, as follows:

> **FOURTH CLAIM FOR RELIEF**
>
> Negligence Per Se
>
> 72. The allegations contained in Paragraphs 1-71 of the Verified Complaint are realleged and incorporated herein by reference as if fully set forth herein.
>
> 73. The City's acts and omissions described herein constitute a violation of North Carolina General Statute § 160A-311, et seq., Section 1, Chapter 12 of the Cumberland County Code and its own Stormwater Quality Management Program Plan and Administrative Manual for Implementation of the Stormwater Control Ordinance.
>
> 74. The City's violations of the subject regulations, ordinances, and state and federal law have caused damages to the Plaintiffs' property as described herein.
>
> 75. Plaintiffs are entitled to compensatory damages in an amount in exceeding $75,000[.00], the exact amount to be determined at trial.

For the reasons discussed with respect to negligence, this claim was also properly dismissed with respect to the overtopping of Plaintiffs' dams, but not with respect to the subsequent discharge of stormwater onto Plaintiffs' lakebeds. *See supra* Part C.

E. Nuisance

[5] Plaintiffs state their fifth claim, nuisance, as follows:

> **FIFTH CLAIM FOR RELIEF**
>
> Nuisance—Recurring Nuisance
>
> 76. The allegations contained in Paragraphs 1 - 75 of the Verified Complaint are realleged and incorporated herein by reference as if fully set forth herein.
>
> 77. The City through its acts and omissions created a nuisance by utilizing [] Plaintiffs' property as a public use collection facility for stormwater. The City has failed to consider the cumulative impact of directing excessive stormwater over and into the Plaintiffs' property instead of adequately managing, directing, and collecting stormwater through public use measures management.
>
> 78. Now that three of four of Plaintiffs' dams overtopped and Plaintiffs' lakes are gone, the City is discharging stormwater from its MS4 directly onto dry land owned by [] Plaintiffs.
>
> 79. The City's acts and omissions have created a nuisance per se which has become dangerous and a threat to the Plaintiffs' lives, health, and property.
>
> 80. The City has no right to neglect the inspection, maintenance, repair, and replacement of the easements with respect to the scope of the City's direction and dissemination of stormwater over and into the Plaintiffs' property in lieu of directing and disseminating the stormwater over and into public use facilities and property.
>
> 81. 'The City has no right to have neglected the City of Fayetteville Stormwater Management Ordinance and related City of Fayetteville stormwater management plans to the detriment of the Plaintiffs' lives, health, and property, by directing and discharging an unreasonable amount of stormwater over and into the Plaintiffs' property.
>
> 82. The Plaintiffs have suffered damages including loss of property, damages to their property, damages to the improvements on their property, damages to their health, and a diminution of value to their property.

> 83. Plaintiffs are entitled to compensatory damages in an amount [] exceeding $75,000[.00], the exact amount to be determined at trial.

This claim also involves both the past discharge of stormwater into Plaintiffs' lakes and the current and future discharge of stormwater onto Plaintiffs' now-dry lakebed; however, given the preclusive effect of the federal court order, we examine only the post-overtop dumping onto Plaintiffs' dry lakebed. *See supra* Part A. Moreover, as with the negligence claim, the post-overtop discharge components of this claim are, in both expression and substance, claims for damages rather than claims for inverse condemnation, defeating any arguments by Defendant that inverse condemnation is Plaintiffs' exclusive remedy. *See supra* Part C. Finally, as before, governmental immunity does not bar this claim. *Id.*

As for the statute of limitations, nuisance claims, like negligence claims, are subject to a three-year limitations period. *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 511 (1990) (citing *Anderson v. Waynesville*, 203 N.C. 37 (1932)). Thus, the portion of Plaintiffs' nuisance claim based on the discharge of water onto the dry lakebed, which arose within the limitations period, is not time-barred. *See supra* Part C.

The trial court therefore erred in dismissing the portion of the nuisance claim concerning Defendant's post-overtop discharging of stormwater.

F. Trespass

[6] Plaintiffs state their sixth claim, trespass, as follows:

> **SIXTH CLAIM FOR RELIEF**
>
> Trespass-Recurring Trespass
>
> 84. The allegations contained in Paragraphs 1 – 83 of the Verified Complaint are realleged and incorporated herein by reference as if fully set forth herein.
>
> 85. The City has trespassed on the Plaintiffs' property without consent. The City has acted recklessly and without consideration of the Plaintiffs' property rights.
>
> 86. The Plaintiffs have been damaged from the cumulative and excessive amounts of stormwater the City has directed and discharged over and through the Plaintiffs' property in lieu of directing the stormwater through dedicated public use mechanisms and property.

> 87. Plaintiffs are entitled to compensatory damages in an amount in exceeding $75,000[.00], the exact amount to be determined at trial.

While not as clear as in the previous claim, the use of the present perfect tense—"has trespassed"—indicates that this claim refers to both the past discharge of stormwater into the lakes and the current discharge of stormwater onto the dry lakebeds. As before, the federal order is preclusive as to the damages caused prior to the breach of the dams, so that portion of the claim was properly dismissed. *See supra* Part A. However, as a claim for damages, the availability of inverse condemnation did not exclude Plaintiffs' ability to raise a claim for trespass. *See supra* Part C. Nor does governmental immunity apply. *Id.* Finally, as trespass and nuisance are governed by the same statute of limitations, *see Wilson*, 327 N.C. at 511, trespass is, for the same reason as nuisance, not time-barred. *See supra* Part E.

The trial court therefore erred in dismissing the portion of the trespass claim concerning Defendant's post-overtop discharging of stormwater.

G. *Quantum Meruit*

[7] Finally, Plaintiffs state their seventh claim, *quantum meruit*, as follows:

> **SEVENTH CLAIM FOR RELIEF**
>
> Quantum Meruit/Unjust Enrichment
>
> 88. The allegations contained in Paragraphs 1 – 87 of the Verified Complaint are realleged and incorporated herein by reference as if fully set forth herein.
>
> 89. The City has for at least thirty years enjoyed the direct and indirect benefits of the use of the Plaintiffs' private property identified herein for public use without compensation to the owners of the subject property. As a result, the City has been unjustly enriched.
>
> 90. The City has further enjoyed the direct and indirect benefits of the easements referenced herein for public use without compensation to the Plaintiffs. Additionally, the City has enjoyed the continuous financial benefit associated with avoiding the payment of the costs associated with the reasonable inspection, management, and upgrades to the easements and property owned by the Plaintiffs. As a result, the City has been unjustly enriched, and the expense has been incurred by the Plaintiffs.

> 91. The City is thus indebted to Plaintiffs for damages for the amounts necessary to repair or replace the easements and subject installations made by the City within the easements, to repair or replace the subject dams and lakes, and Plaintiffs are entitled to recover those damages from the City.

As expressed, this claim seeks recompense for the flooding of the lakes and the overtopping of the dams and makes no mention of the subsequent dumping by the city onto Plaintiffs' dry lakebeds. Thus, the federal court order is preclusive as to this entire claim, and it was properly dismissed. *See supra* Part A.

CONCLUSION

The trial court correctly dismissed all claims arising from the overtopping of the dams themselves due to the federal order's preclusive effect on the issue of causation. It also correctly dismissed the entirety of Plaintiffs' inverse condemnation claim. However, Plaintiffs' claims for damages arising from Defendant's discharging of stormwater onto Plaintiffs' dry lakebeds—namely, negligence, negligence *per se*, nuisance, and trespass—were improperly dismissed. Accordingly, we reverse the trial court's dismissal order as to those issues and remand for further proceedings.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judge WOOD concurs.

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

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

I agree with the majority's conclusions regarding Plaintiffs' claims for breach of easements, negligence, negligence *per se*, nuisance, trespass, and *quantum meruit*. I concur with the majority's holding Plaintiffs' breach of easements and *quantum meruit* claims were precluded by the federal order and properly dismissed. I also concur with the majority's decision to reverse those portions of the trial court's order dismissing Plaintiffs' post-breach claims, which includes Plaintiffs' claims for negligence, negligence *per se*, nuisance, and trespass.

The majority's opinion erroneously affirms the trial court's order allowing Defendant's Rule 12(b) motion to dismiss Plaintiffs' inverse condemnation claim for purportedly bringing their claim after the statute of limitations had expired. Plaintiffs' inverse condemnation claim should have survived Defendant's Rule 12(b) motion to dismiss. Further evidence beyond the face of the compliant should have been presented prior to ruling on Plaintiffs' claim. I respectfully dissent.

I. Relevant Background

Plaintiffs' complaint asserted claims for inverse condemnation. Their complaint facially and expressly asserts: "This action has been initiated within twenty-four (24) months of the date of the taking of the affected property."

Defendant did not answer Plaintiff's complaint, but moved, pursuant to North Carolina Rules of Civil Procedure 12(b)(1), (b)(2), and (b)(6) to dismiss Plaintiffs' claims. Defendant's bare motion asserted Plaintiffs' inverse condemnation claim was "barred by the statute of limitations."

A hearing was held on 13 February 2023. The trial court allowed Defendant's Rule 12(b) motions to dismiss, dismissing each of Plaintiffs' claims with prejudice. The trial court's brief order merely stated it had "carefully considered the pleadings, the written and oral arguments of counsel, and the relevant authority in the light most favorable to the Plaintiffs[.]" Apparently, the trial court considered matters outside the face of Plaintiffs' complaint.

II. Analysis

Rule 8(c) of the North Carolina Rules of Civil Procedure provides: "In pleading to a preceding pleading, a party *shall set forth affirmatively* . . . statute of limitations, . . . , and any other matter constituting an avoidance or affirmative defense." N.C. R. Civ. P. 8(c) (emphasis supplied). This Rule further explains "[s]uch pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved." *Id.*

" 'A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss, *if it appears on the face of the complaint that such a statute bars the claim*.' " *Shepard v. Ocwen Federal Bank, FSB*, 361 N.C. 137, 638 S.E.2d 197 (2006) (emphasis supplied) (quoting *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996)). A statute of limitations defense is not a jurisdictional issue or bar, and

trial "courts are under no obligation to raise the time bar *sua sponte*." *Day v. McDonough*, 547 U.S. 198, 205, 164 L. Ed. 2d 376, 381 (2006).

> The obvious purpose of . . . Rule 12(b) is to preclude any unfairness resulting from surprise when an adversary introduces extraneous material on a Rule 12(b)(6) motion, and to allow a party a reasonable time in which to produce materials to rebut an opponent's evidence once the motion is expanded to include matters beyond those contained in the pleadings.

Coley v. N.C. Nat'l. Bank, 41 N.C. App. 121, 126, 254 S.E.2d 217, 220 (1979).

Rule 12(b) permits a party to assert certain defenses "by motion", including the defense for failure to state a claim upon which relief may be granted. N.C. R. Civ. P. 12(b)(6). "A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The consequences of failure to make such a motion shall be as provided in sections (g) and (h)." N.C. R. Civ. P. 12(b). Rule 12(h)(2) provides: "A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits."

While Rule 12(b) motions must "be made before pleading if a further pleading is permitted[,]" In contrast, Rule 12(c) permits a party "[a]fter the pleadings are closed but within such time as not to delay the trial" to "move for judgment on the pleadings." N.C. R. Civ. P. 12(c).

"[W]hen the defendant pleads the statute of limitations *in his answer*, the plaintiff files no reply thereto and the complaint *shows upon its face* facts which, without more, support such plea in bar, the defendant's motion for judgment on the pleadings should be granted on that ground." *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 207, 171 S.E.2d 873, 879 (1970) (emphasis supplied) (citations omitted). "Once the [affirmative] defense of statute of limitations is raised, the burden is on the plaintiff to show that their claim is not time-barred." *Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 55, 698 S.E.2d 404, 417 (2010).

"A statute of limitations can provide the basis for dismissal on a Rule 12(b)(6) motion *if the face of the complaint* establishes that plaintiff's claim is so barred." *Soderlund v. N.C. Sch. of the Arts*, 125 N.C. App. 386, 389, 481 S.E.2d 336, 338 (1997) (emphasis supplied). "Both a motion for judgment on the pleadings and a motion to dismiss for failure to state a claim upon which relief can be granted should be granted when

a complaint fails to allege facts sufficient to state a cause of action or pleads facts which deny the right to any relief." *Robertson v. Boyd*, 88 N.C. App. 437, 440, 363 S.E.2d 672, 675 (1988).

> Rule 12(b) provides that a motion to dismiss for failure to state a claim under Rule 12(b)(6) shall be treated as one for summary judgment and disposed of as provided in Rule 56 where matters outside the pleading are presented to and not excluded by the court in ruling on the motion. Rule 12(c) contains an identical provision, stating that if, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

Horne v. Town of Blowing Rock, 223 N.C. App. 26, 30, 732 S.E.2d 614, 617 (2012) (internal citations, quotation marks, and brackets omitted). Neither Rule 12(c) nor 56 was cited in the trial courts order as a basis for its ruling.

This Court has previously explained the careful scrutiny required when a trial court allows a judgment on the pleadings:

> Because a judgment on the pleadings is a *summary procedure resulting in a final judgment*, a motion for judgment on the pleadings must be *carefully scrutinized*. A motion for judgment on the pleadings is *not favored* by the courts, and the pleadings of the nonmovant will be liberally construed. The trial court is required to view the facts and permissible inferences in the *light most favorable to the nonmoving party*. The movant must show that there are no issues of material fact and that it is clear he is entitled to judgment. A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate. *In particular, a judgment on the pleadings in favor of a defendant who asserts the statute of limitations as a bar is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted.*

Benson v. Barefoot, 148 N.C. App. 394, 396, 559 S.E.2d 244, 246 (2002) (emphasis supplied) (citations and internal quotation marks omitted).

In *Benson*, because "[n]either the complaint nor the answer divulge[d] the dates" payments were made, it was "not possible to tell from the pleadings alone whether the payments were made within the limitations period." *Id.* While the defendants in *Benson* correctly noted plaintiff possessed the burden of proof to prove the action was timely filed, "burdens of proof have no place in a motion for judgment on the pleadings, a motion which is ruled upon in the absence of any evidence." *Id.* This Court in *Benson* reasoned: "on a motion for judgment on the pleadings, dismissal is proper only if it appears *on the face of the complaint* that the plaintiff filed outside the limitations period." *Id.* at 396-97, 559 S.E.2d at 246 (emphasis supplied).

Here, the facts are similar to those in *Benson*. While the inverse condemnation claim in Plaintiffs' complaint alleged their action had been asserted within twenty-four months of the taking of their property, no date was provided. Defendant's Rule 12(b) motion was similarly sparse, and it merely provided Plaintiffs' claim was barred by "the statute of limitations." As explained in *Benson*, it is "not possible to tell from the pleadings alone whether the [alleged taking occurred] within the limitations period." *Id.* at 396, 559 S.E.2d at 246. The trial court erred in dismissing Plaintiff's inverse condemnation claim under Rule 12(b)(6).

III. Conclusion

I concur to affirm the majority's conclusions regarding dismissal of Plaintiffs' claims for breach of easements and *quantum meruit*. I also concur with the majority's conclusions to reverse dismissal of Plaintiff's post-breach claims for negligence, negligence *per se*, nuisance, trespass and remand.

Plaintiff's allegations must be taken as true and reviewed in the light most factorable to Plaintiff. The face of the complaint failed to provide definitive information for the trial court to determine whether the affirmative defense of statute of limitations had passed on Plaintiff's inverse condemnation claim. The trial court's *sua sponte* allowance of Defendant's Rule 12(b) motion to dismiss on that basis was error and prejudicial. I respectfully dissent from that portion of the majority's opinion.

IN RE M.B.S., A MINOR JUVENILE

No. COA24-237

Filed 1 October 2024

Termination of Parental Rights—ineffective assistance of counsel—deficiency in petition—issue not preserved for appeal—prejudice shown

The termination of a mother's parental rights in her son was reversed on appeal because the mother received ineffective assistance of counsel where: the termination petition did not comply with N.C.G.S. § 7B-1104(6), since it merely recited statutory grounds for termination without alleging sufficient facts to put the mother on notice of the specific acts, omissions, or conditions at issue; the mother's trial attorney did not move to dismiss the petition before or during trial, and therefore failed to preserve the statutory noncompliance issue for appellate review; and the attorney's failure prejudiced the mother because, had counsel timely moved to dismiss the petition, the trial court would have dismissed it (or reversibly erred in failing to do so).

Appeal by respondent-mother from order entered 11 December 2023 by Judge James Grogan in Rockingham County District Court. Heard in the Court of Appeals 27 August 2024.

Ivey McClellan Siegmund Brumbaugh & McDonough, LLP, by Darren A. McDonough, for petitioner-appellee.

No brief filed on behalf of guardian ad litem.

Kimberly Connor Benton for respondent-appellant-mother.

ZACHARY, Judge.

Respondent-Mother appeals from the trial court's order terminating her parental rights to her minor child, "Marcus."[1] After careful review, we reverse the trial court's termination order as to Respondent-Mother.

1. We use the pseudonym to which the parties stipulated for ease of reading and to protect the juvenile's identity. We further note that Respondent-Father has not appealed from the trial court's order, which also terminated his parental rights to Marcus, and consequently, he is not a party to this appeal.

I. Background

Marcus was born in October 2018. Based upon Respondent-Mother's history with her three younger children—each of whom had been removed from her custody—along with her "testing positive for [illegal] substances at the time [Marcus] was born" and Marcus's withdrawal symptoms at the time of birth, the Rockingham County Department of Social Services ("DSS") placed Marcus with Petitioner, his paternal grandmother. Marcus and his parents lived with Petitioner for approximately four months before moving in with Respondent-Mother's grandmother for a period of one or two months, and then moving to a different residence for another short period of time.

In April 2019, an assailant shot Respondent-Father in the face and robbed him while Marcus was present. Shortly after that incident, Petitioner filed a complaint seeking custody of Marcus, together with a motion for emergency custody of Marcus, the latter of which the trial court allowed on 26 April 2019. For the remainder of that year, Petitioner allowed Respondent-Mother to regularly visit Marcus, but the frequency of those visits decreased as the relationship between Respondent-Mother and Petitioner frayed in 2020.

On 10 February 2021, the Rockingham County Child Support Enforcement Agency filed a complaint on Petitioner's behalf against Respondent-Mother seeking child support and health insurance coverage for Marcus. On 28 July 2021, the trial court entered an order requiring Respondent-Mother, *inter alia*, to pay child support at the rate of $50.00 per month and to provide health insurance coverage for Marcus when available to her at a reasonable cost.

On 3 November 2021, Petitioner filed a petition to terminate Respondent-Mother's parental rights to Marcus. Respondent-Mother filed an answer on 8 June 2022. Petitioner subsequently took a voluntary dismissal of her initial petition and filed an amended petition on 7 October 2022. Respondent-Mother did not file an answer to the amended petition.

On 29 November 2023, the amended termination petition came on for hearing in Rockingham County District Court. The trial court first concluded that grounds existed sufficient to terminate Respondent-Mother's parental rights on the bases of neglect; willfully leaving Marcus in a placement outside of the home for more than 12 months; willfully failing to pay for the care, support, and education of Marcus; and incapability of providing for the proper care and supervision of Marcus. The trial court then proceeded to disposition and

determined that it would be in Marcus's best interests to terminate Respondent-Mother's parental rights. On 11 December 2023, the trial court memorialized its ruling in an order terminating Respondent-Mother's parental rights.

Respondent-Mother timely filed notice of appeal on 5 January 2024.

II. Discussion

Respondent-Mother raises several issues on appeal, two of which concern the sufficiency of the facts alleged in the amended petition to terminate her parental rights. She first argues that the trial court's order "must be reversed because the [amended] petition lacked the necessary factual allegations required by [N.C. Gen. Stat.] § 7B-1104(6)." Alternatively, Respondent-Mother argues for reversal because she "received ineffective assistance of counsel due to her counsel's failure to move to dismiss the statutorily deficient petition."

As explained below, the amended termination petition did not comply with the requirements of N.C. Gen. Stat. § 7B-1104(6). Because this issue was not preserved for appellate review due to Respondent-Mother's trial counsel's failure to move to dismiss the amended petition, we conclude that she received ineffective assistance of counsel.

A. Preservation

This Court has previously recognized that the alleged failure of a termination petition to comply with the requirements of N.C. Gen. Stat. § 7B-1104(6) is an issue that must be preserved for appellate review. *In re H.L.A.D.*, 184 N.C. App. 381, 392, 646 S.E.2d 425, 434 (2007), *aff'd*, 362 N.C. 170, 655 S.E.2d 712 (2008). "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1).

Whether the facts alleged in a termination petition are statutorily sufficient is an issue properly addressed by a Rule 12(b)(6) motion to dismiss. *See In re Quevedo*, 106 N.C. App. 574, 578, 419 S.E.2d 158, 159 ("A Rule 12(b)(6) motion tests the legal sufficiency of a [termination petition]."), *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992).

"The Rules of Civil Procedure apply to proceedings for termination of parental rights, and a Rule 12(b)(6) motion may not be made for the first time on appeal." *H.L.A.D.*, 184 N.C. App. at 392, 646 S.E.2d at 434 (cleaned up). Respondent-Mother acknowledges that her trial counsel

failed "to make a motion to dismiss the petition prior to or during trial." "Therefore, [Respondent-Mother] has not properly preserved this issue for appeal . . . ." *Id.*

Acknowledging the possibility that this issue was not properly preserved for appellate review, Respondent-Mother argues in the alternative that she received ineffective assistance of counsel due to her counsel's failure to move to dismiss the amended petition.

B. Standard of Review

"A claim of ineffective assistance of counsel requires the respondent to show that counsel's performance was deficient and the deficiency was so serious as to deprive the represented party of a fair hearing." *In re B.L.H.*, 239 N.C. App. 52, 62, 767 S.E.2d 905, 912 (2015) (citation omitted). "To make the latter showing, the respondent must prove that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *In re G.G.M.*, 377 N.C. 29, 41–42, 855 S.E.2d 478, 487 (2021) (cleaned up).

C. Analysis

Respondent-Mother contends that if her "trial counsel had moved to dismiss the [amended] petition based upon . . . Petitioner's failure to comply with [N.C. Gen. Stat.] § 7B-1104(6), the motion should have been granted." We agree.

We first address the alleged deficiency in Respondent-Mother's trial counsel's failure to move to dismiss the amended petition below. A petition to terminate parental rights must allege "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights [enumerated in N.C. Gen. Stat. § 7B-1111(a)] exist." N.C. Gen. Stat. § 7B-1104(6) (2023). "While the facts alleged need not be exhaustive or extensive, they must be sufficient to put a party on notice as to what acts, omissions or conditions are at issue." *In re J.S.K.*, 256 N.C. App. 702, 705, 807 S.E.2d 188, 190 (2017) (cleaned up). However, a petition that "sets forth only a bare recitation of the alleged statutory grounds for termination does not meet this standard." *Id.* (cleaned up).

Regarding Respondent-Mother, the amended petition states:

> 11. There exist facts sufficient to warrant a determination that Respondent[-]Mother's parental rights should be terminated, and in support of this allegation Petitioner shows the following:

a. Respondent[-]Mother has neglected the juvenile as defined in [N.C. Gen. Stat.] § 7B-1111(a)(1);

b. Respondent[-]Mother has willfully left the juvenile in placement outside the home for more than 12 months without making reasonable progress in correcting those conditions which led to the removal of the juvenile as defined in [N.C. Gen. Stat.] § 7B-1111(a)(2);

c. Respondent[-]Mother has failed to pay for the care, support, and education of the juvenile, as required by the child support order as defined in [N.C. Gen. Stat.] § 7B-1111(a)(4);

d. Respondent[-]Mother is incapable of providing for the proper care and supervision of the juvenile as defined in [N.C. Gen. Stat.] § 7B-1111(a)(6);

e. Respondent[-]Mother, as a natural parent of the juvenile, has willfully abandoned the juvenile for at least six (6) consecutive months immediately preceding the filing of this Petition for Termination of Parental rights as defined in [N.C. Gen. Stat.] § 7B-1111(a)(7).

"Because these allegations are bare recitations of the alleged statutory grounds for termination listed in N.C. Gen. Stat. § 7B-1111," the amended termination petition "failed to comply with N.C. Gen. Stat. § 7B-1104(6) and was insufficient to put Respondent-[M]other on notice as to what acts, omissions, or conditions were at issue." *Id.* at 707, 807 S.E.2d at 191.

We acknowledge that this Court has previously overlooked the similar statutory noncompliance of a termination petition that merely recited the alleged statutory grounds for termination in a case where the petition "incorporate[d] an attached custody award, . . . and the custody award state[d] sufficient facts to warrant . . . a determination" of the alleged grounds for termination. *Quevedo*, 106 N.C. App. at 579, 419 S.E.2d at 160. However, unlike in *Quevedo*, Petitioner did not incorporate by reference the terms of any prior order into the amended termination petition. This distinction is significant because, in the absence of such an incorporation by reference, "the trial court [would have] erred in denying Respondent-[M]other's motion to dismiss" had her trial counsel made such a motion. *J.S.K.*, 256 N.C. App. at 707, 807 S.E.2d at 191.

We next address the second prong of the ineffective-assistance claim—whether "there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *G.G.M.*, 377 N.C. at 41–42, 855 S.E.2d at 487 (citation omitted). With respect to the issue of whether a trial counsel's failure to move to dismiss a termination petition that does not satisfy the requirements of N.C. Gen. Stat. § 7B-1104(6) satisfies this second requirement to demonstrate ineffective assistance, Respondent-Mother observes that "[t]his Court has already answered this question in the affirmative" in an unpublished opinion.[2]

In *In re A.X.M.*, as here, "had counsel for [the] respondents moved to dismiss the petition for failure to comply with N.C. Gen. Stat. § 7B-1104(6), the trial court would have dismissed the petition or erred in failing to do so." 264 N.C. App. 637, 824 S.E.2d 924, 2019 WL 1281487, at *4 (2019) (unpublished). This Court reasoned that the failure to move to dismiss prejudiced the respondents, because "the result of the proceeding clearly would have been different had counsel moved to dismiss the petition. Had counsel moved to dismiss, DSS would have been unable to proceed on its petition to terminate." *Id.* at *5.

Although this decision is not binding, we find the reasoning of *A.X.M.* persuasive and adopt it here. Respondent-Mother has shown that she received ineffective assistance of counsel "through the[ ] failure to move to dismiss [the amended] petition to terminate parental rights, as such a motion should have resulted in dismissal of the [amended] petition." *Id.* Accordingly, "[a]s a result of trial counsel's ineffective assistance, we must, and hereby do, reverse the trial court's order terminating [Respondent-Mother's] parental rights." *Id.*

III. Conclusion

For the foregoing reasons, we reverse that portion of the trial court's order terminating Respondent-Mother's parental rights.

REVERSED IN PART.

Judges HAMPSON and GORE concur.

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2. "Although unpublished opinions do not have precedential value, an unpublished opinion may be used as persuasive authority at the appellate level if the case is properly submitted and discussed and there is no published case on point." *In re N.B.*, 289 N.C. App. 525, 534 n.4, 890 S.E.2d 199, 205 n.4 (2023) (cleaned up).

K.H. A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, DEBORAH CLAGGETT, PLAINTIFF
v.
DANIELLE L. DIXON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY, AND ALAMANCE-BURLINGTON BOARD OF EDUCATION, DEFENDANTS

No. COA23-878

Filed 1 October 2024

1. Immunity—sovereign immunity—assault by teacher—failure to specifically allege waiver—dismissal proper

In a civil action brought by a public middle school student and her grandmother (plaintiffs) against a teacher and the county school district arising from a teacher's physical assault of the student in a classroom, the trial court's dismissal pursuant to Civil Procedure Rule 12(b)(2) of tort claims against the district on sovereign immunity grounds was affirmed where plaintiffs failed to specifically plead waiver of sovereign immunity by the district, such as through the purchase of insurance that would indemnify it for the allegedly tortious acts.

2. Constitutional Law—North Carolina—right to a sound basic education—single assault by teacher—failure to state a claim

In a civil action brought by a public middle school student and her grandmother (plaintiffs) against a teacher and the county school district arising from a teacher's physical assault of the student in a classroom, the trial court's dismissal pursuant to Civil Procedure Rule 12(b)(6) of plaintiffs' cause of action brought under the right to a sound basic education guaranteed by the North Carolina Constitution was affirmed where the complaint failed to assert a colorable constitutional claim by alleging repeated or ongoing abuse, hostility, and harassment, but rather focused only on the single classroom assault and its aftereffects.

Judge MURPHY concurring in part and dissenting in part.

Appeal by plaintiff from order entered 17 April 2023 by Judge Michael L. Robinson in Alamance County Superior Court. Heard in the Court of Appeals 17 April 2024.

McMillion Law, PLLC, by Jeff McMillion, for plaintiff-appellant.

Tharrington Smith, LLP, by David B. Noland, for defendant-appellee Alamance-Burlington Board of Education.

THOMPSON, Judge.

Deborah Claggett, on behalf of her minor granddaughter, K.H.,[1] and as K.H.'s guardian ad litem, brought action against Danielle Dixon, individually and in her official capacity, and the Alamance-Burlington Board of Education, alleging four tort claims and a claim that K.H. was denied her constitutional right to a sound basic education pursuant to article I, section 15, and article IX, section 2 of the North Carolina Constitution. The Alamance-Burlington Board of Education (defendant) filed a motion to dismiss pursuant to Rules 12(b)(1), 12(b)(2) and 12(b)(6) and an answer to plaintiff's complaint. The Alamance County Superior Court entered an order granting defendant's motion to dismiss, and plaintiff timely appealed. After careful review, we affirm the trial court's order dismissing plaintiff's complaint against defendant.

I. Factual Background and Procedural History

K.H. was a student at Broadview Middle School, located in Burlington, North Carolina.[2] On 2 November 2022, K.H. attempted to enter Danielle Dixon's[3] (Dixon) classroom to retrieve K.H.'s bookbag. However, K.H.'s attempt was prevented by Dixon, who used her arm to block K.H. from entering the classroom. K.H. persisted in her efforts to enter the classroom and ultimately struck Dixon's arm. In response, Dixon grabbed K.H., pulled her inside the classroom, and shut the door. Once inside the classroom, Dixon grabbed K.H. by her hair and slammed K.H. into the door before forcefully slamming K.H. to the ground. While still clenching the back of K.H.'s head by her hair, Dixon slammed K.H.'s head into the ground "no less than five times[.]"

As Dixon's assault on K.H. was occurring, other students inside the classroom were yelling and requesting Dixon "to release" K.H. and to stop attacking her. The commotion from the attack prompted two other teachers to enter the classroom and call for help. Despite the other teachers entering the classroom, Dixon continued holding K.H. on the

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1. Initials are used to protect the identity of the minors referenced in this opinion.

2. Broadview Middle School falls within the Alamance-Burlington Board of Education's district and is governed thereby.

3. Danielle Dixon is not a party to this appeal. Further, at all times relevant to this appeal, Dixon was a teacher employed by defendant.

ground by the hair on the back of her head and demanding that K.H. get out of her classroom. Following the assault, K.H. was suspended for ten days and subsequently relocated to Ray Street Academy.

On 5 January 2023, K.H., by and through her guardian ad litem/grandmother, Deborah Claggett, filed a complaint against defendant alleging several causes of action including (1) assault and battery, (2) negligent hiring, retention, and supervision of Dixon, (3) negligent infliction of emotional distress, (4) intentional infliction of emotional distress, and (5) violations of the North Carolina Constitution article I, section 15 and article IX, section 2.

On 16 February 2023, in response to plaintiff's complaint, defendant contemporaneously filed an Answer and a Motion to Dismiss. Defendant sought to dismiss plaintiff's complaint "pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure[.]"

On 10 April 2023, defendant's motion to dismiss plaintiff's complaint was heard during the civil session of Alamance County Superior Court. After hearing from both parties, the court took the matter under advisement and subsequently entered an order granting defendant's motion to dismiss, and each of plaintiff's claims was dismissed with prejudice.

On 16 May 2023, plaintiff entered timely notice of appeal.

II. Discussion

A. Appellate Jurisdiction

As an initial matter, we must determine whether this Court has jurisdiction to hear plaintiff's interlocutory appeal. Plaintiff contends that the superior court's order granting defendant's motion to dismiss—based on the defense of governmental immunity—is immediately appealable. We agree.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, an interlocutory order or judgment which affects a substantial right is immediately appealable. *Id.* at 726, 392 S.E.2d at 736. Moreover, "[t]his Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Kawai Am. Corp. v. Univ. of N.C. at Chapel Hill*, 152 N.C. App 163, 165, 567 S.E.2d 215, 217 (2002) (citation omitted). However, the scope of appellate review is limited.

While "interlocutory orders raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review[,]" this immediate appellate review only applies to the "denial of a motion to dismiss under Rules 12(b)(2), 12(b)(6), and 12(c), or a motion for summary judgment under Rule 56." *Hinson v. City of Greensboro*, 232 N.C. App. 204, 209, 753 S.E.2d 822, 826 (2014) (citations omitted). Therefore, "[w]e cannot review a trial court's order denying a motion to dismiss under Rule 12(b)(1)[,]" *id.* (citation omitted), because a "Rule 12(b)(1) motion based on sovereign immunity is neither immediately appealable pursuant to N.C. Gen. Stat. § 1-277(b), nor affects a substantial right." *Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 29, 732 S.E.2d 614, 616 (2012) (citation omitted).

Here, defendant filed a motion to dismiss plaintiff's complaint pursuant, collectively, to Rule 12(b)(1), 12(b)(2), and 12(b)(6). As it relates to plaintiff's tort claims, the trial court granted defendant's motion to dismiss because plaintiff's complaint "d[id] not sufficiently demonstrate a basis for waiver of [defendant]'s sovereign immunity as required under Rules 12(b)(1)–(2)." Regarding plaintiff's constitutional claim, the trial court granted defendant's motion to dismiss because plaintiff's "[c]omplaint f[ell] short of alleging facts giving rise to the type of claims contemplated in *Deminski v. State Bd. of Educ.*, and therefore [was] insufficient under Rule 12(b)(6)." Considering this in light of our holdings in *Horne* and *Hinson*, we may properly review plaintiff's appeal of the trial court's order granting defendant's 12(b)(2) and 12(b)(6) motions to dismiss.

B. Sovereign Immunity

[1] On appeal, plaintiff contends that the "trial court erred by dismissing the plaintiff's claims under the theory of sovereign immunity because a school board trust is a de facto insurance policy." We do not agree.

The doctrine of sovereign immunity is a well-established "principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from suit." *Can Am S., LLC v. State of N.C.*, 234 N.C. App. 119, 125, 759 S.E.2d 304, 309 (2014) (citation omitted). "By application of this principle, a subordinate division of the state or an agency exercising statutory governmental functions may be sued only when and as authorized by statute." *Id.* (citation omitted). This Court has indicated that "[s]overeign immunity is not merely a defense to a cause of action; it is a bar to actions that requires a plaintiff to establish a waiver of immunity." *Id.* Therefore, "the

trial court must determine whether the complaint specifically alleges a waiver of governmental immunity." *Id.* (citation omitted). "[P]recise language alleging that the State has waived the defense of sovereign immunity is not necessary, but, rather, the complaint need only contain sufficient allegations to provide a reasonable forecast of waiver[,]" and if a plaintiff fails to allege such waiver, "the complaint fails to state a cause of action." *Id.* (citations omitted).

To determine whether the trial court properly granted defendant's Rule 12(b)(2) motion to dismiss based on sovereign immunity, "we must consider: (1) whether plaintiff sufficiently pleaded that defendant[ ] waived [its] sovereign immunity; and (2) whether defendant[ ] expressly or impliedly waived sovereign immunity." *Id.* at 126, 759 S.E.2d at 309.

"As a general rule, the doctrine of governmental, or sovereign immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity." *Lail v. Cleveland Cty. Bd. of Educ.*, 183 N.C. App. 554, 558, 645 S.E.2d 180, 184 (2007) (citation omitted). "A county or city board of education is a governmental agency, and therefore may not be liable in a tort action except insofar as it has duly waived its immunity from tort liability pursuant to statutory authority." *Id.* N.C. Gen. Stat. § 115C-42 provides a method in which a local board of education may waive its immunity. More specifically,

> [a]ny local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.

N.C. Gen. Stat. § 115C-42 (2023). Furthermore, "a school board can only waive its governmental immunity where it procures insurance through a company or corporation licensed and authorized to issue insurance in this State or a qualified insurer as determined by the Department of Insurance." *Lail*, 183 N.C. App. at 560–61, 645 S.E.2d at 185.

In this case, plaintiff failed to sufficiently plead that defendant waived its sovereign immunity. While "[t]he requirement that a plaintiff

specifically allege waiver of governmental immunity does not mandate that a complaint use any particular language[,]" *Can Am S., LLC*, 234 N.C. App. at 126, 759 S.E.2d at 310 (ellipsis and citation omitted), plaintiff's complaint was required to, "consistent with the concept of notice pleading, . . . allege facts that, if taken as true, are sufficient to establish a waiver by the State of sovereign immunity." *Id.* However, plaintiff's only contention regarding a defense of sovereign immunity was that "[d]efendant Board failed to provide a safe learning environment free of harassment and intimidation as required by N.C. Const. art[icle] I, [section] 15 and N.C. Const. art[icle] IX[,] [section] 2, which precludes the [d]efendant Board and their agents from governmental immunity." Thus, plaintiff's contention falls short of establishing that defendant waived its sovereign immunity. Because plaintiff failed to sufficiently plead that defendant waived its sovereign immunity, we need not address the second prong of the Rule 12(b)(2) motion to dismiss analysis.

Consequently, we hold that the trial court did not err in dismissing plaintiff's tort claims—assault and battery; negligent hiring, retention, and supervision; negligent infliction of emotional distress; and intentional infliction of emotional distress—against defendant pursuant to Rule 12(b)(2) because defendant had not waived its sovereign immunity; therefore, the trial court did not have personal jurisdiction over defendant.

C. Constitutional Claim

[2] Next, plaintiff contends that the trial court erred in granting defendant's Rule 12(b)(6) motion to dismiss because "plaintiff had stated a proper claim for violation of the North Carolina Constitution against [defendant]." We do not agree.

This Court reviews a Rule 12(b)(6) motion to dismiss de novo. *Bobbitt v. Eizenga*, 215 N.C. App. 378, 379, 715 S.E.2d 613, 615 (2011) (italics omitted). "The standard of review of an order granting a 12(b)(6) motion 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." *Id.* at 379–80, 715 S.E.2d at 615 (citation omitted). Accepting that "the complaint's material factual allegations are taken as true[,]" a trial court may properly grant a motion to dismiss if one of the following conditions is satisfied: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Id.* at 380, 715 S.E.2d at 615.

It is noteworthy that although sovereign immunity generally bars an action against the State unless the State has consented to suit or otherwise waived its immunity, "the doctrine of sovereign immunity will not stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed under the North Carolina Constitution." *Coastal Conservation Ass'n v. State of N.C.*, 285 N.C. App. 267, 279, 878 S.E.2d 288, 298 (2022). As such, "a direct constitutional claim will survive a Rule 12(b)(6) motion to dismiss, notwithstanding the doctrine of sovereign or governmental immunity." *Id.* To determine whether a plaintiff's complaint has sufficiently alleged a claim for which relief may be granted under our state constitution, we must apply a three-part test. *Id.*

"First, to allege a cause of action under the North Carolina Constitution, a state actor must have violated an individual's constitutional rights. Second, the claim must be colorable." *Id.* (citations omitted). To be a colorable claim, "the claim must present facts sufficient to support an alleged violation of a right protected by the State Constitution." *Id.* And third, "there must be no adequate state remedy. No adequate state remedy exists when state law does not provide for the type of remedy sought by the plaintiff." *Id.* (internal quotation marks, brackets, and citations omitted). Our Supreme Court has indicated that "when there is a clash between [ ] constitutional rights and sovereign immunity, the constitutional rights must prevail." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 339, 678 S.E.2d 351, 355 (2009) (emphasis omitted) (citation omitted). As such, a claim that is barred by sovereign immunity is not an adequate remedy, because "to be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Id.* at 339–40, 678 S.E.2d at 355.

Applying the first part of the test to the instant case, we conclude that plaintiff successfully alleged that a state actor violated K.H.'s constitutional rights. Here, plaintiff alleged that defendant "failed to provide a safe learning environment free of harassment and intimidation as required by N.C. Const. art[icle] I, [section] 15 and N.C. Const. art[icle] IX[,] [section] 2, which precludes the [d]efendant Board and their agents from governmental immunity." Defendant, Alamance-Burlington Board of Education, "as a government entity, is a government actor." *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 414, 858 S.E.2d 788, 794 (2021). Thus, we turn to the second part of the test.

Under the second part of the test, we must determine if plaintiff "alleged a colorable constitutional claim." *Id.* Article I, section 15 states,

"[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. And, article IX, section 2 states, "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform school system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." N.C. Const. art. IX, § 2. Our Supreme Court has stated that, article I, section 15 and article IX, section 2 of our state constitution "work in tandem . . . to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." *Deminski*, 377 N.C. at 412, 858 S.E.2d at 793. Pursuant to *Leandro*,

> a 'sound basic education' is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Leandro v. State of North Carolina, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997). Finally, "[t]aken together, [a]rticle I, [s]ection 15 and [a]rticle IX, [s]ection 2 require the government to provide an opportunity to learn that is free from *continual* intimidation and harassment which prevent a student from learning. In other words, the government must provide a safe environment where learning can take place." *Deminski*, 377 N.C. at 412–13, 858 S.E.2d at 793 (emphasis added).

Looking to our case precedent for guidance, we find that the instant case is readily distinguishable from *Deminski*. In *Deminski*, the plaintiff, mother of minors E.M.D., K.A.D., and C.E.D. (plaintiff-students), alleged that during a *several*-month period, her daughter, C.E.D., was *repeatedly* subjected to bullying and sexual harassment by other students. *Id*. at 407, 858 S.E.2d at 790. As a result of enduring this conduct for months without relief from school personnel, the plaintiff filed a complaint

pursuant to article I, section 15, and article IX, section 2 of the North Carolina Constitution. *Id.* at 409, 858 S.E.2d at 791. In her complaint, the plaintiff's allegations—regarding the bullying and sexual harassment that C.E.D. was subjected to—included the phrases, "on multiple occasions," "repeatedly[,]" and "[o]n at least one occasion[,]" *id.* at 407–09, 858 S.E.2d at 790–91, which indicates that the bullying and harassment occurred more than once. Additionally, the plaintiff alleged that one of the students that had been bullying and sexually harassing C.E.D. was also enrolled in classes with E.M.D. and K.A.D., and that their experiences in class with this student included "sexual conduct, *constant* verbal interruptions laced with vulgarity, and physical violence including knocking students' items onto the floor, throwing objects, and pulling books and other items off shelves and onto the ground." *Id.* at 409, 858 S.E.2d at 791 (emphasis added). The *Deminski* plaintiff's complaint indicated that she had "*repeatedly* notified the teacher, assistant principal, [the] principal" and "the Pitt County Board of Education" (collectively referred to hereinafter as "school personnel") of the incidents and was told that "there was a 'process' " and that it would "take time." *Id.* (emphasis added). The defendant moved to dismiss plaintiff's complaint, the trial court denied the motion, and defendant appealed the trial court's denial. *Id.* at 410, 858 S.E.2d 792. Ultimately, defendant's motion to dismiss made its way to our Supreme Court. *Id.* at 411, 858 S.E.2d at 792. Based on the allegations found in the plaintiff's complaint, our Supreme Court found that the plaintiff had alleged a colorable constitutional claim to survive the defendant's motion to dismiss, because "the school's deliberate indifference to *ongoing* student harassment created an environment in which plaintiff-students could not learn[,]" and that "the right to a sound basic education rings hollow if the structural right exists but in a setting that is so intimidating and threatening to students that they lack a meaningful opportunity to learn." *Id.* at 414, 858 S.E.2d at 794 (emphasis added).

Here, plaintiff alleged that defendant violated her constitutional rights to education by failing "to provide an environment free of physical abuse, verbal abuse, harassment, and hostility[,]" and "failed to provide a safe learning environment for learning to take place." To support these allegations, plaintiff stated that

> [d]efendant Board and their agents [ ] failed in their constitutional requirements by:
>
> a. [s]howing a deliberate indifference to the hostile environment by failing to provide an adequately staffed learning environment;

> b. [s]howing a deliberate indifference to this environment by hiring [d]efendant Dixon to a teaching position without an active and valid teaching license under North Carolina law;
>
> c. [s]howing a deliberate indifference to this environment by allowing [d]efendant Dixon to continue teaching after multiple issues within her classroom;
>
> d. [f]ailing to terminate a teacher after the teacher did not obtain proper licensure required under North Carolina law; and
>
> e. [a]llowing a teacher to be in [a] position of authority over students without proper licensure required under North Carolina law.

Plaintiff further alleged that K.H. "suffered educational consequences" and that K.H.'s "academic performance . . . was placed in peril when she was physically abused by a teacher of the [d]efendant[,]" and "forced to move schools without her input."

While it is plaintiff's contention that defendant's negligent acts and omissions deprived her of her constitutional right to a sound basic education, we fail to see how these allegations give rise to the type of claims contemplated in *Deminski*. Unlike the allegations found in the *Deminski* complaint, here, plaintiff's complaint is entirely devoid of any allegation that would suggest that plaintiff was subjected to *repeated* or *ongoing* issues with Dixon. Despite plaintiff's allegation that "Dixon had multiple issues within her classroom with other students and disciplinary actions by the [p]rincipal[,]" plaintiff's complaint is entirely predicated on the *singular* attack by Dixon that occurred on 2 November 2022. Furthermore, it is unclear from the complaint what the "multiple issues within [Dixon's] classroom" were; instead, this is a vague statement that does not illustrate what impact these "multiple issues . . . with other students" had on K.H.'s ability to receive an education. Whereas in *Deminski*, it is abundantly clear from the allegations that the constant bullying, sexual harassment, and disruptive behaviors that C.E.D. and her sisters were subjected to usurped their "opportunity to learn [in an environment] that [wa]s free from *continual* intimidation and harassment[.]" *Id.* at 412–13, 858 S.E.2d at 793 (emphasis added). The allegations in *Deminski* make it clear that the incidents giving rise to the cause of action were happening to C.E.D. and her sisters, as opposed to the current case where the allegation states there were "multiple issues with *other students*[,]" not K.H.

Another distinguishing feature between the instant case and *Deminski* is that in this case, plaintiff's complaint lacks any allegation that plaintiff reported to, or in any way notified, defendant or any school personnel about the "multiple issues within [Dixon's] classroom[.]" The only instance in which it is alleged that *anyone* was made aware of Dixon's conduct is found in plaintiff's statement of facts where plaintiff alleged that two teachers entered the classroom after hearing the "yelling and commotion" caused by Dixon's attack on plaintiff on 2 November 2022. In contrast, the plaintiff in *Deminski* alleged that she had "repeatedly notified the teacher, assistant principal, [the] principal . . . and [d]efendant, Pitt County Board of Education" of the incidents that were occurring and was told that "there was a process that would take time[.]" *Id.* at 409, 858 S.E.2d at 791 (internal quotation marks omitted).

Finally, plaintiff's complaint is without any allegation that being transferred to Ray Street Academy in any way failed to provide K.H. the constitutional right to the sound basic education described in *Leandro*. *See Leandro*, 346 N.C. at 347, 488 S.E.2d at 255 (defining what a 'sound basic education' is). Nowhere in the complaint did plaintiff allege that she had appealed defendant's decision to relocate K.H. to Ray Street Academy, nor did plaintiff allege that K.H. was precluded from re-entering Broadview Middle School at a later date.

In sum, we conclude that plaintiff has failed to allege a colorable constitutional claim because "[plaintiff's] complaint on its face reveals the absence of facts sufficient to make a good claim[.]" *Bobbitt*, 215 N.C. App. at 380, 715 S.E.2d at 615. As such, we conclude that the trial court did not err in granting defendant's Rule 12(b)(6) motion to dismiss plaintiff's constitutional claim.

III. Conclusion

Based on the foregoing discussion, we hold that the trial court properly granted defendant's motion to dismiss pursuant to Rule 12(b)(2) and 12(b)(6). The trial court was without personal jurisdiction over defendant because defendant had not waived its sovereign immunity, thus dismissing plaintiff's tort claims pursuant to Rule 12(b)(2) was proper. Plaintiff failed to allege a colorable constitutional claim, and the trial court properly dismissed plaintiff's constitutional claim pursuant to Rule 12(b)(6). For these reasons, we affirm the trial court's order granting defendant's motion to dismiss.

AFFIRMED.

Judge MURPHY concurs in part and dissents in part.

Judge ARROWOOD concurs.

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

I concur in the Majority's holding that the trial court did not err in dismissing Plaintiff's tort claims pursuant to Rule 12(b)(2), as Defendant did not waive its sovereign immunity. However, I respectfully dissent from the Majority's holding that the trial court did not err in dismissing Plaintiff's direct constitutional claim pursuant to Rule 12(b)(6), as Plaintiff's allegations, when taken as true under our proper standard of review, are clearly sufficient to support an alleged violation of Defendant's right to "an opportunity to receive a sound basic education in our public schools[]" protected by Article I, § 15, and Article IX, § 2, of our State Constitution. *See Deminski*, 377 N.C. at 412 (recognizing that Article I, § 15, and Article IX, § 2, "work in tandem . . . to guarantee every child of this state an opportunity to receive a sound basic education in our public schools").

"[W]here there is a right, there is a remedy." *Kinsley v. Ace Speedway Racing, Ltd.*, 386 N.C. 418, 423 (2024). In *Corum v. Univ. of N.C.*, 330 N.C. 761 (1992), our Supreme Court "created" "a common law cause of action when existing relief does not sufficiently redress a violation of a particular constitutional right[,]" now known as "*Corum* claims[,]" "[t]o ensure that every right does indeed have a remedy in our court system[.]" *Id.*; *see also Askew v. City of Kinston*, 386 N.C. 286, 292 (2024).

Sovereign immunity is no defense to a valid *Corum* claim. *Id.* And while Plaintiff's tort claims are barred by the doctrine of sovereign immunity, under *Corum*, "[P]laintiff may move forward in the alternative, bringing [her] colorable claims directly under our State Constitution *based on the same facts that formed the basis for* [*her*] *common law . . . claim*[*s*]." *Craig*, 363 N.C. at 340 (emphasis added).

Our Supreme Court "made clear in *Deminski*, at the motion to dismiss stage, whether a claim is 'colorable' focuses entirely on the allegations in the complaint." *Kinsley*, 386 N.C. at 424 (citing *Deminski*, 377 N.C. at 412). "Those allegations are treated as true and the Court examines whether the allegations, if proven, constitute a violation of a right protected by the North Carolina Constitution." *Id.* (marks omitted); *see Deminski*, 377 N.C. at 413 (marks omitted) (recognizing "colorable claim" as "a plausible claim that may reasonably be asserted, given the facts presented and the current law (or a reasonable and

logical extension or modification of the current law)"). We do "not predetermine the likelihood that plaintiff will win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of [her] case." *Craig*, 363 N.C. at 341; *cf. Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 654 (1999) ("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.").

"To . . . accord every injury its proper redress, *Corum* requires courts to disaggregate the rights violated, the constitutional harms alleged, and the appropriate remedy *on the facts of the particular case*." *Askew*, 386 N.C. at 294 (emphasis added) (internal marks omitted). Instead of viewing Plaintiff's allegations wholistically to determine whether they would "present facts sufficient to support an alleged violation of a right [to an opportunity to receive a sound basic education] protected by the State Constitution[,]" *Kinsley*, 386 N.C. at 423, the Majority treats *Deminski* as establishing a factual floor for colorable *Corum* claims in this context. Instead, *Deminski* is one application of the *Corum* test to one specific set of factual allegations supporting an alleged violation of the right to an opportunity to receive sound basic education and not an end point on the spectrum.

The Majority's apparent "fail[ure] to see how [Plaintiff's] allegations" that Defendant's "negligent acts and omissions deprived her of her constitutional right to a sound basic education[] . . . give rise to the type of claims contemplated in *Deminski*[]" rests solely on its determination that—unlike in *Deminski*—Plaintiff did not allege that she "was subjected to *repeated* or *ongoing* issues with Dixon[]" but to a mere "*singular* attack" by her teacher. *Majority* at 71 (emphasis in original). This holding ignores Plaintiff's allegations that Defendant "show[ed] a deliberate indifference" to the hostile learning environment created by Dixon's lack of "an active and valid teaching license under North Carolina law[]"; Defendant's failure to terminate Dixon after she "did not obtain proper licensure required under North Carolina law"; and Defendant's placement of Dixon "in a position of authority over students without proper licensure" in their entirety. These factual circumstances not present in *Deminski* are alleged here and therefore require our consideration.

In her complaint, Plaintiff alleged that Defendant hired and retained Dixon, who did not have a teaching license at any time during the events giving rise to this action, to teach and supervise students in the inadequately staffed school that Plaintiff, a student under Defendant's care and control, attended:

> 9. [Dixon] is currently employed as a teacher for Defendant Board and was hired on [12 September] 2022[] and maintained her teaching position at Broadview Middle School . . . .
>
> 10. . . . Dixon was issued a North Carolina Teachers License . . . on [5 November] 2012[,] and that license expired on [30 June] 2015.
>
> 11. During all times relevant to this action, [Dixon] was working as a teacher for Defendant Board with a license that expired seven years before being hired and was not updated before [Dixon] began teaching full time for Defendant Board.
>
> 12. Defendant Board[] . . . failed to properly search and determine if [Dixon] was a properly licensed teacher in good standing.
>
> 13. Defendant Board[] . . . failed to follow up on [Dixon's] teaching licensure status and allowed [Dixon] to teach without a proper state licensure.
>
> 14. . . . [D]uring the time frame of [Dixon] being hired by Defendant [B]oard until [2 November] 2022, [Dixon] had multiple issues within her classroom with other students and disciplinary actions by the Principal of Broadview Middle School, all while not being licensed to be a teacher in North Carolina.
>
> 15. . . . [A]t the time of this writing, there are over 15 open teaching positions at Broadview Middle School.

Plaintiff further alleged that Dixon, who Defendant had hired to teach at Broadview Middle School without a valid teaching license, assaulted Plaintiff, a student whom Defendant had placed in Dixon's care:

> 17. Minor Plaintiff, who had an assigned teacher of [Dixon], attempted to walk into her assigned classroom to retrieve her bookbag, when [Dixon] blocked her path with her arm while Minor Plaintiff was approximately three inches away and still moving forward.
>
> 18. Minor Plaintiff was unable to avoid any contact with [Dixon] because of the close proximity when [Dixon] moved her arm in the path of Minor Plaintiff. This caused Minor Plaintiff to strike [Dixon] in her arm.

> 19. [Dixon] then grabbed Minor Plaintiff and pulled her inside of the classroom while closing the door.
>
> 20. Once inside the classroom, [Dixon] grabbed Minor Plaintiff by the hair and slammed Minor Plaintiff into the door with enough force to break a broom that was located between Minor Plaintiff and the wall and door area.
>
> 21. [Dixon] then grabbed the Minor Plaintiff by the hair on the back of her head and forcefully slammed Minor Plaintiff to the ground.
>
> 22. [Dixon] then, while still holding onto the Minor Plaintiff's hair and back of her head, slammed Minor Plaintiff's head into the ground . . . .
>
> . . . .
>
> 26. Minor [Plaintiff's] head was slammed into the ground no less than five . . . times by [Dixon] . . . .
>
> 27. During the assault and battery[,] . . . the students inside of the classroom began yelling for [Dixon] to release the Minor Plaintiff and stop her . . . attack . . . .
>
> 28. Upon the yelling and commotion caused by [Dixon's] continued attack on the Minor Plaintiff, two other teachers entered the room and called for help.
>
> 29. [Dixon], even after the two other teachers entered the classroom, continued to hold Minor [Plaintiff] to the ground by the hair on the back of her head and yelled for the Minor [Plaintiff] to get out of her classroom.
>
> 30. . . . [Dixon] was entrusted to maintain the safety of the children she was teaching and order [in] said classroom . . . .

As a result of this attack, Plaintiff alleged that she suffered physical, academic, and emotional consequences:

> 33. The attack on Minor Plaintiff resulted in her hair being pulled out, bruises, and ongoing emotional distress which was directly caused by [Dixon's] attack.
>
> 34. . . . Minor Plaintiff was initially suspended for 10 days by the Defendant Board Superintendent, Dr. Dain Butler, until video of the altercation was made available to local

> news outlets, when the decision was reversed[,] and Minor Plaintiff was placed in Ray Street Academy.
>
> 35. Minor Plaintiff was not allowed to continue her academic education at Broadview Middle School and was forced to change her schools and livelihood . . . .

Plaintiff further alleged, *inter alia*, that Defendant, whose responsibility it was to train, supervise, hire, and discipline Dixon, "failed to properly train [Dixon] regarding appropriate interaction with minor children;" "failed to properly investigate whether [Dixon] had a valid and active teaching license;" "failed to properly investigate whether [Dixon] had the emotional capacity to be an effective teacher of minor children;" "failed to properly investigate whether [Dixon] had any prior training in how to appropriately interact with minor children;" "failed to properly supervise [Dixon] during Board[-]sanctioned academic classes" in which Dixon "was tasked with teaching . . . [students] whose parents had entrusted their minor children to the Defendant Board and its employees, including during the aforementioned actions of [Dixon];" and "failed to intervene when there was . . . evidence of past issues with [Dixon's] teaching and actions towards other minor students of her class at Broadview[.]" Furthermore, "Defendant Board was aware, or should have been aware, [because] of past previous behaviors that [Dixon] was predisposed to commit and/or [was] committing the type of acts alleged herein . . . ."

Plaintiff incorporated each of these allegations underlying her various tort claims into her *Corum* claim "as if fully set forth[]" and alleged, *inter alia*, the following:

> 63. Article I, Section 15[,] and Article IX, Section 2[,] of the North Carolina Constitution require Defendant Board and their Agents to provide a sound basic education and to guard and maintain [citizens'] right [to that education].
>
> 64. Defendant Board and their agents are required by the North Carolina Constitution to provide a safe environment for students to learn free of verbal abuse, physical abuse, hostility, and harassment.
>
> 65. Defendant Board and [Dixon], as previously stated throughout this complaint, have failed to provide an environment free of physical abuse, verbal abuse, harassment, and hostility.
>
> 66. Defendant Board and [Dixon] have failed to provide a safe learning environment for learning to take place.

> 67. Defendant Board and their agents have failed in their constitutional requirements by:
>
> a. Showing a deliberate indifference to the hostile environment by failing to provide an adequately staffed learning environment;
>
> b. Showing a deliberate indifference to this environment by hiring [Dixon] to a teaching position without an active and valid teaching license under North Carolina law[];
>
> c. Showing a deliberate indifference to this environment by allowing [Dixon] to continue teaching after multiple issues within her classroom;
>
> d. Failing to terminate [Dixon] after the teacher did not obtain proper licensure required under North Carolina law; and
>
> e. Allowing a teacher to be in [a] position of authority over students without proper licensure required under North Carolina law.
>
> . . . .
>
> 70. The academic performance of Minor Plaintiff was placed in peril when she was physically abused by a teacher of the Defendant Board, initially suspended for the conduct of [Dixon], [and] then [had] the suspension rescinded but then [was] forced to move schools without her input. Minor Plaintiff suffered educational consequences from the Defendant's actions.

Taken as true, Defendant was deliberately indifferent to the hostile environment it created when it placed an individual with no valid teaching license in a position of authority to instruct academic classes and to supervise children in its public school; failed to adequately staff that school; failed to investigate, train, assess, or ensure that Dixon had the requisite academic, emotional, and social qualifications to teach, supervise, and care for students in that school; and failed to take action when Dixon's concerning behaviors first arose. As a result, this unlicensed individual, whose ability or inability to properly, safely, and adequately teach and supervise students that Defendant remained deliberately indifferent to, attacked Plaintiff, a student under her supervision, before, during, and after two teachers finally responded

after being alerted of the attack by students' yelling. Thereafter, Plaintiff was suspended from the school that she attended and forced to interrupt her academic year to move to another school.

A sound basic education is not *just* one "that is free from *continual* intimidation and harassment which prevent a student from learning," *Majority* at 69 (quoting *Deminski*, 377 N.C. at 412-13), but—as the Majority recognizes—

> one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Leandro, 346 N.C. at 347.

The aggregate of Plaintiff's allegations, including the facts underlying her common law claims which were incorporated by reference within her *Corum* claim, are sufficient to support an alleged violation of Defendant's right to an opportunity to receive a sound basic education in our public schools protected by Article I, § 15, and Article IX, § 2, of our State Constitution, because, if true, Defendant's deliberate indifference to the hostile environment created by placing an unlicensed person in a position of authority over Plaintiff deprived Plaintiff of that right.

I agree with the Majority that Plaintiff's allegations are sufficient under the first prong of the *Corum* test. Furthermore, as the Majority holds, Plaintiff's common law actions are barred by sovereign immunity; thus, no adequate state remedy exists for Plaintiff's injuries under the third prong of the *Corum* test. For the foregoing reasons, however, I would hold that Plaintiff's allegations are also sufficient under the second prong of the *Corum* test and reverse the order dismissing Plaintiff's *Corum* claim under Rule 12(b)(6). I respectfully dissent in part.

KAYLOR v. KAYLOR

[296 N.C. App. 80 (2024)]

BETH MINTEER KAYLOR, Plaintiff
v.
JOHNNY GAITHER KAYLOR, Defendant

No. COA23-1138

Filed 1 October 2024

1. Divorce—equitable distribution—award of unequal distribution—no abuse of discretion

The district court did not abuse its discretion in awarding an unequal distribution in favor of plaintiff where the court made findings of fact that: defendant was abusing drugs, including methamphetamine, when he suffered a heart attack; as a result of his drug abuse, defendant allowed the business owned by the parties to deteriorate; and plaintiff made all loan payments on real property after the date of separation. The findings regarding defendant's drug use did not indicate an erroneous consideration of marital fault; rather, they pertained to the factors listed in N.C.G.S. § 50-20(c) (which must be considered to support an unequal distribution award) such as the parties' health and their efforts to either preserve or waste marital property. Further, defendant was not prejudiced by the lack of an explicit finding of the net value of the marital estate where that information was easily ascertainable based upon the detailed findings as to the date of separation value, date of distribution value, and any debts or encumbrances for each piece of property in the marital estate.

2. Divorce—equitable distribution—classification—marital property—affidavit as competent evidence

In an equitable distribution proceeding, the trial court did not err in classifying a piece of real property as marital where plaintiff listed the real property as marital property in her equitable distribution inventory affidavit, which the trial court accepted as a verified pleading to be used as substantive evidence—without objection, as defendant did not appear in person or through counsel at the equitable distribution trial. Accordingly, the affidavit was competent evidence supporting the court's classification.

3. Divorce—equitable distribution—ad valorem taxes—findings of fact—competent evidence

In an equitable distribution proceeding, the trial court's findings of fact regarding ad valorem taxes owed on six pieces of real

property were supported by competent evidence in the form of plaintiff's equitable distribution inventory affidavit listing each of those tax liabilities, which the trial court accepted as a verified pleading to be used as substantive evidence—without objection, as defendant did not appear in person or through counsel at the equitable distribution trial.

4. Appeal and Error—equitable distribution—failure to file affidavit—not preserved for appellate review

In an equitable distribution proceeding, where defendant failed to attend six case reviews or the equitable distribution trial, and never offered his own equitable distribution inventory affidavit during the proceedings, he failed to preserve for appellate review his argument that the trial court abused its discretion by failing to afford him thirty days after being served with plaintiff's equitable distribution inventory affidavit to file his own affidavit.

5. Divorce—equitable distribution—challenged finding—not a mere recitation of testimony—not reserving an issue for later hearing

One portion of a challenged finding of fact in an equitable distribution order was not impermissible as a mere restatement of testimony by plaintiff, but rather reflected the court's consideration of that evidence and its determination that one of plaintiff's credit cards had been used after the date of separation without her knowledge or permission. A second portion of the same finding of fact—stating that plaintiff could petition the court to reconsider distribution of the marital property as to that credit card debt if plaintiff's efforts to obtain a remedy from the credit card company failed—was not an impermissible reservation of that issue for a later hearing, but rather only stated plaintiff's existing right under the General Statutes.

Appeal by Defendant from order entered 1 June 2023 by Judge Andrea C. Plyler in Catawba County District Court. Heard in the Court of Appeals 14 August 2024.

Wesley E. Starnes for Defendant-Appellant.

No brief filed for Plaintiff-Appellee.

COLLINS, Judge.

Defendant Johnny Gaither Kaylor appeals from an equitable distribution order entered after a trial he did not attend. Defendant argues that the trial court erred by finding that an unequal distribution in favor of Plaintiff Beth Minteer Kaylor was equitable, classifying a certain piece of real property as marital, and making insufficient and unsupported findings of fact. We find no merit in Defendant's arguments and affirm the trial court's order.

I. Background

Plaintiff and Defendant were married on 11 September 1998 and separated on 30 December 2021. No children were born of the marriage.

Plaintiff filed a complaint against Defendant on 16 June 2022 including a claim for equitable distribution. Defendant filed his answer on 22 August 2022. Case reviews were held on 26 September 2022, 31 October 2022, 28 November 2022, 6 February 2023, 13 March 2023, and 27 March 2023. Defendant, personally or through counsel, failed to attend any of them. At the 27 March 2023 review, the case was scheduled for trial. On 12 May 2023, Plaintiff submitted an equitable distribution affidavit. Defendant failed to submit an equitable distribution affidavit of his own.

A trial was held on 17 May 2023. Defendant, personally or through counsel, failed to attend. The trial court entered an equitable distribution order classifying the parties' property and awarding an unequal distribution of the parties' property in favor of Plaintiff. Defendant appeals.

II. Discussion

A. Trial Court's Award of Unequal Distribution

[1] Defendant first contends that the trial court abused its discretion in awarding an unequal distribution in Plaintiff's favor.

Our review of an equitable distribution order "is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citations omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Petty v. Petty*, 199 N.C. App. 192, 197, 680 S.E.2d 894, 898 (2009) (quotation marks and citation omitted).

N.C. Gen. Stat. § 50-20 (2023) governs the distribution of marital and divisible property upon a couple's divorce. Equitable distribution "is a three-step process requiring the trial court to (1) determine what is marital [and divisible] property; (2) find the net value of the property;

and (3) make an equitable distribution of that property." *Id.* at 197, 680 S.E.2d at 898 (quotation marks and citations omitted); *see also* N.C. Gen. Stat. § 50-20.

An equal division of marital property is equitable unless, after considering the factors listed in § 50-20(c) that were raised by the evidence, the trial court finds that an equal division of marital property would not be equitable under the circumstances. *See Truesdale v. Truesdale*, 89 N.C. App. 445, 450, 355 S.E.2d 512, 516 (1988) (citing *White*, 312 N.C. at 776–77, 324 S.E.2d at 832–33). If the court so finds that an equal division is not equitable, it must make specific findings of fact setting forth the reasons for an unequal division. *Albritton v. Albritton*, 109 N.C. App. 36, 41–42, 426 S.E.2d 80, 84 (1993). "The trial court need not make exhaustive findings of the evidentiary facts, but must include the ultimate facts considered." *Mosiello v. Mosiello*, 285 N.C. App. 468, 471, 878 S.E.2d 171, 175 (2022) (quotation marks and citation omitted). The trial court has discretion in determining how much weight to accord to each factor, *id.* at 471, 878 S.E.2d at 176, and a single factor may be sufficient to support an unequal distribution, *Mungo v. Mungo*, 205 N.C. App. 273, 278, 695 S.E.2d 495, 499 (2010).

Here, the trial court found that an unequal distribution in favor of Plaintiff was equitable based on the following:

> a. The parties were married and lived together for 23 years. The Plaintiff is currently 50 years of age. The Defendant has abused drugs, including methamphetamine, since at least April 9, 2019 at which time he had a heart attack. The Defendant has continued using illicit drugs since suffering the heart attack.
>
> b. Prior to April 9, 2019 the Defendant was a hard worker and the parties owned a successful business, Kaylor Electric, which afforded them the ability to purchase valuable real and personal property.
>
> c. Since 2016 the Plaintiff performed bookkeeping duties for Kaylor Electric but did not receive income for this service.
>
> d. After April 9, 2019 the Defendant allowed his business to deteriorate as a result of his apparent drug use so that, after the date of separation, the Defendant no longer worked at his business. By his actions,

the Defendant wasted, neglected and devalued the parties' very successful marital business.

e. The Plaintiff preserved marital property by making all of the loan payments due on the real property located at 2220 Withers Rd, Maiden even though the Defendant occupied the residence from the date of separation to the present.

f. The Plaintiff preserved marital property by making all of the loan payments due on the real property located at 2204 Withers Rd, Maiden from the date of separation to the present.

g. The Defendant has not demonstrated the ability or willingness to timely service the debt owed by the parties on the real property which he currently occupies to preserve the same.

h. The Defendant has not demonstrated the ability or willingness to timely service the debt on the real property distributed to him by the terms of the Order hereafter to preserve the same.

These findings of fact evidence the trial court's consideration of the statutory factors raised by the evidence and are sufficient to support an unequal distribution. *See Truesdale*, 89 N.C. App. at 450, 355 S.E.2d at 516.

Defendant argues that findings of fact (a) and (d) indicate that the trial court erroneously considered marital fault in finding that an unequal distribution was equitable. Defendant, however, mischaracterizes the findings.

Finding (a) addresses factor (3), "[t]he duration of the marriage and the age and physical and mental health of both parties." N.C. Gen. Stat. § 50-20(c)(3). The finding includes the duration of the parties' marriage; Defendant's age; and Defendant's physical health, including his drug abuse and his heart attack.

Finding (d) addresses factor (11a), "[a]cts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution." *Id.* § 50-20(c)(11a). The finding includes Defendant's drug use as to its negative effect on the parties' business and Defendant's resulting

inability to preserve marital property by making loan payments. As the challenged findings addressed factors set forth in N.C. Gen. Stat. § 50-20(c), Defendant's argument lacks merit.

Defendant also argues that the trial court erred by failing to make an express finding as to the total net value of the marital estate.

"While trial courts should make explicit findings regarding the net fair market value of property on the date of separation, a spouse is not necessarily prejudiced by the trial court's failure to state the net value of the property if it is easily ascertained by the trial court's findings[.]" *Mosiello*, 285 N.C. App. at 474, 878 S.E.2d at 178 (citation omitted). Ultimately, the trial court's findings "must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness." *Watson v. Watson*, 261 N.C. App. 94, 97, 819 S.E.2d 595, 598 (2018) (citation omitted).

Here, the trial court made specific and detailed findings as to each piece of property in the marital estate, including each piece of property's date of separation value, date of distribution value, and any debt or encumbrances. From these detailed findings, the net value of the marital estate is easily ascertained, and Defendant is not prejudiced by the trial court's failure to make an explicit finding. Accordingly, the trial court did not abuse its discretion in awarding an unequal distribution in Plaintiff's favor.

B. Classification of 524 East Main St. Property as Marital Property

[2] Defendant next contends that the trial court erred by classifying the real property located at 524 East Main Street as marital property.

This Court reviews the classification of property during equitable distribution to determine "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) (citation omitted). "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). The classification of property in an equitable distribution proceeding is considered a conclusion of law and is reviewed de novo. *Romulus v. Romulus*, 215 N.C. App. 495, 500, 715 S.E.2d 308, 312 (2011).

"Marital property" is "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[.]" N.C. Gen. Stat. § 50-20(b)(1). "It is presumed that all property acquired after the date of marriage and before the date of separation is marital property[.]" *Id.* This presumption "may be rebutted by the greater weight of the evidence." *Id.* The party seeking to classify an asset as marital bears the initial burden of proof, which may be satisfied by a preponderance of the evidence. *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991).

Here, the trial court found as follows:

> 20. During their marriage, the parties purchased a house and lot located at 524 East Main Street, Maiden, North Carolina which is titled in their joint names. On the date of separation, the house and lot had a fair market value of $191,000.00. The parties purchased the house and lot as an income producing rental property, however, the Plaintiff does not know if there are renters in the residence nor has she received any rental income from the residence since the date of separation. The date of distribution fair market value is $191,000.00.

Defendant contends that Plaintiff presented no evidence as to the actual date of acquisition of this property and thus, she is not entitled to the marital presumption. Plaintiff, however, listed the 524 East Main Street property in her equitable distribution affidavit as marital property.

Parties to an equitable distribution action must file equitable distribution inventory affidavits. N.C. Gen. Stat. § 50-21(a) (2023). Those affidavits "are deemed to be in the nature of answers to interrogatories propounded by the parties[,]" *id.*, and the answers "may be used to the extent permitted by the rules of evidence." *Id.* § 1A-1, R. 33(b) (2023).

Here, after noting that Defendant had failed to appear at any status conference from 28 November 2022 forward, had not filed his equitable distribution affidavit, and was not present in the courtroom for trial, the trial court asked Plaintiff if she had a motion on her affidavit. Plaintiff moved the trial court to accept the affidavit as a verified pleading and to accept the facts as alleged in the affidavit. The trial court accepted the affidavit as the pre-trial order. Because Defendant failed to appear at the trial, he failed to object to the affidavit's use as substantive evidence and the trial court accepting the facts alleged in the affidavit. The trial court's finding was thus supported by the evidence, and the trial court did not err by classifying the 524 East Main Street property as marital.

C. Ad Valorem Taxes

[3] Defendant next contends that the trial court's findings of fact concerning various ad valorem taxes on the parties' property were not supported by competent evidence.

"The trial court's findings of fact are binding on appeal as long as competent evidence supports them[.]" *Kabasan*, 257 N.C. App. at 440, 810 S.E.2d at 696 (citation omitted). Our courts have held that "[t]he subjective opinions of the owner of property as to its value are admissible and competent." *Squires v. Squires*, 178 N.C. App. 251, 259, 631 S.E.2d 156, 161 (2006) (quotation marks and citation omitted).

Here, Defendant contends that the following findings of fact are not supported by competent evidence:

> 53. The parties currently owe ad valorem taxes for the property located at 2220 Withers Rd, Maiden, North Carolina for tax year 2022 in the amount of $1,298.56.
>
> 54. The parties currently owe ad valorem taxes for the property located at 2204 Withers Rd, Maiden, North Carolina for tax year 2022 in the amount of $875.41.
>
> 55. The parties currently owe ad valorem taxes for the property located at 2216 Withers Rd, Maiden, North Carolina for tax year 2022 in the amount of $127.03.
>
> 56. The parties currently owe ad valorem taxes for the property located at 524 E. Main St., Maiden, North Carolina for tax year 2022 in the amount of $808.27.
>
> 57. The parties currently owe ad valorem taxes for the property located at 3561 Abernathy Williams Rd, Maiden, North Carolina for tax year 2022 in the amount of $97.27.
>
> 58. The parties currently owe ad valorem taxes for the property located at 3563 Abernathy Williams Rd, Maiden, North Carolina for tax year 2022 in the amount of $43.00.

Plaintiff, however, listed these taxes in her equitable distribution affidavit. She moved the trial court to accept the affidavit as a verified pleading and to accept the facts as alleged in the affidavit. The trial court accepted the affidavit as the pre-trial order. Defendant failed to appear at the trial; thus, he failed to object to the affidavit's use as substantive

evidence and the trial court accepting the facts alleged in the affidavit. Accordingly, the trial court's findings as to the ad valorem taxes on the parties' real property were supported by competent evidence.

D. Defendant's Failure to File Equitable Distribution Affidavit

[4] Defendant next contends that the trial court abused its discretion by failing to afford him thirty days from the date he was served with Plaintiff's equitable distribution inventory affidavit to submit his own affidavit, in violation of the local rules of court. Defendant, however, failed to attend the case reviews on 26 September 2022, 31 October 2022, 28 November 2022, 6 February 2023, 13 March 2023, and 27 March 2023; failed to attend the equitable distribution trial; and failed to offer an equitable distribution inventory affidavit at any point. Defendant has thus failed to preserve this issue for our review. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). The purpose of this rule "is to require a party to call the [trial] court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal." *Lathon v. Cumberland Cnty.*, 184 N.C. App. 62, 68, 646 S.E.2d 565, 568 (2007) (quotation marks and citation omitted). Accordingly, this argument is dismissed. *See Cohen v. McLawhorn*, 208 N.C. App. 492, 497, 704 S.E.2d 519, 524 (2010) (plaintiff waived his argument that the trial court erred by dismissing the action because defendants violated the local rules where plaintiff failed to raise the issue before the trial court).

E. Finding of Fact 59

[5] Finally, Defendant challenges finding of fact 59. Specifically, he argues that the first paragraph merely restates Plaintiff's testimony and does not resolve the evidence presented and the second paragraph impermissibly reserves an issue for later hearing.

The challenged finding states as follows:

> The Plaintiff has learned that the Defendant may have fraudulently used a credit card in her individual name and on which he is not an authorized user. The credit card is a Visa First Nation of Omaha card. The Plaintiff had the credit card for eight years and did not use the card after the parties' date of separation. After filing her Equitable Distribution Affidavit she received a letter regarding the cancelation of

> another credit card due to delinquency and that is when she discovered the charges on the Visa First Nation of Omaha card which totaled approximately $7,800.00.
>
> The Plaintiff is pursuing means directly with the credit card company to remedy this situation, however, should that route not be productive, the Plaintiff may petition this Court to re-consider distribution of the parties' marital property only as it concerns distribution of this debt and its effect on the distribution ordered hereafter.

The trial court is required to "make written findings of fact that support the determination that the marital property and divisible property has been equitably divided." N.C. Gen. Stat. § 50-20(j). "Findings of fact that merely restate a party's contentions or testimony without finding the facts in dispute are not adequate. It is the duty of the fact finder to resolve conflicting evidence." *Dunlap v. Clarke Checks, Inc.*, 92 N.C. App. 581, 584, 375 S.E.2d 171, 174 (1989) (citation omitted).

Contrary to Defendant's assertion, the first paragraph of this finding is not a mere recitation of Plaintiff's testimony. Rather, the finding shows that the court considered the evidence presented by Plaintiff and found as a fact that her credit card had been charged $7,800.00, despite her not using the card since the date of the parties' separation.

Defendant also contends that, by finding that Plaintiff may petition the court to re-consider the distribution of this specific debt, the trial court erroneously "reserve[ed] the issue of alleged credit card fraud for later consideration."

Based on its findings of fact and conclusions of law, the trial court ordered, adjudged, and decreed the order to be "a full, final, fair, and equitable distribution of the parties' marital property and debt[.]" This order thus resolves all issues related to equitable distribution, does not reserve the issue of credit card fraud for later consideration in the equitable distribution matter, and gives Plaintiff no more right to petition the court than exists under the law.

III. Conclusion

For the reasons set forth above, we affirm the trial court's equitable distribution order.

AFFIRMED.

Judges MURPHY and FLOOD concur.

MOORHEAD v. MOORHEAD

[296 N.C. App. 90 (2024)]

KIMBERLY MOORHEAD, PLAINTIFF
v.
TIM MOORHEAD, DEFENDANT

No. COA23-679

Filed 1 October 2024

1. Domestic Violence—protective order—harassment—surveillance and tracking—lack of legitimate purpose

The trial court did not err by entering a domestic violence protective order based on its findings of fact that defendant harassed plaintiff by: accessing security cameras inside the marital home to observe plaintiff, their children, and others; hiring a private investigator to follow and report on plaintiff and people she interacted with; placing a tracker on plaintiff's car; and, in particular, communicating to plaintiff about the information he had gathered on her activities. Competent evidence supported the trial court's determination that there was no legitimate purpose to defendant's actions and that those actions caused plaintiff to be in fear of continued harassment rising to the level of substantial emotional distress.

2. Domestic Violence—protective order—threats of suicide—sufficiency of evidence

In its domestic violence protective order, the trial court's finding of fact that defendant made previous threats to commit suicide at the time the parties' marriage was ending was supported by competent evidence, including plaintiff's allegations and defendant's acknowledgment that he may have made the threats while drinking but did not remember them; therefore, the finding was conclusive on appeal.

3. Domestic Violence—protective order—harassment—surveillance and tracking—support for conclusion of domestic violence

In its domestic violence protective order, the trial court did not err by concluding that defendant committed an act of domestic violence against plaintiff based on the court's findings of fact—supported by competent evidence—that defendant used information gathered from security cameras inside the marital home, a tracking device placed on plaintiff's car, and a private investigator to inform plaintiff of his knowledge of her movements and activities, which caused plaintiff fear and anxiety and constituted harassment.

4. Domestic Violence—protective order—surrender of firearms —threats of suicide—statutory mandate

In its domestic violence protective order, the trial court did not err by following the statutory mandate in N.C.G.S. § 50B-3.1(a) to require defendant to surrender his firearms after the court found as fact—supported by competent evidence—that defendant had previously made threats of suicide.

Appeal by defendant from order entered 6 March 2023 by Judge Christine Walczyk in District Court, Wake County. Heard in the Court of Appeals 6 February 2024.

Gailor Hunt Davis Taylor & Gibbs, PLLC, by Jonathan S. Melton, for defendant-appellant.

Sandlin Family Law Group, by Deborah Sandlin, for plaintiff-appellee.

STROUD, Judge.

In this appeal from a domestic violence protective order, Defendant Tim Moorhead contends that the trial court erred in making certain findings about his acts and their impact on Plaintiff Kimberly Moorhead, concluding based on those findings that Defendant committed an act of domestic violence against Plaintiff and requiring Defendant to surrender his firearms, ammunition, and gun permits to the sheriff. We reject each of Defendant's arguments and affirm the domestic violence protective order.

I. Factual Background and Procedural History

On 7 February 2023, Plaintiff sought an *ex parte* domestic violence protective order ("DVPO"). In her complaint, Plaintiff alleged that after the parties' separation,[1] Defendant used cameras connected to a security system – installed in the marital home during the marriage – to observe Plaintiff, the parties' children, and others inside the former marital home; watched Plaintiff and her family through the home's windows; sent many harassing emails and texts to Plaintiff, her family members, and others; threatened to commit suicide three times in late 2020 and early 2021; and possessed four firearms. Based on those allegations

1. The parties divorced on 3 March 2023.

and others, Plaintiff asked the court to prohibit Defendant's abusive and harassing behavior, bar him from contact with Plaintiff and the children, and require him to surrender his firearms, ammunition, and gun permits. An *ex parte* DVPO was entered on 7 February 2023.

The matter came on for hearing on 6 March 2023, where the evidence tended to show Plaintiff and Defendant had three daughters during their marriage, two of whom were minors and living with Plaintiff in the former marital home at the time of the hearing. At various times after their separation, Defendant communicated with Plaintiff – by phone call, text, email, in person, and through contacts with friends, family members, and others in Plaintiff's orbit – in a way that caused Plaintiff fear and distress.

Defendant acknowledged that, after the parties' separation, he accessed a security camera inside Plaintiff's home to observe the people and activities; hired a private investigator to follow and report Plaintiff and people with whom she had interactions; and used information from a tracking device he placed on Plaintiff's car. Plaintiff testified about many situations in which Defendant seemed to use information gained from those sources – about Plaintiff's location, actions, and plans – to send her communications that Plaintiff found to be frightening and upsetting. For example, Defendant texted Plaintiff about her medical coverage while she was at a gynecology appointment; alerted Plaintiff he was aware of travel plans she had not shared with him; described watching Plaintiff and their children inside their home; indicated awareness of communications Plaintiff had with her legal counsel and others; and showed up in person while Plaintiff was on a dinner date at a restaurant. Defendant did not deny obtaining this information about Plaintiff and her activities or his communications to Plaintiff, instead focusing his testimony on his contention that his actions were for legitimate purposes and his communications were justified. Plaintiff also testified about three times Defendant threatened to commit suicide near the end of the parties' marriage.

Following the 6 March 2023 hearing, the trial court entered the DVPO that same day, with the order set to expire 5 March 2024.[2] Defendant timely appealed.

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2. The DVPO was set to expire on 5 March 2024. However, "appeals from expired domestic violence protective orders are not moot because of the stigma that is likely to attach to a person judicially determined to have committed domestic abuse." *In re A.K.*, 360 N.C. 449, 458, 628 S.E.2d 753, 759 (2006) (citations, quotation marks, ellipses, and brackets omitted).

II. Analysis

On appeal, Defendant argues the trial court erred in four ways: (1) in finding that Defendant placed Plaintiff in fear of continued harassment rising to the level of infliction of emotional distress; (2) in finding that Defendant made threats to commit suicide; (3) in concluding Defendant committed an act of domestic violence against Plaintiff; and (4) in requiring Defendant to surrender his firearms, ammunition, and gun permits. After careful review, we find no merit in these claims.

A. Standard of Review

> When the trial court sits without a jury on a DVPO, the standard of review on appeal 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. Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding.

Chociej v. Richburg, 287 N.C. App. 615, 617, 883 S.E.2d 649, 650-51 (2023) (citations, quotation marks, and brackets omitted).

Findings of fact supported by competent evidence are conclusive on appeal even if there is evidence to the contrary. *Bridges v. Bridges*, 85 N.C. App. 524, 526, 355 S.E.2d 230, 231 (1987). This is because

> where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial court. This Court can only read the record and, of course, the written word must stand on its own. But the trial judge is present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures, appearances and postures, shrillness and stridency, calmness and composure, all of which add to or detract from the force of spoken words.

Brandon v. Brandon, 132 N.C. App. 646, 651, 513 S.E.2d 589, 593 (1999) (citations, quotations marks, and brackets omitted).

B. Findings Regarding Specific Incidents of Harassment by Defendant

[1] Defendant first argues that the trial court erred in making several findings of fact regarding various incidents of his harassment of Plaintiff. Specifically, Defendant contends that his admitted actions

of "moving a tracker from the parties' daughter's car to Plaintiff's car and accessing Plaintiff's CPI account (including viewing inside cameras) . . . . [along with] hir[ing] a Private Investigator to follow Plaintiff 24/7 for several months" cannot constitute harassment because he had a legitimate purpose for them. Defendant's framing of this argument reflects his misperception of the actions that constituted harassment under the pertinent statutes. Competent evidence to support the trial court's determination was before the trial court. Accordingly, we reject Defendant's position.

Plaintiff sought and was granted a DVPO under the second statutory definition of domestic violence: "[p]lacing the aggrieved party or a member of the aggrieved party's family or household in fear of . . . continued harassment, as defined in [North Carolina General Statute Section] 14-277.3A, that rises to such a level as to inflict substantial emotional distress." N.C. Gen. Stat. § 50B-1(a)(2) (2023). Section 14-277.3A delineates the criminal offense of "stalking" and includes the following definition pertinent to this appeal:

> (2) Harasses or harassment. — Knowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and *that serves no legitimate purpose*.

N.C. Gen. Stat. § 14-277.3A(b)(2) (2023) (emphasis added). Under these statutes, the trial court must make findings of fact regarding the defendant's conduct, the effect of the conduct on the plaintiff, and whether the defendant's conduct "serves no legitimate purpose." *Martin v. Martin*, 266 N.C. App. 296, 307, 832 S.E.2d 191, 200 (2019). We review the findings of fact to determine if they are supported by competent evidence, and "we defer to the trial court's assessment of [the] defendant's credibility" and whether the defendant's actions "served no legitimate purpose." *Stancill v. Stancill*, 241 N.C. App. 529, 542, 773 S.E.2d 890, 899 (2015) (citations omitted).

Defendant maintains that "[t]he conduct and the purpose of the conduct [alleged to constitute harassment] are key factors to consider." We agree, but Defendant misperceives the conduct which constituted harassment here. As the trial court found, it was not simply – or even

primarily – Defendant's placement of a tracking device on Plaintiff's car, his hiring of a private investigator to monitor Plaintiff, or his access of security cameras inside Plaintiff's home that formed the gravamen of his harassment of Plaintiff. As the trial court found, "Defendant *used the information he uncovered* to harass Plaintiff" by email, in-person confrontation, text, and phone calls. (Emphasis added.) Yet, Defendant focuses his arguments on several actions he undertook to gather this information.

For example, Defendant acknowledges that he moved a tracking device from the car used by one of the parties' children to Plaintiff's car and focuses his argument on the legality of this admitted action. Thus, Defendant argues that his action would not constitute the offense of cyberstalking as stated in our statutes because he testified that he told Plaintiff he had placed it on the vehicle, and lack of consent is an element of cyberstalking via a tracking device. *See* N.C. Gen. Stat. § 14-196.3(b)(5) (2023). Yet, the pertinent issue at the DVPO hearing was not whether Defendant committed the criminal offense of cyberstalking in his installation of the tracking device – although he may have done so – but instead whether his communications with Plaintiff based on information obtained from the tracking device were terrorizing or tormenting to Plaintiff and "serve[d] no legitimate purpose."[3]

At the DVPO hearing, Plaintiff testified that she discovered a tracking device on her vehicle in October 2022, eleven months after the parties separated. Plaintiff explained that she had been aware that the device had been placed on the car used by one of the parties' children "[s]ometime before [that child] turned 18," but that after finding that it had been moved to her own car, Plaintiff felt "[s]cared. . . . [because s]omebody was knowing everywhere I've been." Plaintiff further testified about multiple occasions when she received harassing texts from or was confronted in person by Defendant, which indicated to Plaintiff that Defendant was aware of her specific location, including during a gynecology appointment and while on a birthday dinner date at a restaurant.

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3. Although not relevant to our resolution of this matter, we note that, although Defendant repeatedly alleges Plaintiff's "knowledge and consent" regarding placement of the tracking device in the context of cyberstalking pursuant to North Carolina General Statute Section 14-196.3(b)(5), only lack of *consent* appears as an element of that offense. N.C. Gen. Stat. § 14-196.3(b)(5). Accordingly, it would appear that the placement of a tracking device with a victim's knowledge but without the victim's *consent* would nonetheless be a criminal offense.

In his testimony, Defendant stated that he had placed the tracker on Plaintiff's car because he was worried about the car's battery and that the tracker also "monitors the engine condition, it monitors [the] battery." Certainly, the trial court could have found Defendant's testimony to be credible and it could have found that Defendant's purpose was to monitor the car's condition and that this is a legitimate purpose, at least for placement of the device. *See Brandon*, 132 N.C. App. at 651, 513 S.E.2d at 593. But the trial court did not find the Defendant's explanation regarding his purpose to be credible. In addition, the trial court's findings focus on Defendant's use of the information he obtained from the tracker, not simply the fact that the tracker was on the car. Although Defendant's counsel cross-examined Plaintiff briefly about the restaurant incident, Defendant did not deny Plaintiff's allegation he had used the tracking device to learn Plaintiff's location so he could send her communications or confront her. In any event, the trial court has the duty to make credibility determinations regarding the witnesses and their testimony, *see id.*, and Plaintiff's testimony was "[c]ompetent evidence . . . adequate to support [a] finding" that Defendant used information about Plaintiff's location obtained from the tracking device to terrorize and/or torment Plaintiff both by phone and an in-person confrontation and not for a legitimate purpose, *Chociej*, 287 N.C. App. at 617, 883 S.E.2d at 650-51.

Turning to Defendant's employment of a private investigator to surveil Plaintiff, he presents a similarly misplaced argument: that the surveillance was properly conducted and for a legitimate purpose, specifically because Plaintiff was dating, and had introduced the parties' children to, a man with a criminal record. Defendant is correct that using a private investigator to obtain information about someone who could present a threat to his children *could* be a legitimate purpose for conducting surveillance, but there was competent evidence to support the trial court's finding that Defendant did not have a legitimate purpose for his conduct. The problem here arose from how Defendant used the information he obtained from the surveillance. At the hearing, the trial court acknowledged that the act of hiring a private investigator to conduct surveillance by itself is not domestic violence. Defendant also argues that the surveillance was done in an appropriate manner, but the actions of the investigator were not the issue here. The trial court found Defendant *used the information he obtained from the investigator* to let Plaintiff "know he knew where she was traveling" or that he had seen Plaintiff's boyfriend "playing volleyball with [the parties'] children" inside Plaintiff's home. Plaintiff's testimony that those communications made her feel "unsafe," "panicked," and harassed was competent evidence for the trial court to consider. The determination

that Defendant's acts – communicating that he knew where Plaintiff was and what was occurring in the privacy of her home – served no legitimate purpose was reserved for the finder of fact, and there was competent evidence to support it. *See Stancill*, 241 N.C. App. at 542, 773 S.E.2d at 899.

Likewise, Defendant's argument that "Plaintiff was aware Defendant had access to the . . . security cameras and did not restrict his access" does not address the dispositive question: whether Defendant used information gained from that access to communicate to Plaintiff in a harassing way and without a legitimate purpose. *See* N.C. Gen. Stat. § 14-277.3A(b). Once again, our review of the transcript reveals competent evidence supports the trial court's findings, as Plaintiff testified she felt "[v]ictimized" and "[s]cared" by Defendant's communications alerting her he could see what occurred inside her home. The trial court was entitled to rely on that evidence in making its findings about Defendant's harassment of Plaintiff. *See Stancill*, 241 N.C. App. at 542, 773 S.E.2d at 899.

In sum, we agree with Plaintiff that "[t]he ultimate question is whether [Defendant's] actions in using the information he obtained whether legally or illegally rises to the level of harassment which caused substantial emotional distress." Given the competent evidence on this point, it was for the trial court to assess the credibility of the witnesses, *see Brandon*, 132 N.C. App. at 651, 513 S.E.2d at 593, and then to make its determination and findings, *see Stancill*, 241 N.C. App. at 542, 773 S.E.2d at 899. The trial court here did exactly that, and Defendant has provided no basis for this Court to invade the province of that tribunal. Defendant's arguments on these matters are overruled.

C. Finding that Defendant Threatened Suicide

[2] Defendant next argues that the trial court erred in finding he "made previous threats to commit suicide at the end of 2020 and beginning of 2021 when the [parties'] marriage was ending." Defendant suggests that "when determining whether a [d]efendant made threats to commit suicide, the context and timing of the alleged threats must be considered[,]" citing *Stancill*. We find *Stancill* inapposite as the DVPO under review in that case contained no finding that the defendant had threatened suicide and therefore any discussion about the context and timing of threats in making such a finding was dicta. *Id.* at 540, 773 S.E.2d at 897 ("In fact, as discussed in more detail below, the DVPO does not include a finding that [the] defendant had threatened suicide.").

Moreover, the record on appeal in this matter contains competent evidence from both parties supporting the trial court's finding. Defendant

acknowledges that Plaintiff alleged Defendant's three threats of suicide in her complaint and also testified about those instances at the DVPO hearing. Further, in his answer, Defendant "admit[ted] that he and Plaintiff were consuming a great deal of wine during the time frame alleged, so that he may have made statements similar to the ones alleged and does not remember them." Because the trial court's finding of fact that Defendant threatened to commit suicide on the occasions noted is supported by competent evidence, it is conclusive on appeal. *See Bridges*, 85 N.C. App. at 526, 355 S.E.2d at 231. Defendant's argument is overruled.

D. Conclusion that Defendant Committed an act of Domestic Violence

[3] Defendant bases this argument on his contention that the trial court's findings regarding his use of information obtained from the tracking device he placed on Plaintiff's car, the private investigator he hired, and his accessing of security cameras inside Plaintiff's home to harass Plaintiff did not support its conclusion that Defendant committed acts of domestic violence against Plaintiff. As explained above, Plaintiff testified about the fear and anxiety she experienced because of Defendant's communications, and the trial court did not find Defendant's testimony he had "legitimate" reasons for those communications to be credible. *See id.*; *see also Brandon*, 132 N.C. App. at 651, 513 S.E.2d at 593. Having rejected Defendant's misplaced contentions about the trial court's findings regarding those acts above, we likewise reject his challenge to the trial court's reliance on those findings for its conclusion that Defendant committed at least one act of domestic violence by means of harassment.

Once a trial court "finds that an act of domestic violence has occurred, the court *shall* grant a protective order restraining the defendant from further acts of domestic violence." N.C. Gen. Stat. § 50B-3(a) (2023) (emphasis added). Because even a single act of domestic violence found by the court requires issuance of a DVPO, *see Keenan v. Keenan*, 285 N.C. App. 133, 134, 877 S.E.2d 97, 99 (2022), we need not address Defendant's assertions that "the [additional] findings that Defendant threatened to report Plaintiff's email monitors, charge their daughter with extortion, and called Plaintiff's boyfriend a 'cokehead' relate to third parties, not Plaintiff herself, and cannot support a conclusion of domestic violence." The trial court's findings regarding Defendant's harassment of Plaintiff, as defined in North Carolina General Statute Section 14-277.3A(b)(2), were supported as explained above, and they

were sufficient to sustain entry of the DVPO under North Carolina General Statute Section 50B-1(a)(2).

E. Order for the Surrender of Firearms

[4] Defendant's argument on this point rests entirely on his claim that "the trial court erred in finding that [he] made threats to commit suicide." As discussed above, the trial court's finding that Defendant threatened suicide three times was supported by Plaintiff's testimony at the hearing and Defendant's answer. Our statutes require that where a DVPO is issued and threat to commit suicide by a defendant is found by the court, "the court *shall* order the defendant to surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms[.]" N.C. Gen. Stat. § 50B-3.1(a) (2023) (emphasis added). Here, the trial court complied with this statutory directive, and Defendant's argument of error lacks merits.

III. Conclusion

The DVPO entered 6 March 2023 is affirmed.

AFFIRMED.

Judges GRIFFIN and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
WARREN DOUGLAS JACKSON, DEFENDANT

No. COA23-637

Filed 1 October 2024

Search and Seizure—investigation into trespass—consent to search vehicle—reasonableness of seizure—evidentiary support

The trial court properly denied defendant's motion to suppress evidence of illegal drugs found in his car where the court's findings of fact were supported by competent evidence and where the findings, in turn, supported the court's conclusions of law that defendant was not unreasonably seized when he consented to a search of his vehicle. Defendant was seized when the law enforcement officer who responded to a report of a suspicious vehicle on private property asked for defendant's and his passenger's driver's licenses, and

then kept those licenses as the cars drove back down a trail to meet a backup officer (which was a reasonable safety measure under the circumstances since the second officer's car was unable to drive up the trail). The officer's reasonable suspicion of criminal activity was not dispelled by defendant's denial that he knew he was on private property where defendant and the passenger were fidgety and acting nervous and where the officer discovered that the passenger had an outstanding warrant for her arrest. Thus, the seizure had not been unreasonably extended when the officer asked defendant if he had anything illegal in the car—to which defendant responded, "you're welcome to look"—and, therefore, defendant's consent was not per se involuntary.

Appeal by Defendant from judgment entered 14 September 2022 by Judge Peter B. Knight in Mitchell County Superior Court. Heard in the Court of Appeals 10 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Wendy J. Lindberg, for the State.

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

CARPENTER, Judge.

Warren Douglas Jackson ("Defendant") appeals from judgment after a jury convicted him of possessing methamphetamine and possessing drug paraphernalia. On appeal, Defendant argues that the trial court erred by denying his motion to suppress evidence obtained from his car, and his convictions should therefore be reversed. After careful review, we disagree with Defendant and discern no error.

I. Factual & Procedural Background

On 1 March 2021, a Mitchell County grand jury indicted Defendant for possessing methamphetamine and possessing drug paraphernalia. On 3 August 2022, Defendant filed a motion to suppress evidence obtained from his car. On 13 September 2022, the trial court heard Defendant's motion, and the evidence tended to show the following.

On 31 March 2020, Lieutenant Beam of the Mitchell County Sheriff's Office responded to a call about a suspicious vehicle. The caller stated that a Volkswagen Bug entered a private trail on the caller's property.

When Lieutenant Beam arrived at the trail, several individuals stopped him and said they saw a car and were "concern[ed] about it."

Lieutenant Beam then spoke with the caller. The caller said the Bug drove onto his unpaved logging trail and had "not come back down." Lieutenant Beam, in his four-wheel-drive truck, drove up to the end of the trail, where he found Defendant, a female companion ("Passenger"), and Defendant's Volkswagen Bug (the "Bug") covered in mud and dirt. Lieutenant Beam radioed his location to dispatch, and dispatch told him another officer was on the way.

Lieutenant Beam asked Defendant and Passenger for identification and if they had permission to be on the property. Defendant and Passenger each gave Lieutenant Beam their driver's license, and neither of them knew they were on private property; they were "just out riding around."

Lieutenant Beam "talked to them for a few minutes, and the way both [Defendant] and [Passenger] were acting made [Beam] really nervous. They were just moving around a lot. [Beam] couldn't get them to be still." Lieutenant Beam's backup deputy, Deputy Hilemon, arrived at the entrance of the trail shortly after being dispatched. Deputy Hilemon's car, however, could not make it up the trail to meet Lieutenant Beam.

Lieutenant Beam then asked Defendant and Passenger if they could drive the Bug back down the trail so that Lieutenant Beam could meet Deputy Hilemon and finish the investigation at the bottom of the trail. Defendant and Passenger "agreed" and drove the Bug down the trail. Lieutenant Beam drove down separately, and he still held Defendant and Passenger's driver's licenses.

While driving to the bottom of the trail, Lieutenant Beam discovered that Passenger had outstanding warrants for her arrest. Accordingly, Deputy Hilemon arrested Passenger when she and Defendant reached the bottom of the trail. Lieutenant Beam, who still had Defendant's driver's license, then asked Defendant to step out of the Bug and if he had anything illegal in the car. Defendant shrugged his shoulders and said, "you're welcome to look." Lieutenant Beam searched the Bug and found what appeared to be methamphetamine.

On 13 September 2022, the trial court issued a written order (the "Order") denying Defendant's motion to suppress. The State tried Defendant on 14 September 2022. That same day, the jury found Defendant guilty of possessing methamphetamine and possessing drug paraphernalia. The trial court sentenced Defendant to a minimum of nine and a corresponding maximum of twenty months of imprisonment,

suspended for eighteen months of supervised probation. Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issue

The issue on appeal is whether the trial court erred by denying Defendant's motion to suppress.

IV. Analysis

On appeal, Defendant challenges the Order by arguing that: (1) certain findings of fact are unsupported by competent evidence; and (2) several conclusions of law are erroneous. We disagree with Defendant.

A. Standard of Review

We review a motion-to-suppress order 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. Travis*, 245 N.C. App. 120, 122, 781 S.E.2d 674, 676 (2016) (quoting *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015)). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176 (2016) (quoting *State v. Chukwu*, 230 N.C. App. 553, 561, 749 S.E.2d 910, 916 (2013)).

Officer testimony is usually competent evidence, as "[w]e defer to the trial court's assessment of the officer's credibility . . . ." *State v. Jacobs*, 290 N.C. App. 519, 523, 892 S.E.2d 495, 499 (2023) (alteration in original) (quoting *State v. Salinas*, 214 N.C. App. 408, 411, 715 S.E.2d 262, 264 (2011)). And if a trial court's findings are supported by competent evidence, "they are binding on appeal, even if there is evidence to the contrary." *State v. Green*, 194 N.C. App. 623, 630, 670 S.E.2d 635, 640 (2009).

We review conclusions of law de novo. *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (2007). Under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

We classify findings of fact and conclusions of law by their substance; the labels used by the trial court "will not defeat appellate

review." *City of Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946). Thus, even if labeled as findings of fact, we will treat legal conclusions as such, and vice versa. *See Harris v. Harris*, 51 N.C. App. 103, 107, 275 S.E.2d 273, 276 (1981).

B. Challenged Findings of Fact

On appeal, Defendant challenges findings of fact 11, 13, 14, 20, 21, 22, and conclusion of law 25. The challenged portions of these findings and conclusions are as follows.

Finding 11 states that Defendant and Passenger were acting "very nervous and were moving around." Finding 13 states that in order to "continue his investigation of the apparent trespass in a more safe or secure location," Lieutenant Beam asked Defendant and Passenger if they would drive to the bottom of the trail. Finding 14 states that Defendant and Passenger "agreed" to drive down the trail. Finding 20 states that Lieutenant Beam was investigating an "apparent trespass." Finding 21 states that Defendant and Passenger's nervousness and quick movements concerned Lieutenant Beam.

Finding 22 states that Defendant voluntarily consented to the search of his car. Conclusion 25, although labeled a conclusion, is a finding of fact; it also states that Defendant voluntarily consented to the search of his car. *See State v. Hall*, 268 N.C. App. 425, 429, 836 S.E.2d 670, 674 (2019) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047–48, 36 L. Ed. 2d 854, 862–63 (1973)) (stating that consent determinations under the Fourth Amendment are factual).

In sum, we conclude that each challenged finding is supported by competent evidence because each finding is supported by probative testimony from Lieutenant Beam, and we defer to the trial court's assessment of Lieutenant Beam's credibility. *See Jacobs*, 290 N.C. App. at 523, 892 S.E.2d at 499. Nonetheless, we will separately address the challenged findings below.

1. Findings 11 & 21

These findings both state Defendant and Passenger were acting nervous, which made Lieutenant Beam nervous. At the motion hearing, Lieutenant Beam testified that he "talked to them for a few minutes, and the way both [Defendant] and [Passenger] were acting made [Beam] really nervous. They were just moving around a lot. [He] couldn't get them to be still."

Lieutenant Beam's testimony "is evidence that a reasonable mind might accept as adequate to support the finding" that Defendant and

Passenger were acting nervously. *See Ashworth*, 248 N.C. App. at 651, 790 S.E.2d at 176. Further, Lieutenant Beam's testimony supports a finding that Defendant and Passenger's behavior made Beam nervous. *See id.* at 651, 790 S.E.2d at 176. Therefore, findings 11 and 21 are supported by competent evidence. *See Travis*, 245 N.C. App. at 122, 781 S.E.2d at 676.

2. Findings 13 & 20

Defendant challenges these findings by arguing that no evidence shows that Lieutenant Beam was investigating an "apparent trespass." On the contrary, Lieutenant Beam testified that the owner of the trail saw an unknown car enter the trail and had "not come back down." Moreover, Lieutenant Beam testified that several other individuals saw a car, and they were "concern[ed] about it."

Lieutenant Beam's testimony here is also "evidence that a reasonable mind might accept as adequate to support the finding" that Defendant and Passenger were "apparent[ly]" trespassing on the trail. *See Ashworth*, 248 N.C. App. at 651, 790 S.E.2d at 176. Accordingly, findings 13 and 20 are supported by competent evidence. *See Travis*, 245 N.C. App. at 122, 781 S.E.2d at 676.

3. Finding 14

Defendant challenges this finding by arguing that there is insufficient evidence to support that he agreed to move down the trail. According to Defendant, he did not "agree" to drive to the bottom of the trail; he was complying with Lieutenant Beam's order.

Because Lieutenant Beam was a law-enforcement officer, and because Lieutenant Beam held Defendant's driver's license, Defendant's assertion could have merit. Indeed, these facts are probative as to whether Defendant was seized under the Fourth Amendment when he "agreed" to drive to the bottom of the trail.

But here, we are analyzing whether this finding is supported by competent evidence, and the competent-evidence standard is a low bar. *See Green*, 194 N.C. App. at 630, 670 S.E.2d at 640 (stating that findings supported by competent evidence "are binding on appeal, even there if there is evidence to the contrary"). Accordingly, finding 14 is supported by competent evidence because Lieutenant Beam specifically testified that Defendant and Passenger agreed to drive to the bottom of the trail. *See Ashworth*, 248 N.C. App. at 651, 790 S.E.2d at 176.

4. Finding 22 & Conclusion 25

In this finding and conclusion, Defendant argues that the trial court erred by finding that he consented to the search of his car. Although consent is a factual inquiry, *see Hall*, 268 N.C. App. at 429, 836 S.E.2d at 674, Defendant makes a per se legal argument. Specifically, Defendant argues that his consent was necessarily involuntary because he was unreasonably seized when he gave it.

For this argument, Defendant cites *State v. Parker*, 256 N.C. App. 319, 327, 807 S.E.2d 617, 622 (2017), which cites *State v. Myles*, 188 N.C. App. 42, 51, 654 S.E.2d 752, 758 (2008), which cites *Florida v. Royer*, 460 U.S. 491, 507–08, 103 S. Ct. 1319, 1329, 75 L. Ed. 2d 229, 243 (1983) (plurality opinion). In *Royer*, the Supreme Court held that because the defendant "was being illegally detained when he consented to the search of his luggage, . . . [his] consent was tainted by the illegality and was ineffective to justify the search." *Id.* at 507–08, 103 S. Ct. at 1329, 75 L. Ed. 2d at 243.

So to discern whether the trial court properly found that Defendant consented to Lieutenant Beam's search, we must discern whether Defendant was illegally seized when he consented. *See id.* at 507–08, 103 S. Ct. at 1329, 75 L. Ed. 2d at 243. Because Defendant's challenged conclusions of law hinge on the same question, we will examine the seizure question more thoroughly in our forthcoming conclusion-of-law discussion. We disagree with Defendant, however: He was not unreasonably seized when he consented to Lieutenant Beam's search. Therefore, the trial court did not err by finding that Defendant consented to the search.

C. Challenged Conclusions of Law

Defendant challenges conclusions of law 23 and 24, and findings of fact 19 and 21. Finding 19 states that "[i]t was appropriate and necessary" for Lieutenant Beam to relocate Defendant to the bottom of the trail, and finding 21 states that Lieutenant Beam had reasonable suspicion to investigate Defendant. Although not labeled as such, findings 19 and 21 are conclusions of law. *See Harris*, 51 N.C. App. at 107, 275 S.E.2d at 276. Like finding 21, conclusion 23 states that Lieutenant Beam had reasonable suspicion to investigate Defendant. Conclusion 24 states that Lieutenant Beam's investigation was "not improperly extended."

Defendant argues that these conclusions are wrong under the Fourth Amendment of the United States Constitution and Article I, Section 20 of the North Carolina Constitution. Because these constitutional provisions are analogous, we can resolve Defendant's state and

federal concerns through a single Fourth Amendment analysis. *See State v. Miller*, 367 N.C. 702, 706, 766 S.E.2d 289, 292 (2014) (citing *State v. Garner*, 331 N.C. 491, 506–07, 417 S.E.2d 502, 510 (1992)) ("In construing these analogous provisions together, we have held that nothing in the text of Article I, Section 20 calls for broader protection than that of the Fourth Amendment.").

1. The Fourth Amendment

The Fourth Amendment of the United States Constitution prohibits "unreasonable searches and seizures." U.S. CONST. amend. IV. The Fourth Amendment applies to the States through the Fourteenth Amendment. *See State v. Campbell*, 359 N.C. 644, 659, 617 S.E.2d 1, 11 (2005).

Under the Fourth Amendment, "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980). Freedom of movement is restrained by a show of authority " 'if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " *State v. Isenhour*, 194 N.C. App. 539, 543, 670 S.E.2d 264, 267 (2008) (quoting *Mendenhall*, 446 U.S. at 553, 100 S. Ct. at 1877, 64 L. Ed. 2d at 509). Whether a reasonable person would feel "free to leave" a police encounter is determined by analyzing the totality of circumstances. *Id.* at 543, 670 S.E.2d at 267–68.

A seizure, however, is reasonable if the seizing officer has probable cause to believe the seized citizen committed a crime. *See United States v. Watson*, 423 U.S. 411, 423–24, 96 S. Ct. 820, 827–28, 46 L. Ed. 2d 598, 608–09 (1976). A *Terry* stop, a limited form of seizure, is also reasonable under the Fourth Amendment. *State v. Mangum*, 250 N.C. App. 714, 720, 795 S.E.2d 106, 113 (2016) ("In *Terry*, the United States Supreme Court held that police officers may initiate a brief, investigatory stop of an individual when 'specific and articulable facts . . . , taken together with rational inferences from those facts, reasonably warrant that intrusion.' " (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968))).

A *Terry* stop is appropriate "when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.' " *Navarette v. California*, 572 U.S. 393, 396–97, 134 S. Ct. 1683, 1687, 188 L. Ed. 2d 680, 686 (2014) (quoting *United States v. Cortez*, 449 U.S. 411, 417–18, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 629 (1981)). Put differently, a *Terry* stop is a reasonable seizure under the Fourth Amendment if the seizing officer has "reasonable suspicion."

The reasonable-suspicion standard is lower than the probable-cause standard; reasonable suspicion requires less evidence than probable cause. *State v. Wainwright*, 240 N.C. App. 77, 84, 770 S.E.2d 99, 105 (2015). Probable cause requires a reasonable probability of guilt. *Illinois v. Gates*, 462 U.S. 213, 243 n.13, 103 S. Ct. 2317, 2335 n.13, 76 L. Ed. 2d 527, 552 n.13 (1983). But "reasonable suspicion exists when 'the totality of the circumstances—the whole picture' supports the inference that a crime has been or is about to be committed." *Wainwright*, 240 N.C. App. at 84, 770 S.E.2d at 105 (quoting *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 440 (2008)).

A *Terry* stop's duration is governed by the "mission" of the stop and the "related safety concerns." *Rodriguez v. United States*, 575 U.S. 348, 354, 135 S. Ct. 1609, 1614, 191 L. Ed. 2d 492, 498 (2015). In other words, a *Terry* stop may last no longer than is necessary to confirm or dismiss the suspicion that warranted the stop and to "attend to related safety concerns." *See id.* at 354, 135 S. Ct. at 1614, 191 L. Ed. 2d at 498.

Regarding related safety concerns, "an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely . . . ." *State v. Johnson*, 279 N.C. App. 475, 484, 865 S.E.2d 673, 680 (2021) (quoting *State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 673 (2017)). Therefore, "time devoted to officer safety is time that is reasonably required to complete that mission." *Id.* at 484, 865 S.E.2d at 680 (quoting *Bullock*, 370 N.C. at 262, 805 S.E.2d at 676).

2. Criminal Trespass

Criminal trespass requires a defendant to enter property without authorization, and the defendant must have had some indication that she should not have entered the property. *See* N.C. Gen. Stat. §§ 14-159.12–.13 (2023). First-degree trespass applies, for example, when the defendant enters the "premises of another so enclosed or secured as to demonstrate clearly an intent to keep out intruders." *Id.* § 14-159.12(a)(1). And second-degree trespass applies, for example, when the defendant enters "the premises of another after the person has been notified not to enter or remain there by the owner." *Id.* § 14-159.13(a)(1).

3. Application

Here, we must first determine whether Lieutenant Beam seized Defendant before we can determine whether any seizure was reasonable. *See* U.S. Const. amend. IV. When Lieutenant Beam first approached Defendant and Passenger on the trail, a reasonable person in Defendant's situation may have felt free to leave. *See Isenhour*, 194 N.C. App. at 543, 670 S.E.2d at 267.

Nonetheless, a reasonable person in Defendant's situation would not have felt free to leave once Lieutenant Beam had Defendant's driver's license. *See id.* at 543, 670 S.E.2d at 267. At that point, if Defendant wanted to leave, he would have needed to do so without his driver's license. No reasonable person would have done so. Further, after Deputy Hilemon arrested Passenger at the bottom of the trail, Lieutenant Beam still had Defendant's driver's license, and Lieutenant Beam then asked Defendant if he had anything illegal in the car.

At this point, a reasonable person in Defendant's shoes would feel compelled to stay. *See id.* at 543, 670 S.E.2d at 267. And immediately after Lieutenant Beam inquired about contraband in the car, Defendant told Lieutenant Beam that he was "welcome to look." Accordingly, Defendant was seized when he consented to the search. *See id.* at 543, 670 S.E.2d at 267. So the next question is whether Defendant was reasonably seized.

Because Lieutenant Beam seized Defendant for investigatory purposes, we must discern whether Lieutenant Beam had reasonable suspicion. *See Mangum*, 250 N.C. App. at 720, 795 S.E.2d at 113. And if Lieutenant Beam had reasonable suspicion, we must discern whether the seizure lasted longer than necessary to confirm or dismiss the suspicion. *See Rodriguez*, 575 U.S. at 354, 135 S. Ct. at 1614, 191 L. Ed. 2d at 498.

Lieutenant Beam arrived at the trail to investigate an alleged trespass. On arrival, Lieutenant Beam spoke to several concerned neighbors about a suspicious car, and he spoke to the trail owner, who said an unauthorized car drove up his trail and "not come back down." This evidence is enough to support reasonable suspicion because it supports an "inference that a crime ha[d] been or [wa]s about to be committed." *See Wainwright*, 240 N.C. App. at 84, 770 S.E.2d at 105; N.C. Gen. Stat. §§ 14-159.12–.13. Indeed, this evidence supports a reasonable probability of trespass, so Lieutenant Beam actually had probable cause to suspect that Defendant was trespassing. *See Gates*, 462 U.S. at 243 n.13, 103 S. Ct. at 2335 n.13, 76 L. Ed. 2d at 552 n.13.

The crux of this case, however, is whether Lieutenant Beam confirmed or dismissed his suspicion before Defendant consented to a search of the car. *See Rodriguez*, 575 U.S. at 354, 135 S. Ct. at 1614, 191 L. Ed. 2d at 498. It is true that Defendant told Lieutenant Beam that he did not know he was on private property. Without more, this could have dispelled Lieutenant Beam's suspicion of trespass. *See* N.C. Gen. Stat. § 14-159.12–.13. But it is also true that Defendant could have lied to Lieutenant Beam: Lieutenant Beam testified that Defendant and

Passenger were fidgeting and acting nervous. So Defendant's denial, on its own, was not enough to dispel Lieutenant Beam's reasonable suspicion of trespass.

Further, before Defendant consented to the search, Lieutenant Beam realized that Passenger had an outstanding warrant for her arrest. Although accompanying a wanted criminal is not necessarily indicative of criminal activity, it also does not dispel the suspicion of criminal activity.

Moreover, Lieutenant Beam did not wrongfully extend Defendant's seizure by asking him and Passenger to drive to the bottom of the trail. Rather, Lieutenant Beam's request was merely a safety measure. *See Johnson*, 279 N.C. App. at 484, 865 S.E.2d at 680. Instead of investigating Defendant and Passenger alone at the top of a mountain trail, Lieutenant Beam opted to finish his investigation with his backup officer at bottom of the trail. The time required to drive to the bottom of the trail was negligible, and "time devoted to officer safety is time that is reasonably required to complete th[e] mission." *See id.* at 484, 865 S.E.2d at 680 (quoting *Bullock*, 370 N.C. at 262, 805 S.E.2d at 676).

In other words, when Defendant consented to the search, he was not unreasonably seized by Lieutenant Beam. The mission of Lieutenant Beam's seizure was to investigate an alleged trespass, Lieutenant Beam had reasonable suspicion of trespass, and Defendant and Passenger's behavior did not alleviate Lieutenant Beam's suspicion or any "related safety concerns." *See Rodriguez*, 575 U.S. at 354, 135 S. Ct. at 1614, 191 L. Ed. 2d at 498.

Thus, because Defendant was not unreasonably seized when he consented to the search of his car, his consent was not per se involuntary. *See Royer*, 460 U.S. at 507–08, 103 S. Ct. at 1329, 75 L. Ed. 2d at 243. Accordingly, we affirm the Order's conclusion that Lieutenant Beam maintained reasonable suspicion when Defendant consented to the search, and we affirm the Order's finding that Defendant consented to the search.

V. Conclusion

We hold that competent evidence supports the Order's findings of fact, the Order's findings of fact support its conclusions of law, and the Order's conclusions of law are legally correct. Therefore, we discern no error.

NO ERROR.

Chief Judge DILLON and Judge MURPHY concur.

STATE OF NORTH CAROLINA
v.
MARK ANTHONY JENKINS, DEFENDANT

No. COA23-1107

Filed 1 October 2024

Sexual Offenses—sentencing—Justice Reinvestment Act—date of offense—evidence sufficient

The trial court did not err in sentencing defendant for indecent liberties with a child pursuant to N.C.G.S. § 15A-1340.17(d)—as amended by the Justice Reinvestment Act and applying to offenses committed on or after 1 December 2011—where the victim testified about her date of birth, that the abuse began when she was in fifth or sixth grade, and that it continued until she was fourteen or fifteen years of age. Even drawing inferences that were mathematically favorable to defendant, that evidence was more than mere "suspicion and conjecture"; it tended to show that defendant committed indecent liberties against his step-granddaughter both before and after the effective date of the sentencing amendment.

Appeal by Defendant from judgment entered 2 March 2023 by Judge Lori I. Hamilton in Davidson County Superior Court. Heard in the Court of Appeals 14 August 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Danielle M. Orait, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Franke, for the defendant-appellant.

STADING, Judge.

Mark Anthony Jenkins ("Defendant") appeals from a jury's verdict finding him guilty of three counts of indecent liberties with a child and two counts of statutory sexual offense with a child fifteen years of age or younger. Defendant contends the trial court improperly sentenced him. After careful review, we discern no error.

I. Background

On 8 November 2021, Defendant was indicted for three counts of indecent liberties with a child and two counts of statutory sexual

offense with a child fifteen years of age or younger. The victims were Defendant's step-grandchildren, Tara and Kate.[1] Defendant's appeal concerns Defendant's conviction in case number 21 CRS 51598 for the offense of indecent liberties upon Tara.

At trial, Tara testified that Defendant began giving her leg massages when she was "probably about . . . [in] the fifth grade" and escalations of Defendant's conduct continued "often" until she was about "14 [or] 15." As the conduct developed, Tara recounted being uncomfortable and scared. As time went on, the leg massages turned into more consistent touching, with Defendant moving his hands further up Tara's thigh to her private parts. She recalled that Defendant would open her legs and eventually move his hands underneath her shorts. Tara also described how Defendant showed her pornographic material and asked to see her breasts. Defendant informed Tara that if she told anyone, "he's going to go to jail and nobody's going to believe [her]."

In 2011, the General Assembly enacted the "Justice Reinvestment Act," which amended N.C. Gen. Stat. § 15A-1340.17 (2023). *See* 2011 N.C. Sess. Laws 192, sec. 2.(e). Before the amendment became effective, a prior record level one offender convicted of a class F felony, occurring between 1 December 2009 and 30 November 2011, would be sentenced at the top of the presumptive range at sixteen to twenty months. *See* N.C. Gen. Stat. § 15A-1340.17(d) (eff. 1 Dec. 2009). After the amendment became effective, a prior record level one offender convicted of a class F felony, occurring on or after 1 December 2011, would be sentenced at the top of the presumptive range at sixteen to twenty-nine months. *See* N.C. Gen. Stat. § 15A-1340.17(d) (eff. 1 Dec. 2011). In essence, the amendment created nine months of post-release supervision for Class F through I felonies. *Id.*

At the conclusion of Defendant's trial, a jury found him guilty of two counts of statutory sex offenses with a child less than or equal to fifteen years of age and three counts of indecent liberties with a child. Under case number 21 CRS 51598, Defendant was convicted of indecent liberties with a child and sentenced as provided under the Justice Reinvestment Act to serve an active term of sixteen to twenty-nine months. N.C. Gen. Stat. § 15A-1340.17(d) (2023). Defendant timely entered his notice of appeal.

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1. Pseudonyms are used to protect the identity of minors. *See* N.C. R. App. P. 42(b) (2023).

II. Analysis

Defendant argues that the State's evidence was unclear as to whether he committed the offenses before or after 1 December 2011, and he should have been sentenced under the version of N.C. Gen. Stat. § 15A-1340.17 for "offenses committed between 1 December 2009 and 1 December 2011." Thus, Defendant argues the trial court committed reversible error by sentencing him under the Justice Reinvestment Act. "[N]onconstitutional sentencing issues are preserved without contemporaneous objection. . . ." *State v. Meadows*, 371 N.C. 742, 749, 821 S.E.2d 402, 407 (2018). When a defendant challenges the sentence imposed by the trial court, the "standard of review is 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.' " *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1) (2023)).

Defendant contends that *State v. Poston* controls this appeal. 162 N.C. App. 642, 591 S.E.2d 898 (2004). After careful review, we disagree. The defendant in *Poston* was indicted for sex crimes committed against a minor, and the indictment alleged the offenses occurred during the period of 1 June 1994 to 31 July 1994, and from 8 October 1997 to 16 October 1997. *Id.* at 645–46, 591 S.E.2d at 901. Effective 1 October 1994, the General Assembly enacted the Structured Sentencing Act to replace the Fair Sentencing Act. *Id.* at 646, 591 S.E.2d at 901. The defendant was sentenced under the Fair Sentencing Act for crimes committed before 1 October 1994. *Id.* During the trial, however, testimony revealed the offenses occurred when the victim was "around seven" years of age, and the victim turned seven well after the enactment of the Structured Sentencing Act. *Id.* at 651, 591 S.E.2d at 904. This Court held "[t]he testimony that [the sexual offenses] occurred when [the victim] was '[a] round seven' … supports only a suspicion or conjecture that the crime occurred prior to 1 October 1994." *Id.* As such, *Poston* instructs when more than one sentencing regime could apply for offenses occurring during a range of time, there must be more than "suspicion or conjecture" that the offensive acts occurred after the new regime became effective. *Id.*

Here, the State's evidence supports more than mere "suspicion and conjecture" that Defendant committed indecent liberties against Tara both before and after the 1 December 2011 effective date of the Justice Reinvestment Act. *Id.* Early in her direct examination at trial on 28 February 2023, Tara testified she was then twenty-two years old and

gave her date of birth.[2] Tara stated she first met Defendant "[a]round 2007." Next, Tara was asked about the beginning of the conduct:

> PROSECUTOR: Now, sort of drawing your attention to middle school. Around fifth or sixth grade, were you going over to your grandparents' house a lot?
>
> TARA: Yes.
>
> PROSECUTOR: And during that time frame, did anything ever happen with the defendant that made you feel uncomfortable?
>
> TARA: Yes.
>
> PROSECUTOR: If you could talk to the jury about when that started.
>
> TARA: I would say probably about, yeah, fifth grade, we would be over there and I would be watching a movie and there would be, like, leg massages. And at first it was, like, I'm a kid, so I'm just going to think, oh, just a fine little leg massage. But then after that, it would be going a little bit up more on my thighs and then it would just be a constant thing.

Then, Tara explained when Defendant's conduct ceased:

> PROSECUTOR: How often do you think the massaging of the legs and moving his hand up, how often do you think that happened?
>
> TARA: Often. Pretty frequently.
>
> PROSECUTOR: Was it like every time you went over there?
>
> TARA: Yes. Until about the age of, like, 15 -- 14, 15.

Even drawing inferences from this testimony that are mathematically favorable to Defendant, this evidence tends to show the conduct continued until at least 2014—well beyond the Justice Reinvestment Act's 1 December 2011 effective date. Thus, the evidence presented at trial is not mere "suspicion or conjecture" and adequately supports the

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2. Although the victim testified to her date of birth at trial, this matter is under seal and her personally identifying information is not stated herein.

sentence rendered by the trial court. *See Poston*, 162 N.C. App at 651, 591 S.E.2d at 904; *see also Deese*, 127 N.C. App. at 540, 491 S.E.2d at 685. Accordingly, we discern no error in Defendant's sentencing.

III. Conclusion

We hold the trial court's imposition of Defendant's sentence is without error.

NO ERROR.

Judges TYSON and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
JOSHUA DAVID REBER

No. COA22-130-2

Filed 1 October 2024

1. Constitutional Law—effective assistance of counsel—failure to file motion to suppress cell phone search—lack of prejudice

In a prosecution for multiple sexual offenses, defendant's counsel did not render ineffective assistance by failing to file a motion to suppress evidence obtained from defendant's cell phone pursuant to a search warrant. Defendant could not establish prejudice from his counsel's failure where, because probable cause existed to support the issuance of the warrant—based on a report from the victim that defendant had sent her nude photos and texts containing sexual content from his cell phone, none of which was ultimately found on the phone seized from defendant—there was no reasonable probability of a different outcome had the motion been made.

2. Appeal and Error—preservation of issues—juror qualification—failure to challenge—no prejudice—no structural error

In a prosecution for multiple sexual offenses, defendant failed to preserve for appellate review his argument that, because four jurors empaneled on his jury had served on a jury in a separate case earlier the same day, they were not qualified to serve as jurors in defendant's trial pursuant to N.C.G.S. § 9-3 (which lists as a requirement that a prospective juror not have "served as a juror during

the preceding two years"). Defendant neither availed himself of his recourse for the alleged statutory violation by challenging the jurors for cause, nor exhausted his peremptory challenges, a necessary precondition for demonstrating prejudice. Further, without a showing of prejudice, defendant's argument that the trial court committed structural constitutional error also failed. Finally, assuming arguendo that the issue had been properly preserved, defendant failed to show that he was deprived of a fair trial.

Appeal by Defendant from judgments entered 9 August 2021 by Judge Forrest D. Bridges in Ashe County Superior Court. Originally heard in the Court of Appeals on 19 October 2022, with opinion issued 16 May 2023 by a divided panel of this Court. *See State v. Reber*, 289 N.C. App. 66, 887 S.E.2d 487 (2023), ("*Reber I*"). By plurality opinion filed 23 May 2024, the Supreme Court of North Carolina reversed this Court's decision and remanded for consideration of the issues not previously addressed in *Reber I*. *See State v. Reber*, 386 N.C. 153, 900 S.E.2d 781 (2024).

Attorney General Joshua H. Stein, by Special Deputy Attorney General Margaret A. Force, for the State.

Daniel M. Blau, for the Defendant.

WOOD, Judge.

This case is before us on remand from the Supreme Court of North Carolina for the sole purpose of considering Defendant's two remaining arguments on appeal not contemplated by this Court in *Reber I*. Namely, whether Defendant received ineffective assistance of counsel when his attorney failed to move to suppress evidence obtained from his cell phone pursuant to a search warrant; and whether the trial court committed structural constitutional error by allowing four disqualified jurors to serve on Defendant's trial. After careful consideration of Defendant's remaining arguments, we conclude Defendant received a fair trial free from error.

I. Factual and Procedural Background

The factual background and history of this case are fully set forth in *Reber I* and the Supreme Court opinion further summarized and addressed the facts relevant to its holdings on the issues. *State v. Reber*, 289 N.C. App. 66, 887 S.E.2d 487 (2023), *rev'd and remanded*, 386 N.C.

153, 900 S.E.2d 781 (2024). Accordingly, we now consider only those facts pertinent to Defendant's two remaining arguments on appeal.

This case concerns the sexual abuse of a minor child, K.W.,[1] spanning many years. The abuse was uncovered when K.W. informed her mother that Joshua Reber ("Defendant") had been regularly engaging in sexual acts with her. The sexual abuse began when K.W. was eight years old and ended around her eleventh birthday in 2015. K.W. testified that for over three years most incidents occurred in private locations or at nighttime, and included vaginal sex, digital penetration, and oral sex. K.W. additionally testified that she communicated with Defendant on Facebook Messenger and Snapchat, where they sent nude photos to one another.

Defendant was arrested on 4 November 2015 for several counts of sexual offense with a child and rape of a child. Following his arrest, on 19 November 2015, the investigating law enforcement officer obtained a search warrant for Defendant's phone. On 15 March 2016, Agent Anderson of the SBI conducted a forensic examination of his cell phone. The information extracted from the phone indicated that the phone had not been "activated" until May 2015, one month after the alleged abuse stopped. Agent Anderson testified that various applications were installed on the phone on 15 May 2015, which, in his training and experience, is consistent with the activation of a new cell phone. Agent Anderson did not find evidence of nude photograph exchanges or other communications between Defendant and K.W. Rather, the data extraction contained thousands of text messages between Defendant and his girlfriend at that time, Danielle. Agent Anderson further testified that an attempt to conduct a forensic examination of K.W.'s device was unsuccessful due to technical issues. Thus, the search of both Defendant's and K.W.'s devices did not render any evidence indicative of K.W. and Defendant's relationship. Defendant's attorney did not file a motion to suppress the evidence discovered pursuant to the search warrant.

Defendant came on for a jury trial during the 2 August 2021 criminal session of Ashe County Superior Court. At trial, Defendant testified on his own behalf, denied ever engaging in any sexual activities with K.W., and denied exchanging nude photos with K.W. Defendant further testified that he did not buy a new phone to hide any previous communications between him and K.W. Additionally, he stated that he had not used

1. A pseudonym is used to protect the identity of the juvenile pursuant to N.C. R. App. P. 42(b).

Snapchat during the period between 2012 and 2015 to communicate with K.W. but may have downloaded the application on one occasion in 2015 to chat with his girlfriend Danielle. On cross-examination, the State questioned Defendant about his relationship with Danielle and certain text messages exchanged between them. The first text message exchange introduced at trial concerned a prior sexual encounter that had occurred between Defendant and Danielle while she was intoxicated. The other text message exchange concerned their desire to meet at a motel to engage in sexual activity. Defendant informed Danielle that he would have to bring his daughter and ask her not to say anything about it to his grandparents because they are religious and did not condone of sexual activity outside of marriage. These text messages, discovered pursuant to the search warrant, were referenced again during the prosecutor's closing argument.

The jury was tasked with weighing K.W.'s detailed testimony against Defendant's blanket denial, as there were no witnesses or physical evidence of the alleged abuse. Ultimately, on 9 August 2021, the jury found Defendant guilty of four counts of rape of a child and six counts of sex offense with a child. The trial court consolidated the charges and Defendant was sentenced to two consecutive terms of 300 to 420 months of imprisonment. Defendant gave oral notice of appeal in open court and filed a written notice of appeal on 13 August 2021.

In *Reber I*, Defendant argued before this Court that (1) the trial court committed plain error by allowing the State to introduce into evidence the text message exchanges between Defendant and Danielle; (2) the trial court erred by failing to intervene *ex mero motu* in response to certain statements made by the State during the prosecutor's closing argument; (3) the search warrant to access Defendant's phone was deficient and Defendant received ineffective assistance of counsel when his attorney failed to file a motion to suppress the evidence obtained therein; and (4) the trial court committed structural constitutional error by allowing multiple disqualified jurors to serve on Defendant's trial. *State v. Reber*, 289 N.C. App. 66, 74, 887 S.E.2d 487, 495 (2023). On 23 May 2024, a divided Supreme Court issued an opinion which reversed this Court's majority opinion and remanded with instruction for consideration of Defendant's remaining arguments on appeal. *State v. Reber*, 386 N.C. at 166, 900 S.E.2d at 791 (2024).

II. Analysis

We now consider (1) whether Defendant received ineffective assistance of counsel when his attorney failed to move to suppress the search

warrant granting access to Defendant's cell phone records because it was not supported by probable cause; and (2) whether the trial court committed structural constitutional error when it allowed four jurors, who were empaneled on a preceding case during the same session of the court, to serve on Defendant's trial.

A. Ineffective Assistance of Counsel

[1] Whether a Defendant received ineffective assistance of counsel is reviewed *de novo* on appeal. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (citation omitted). "[T]he Appellate Rules generally require that parties take some action to preserve an issue for appeal. Exceptions exist, however, allowing a party to raise an issue on appeal that was not first presented to the trial court." *State v. Meadows*, 371 N.C. 742, 746, 821 S.E.2d 402, 405 (2018) (citation omitted). Among these exceptions is a claim for ineffective assistance of counsel, allowing a party to assert this type of claim for the first time on appeal. "Generally, a claim of ineffective assistance of counsel should be considered through a motion for appropriate relief before the trial court in post-conviction proceedings and not on direct appeal." *State v. Allen*, 262 N.C. App. 284, 285, 821 S.E.2d 860, 861 (2018) (citation omitted). When this Court reviews this type of claim on direct appeal, the claim "will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted).

To establish a claim for ineffective assistance of counsel, the defendant carries the burden of satisfying a two-part test. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). This well-established test requires that

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). The first prong is measured under an objective, reasonableness standard

and requires the defendant to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *State v. Stroud*, 147 N.C. App. 549, 555, 557 S.E.2d 544, 548 (2001) (cleaned up). "Counsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001). Under the second prong, establishing prejudice, the test asks "whether there is a 'reasonable probability' that, absent the errors, the result of the proceeding would have been different." *Reber*, 386 N.C. at 159, 900 S.E.2d at 787 (citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (cleaned up).

To assess whether Defendant received ineffective assistance of counsel when his counsel failed to challenge the search warrant through a motion to suppress, we first must determine whether the issuance of the warrant was lawful. *See State v. Hernandez*, 899 S.E.2d 899, 913 (N.C. Ct. App. 2024) ("Had Defendant's trial counsel objected to the [search warrant], the result of the proceeding would have been the same. Thus, we can discern from the Record on appeal that Defendant was not prejudiced . . . and he did not receive [ineffective assistance of counsel]."). Defendant argues that the search warrant and supporting affidavit contain "multiple deficiencies," including failure to establish temporal proximity and failure to establish probable cause.

"Pursuant to N.C. Gen. Stat. § 15A-244, an application for a search warrant must contain a statement of probable cause and allegations of fact supporting the statement of probable cause. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause." *State v. Eddings*, 280 N.C. App. 204, 209, 866 S.E.2d 499, 503 (2021) (cleaned up). The supporting affidavit "is sufficient if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence [of] . . . the items sought and that those items will aid in the apprehension or conviction of the offender." *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984) (citation omitted). In other words, "[t]he affidavit must establish a nexus between the objects sought and the place to be searched." *State v. Parson*, 250 N.C. App. 142, 152, 791 S.E.2d 528, 536 (2016) (citations omitted). Whether probable cause exists is viewed under the "totality of the circumstances" test. *Id.* at 151, 791 S.E.2d at 536 (citation omitted). The totality of the circumstances test requires a "common-sense decision based on all the circumstances that there

is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) (cleaned up).

To establish probable cause for the issuance of a search warrant, the determination "is grounded in practical considerations" and "does not mean actual and positive cause nor import absolute certainty." *State v. Steen*, 352 N.C. 227, 243, 536 S.E.2d 1, 11 (2000) (cleaned up). Rather, "[a] magistrate may draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant." *State v. Riggs*, 328 N.C. 213, 221, 400 S.E.2d 429, 434 (1991) (cleaned up). The issuing magistrate is tasked with "mak[ing] a practical, common-sense decision" and "great deference should be paid to a magistrate's determination of probable cause." *State v. Dexter*, 186 N.C. App. 587, 592, 651 S.E.2d 900, 904 (2007) (cleaned up).

In the present case, the affidavit attached to the search warrant application includes under "item to be searched":

> Verizon cell phone having cell number 828-514-1208 seized from the property of inmate Joshua David Reber, currently incarcerated in the Ashe County Detention Center, on _____. The phone has remained in the custody of Your Affiant since the seizure.

The affiant, Captain Gentry, indicated under "items to be seized," that she sought discovery of electronically stored information, such as telephone calls, text messages, contact list, photographs, and billing information. Captain Gentry's probable cause statement, detailed her training, experience, and expertise as to child sexual abuse cases, explaining that it is a "common practice" for one alleged with the commission of this offense to use a cell phone to store evidence of criminal activity, such as the exchanging of nude photographs or text messages about sexual acts. Further, Captain Gentry explained,

> Based on information provided hereafter, this Affiant believes that probable cause exists to conclude that the pertinent information may be found on the aforementioned device, described earlier in this application. Specifically, the alleged child victim has reported that the Defendant Joshua David Reber did send nude photos to her using such programs as SNAPCHAT via his cell phone. Defendant Reber would also send text messages containing sexual conduct involving the alleged victim and himself.

Ultimately, the warrant issued and the cell phone was searched, but the evidence sought was not found. The search indicated that the phone did not contain data prior to May 2015, one month after the alleged abuse stopped.

Defendant contends the search warrant application was deficient because (1) it is not clear how or when the phone came into the officers' possession; (2) there is no time frame provided for when the illegal activity allegedly took place; and (3) there is no indication that K.W. provided investigators with the phone number that Defendant used to communicate with her, so it is impossible to confirm that the seized phone was the same phone Defendant used to commit the alleged offense. Defendant argues that, due to these errors, the warrant was unsupported by probable cause.

In considering Defendant's argument, we note an issuing magistrate is permitted to draw "reasonable inferences" from the warrant application. *Riggs*, 328 N.C. at 221, 400 S.E.2d at 434. As to Defendant's first issue, Captain Gentry clearly states how the cell phone came into the officers' possession in the affidavit—it was "seized from the property of inmate [Defendant], currently incarcerated in the Ashe County Detention Center." Thus, the magistrate could reasonably infer that the cell phone was seized at the time of Defendant's arrest. Second, although Defendant correctly states that the affidavit does not include a time frame of when the alleged illegal activity took place, it does indicate that this matter concerns an "on-going investigation" and it is "common practice" to "store information of criminal activity" on a cell phone. Further, it states that K.W. informed law enforcement that Defendant sent nude photos of himself to her over snapchat and sent text messages referencing sexual activity to her. Thus, the warrant application and affidavit contained information sufficient for a magistrate judge to conclude Captain Gentry sought information stored on Defendant's cell phone related to K.W.'s statement. The magistrate could reasonably infer that the "time frame" would be established by evidence recovered from Defendant's phone. Lastly, Defendant's contention regarding the impossibility of confirming, prior to the search, that Defendant used that particular phone to communicate with K.W., lacks merit. Again, it is reasonable for a magistrate to have inferred that the phone in Defendant's possession at the time of his arrest and incarceration was in fact the same phone used to contact K.W. and evidence of the alleged crime would have potentially been stored on that cell phone. Accordingly, these inferences are "grounded in practical considerations" and the affidavit was not deficient for any of the three reasons raised by Defendant on appeal. *Steen*, 352 N.C. at 243, 536 S.E.2d at 11.

This Court has held, "[p]robable cause cannot be shown, however, by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based." *State v. Rayfield*, 231 N.C. App. 632, 651, 752 S.E.2d 745, 759 (2014) (cleaned up). An affidavit is not purely conclusory when it details "some connection or nexus linking the [property] to illegal activity" and that "direct evidence is not always necessary to establish probable cause." *State v. Bailey*, 374 N.C. 332, 335-36, 841 S.E.2d 277, 280-81 (2020) (citation omitted). Here, Captain Gentry's affidavit established a connection linking Defendant's cell phone to illegal, sexual activity with K.W. The affidavit did not simply state Captain Gentry's belief that probable cause exists, rather, it explained, her background and training on this type of criminal activity; how, in her experience, it is "common practice" for information related to the illegal activity to be stored on a cell phone; how Defendant allegedly sent nude photos to K.W. via snapchat; how Defendant sent text messages involving sexual conduct to K.W.; and that the purpose of the warrant was to find evidence of phone calls, text messages, emails, pictures, and videos. Thus, it sufficiently details that a search of Defendant's cell phone may reveal evidence of illegal sexual activity with a child. Accordingly, because the affidavit set out the underlying circumstances from which the issuing judge could find that probable cause existed to search Defendant's cell phone, we conclude that the issuance of the warrant was proper.

Having determined that probable cause existed to support the issuance of the search warrant, we now conclude that "[h]ad Defendant's trial counsel objected to the [search warrant], the result of the proceeding would have been the same." *Hernandez*, 899 S.E.2d 899, 913 (N.C. Ct. App. 2024). *See Braswell*, 312 N.C. at 563, 324 S.E.2d at 249 (Under the second prong of the ineffective assistance of counsel test, a defendant must show a "reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different."). Stated differently, had Defendant's counsel moved to suppress the evidence obtained from the search warrant, the motion would have been properly denied since the warrant was sufficient to establish probable cause. Thus, Defendant is unable to show the requisite prejudice to support a "reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 241.

Since it is understood that "there is no reason for a court deciding an ineffective assistance of counsel claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one[,]"

we need not address the first prong under the test. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069. We hold that Defendant did not satisfy the second prong of prejudice, that his "counsel's errors were so serious as to deprive [him] of a fair trial." *Id.* at 687, 104 S. Ct. at 2064. Accordingly, Defendant did not receive ineffective assistance of counsel when his counsel failed to file a motion to suppress the evidence obtained from the search of his cell phone.

B. Disqualified Jurors

[2] Defendant next argues that the trial court committed structural constitutional error by allowing certain jurors to serve on his trial. From 2 August 2021 to 3 August 2021, the Ashe County Superior Court conducted a jury trial on a different case involving misdemeanor stalking. In that case, the jury returned a verdict of not guilty on the morning of 3 August 2021. Following the verdict, the judge, who also presided over Defendant's trial, addressed the jury. The judge informed the jurors that their service on the misdemeanor stalking case was complete, but since the jurors were already summoned for the week, the judge asked them to stay until he figured out what the State's next case was. In the afternoon of 3 August 2021, during the same session of court, Defendant's case was called for trial. Six of the jurors from the preceding case were selected to participate in *voir dire* for Defendant's case. During the selection process, Defendant's counsel was aware that these six jurors had sat and rendered a not-guilty verdict on the case heard that same morning. Defendant's counsel did not raise any objection, and none of the jurors were challenged for cause. Ultimately, four of the six jurors were empaneled for Defendant's trial.

N.C. Gen. Stat. § 9-3 provides the qualifications of prospective jurors. It states, in relevant part, "[a] person is qualified to serve as a juror" who is "a resident of the State" and "a resident of the county[,]" who "*has not served as a juror during the preceding two years*" and "[a] person not qualified under this section is subject to challenge for cause." N.C. Gen. Stat. § 9-3 (emphasis added). On appeal, Defendant argues that the trial court acted contrary to N.C. Gen. Stat. § 9-3 when it seated the four jurors who had served on the previous case. He argues that these jurors were not permitted to serve on his case, as once the jurors sat and rendered a verdict on the previous case, they were disqualified from further service. Without disqualification, Defendant argues, the statutory mandate of "who have not served as jurors during the preceding two years" is violated. Defendant contends that this improper selection amounts to a structural constitutional error that warrants automatic reversal of the verdict rendered by the jury. Further, Defendant asserts, without

evidence, that because the jurors had already returned a not guilty verdict in the previous case, the four jurors "were more likely to convict [Defendant]" and thus the error was prejudicial to his trial.

Defendant argued three separate grounds upon which this issue should be reviewed on appeal, each will be addressed in turn. First, Defendant argues that "when a trial court acts contrary to a statutory mandate regarding jury selection, the error is preserved even if the defendant did not object below." We disagree. "N.C. Gen. Stat. § 9-3 specifically provides that persons not qualified to be jurors are subject to challenge for cause." *State v. Davis*, 191 N.C. App. 535, 545, 664 S.E.2d 21, 27 (2008) (citation omitted). Defendant's "sole recourse under the statute was to challenge the juror for cause. Having failed to do so at trial, he has not preserved the issue for appellate review." *Id.* (citation omitted). The court did not bar Defendant from challenging for cause and it was incumbent on Defendant to use peremptory challenges appropriately.

However, presuming, without deciding, that the trial court did violate a mandate in N.C. Gen. Stat. § 9-3, Defendant must prove more than a statutory violation. "This Court has consistently required that defendants claiming error in jury selection procedures show prejudice in addition to a statutory violation before they can receive a new trial." *State v. Garcia*, 358 N.C. 382, 406–07, 597 S.E.2d 724, 743 (2004) (citations omitted). To establish prejudice in jury selection, the defendant must have exhausted all peremptory challenges. *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000) (citations omitted). If peremptory challenges are unused, and the defendant makes no challenge for cause, then he cannot be said to have been forced to accept an undesirable juror. *Garcia*, 358 N.C. at 408, 597 S.E.2d at 743–44 (citation omitted). N.C. Gen. Stat. § 15A-1217 provides that, in noncapital cases, the "defendant is allowed six challenges." N.C. Gen. Stat. § 15A-1217(b). Defendant does not claim to have exhausted all challenges and the transcript indicates only two of six strikes were used. Consequently, Defendant cannot establish prejudice in the jury selection process.

Second, Defendant claims that "this Court and our Supreme Court have also reviewed unpreserved structural error despite a defendant's failure to object at trial." "Structural error is a rare form of constitutional error resulting from structural defects in the constitution of the trial mechanism which are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Garcia*, 358 N.C. at 409, 597 S.E.2d at 744 (cleaned up). Since the United States Supreme Court first identified structural error in 1991, "that Court has identified only six instances of structural error to date." *Id.* (citations

omitted). Improper selection of jurors in violation of state statute is not one of the six instances identified by the Court. *Id.* Furthermore, "the United States Supreme Court emphasizes a strong presumption *against* structural error." *Id.* at 409-10, 597 S.E.2d at 744-45 (citations omitted). Our Supreme Court "has recently declined to extend structural error analysis beyond the six cases enumerated by the United States Supreme Court." *Id.* at 410, 597 S.E.2d at 745 (citation omitted).

Defendant claims that this Court has previously "reviewed unpreserved structural error." However, both cases provided by Defendant are distinguishable from the current case. In *State v. Colbert*, the defendant was deprived of his "right to counsel." *State v. Colbert*, 311 N.C. 283, 286, 316 S.E.2d 79, 81 (1984). In *State v. Veney*, the Court similarly reviewed whether the defendant was deprived of his right to counsel. *State v. Veney*, 259 N.C. App. 915, 920, 817 S.E.2d 114, 118 (2018). Deprivation of counsel is one of the six structural errors identified by the United States Supreme Court, unlike jury selection issues. *Garcia*, 358 N.C. at 409, 597 S.E.2d at 744. Defendant states that even if this Court does not find structural error, "the error was still prejudicial and requires a new trial," regardless of the standard applied. However, as discussed *supra*, Defendant has failed to establish prejudice in the jury selection process under the facts of his case.

Lastly, Defendant asserts that this Court should review this issue "under Appellate Rule 2" to "prevent manifest injustice to a party." The exercise of Rule 2 was intended to be limited to "rare occasions." *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (citations omitted). This Court has tended to invoke Rule 2 in "circumstances in which [the] substantial rights of an appellant are affected." *Id.* (citation omitted). Defendant asserts, without evidence, that his right to a fair and impartial jury was violated because four jurors who had been empaneled, despite their prior service, were more likely to find him guilty. However, Defendant has failed to demonstrate that his right to a fair and impartial jury was adversely affected. "A defendant is not entitled to any particular juror. His right to challenge is not a right to select but to reject a juror." *State v. Harris*, 338 N.C. 211, 227, 449 S.E.2d 462, 470 (1994). In *Harris*, failure to exhaust peremptory challenges evidenced "satisfaction" with the jury. *Id.* (citation omitted). Defendant had four remaining peremptory strikes but failed to use them. Defendant's decision to not exhaust his peremptory strikes does not deprive him of any substantial right that would justify invoking Rule 2.

Defendant does not satisfy any of the three grounds upon which the issue would be preserved on appeal. Presuming *arguendo* that it was

preserved, Defendant is unable to show that he was prejudiced by the alleged error or that it deprived him of a fair trial.

III. Conclusion

For the foregoing reasons, we conclude that Defendant did not receive ineffective assistance of counsel when his counsel failed to file a motion to suppress because the search warrant was proper and supported by probable cause. Further, Defendant is unable to satisfy the two-part test, as set forth in *Strickland*, to demonstrate ineffective assistance of counsel. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. We also hold that Defendant's jury selection argument was not properly preserved for consideration by this Court. Accordingly, we hold that Defendant received a fair trial free from error.

NO ERROR.

Chief Judge DILLON and Judge COLLINS concur.

STATE OF NORTH CAROLINA
v.
CODIE BRUCE SCHIENE

No. COA23-682

Filed 1 October 2024

Search and Seizure—warrantless search of vehicle—probable cause—odor of marijuana and other circumstances

In a prosecution on drugs and weapons charges arising from the discovery of contraband during the warrantless search of defendant's vehicle after a police officer smelled unburned marijuana, the trial court did not err in denying defendant's motion to suppress where the totality of the circumstances—including, in addition to the detection of the odor of marijuana by a police officer trained and experienced in such identifications, that defendant's car was parked in a location, manner, and time of night that could indicate its use for illegal drug sales—were sufficient to support a reasonable belief that the vehicle contained marijuana. Accordingly, defendant's appellate argument that the legalization of hemp overruled precedent that the odor of marijuana alone could support warrantless vehicle searches was inapposite.

Judge MURPHY concurring in the result only by separate opinion.

Appeal by defendant from judgment entered 30 January 2023 by Judge Matt Osman in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Zachary K. Dunn, and Scott T. Stroud, for the State.

BJK Legal, by Benjamin J. Kull, for Defendant.

PER CURIAM.

Codie Bruce Schiene ("Defendant") appeals from his convictions and judgment entered pursuant to a guilty plea for possession of a firearm by a felon, felonious possession of a stolen firearm, and attaining habitual felon status. Defendant argues the trial court erroneously denied his motion to suppress physical evidence seized from an automobile search. Defendant's argument is based upon the purported similarities between legal hemp and illegal marijuana, particularly the asserted indistinguishable odor when identifying the two substances. We hold the trial court correctly denied Defendant's motion to suppress and affirm the order.

I. Facts and Procedural History

On 22 September 2020, Charlotte Mecklenburg Police Sergeant William Buie ("Sgt. Buie") and Officer Zachary Pegram ("Officer Pegram") were on routine patrol. Around 9:00 p.m., the officers inspected the parking lot of Baymont Inn in the area of Scott Futrell Drive near the airport. Sgt. Buie had previously conducted drug investigations at the Baymont Inn.

The majority of the vehicles in the parking lot were parked in the main parking lot in front of the Baymont Inn. An additional overflow parking lot is located on the side of the hotel. The officers observed two occupants inside a GMC Acadia, which was backed into a parking spot in the far corner of the overflow parking lot on the side of the hotel. Sgt. Buie testified the vehicle was parked in a space that gave the occupants a good view of activity in the parking lot and provided a quick avenue of escape for someone committing criminal acts or activity.

Sgt. Buie parked his marked patrol car about fifteen to twenty feet away from the Acadia, and he and Officer Pegram approached the

vehicle on foot. As Sgt. Buie approached the vehicle, he detected an odor of unburned marijuana. Officer Pegram did not initially smell marijuana.

Sgt. Buie approached the passenger side of the Acadia, while Officer Pegram approached the driver's side. Defendant was in the driver's seat of the vehicle. His nephew, Daquon Luckey ("Luckey"), was present in the passenger seat. Sgt. Buie initiated a conversation with Luckey through the passenger side window. As Luckey rolled the window down to speak with Sgt. Buie, Sgt. Buie identified the odor he had smelled earlier was stronger and coming from inside the Acadia.

Sgt. Buie asked Luckey to exit the vehicle. When Luckey opened the door, the smell became stronger. Within ten seconds of when the officers first approached, Sgt. Buie detained Luckey, and he requested Officer Pegram to go over to the passenger side to detain Defendant. Sgt. Buie then conducted a search of the Acadia and found a firearm, unburned marijuana, digital scales, and an identification of Defendant. The marijuana found was unburned and described as a "leafy green substance in nuggets, in Mason jars, as well as one nugget on the floorboard on the driver's side." There was one Mason jar present on the driver's seat and another inside of a book bag, which dropped out when Defendant exited the vehicle. The Mason jar inside the book bag had a top on it, but the one located on the vehicle's driver's side did not.

Thirty-five minutes after the initial encounter, Sgt. Buie read *Miranda* warnings to Defendant. During those thirty-five minutes, Defendant had made several statements to the officers.

On 12 July 2021, Defendant was indicted on possession of a firearm by a felon, felonious possession of a stolen firearm, and attaining habitual felon status. On 19 August 2022, Defendant filed a motion to suppress the physical evidence seized and all pre-*Miranda* warning statements he a had made during the encounter. On 8 September 2022, Defendant filed an Amended Motion to Suppress. A hearing on the motion was held on 23 September 2022.

The trial court made the following findings of fact:

> 4. Both Sgt. Buie and Officer Pegram had received training at the CMPD Policy Academy regarding drug identification, including learning to detect the order of both burnt and unburnt marijuana. Sgt. Buie has encountered suspected marijuana in the filed hundreds of times. Officer Pegram has encountered suspected marijuana in the field at least a hundred times.

> 5. Neither Sgt. Buie not Officer Pegram have received training to differentiate the odor or appearance of hemp from that of marijuana. Nor do they have field tests to determine the content of THC contained in suspected marijuana while on scene. . . .
>
> 9. In the officers' training and experience, the location and positioning of the GMC Acadia could be indicative of illegal activity because the car was positioned in a way that provided a quick escape, that was distant from the majority of other vehicles in the lot, and that was positioned so that the occupants had full view of anyone, including police, who approached. . . .
>
> 11. As Sgt. Buie approached the car, he smelled an odor of unburned marijuana. The passenger rolled down his window to speak with Sgt. Buie. Upon rolling down the window, Sgt. Buie identified the odor of unburned marijuana as coming from [ ] inside the car. He requested the passenger step out. When the passenger opened the door, the odor of unburned marijuana became stronger.

On 30 September 2022, the trial court denied the motion in part, as to the physical evidence seized, and granted the motion to suppress in part, concerning statements Defendant had made in response to police questioning while in custody, but prior to *Miranda* warnings.

On 30 January 2023, Defendant pled guilty to all three charges. After finding multiple mitigating factors, the court sentenced Defendant to a mitigated active incarceration term of 76 to 104 months. Defendant gave notice of appeal that day.

II. Issues

Defendant raises three issues regarding the trial court's denial of his motion to suppress. He first argues the trial court's factual basis for its denial, that Sgt. Buie "smelled an odor of unburned marijuana" or "identified the odor of unburned marijuana", is unsupported by competent evidence because "such feats of sensory-based deductions are humanly impossible." He further asserts, even if the trial court had found that Sgt. Buie smelled an odor of marijuana, reversal is required due to the advent of legalized hemp, as the "odor alone" doctrine is no longer valid. Finally, Defendant argues the trial court erred when it based its ruling on a misapprehension of law, specifically, when it found that *State v. Teague* stands for the proposition that the so-called "odor alone" doctrine has

survived the advent of legalized hemp in North Carolina. *See State v. Teague*, 286 N.C. App. 160, 179, 879 S.E.2d 881, 896 (2022). We address each in turn.

III. Analysis

The trial court concluded probable cause justified the warrantless search of Defendant's vehicle because Sgt. Buie had "smelled an odor of unburned marijuana." Defendant contends no competent evidence supports any finding of fact that Sgt. Buie had smelled marijuana, because identifying marijuana by smell alone is impossible. Sgt. Buie himself acknowledged that he cannot differentiate between the odor of legal hemp and illegal marijuana. Defendant argues, because the warrantless search of Defendant's vehicle was unsupported by probable cause, the trial court's order denying his motion to suppress must be reversed and the judgment vacated.

A. Standard of Review

In evaluating the denial of a motion to suppress, appellate review "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Brown*, 248 N.C. App. 72, 74, 787 S.E.2d 81, 84 (2016) (citation omitted). Conclusions of law "are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Additionally, there is "great deference [given] to the trial court's ruling on a motion to suppress[.]" *State v. Parker*, 277 N.C. App. 531, 538-39, 860 S.E.2d 21, 28 (2021) (citation and quotation marks omitted).

B. Motion to Suppress

"The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are pe se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *State v. Degraphenreed*, 261 N.C. App. 235, 241, 820 S.E.2d 331, 336 (2018) (citation and internal quotation marks omitted).

One exception is the motor vehicle exception, which states the "search of a motor vehicle which is on a public roadway or *in a public vehicular area* is not in violation of the [F]ourth [A]mendment if it is based on probable cause, even though a warrant has not been obtained." *State v. Isleib*, 319 N.C. 634, 638, 356 S.E.2d 573, 576 (1987) (emphasis supplied).

Under the motor vehicle exception, "a police officer in the exercise of his duties may search an automobile without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile carries contraband materials." *Parker*, 277 N.C. App. at 539, 860 S.E.2d at 28 (citation omitted). Further, if probable cause justified the search of a vehicle, it justifies the search of every part of the vehicle and its contents. *Id*. A probable cause analysis is based upon the "totality of the circumstances." *See Maryland v. Pringle*, 540 U.S. 366, 371, 157 L. Ed. 2d 769, 775 (2003) ("The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances." (citations omitted)).

The State put forth other facts supporting probable cause to search the vehicle aside from the alleged odor of marijuana standing alone. First, the location of Defendant's vehicle within the parking lot and the manner it was parked and positioned could indicate illegal activity, particularly at night. Defendant's car was positioned to provide a quick escape, was distant from most other vehicles in the far corner of the side overflow parking lot, and the occupants had a full view of anyone, including police, who approached. Second, both Sgt. Buie and Officer Pegram had received drug identification training, including learning to detect the odor of both burnt and unburnt marijuana.

As Sgt. Buie approached the car, he smelled an odor of unburned marijuana. Upon Luckey rolling his window down to speak to Sgt. Buie, Sgt. Buie identified the odor of unburned marijuana as coming from inside the car. After requesting Luckey to step out of the vehicle and opening the door, the odor of unburned marijuana became stronger.

These factors are sufficient to support a "reasonable belief" the automobile contained contraband materials. *See Parker*, 277 N.C. App. at 539, 860 S.E.2d at 28. Like the facts in *Parker*, the odor of marijuana and the totality of circumstances gave rise to probable cause. All factors, as observed and detected by the officers, support Sgt. Buie's and Officer Pegram's reasonable suspicions of illegal activity occurring inside of Defendant's car.

Defendant's assertion that the odor of unburned marijuana was the only factual basis to support the denial of the motion to suppress is unsupported by the evidence and findings. Under the totality of the circumstances, the officers had probable cause to perform a warrantless search of Defendant's vehicle. *See Pringle*, 540 U.S. at 371, 157 L. Ed. 2d at 775. The trial court correctly denied Defendant's motion to

suppress in part. Although this holding is sufficient to affirm, we address Defendant's remaining arguments as an alternative basis.

C. The Validity of the "Odor Alone" Doctrine

Defendant alternatively argues that even if the trial court had found that Sgt. Buie smelled an odor of illegal marijuana, the motion to suppress must be reversed following the advent of legalized hemp. In support, Defendant contends the so-called "odor alone" doctrine is no longer valid, challenging the holding in *State v. Greenwood*. 47 N.C. App. 731, 268 S.E.2d 835 (1980), *aff'd in part and rev'd in part*, 301 N.C. 705, 273 S.E.2d 438 (1981).

In *Greenwood*, this Court mentioned two factors for concluding the odor of marijuana gives rise to probable cause for a warrantless search: (1) evidence properly established that the officer believed she smelled marijuana; and, (2) evidence properly established the officer in question was qualified to identify marijuana by its "distinct odor" alone. *Id.* at 741-42, 268 S.E.2d at 841.

This Court reasoned an "officer, trained in the identification of marijuana by its odor, detected the distinct odor of marijuana emanating from defendant's automobile," so there was a sufficient determination of probable cause. *Id.* However, on another issue, it held "even if the further search after defendant's arrest for possession of marijuana was proper, evidence concerning the pocketbook obtained by a search of its contents should have been suppressed." *Id.* at 742-43, 268 S.E.2d at 842.

When *Greenwood* reached our Supreme Court, it reversed this Court's holding on the latter issue, stating that "defendant failed to show that the seizure and search of the pocketbook infringed upon his own personal rights under the Fourth Amendment." *State v. Greenwood*, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981). Following its holding, our Supreme Court stated that this Court "correctly concluded that the smell of marijuana gave the officer probable cause to search the automobile for the contraband drug." *Id.* Defendant argues this statement by the Supreme Court was *obiter dictum*.

Defendant contends the Supreme Court in *Greenwood* made a "passing reference" to this Court's decision regarding the "odor alone" issue, and since the issue was never adjudicated, it is not binding authority. Defendant argues the Supreme Court's holding in *Greenwood* was based upon the understanding law enforcement officers, with sufficient expertise, could reliably detect the distinct odor of marijuana, but this is no longer true. Defendant maintains odor alone cannot justify probable

cause, because even if Sgt. Buie had smelled what could have been unburned marijuana, it could have just as easily been unburned hemp.

Defendant's argument that odor alone cannot justify probable cause is not rooted in any federal or state authority, as no binding authority has upheld any such argument. This Court has repeatedly held "[w]hen an officer detects the odor of marijuana emanating from a vehicle, probable cause exists for a warrantless search of the vehicle for marijuana." *State v. Smith*, 192 N.C. App. 690, 694, 666 S.E.2d 191, 194 (2008) (citation omitted). It can hardly be true that our Supreme Court only made a "passing reference" in *Greenwood* regarding the "odor alone" issue, as it explicitly stated that this Court "correctly concluded that the smell of marijuana gave the officer probable cause to search the automobile for the contraband drug." *Greenwood*, 301 N.C. at 708, 273 S.E.2d at 441. It is clear our Supreme Court agrees the odor of marijuana is sufficient for probable cause. *Id.*

More recently this Court addressed and rejected this specific argument in *State v. Little*, No. COA23-410, 2024 N.C. App. LEXIS 680, 2024 WL 4019033, at *9 (N.C. Ct. App. Sept. 3, 2024). This Court held:

> [D]espite the liberalization of laws regarding possession of industrial hemp, and even if marijuana and industrial hemp smell and look the same, the trial court did not err in concluding there was probable cause for the search of Defendant's vehicle based upon the officer's reasonable belief that the substance he smelled and saw in the vehicle was marijuana.

Id.

This holding is also consistent with multiple federal courts in North Carolina, who also examined the impact of the legalization of industrial hemp and the determination of probable cause. "[T]he smell of marijuana alone . . . supports a determination of probable cause, even if some use of industrial hemp products is legal under North Carolina law. This is because only the probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause." *United States v. Harris*, No. 4:18-CR-57-FL-1, 2019 U.S. Dist. LEXIS 211633, 2019 WL 6704996, at *3 (E.D.N.C. Dec. 9, 2019) (emphasis supplied) (citation and quotation marks omitted).

The United States District Court for the Western District of North Carolina in *United States v. Brooks* also examined a defendant's arguments asserting the alleged smell of marijuana cannot supply probable cause because it could have been from a legal source, reasoning:

> [Pre]suming, arguendo, hemp and marijuana smell "identical," then the presence of hemp does not make all police probable cause searches based on the odor unreasonable. The law, and the legal landscape on marijuana as a whole, is ever changing but one thing is still true: marijuana is illegal. To date, even with the social acceptance of marijuana seeming to grow daily, precedent on the plain odor of marijuana giving law enforcement probable cause to search has *not* been overturned.

United States v. Brooks, No. 3:19-cr-00211-FDW-DCK, 2021 U.S. Dist. LEXIS 81027, 2021 WL 1668048, at *4 (W.D.N.C. Apr. 28, 2021) (footnotes omitted).

In *Teague*, this Court found the reasoning of both *Brooks* and *Harris* persuasive and held: "The passage of the Industrial Hemp Act, in and of itself, did not modify the State's burden of proof at the various stages of our criminal proceeding." *Teague*, 286 N.C. App. at 179, 879 S.E.2d at 896.

Here, as in *Teague*, the smell of marijuana was not the only basis to provide the officers with probable cause. *Id.* at 179 n.6, 879 S.E.2d at 896 n.6. "[T]his is not a case where the detectable odor of marijuana was the only suspicious fact concerning the package. . . . as the totality of the circumstances here was sufficient to give rise to probable cause. Accordingly, this argument is overruled." *Id.* Defendant has not shown error or prejudice under this argument. *See also State v. Johnson*, 288 N.C. App. 441, 443, 886 S.E.2d 620, 631-32 (2023); *Little*, No. COA23-410, 2024 N.C. App. LEXIS 680, 2024 WL 4019033, at *9.

IV. Conclusion

We hold the trial court properly denied Defendant's motion to suppress evidence recovered from the search of Defendant's vehicle. *Id.* Under the totality of the circumstances, sufficient evidence supports probable cause. The trial court's denial of Defendant's motion to suppress is affirmed.

AFFIRMED.

Panel consisting of Judges TYSON, MURPHY and WOOD.

Judge MURPHY concurs in the result only by separate opinion.

MURPHY, Judge, concurring in result only.

Though not considered by the Majority, the trial court made unchallenged, binding findings of fact that law enforcement located Defendant's vehicle in the lot of a hotel "known to be high in violent crime, drug crime, and prostitution" and that "[t]he manner in which the [vehicle] was parked *combined with the high crime nature of the area* and the late hour prompted [Sergeant] Buie to make the decision to approach the car[,]" at which time he detected the odor of marijuana emanating from Defendant's vehicle. *See Teague*, 286 N.C. App. at 167 ("Findings of fact that are not challenged on appeal are deemed to be supported by competent evidence and are binding upon this Court.").

I am bound by the jurisprudential maypole throughout our caselaw that a "high crime area" is a legitimate factor in determining probable cause and not just a legal fiction created to subject the poor and urban areas of our state to an unequal application of the Fourth Amendment. Furthermore, I am bound by our recent decision in *State v. Little* and its application of decisions from our Supreme Court and the Supreme Court of the United States. As a result, when considering the totality of the circumstances in this case, including the high crime area, I would hold the trial court did not err in denying Defendant's motion to suppress. As such, I reluctantly concur in result only.

STATE OF NORTH CAROLINA
v.
DARRICK FOSTER VILLARREAL

No. COA23-186

Filed 1 October 2024

1. Accomplices and Accessories—accessory after the fact—robbery—breaking and entering—sufficiency of evidence

The State presented substantial evidence from which the jury could find defendant guilty of accessory after the fact to robbery with a dangerous weapon and accessory after the fact to felonious breaking or entering, charges arising from defendant's knowledge of and aiding after the fact of a home robbery in which the principal robber stuffed two backpacks full of coins and silver stolen from a safe in the home. Evidence showed that defendant admitted to being present with three other people as plans were being discussed to rob a specific home; after the robbery, defendant picked up two of the others and they discussed where the principal robber had hidden the backpacks; and defendant later aided in locating, moving, and concealing the backpacks.

2. Damages and Remedies—restitution—amount—value of stolen coins and silver—lack of specific evidence—new hearing required

The appellate court granted certiorari to review the trial court's restitution order, which required defendant to pay $12,264.70 after being convicted of multiple offenses arising from a home robbery, during which numerous coins and silver bars were taken from a safe. Although there was some evidence about the value of individual items, the evidence was not specific enough to support the amount listed in the State's worksheet, which was not itemized. The restitution order was vacated and the matter was remanded for a new hearing to determine the appropriate amount of restitution.

Appeal by defendant from judgments entered 21 April 2022 by Judge Michael B. Duncan in Yadkin County Superior Court. Heard in the Court of Appeals 31 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Torrey D. Dixon, for the State.

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

STADING, Judge.

Darrick Foster Villarreal ("Defendant") appeals from judgments entered upon his convictions of accessory after the fact to robbery with a dangerous weapon, accessory after the fact to felonious breaking or entering, and felonious possession of stolen goods, and upon his plea of guilty to attaining habitual felon status. Defendant argues the trial court erred in denying his motion to dismiss the charges of accessory after the fact to robbery with a dangerous weapon and accessory after the fact to breaking or entering. For the reasons below, we hold the trial court did not err in denying his motion to dismiss. Defendant also petitions this Court for a writ of certiorari to obtain a review of the trial court's award of restitution. We allow the petition to issue the writ of certiorari, vacate the restitution order, and remand to the trial court for a new hearing to determine the appropriate amount of restitution.

I. Background

On 26 April 2021, Defendant was indicted for aiding and abetting robbery with a dangerous weapon, accessory after the fact to robbery with a dangerous weapon, accessory after the fact to felony breaking or entering, accessory after the fact to felony second-degree kidnapping, and attaining habitual felon status. On 25 March 2022, Defendant was charged by information with possession of stolen goods. On 13 April 2022, the State dismissed the aiding and abetting robbery with a dangerous weapon charge.

Defendant's trial commenced on the 18 April 2022 criminal session of Wilkes County Superior Court. The State's evidence tended to show that in the afternoon of 6 July 2020, Defendant picked up Brandon Stacy ("Stacy"), Christopher Caudill ("Caudill"), and Heaven Smith ("Smith") by the side of the road in Yadkinville after the vehicle they were driving broke down. The group stopped at a convenience store and then went to Caudill and Smith's residence. Caudill and Smith lived in a small outbuilding behind Caudill's grandparents' home ("the Strickland home").

Once all four were inside the outbuilding, Stacy and Caudill discussed plans to rob Stephen and Ashley Peachey (collectively "the Peacheys"). Either Stacy or Caudill spray painted a plastic gun black, and Stacy put on a black sweatshirt and covered his face with a blue

bandana. Smith helped Stacy pull his hair back. Defendant then left the outbuilding and told the group he would see them later.

Around 5:00 or 5:30 p.m., Stacy left the outbuilding and headed towards the Peacheys' home, which was located less than 100 feet from the Peacheys' business, The Dutch Kettle. Stacy entered through the front door of the Peacheys' home, walked over to the Peacheys' eight-year-old daughter who was standing in the kitchen, and demanded that she take him to her mother, Mrs. Peachey. Mrs. Peachey was in the basement of their home with her one-year-old daughter. Unbeknownst to Stacy, Mrs. Peachey's oldest daughter, who was in an adjoining room, saw Stacy and called Mr. Peachey, who was at The Dutch Kettle, to tell him that there was an intruder in the home. Mr. Peachey ran towards his home after receiving the call.

Meanwhile, the eight-year-old led Stacy to the basement, and Stacy pointed a black gun at Mrs. Peachey. He also had a knife hanging from a sheath. He told Mrs. Peachey that if she did not give him all her money, gold, and silver, he would shoot her. Stacy demanded that Mrs. Peachey open her safe and cut the phone line to the house. Stacy then directed Mrs. Peachey to find her eight-year-old daughter and led Mrs. Peachey and her one-year-old upstairs. As Mrs. Peachey was going up the stairs, he poked his gun in her back and told her to hurry.

When they arrived upstairs, Mrs. Peachey's eight-year-old daughter and her oldest daughter were there. Displaying his gun, Stacy told everyone to head back down to the basement. Stacy directed Mrs. Peachey and her daughters into the room where the safe was located and demanded that Mrs. Peachey open the safe. At that point, Mr. Peachey arrived at his residence and ran down to the basement. Stacy pointed his gun at Mr. Peachey and told him that he was going to "blow [his] head off" if he did not open the safe for him. Mr. Peachey opened the safe, which stored Mr. Peachey and his father's gold and silver coin collection. Stacy had brought a yellow and gray backpack, and Mr. Peachey filled the backpack up with his coins. Stacy then grabbed Mr. Peachey's camouflage backpack, hanging on a nearby hook and began filling it with more coins. Stacy took both backpacks and told Mr. Peachey to show him "the way out of here." Stacy said that if the cops were called, "[w]e're going to come back and eat you up." He then exited through the basement door. Mr. Peachey saw Stacy run through the woods towards the Strickland home. He then called the police.

After leaving the Peacheys' residence, Stacy hid both backpacks in the woods. He returned to the outbuilding and told Caudill and Smith

that the police were coming and that they needed to call Defendant. Smith called Defendant, but he did not answer. Stacy left, and Caudill and Smith went into the Strickland home, where police were waiting. Police apprehended Stacy in a nearby cornfield and questioned Caudill and Smith. Later that night, around 11:00 p.m., Caudill and Smith called Defendant again. Caudill and Smith began walking up the road, away from the Strickland home, and Defendant picked them up. The three went to Winston-Salem to buy heroin. Caudill, Smith, and Defendant returned to Defendant's home and discussed where Stacy had hidden the backpacks.

Defendant searched the woods for the backpacks but could not locate them. Julio Chavez ("Chavez"), Defendant's friend, stood as a "lookout" while Defendant entered the woods. Later that day, Defendant returned to the woods and found both backpacks. Defendant put both backpacks in his car and drove Caudill and Smith to the home he shared with his mother. The backpacks contained silver and bags of coins. Defendant took the backpacks from his car and hid them at his mother's home. The three then drove to Winston-Salem to buy more heroin. Next, they then went to Greensboro and traded a silver bar from the backpacks for heroin. Thereafter, Defendant and Caudill dropped Smith off at the outbuilding, and Defendant and Smith returned to Defendant's home to retrieve the backpacks. When Defendant and Caudill returned to the outbuilding, Defendant threw the backpacks out of the car and left. Caudill and Smith put the contents of one of the backpacks into the other, put the backpacks in a suitcase, and hid the suitcase in a carport located between the Strickland home and the outbuilding.

On 10 July 2020, police searched the carport and found a suitcase which contained one of the backpacks. The backpack had containers filled with coins. During a subsequent search of the Strickland home, police located the second backpack in the attic of the Strickland home and several coins throughout the residence. Police also located a silver coin at Defendant's residence, consistent with the coins missing from the Peacheys' residence.

At the close of the State's evidence, Defendant moved to dismiss all the charges against him. The trial court denied this motion. Defendant testified in his own defense. Following the close of all the evidence, Defendant again moved to dismiss all the charges, which the trial court denied.

On 21 April 2022, a jury found Defendant guilty of accessory after the fact to robbery with a dangerous weapon, accessory after the fact to breaking or entering, and possession of stolen goods. Defendant pleaded

guilty to attaining habitual felon status. The trial court sentenced Defendant to an active term of 84 to 113 months for accessory after the fact to robbery with a dangerous weapon and a consecutive active sentence of 72 to 99 months for possession of stolen goods. The trial court arrested judgment on the accessory after the fact to breaking or entering offense. Defendant was ordered to pay $12,264.70 in restitution. Defendant appeals.

II. Jurisdiction

This Court has jurisdiction to consider Defendant's appeal under N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

III. Analysis

Defendant presents two issues for our consideration: (1) whether the trial court erred by denying his motion to dismiss the accessory after the fact charges, and (2) whether the trial court erred by awarding restitution unsupported by competent evidence. We consider each issue below.

A. Motion to Dismiss

[1] On appeal, Defendant argues that the trial court erred by denying his motion to dismiss the charges of accessory after the fact to robbery with a dangerous weapon and accessory after the fact to breaking or entering. We disagree.

"We review the trial court's denial of a motion to dismiss *de novo*." *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010).

> When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. The defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when it is inconsistent with the State's evidence, the defendant's evidence may be used to explain or clarify that offered by the State. Additionally, a substantial evidence inquiry examines the

> sufficiency of the evidence presented but not its weight, which is a matter for the jury. Thus, if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012) (citations and emphasis omitted).

To survive a motion to dismiss a charge of accessory after the fact to robbery with a dangerous weapon and accessory after the fact to breaking and entering, the State must present sufficient evidence that "(1) the felony has been committed by the principal; (2) the alleged accessory gave personal assistance to that principal to aid in his escaping detention, arrest, or punishment; and (3) the alleged accessory knew the principal committed the felony." *State v. Brewington*, 179 N.C. App. 772, 776, 635 S.E.2d 512, 516 (2006). "The essential elements of robbery with a dangerous weapon are (1) the unlawful taking or attempted taking of personal property from a person or in his presence (2) by use or threatened use of any firearms or other dangerous weapon, implement or means (3) whereby the life of a person is endangered or threatened." *State v. James*, 321 N.C. 676, 686–87, 365 S.E.2d 579, 586 (1988). "The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit a felony or larceny therein." *State v. Cox*, 375 N.C. 165, 172, 846 S.E.2d 482, 488 (2020) (citation omitted).

Defendant first argues that the State failed to present any evidence that Defendant personally assisted Stacy, the principal, in escaping or attempting to escape detection, arrest, or punishment. Defendant contends that it was impossible for him to have personally assisted Stacy because he was not present when Stacy robbed the Peacheys and he had no contact with Stacy after the crimes were committed. We are not convinced.

Smith testified that after Stacy hid the backpacks in the woods, Smith discussed the location of those backpacks with Caudill and Defendant. Defendant then went into the woods on two occasions in search of the backpacks, once with the help of Chavez and once alone. After successfully locating them during his second search, Defendant put the backpacks in his car, drove them to the home he shared with his mother, and hid them there for some time before handing them off to Smith and Caudill. Smith and Caudill then hid both backpacks. They

were later found in the attic of the Strickland home and in a carport between the Strickland home and outbuilding. Viewing this evidence in the light most favorable to the State, there was substantial evidence that after Stacy robbed the Peacheys and hid the backpacks containing coins and silver, Defendant aided Stacy by locating those backpacks, moving them, and concealing them. *See State v. Brewington*, 179 N.C. App. 772, 776, 635 S.E.2d 512, 516 (2006) (stating that "personal assistance in *any* manner so as to aid a felon in escaping arrest or punishment is sufficient to support a conviction as an accessory.").

Next, Defendant asserts that the State failed to present any evidence that he knew Stacy had committed the offenses of robbery with a dangerous weapon or breaking and entering at the time he possessed coins stolen from the Peacheys' home. He relies on his own testimony that he did not know that Stacy intended to rob the Peachey family or to enter into their home. We are not persuaded.

The State presented evidence that Defendant was present in the same small outbuilding where Stacy and Caudill discussed plans to rob the Peacheys. After Stacy had entered the Peacheys' home and robbed them, Defendant picked up Smith and Caudill and the three discussed the bookbags Stacy had obtained and hidden. Smith testified that she told Defendant that Stacy had "went over the fence and left [the bookbags] under the brush in the woods." Smith, Caudill, and Defendant then discussed locating those bookbags. In addition, Detective Arthur C. Shores, III, who was with the Yadkin County Sheriff's Office in July 2020, testified that during an interview with Defendant on 13 July 2020, Defendant admitted "to being there[,] overhearing them talking about the robbery the day of the robbery." This evidence, viewed in the light most favorable to the State, demonstrates that Defendant knew Stacy had committed robbery and breaking or entering.

Here, the State presented sufficient evidence of the elements of accessory after the fact to robbery with a dangerous weapon and accessory after the fact to breaking or entering to withstand a motion to dismiss. Defendant's argument that the trial court erred in denying his motion to dismiss is overruled.

B. Restitution

[2] Defendant challenges the trial court's award of restitution, arguing that it was not supported by competent evidence. However, Defendant acknowledges that he did not file a written notice of appeal from the restitution order and petitions for a writ of certiorari so that this Court can address the merits of his argument.

Rule 21 of the North Carolina Rules of Appellate Procedure provides that this Court may grant certiorari "when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). "A petition for the writ must show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citations omitted). "*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Gantt*, 271 N.C. App. 472, 474, 844 S.E.2d 344, 346 (2020) (citation omitted). We hereby grant Defendant's petition for a writ of certiorari to consider the merits of his challenge to the restitution order.

Under N.C. Gen. Stat. § 15A-1340.34, the trial court may order restitution "for any injuries or damages arising directly and proximately out of the offense committed by the defendant." N.C. Gen. Stat. § 15A-1340.34(c). "We review the trial court's imposition of restitution *de novo*[.]" *State v. Hussain*, 291 N.C. App. 253, 261, 895 S.E.2d 447, 453 (2023) (citation omitted). "[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995) (citation omitted). "[T]he award does not have to be supported by specific findings of fact or conclusions of law, and the quantum of evidence needed to support the award is not high." *State v. Hillard*, 258 N.C. App. 94, 97, 811 S.E.2d 702, 704 (2018).

"Prior case law reveals two general approaches: (1) when there is *no* evidence, documentary or testimonial, to support the award, the award will be vacated, and (2) when there is specific testimony or documentation to support the award, the award will not be disturbed." *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011). In *Moore*, our Supreme Court identified a third approach for cases that "fall in between." *Id.* If there is "some evidence" to support an award of restitution, but "the evidence was not specific enough to support the award[,]" the "appropriate course here is to remand for the trial court to determine the amount of damage proximately caused by [the] defendant's conduct and to calculate the correct amount of restitution." *Id.* at 286, 715 S.E.2d at 849–50.

In the present case, the State's restitution worksheet shows the amount requested as $12,264.70. The worksheet is not itemized. The restitution order provides that Defendant is jointly and severally liable, with Stacy, Caudill, Smith, and "E Strickland," to the Peacheys in the amount of $12,264.70.

Mr. Peachey testified that his safe contained silver bars, as well as the following: "So most of them were Morgan dollars. There were some

what they call Peace silver dollars from a wide range of years. There were some Liberty and Franklin half dollars. . . . And then there were also some American eagles." He did not testify as to the number of coins or silver bars that were taken from his home, but he testified that the value of each silver bar was about $250.00 and that the coins ranged in value from $12.00 to $50.00 each. Detective Shores testified that "based on the fluctuation of [the] price of silver and the value, ups and downs of different years and distinctness of those coins[ ] [s]ometimes they're worth more." Mr. Peachey believed the minimum value of the bars and coins taken from his house was $20,000. That said, Mr. Peachey also testified that he managed to recover $7,000 worth of coins in a box that he found in his yard and "at least $10,000 to $12,000" worth of loose coins in the road.

As in *Moore*, there is "some evidence" in the instant case to support an award of restitution, but the evidence is not specific enough to support the amount included in the State's restitution worksheet or the trial court's award for the damage proximately caused by Defendant. Accordingly, we vacate the restitution award and remand to the trial court for a new hearing to determine the appropriate amount of restitution. *See*, *e.g.*, *State v. Buchanan*, 260 N.C. App. 616, 624, 818 S.E.2d 703, 709–10 (2018).

IV. Conclusion

Since there was substantial evidence of Defendant's accessory after the fact crimes, we hold that the trial court did not err in denying the motion to dismiss. However, because the evidence was not specific enough to support the amount of restitution awarded, we vacate the trial court's restitution order and remand solely on the issue of restitution.

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judges ZACHARY and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
ISAIAH JEROME WASHINGTON

No. COA23-1095

Filed 1 October 2024

Domestic Violence—protective order—knowing violation—sufficiency of evidence

In a prosecution for violating a domestic violence protective order (DVPO) entered against defendant on behalf of his ex-wife and her family, the trial court properly denied defendant's motion to dismiss the charge where the State produced sufficient evidence that defendant knowingly violated the DVPO when he entered a restaurant where his ex-wife's eldest daughter worked, yelled at her upon seeing her there, and, after being asked to leave, placed a photograph on her vehicle in the parking lot. Although defendant claimed that he went to the restaurant without knowing that the daughter would be there, the fact that he made contact with her once he had identified her was enough to show a DVPO violation.

Appeal by defendant from judgment entered 19 April 2023 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 12 June 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Lisa B. Finkelstein, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.

THOMPSON, Judge.

Defendant appeals from a judgment entered upon a jury's verdict finding defendant guilty of violating a domestic violence protective order. On appeal, defendant argues that the trial court erred by denying his motion to dismiss. After careful review, we affirm.

I. Factual Background and Procedural History

Isaiah Washington (defendant) was married to M.A. from 2012 to 2019. At the time of their marriage, M.A. had two daughters from a prior relationship, K.H. and S.H., who were ten and eight years old,

respectively, when their mother married defendant. Ultimately, M.A. and defendant separated in October 2019; in March 2020, M.A. applied for a domestic violence protective order (DVPO) against defendant. Defendant consented to the DVPO and by order entered 6 March 2020, a DVPO was entered in New Hanover County District Court. The DVPO required, *inter alia*, that, "defendant shall not threaten a member of [plaintiff]'s family or household" and that he "stay away" from plaintiff.

Approximately nine months later, on 15 December 2020, defendant entered the restaurant where K.H. had worked for approximately four months. Defendant testified that upon entering the restaurant, he recognized K.H., had a "fight or flight moment[,]" and, according to testimony offered at trial, "immediately turned at [K.H.] and started yelling." Upon identifying defendant, K.H. retreated to the back of the restaurant and notified her manager of defendant's presence. The manager, who was aware of the DVPO against defendant, instructed defendant to leave the restaurant, which defendant did. While leaving the premises, however, defendant identified a vehicle in the parking lot that he believed belonged to K.H.[1] and put a polaroid photograph, which K.H. testified was missing from her mother's drawer, on the windshield of the vehicle.

Later that day, 15 December 2020, a warrant was issued for defendant's arrest for the alleged violation of the March 2020 DVPO. The matter came on for trial on 19 April 2023 in New Hanover County Superior Court. That same day, a jury unanimously found defendant guilty of violating the DVPO, and the trial court sentenced defendant to seventy-five days of confinement in response to violation (CRV) and eighteen months of supervised probation. Defendant entered oral notice of appeal in open court.

II. Discussion

On appeal, defendant contends that the trial court "erred by not dismissing the charge of violating a DVPO" because there was not "substantial evidence [defendant] went to the [restaurant] knowing K.H. worked there . . . ." We do not agree.

A. Standard of review

A trial court's denial of a motion to dismiss due to insufficiency of the evidence "presents a question of law and is reviewed *de novo* on appeal." *State v. Norton*, 213 N.C. App. 75, 78, 712 S.E.2d 387, 390 (2011).

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1. The vehicle in question was a blue Volkswagen "Bug," which doubles as K.H.'s family nickname, "[K.H.] Bug."

"The Court must consider the evidence *in the light most favorable to the State* and the State is entitled to *every reasonable inference* to be drawn from that evidence." *State v. Williams*, 226 N.C. App. 393, 406, 741 S.E.2d 9, 19 (2013) (emphases added).

B. Motion to dismiss

"A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of [the] defendant[ ] being the perpetrator of the charged offense." *Id.* "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* The elements of an offense pursuant to N.C. Gen. Stat. § 50B-4.1 are: "(1) there was a valid domestic violence protective order, (2) the defendant violated that order, and (3) did so knowingly." *Id.* "The word knowingly means that defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged." *Id.* at 399, 741 S.E.2d at 14 (internal quotation marks, ellipsis, and citation omitted).

Defendant's argument rests heavily on our Court's analysis in *State v. Williams*; we find it worthwhile to distinguish the factual circumstances of *Williams* from the present case. In *Williams*, the defendant was charged with violating a DVPO that ordered him to "stay away" from, *inter alia*, "the place where the plaintiff works . . . ." *Id.* at 407, 741 S.E.2d at 20. The defendant argued that the State had not presented sufficient evidence to demonstrate that he had knowledge that the protected person worked at a salon in a public mall. *Id.* at 406, 741 S.E.2d at 19.

Our Court agreed, noting that the defendant "was seen walking in the parking structure of a public mall at some unknown distance from the salon where [the protected person] was working on the night in question." *Id.* at 410, 741 S.E.2d at 21. The court reasoned that the State had not presented evidence that the defendant "was in a location that would permit him to harass, communicate with, follow, or even observe [the protected person] at her salon, which might reasonably constitute a failure to 'stay away' from her place of work." *Id.* Our Court concluded that, "there was no evidence that defendant was aware that [the protected person] worked at the salon, or that he otherwise knew that he was supposed to stay away from [the public mall]" and that "[t]his case is not one where the State presented evidence from which it could be reasonably inferred that [the] defendant was aware that a protected party was present and working at that location." *Id.*

In the present case, however, considering the evidence in the light most favorable to the State and resolving every reasonable inference to

be drawn from that evidence in favor of the State, we conclude that the trial court did not err in denying defendant's motion to dismiss due to insufficiency of the evidence. Unlike in *Williams*, the State presented security footage of defendant "in a location that would permit him to harass, communicate with, follow, or even observe [K.H.] at her" place of employment, a small restaurant, familiar and beloved to communities across the South. *Id.* In fact, defendant did *actually* observe, communicate with, and allegedly, harass, K.H.

The State also proffered testimony evidence that defendant, upon identifying K.H. at her place of employment, yelled something at K.H. Even assuming, *arguendo*, that defendant did not speak to K.H. upon entering her place of employment, after defendant had identified her in the restaurant, and after being instructed to leave, defendant proceeded to place a photograph on K.H.'s vehicle, a clear violation of the DVPO that required he have "no contact" with K.H.

Consequently, we conclude that the trial court did not err in denying defendant's motion to dismiss for insufficiency of the evidence, because, after resolving every reasonable inference to be drawn from the evidence in the State's favor, we are satisfied that there was sufficient evidence from which a jury could, and did, conclude that defendant knowingly violated a valid DVPO when he "made contact" with K.H. at her place of employment.

III. Conclusion

We conclude that the trial court did not err in denying defendant's motion to dismiss due to insufficiency of the evidence. The State presented evidence which, when viewed in the light most favorable to the State, demonstrated that defendant knowingly violated the lawful DVPO. For the aforementioned reason, we discern no error in the judgment of the trial court.

NO ERROR.

Chief Judge DILLON and Judge GORE concur.

TRAVIS JAMES TAYLOR, EMPLOYEE, PLAINTIFF
v.
SOUTHLAND INDUSTRIES, INC., EMPLOYER, OLD REPUBLIC INSURANCE COMPANY, CARRIER GALLAGHER BASSETT SERVICES, THIRD-PARTY ADMINISTRATOR, DEFENDANTS

No. COA24-247

Filed 1 October 2024

Workers' Compensation—average weekly wage—calculation—appropriate method—"fair and just" result

In a worker's compensation case, where a union member (plaintiff) suffered injuries while working as a journeyman pipefitter for a subcontractor (defendant) on a construction project, the Industrial Commission's calculation of plaintiff's average weekly wage using Method 3 under N.C.G.S. § 97-2(5) (listing five calculation methods, ranked in order of preference) was affirmed. The Commission properly determined that Method 3—which applies to employees who worked for less than 52 weeks—applied to plaintiff, who had worked on the construction project for nine and a half weeks, and provided the best approximation of what plaintiff would have earned in his employment at the time of his injury. Further, because of the Commission's unchallenged findings showing that plaintiff could have continued earning wages indefinitely doing the same or similar work but for his injury, the use of Method 3 was "fair and just" to both parties.

Appeal by defendants from opinion and award entered 30 November 2023 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 September 2024.

R. Steve Bowden & Associates, by Edward P. Yount, for the plaintiff-appellee.

Bill Faison Law, by Bill Faison, for the plaintiff-appellee.

Hendrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Samuel Edward Barker, and Amanda Brookie McDonald, for the defendants-appellants.

TYSON, Judge.

Southland Industries, Inc. ("Southland") and Old Republic Insurance Company (collectively "Defendants") appeal from an opinion and award of the North Carolina Industrial Commission (the "Commission"). We affirm.

I. Background

Merck Pharmaceutical contracted with Jacobs Project Management Company ("Jacobs") to serve as general contractor on its construction project located in Durham. Jacobs hired Southland as a subcontractor on the Merck Project. Southland was a signatory contractor with Local Union 421 ("Union") in Durham, which required it to hire Union members to supply their manpower. Travis Taylor ("Plaintiff") is a journeyman pipefitter Union member and was assigned to Southland for work on the Merck Project.

Plaintiff joined the Union in the fall of 2018. Tim Clark, then dispatcher for the Union, emailed Plaintiff on 12 May 2020 to report to Southland for work on the Merck Project at 6:30 a.m. on 18 May 2020. The email did not provide an end date or estimated length of his assignment to Southland for the Merck Project. Plaintiff was informed the *per diem* was $95.00 for workers, who lived fifty or more miles away from the project site, and assigned to work the night shift from 4:00 p.m. until 2:30 a.m.

Plaintiff attended orientation and began work on 21 May 2020. Plaintiff's job duties included the installation and repair of heating, ventilation, and air conditioning ("HVAC") systems by obtaining, handling, rigging, and installing materials and equipment. Plaintiff was hired to weld, operate hand and power tools, ladders, and aerial lifts.

Plaintiff was moving a piece of plywood when he stepped into a two-feet-deep hole, previously covered, but was uncovered on 25 July 2020. Plaintiff sustained three fractures in his right ankle.

Jacobs terminated its contract with Southland on the Merck Project on 21 August 2020. All Southland journeyman pipefitters were laid off and none continued to work for Southland on the Merck Project after 26 August 2020.

Plaintiff filed a Form 18 with the Commission, notified Defendants of his ankle fractures, and alleged an average weekly wage of $2,964.25, with a compensation rate of $1,066.00. Defendants filed a Form 63 with the Commission, conditionally accepting the indemnity and medical benefits of Plaintiff's injury on 2 September 2020. Southland continued to pay Plaintiff's wages through 9 August 2020 and Defendants initiated weekly benefits at the compensation rate of $1,021.38 without prejudice.

Defendants filed a Form 60 accepting the compensability of Plaintiff's injury noting an average weekly wage of $421.25 with a corresponding compensation rate of $280.85 on 9 October 2020. Plaintiff filed a Form 33 request for hearing on the issue of calculating Plaintiff's average weekly wage and compensation rate on 27 October 2021.

The deputy commissioner heard the matter on 24 May 2022, found Plaintiff's average weekly wage as $2,027.98, a compensation rate of $1,358.75, and issued an amended opinion and award on 5 December 2022. The deputy commissioner calculated the average weekly wage using Method 3 of N.C. Gen. Stat. § 97-2(5) (2023). Plaintiff was awarded $1,066.00 weekly, the maximum compensation rate for 2020, the year of his injury.

Defendants appealed to the Full Commission on 16 December 2022, which held a hearing on 4 May 2023. The Full Commission found Method 3 was the appropriate method and calculated Plaintiff's average weekly wage as $2,027.99, with a compensation rate of $1,352.06, which exceeded the maximum compensation rate for 2020. Plaintiff was awarded the maximum compensation rate of $1,066.00.

Defendants were credited for the seven weeks of Plaintiff's salary continuation from the date of accident through 20 August 2020, and for payments from 26 July 2020 through 8 October 2020. Defendants were also entitled to an offset for compensation of $280.85 from 9 October 2020. The Full Commission filed a unanimous opinion and award on 30 November 2023. Defendants timely appealed.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 97-86 (2023).

III. Issue

Defendants argue the Full Commission erred in its calculation of Plaintiff's average weekly wage and compensation rate.

IV. Standard of Review

This Court reviews whether a particular method of determination of an average weekly wage "produces results that are 'fair and just' [as a] question of fact subject to the 'any competent evidence' standard of review in the absence of a showing that the Commission's determination lacked sufficient evidentiary support[.]" *Nay v. Cornerstone Staffing Sols.*, 380 N.C. 66, 85, 867 S.E.2d 646, 659 (2022).

This Court has held: "The determination of the [P]laintiff's average weekly wage requires application of the definition set forth in the Workers' Compensation Act, and the case law construing the statute[,] and thus raises an issue of law, not fact." *Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 331-32, 593 S.E.2d 93, 95 (2004) (citation and internal quotation marks omitted); *see* N.C. Gen. Stat. § 97-2(5) (2023). This Court reviews the Commission's calculation of Plaintiff's average weekly wage *de novo*. *Boney*, 163 N.C. App. at 331-32, 593 S.E.2d at 95.

V. Average Weekly Wage

Defendants argue the Full Commission erred by calculating Plaintiff's average weekly wage by using Method 3. N.C. Gen. Stat. § 97-2(5) (2023).

A. Five Methods of Computation

N.C. Gen. Stat. § 97-2(5) sets out five distinct methods for calculating an injured employee's average weekly wages:

> [Method 1:] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52[.]
>
> [Method 2:] [B]ut if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.
>
> [Method 3:] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.
>
> [Method 4:] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and

> character employed in the same class of employment in the same locality or community.
>
> [Method 5:] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Id. (2023).

This Court has held: "The five methods are ranked in order of preference, and each subsequent method can be applied only if the previous methods are inappropriate." *Tedder v. A&K Enters.*, 238 N.C. App. 169, 174, 767 S.E.2d 98, 102 (2014).

1. Method 3

The Commission determined the first and second methods set out in N.C. Gen. Stat. § 97-2(5) had no application to Plaintiff, given that he had not been employed by Southland for the fifty-two weeks period immediately preceding his injury.

The statutory Method 3 is to be applied when the employee has worked on the job for a period of fewer than fifty-two weeks. *Id.* at 175, 767 S.E.2d at 102. Under this method, the average weekly wages are calculated by dividing the total earnings on the job by the number of weeks or portion of weeks the employee worked. *Id.* This amount was calculated by dividing Plaintiff's total unchallenged earnings, $19,265.90, by the 9.5 total number of weeks he had worked. *See id.*

Plaintiff's weekly wage was $2,027.99. Plaintiff's computed weekly workers' compensation rate was $1,352.06, which exceeded the maximum weekly compensation rate of $1,066.00 for 2020. *See* N.C. Gen. Stat. § 97-29 (a) (2023) ("When an employee qualifies for total disability, the employer shall pay or cause to be paid, as hereinafter provided by subsections (b) through (d) of this section, to the injured employee a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of his average weekly wages, but not more than the amount established annually to be effective January 1 as provided herein, nor less than thirty dollars ($30.00) per week.").

2. Method 5

Defendant argues the Commission's utilization of Method 3 is not "fair and just to both parties" because Jacobs terminated all of

Southland's work on 21 August 2020 for the Merck Project and none of its workers were employed for 52 weeks. Defendants argue the Commission failed to make any findings of fact using Method 3 would be "fair and just to both parties."

Defendant argues the Commission should have applied Method 5, by taking Plaintiff's total earnings and dividing those earnings by 52 weeks and assert Finding of Fact 29 contains "generalities." *Liles v. Faulkner Neon & Elec. Co.*, 244 N.C. 653, 660, 94 S.E.2d 790, 796 (1956).

The Commission found:

> 29. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that having considered the methods for calculation of Plaintiff's average weekly wage set forth in N.C. Gen. Stat. § 97-2(5) and, given the credible evidence presented on the issue and the applicable law, finds the third method to be appropriate in this case. The first and second methods are inappropriate because in this case Plaintiff worked less than 52 weeks immediately preceding the injury in the employment of injury. The third method applies to situations in which employment extended over a period of fewer than 52 weeks prior to the injury and calculates the average weekly wage by "dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages," provided the results are fair and just to both parties. The preponderance of the available credible evidence in this case establishes that, as of the date of injury, Plaintiff was an employee of Defendant-Employer, having earned $19,265.90 in total wages over his 9.5 weeks of employment. $19,265.90 divided by 9.5 equals $2,027.99. This results in the maximum compensation rate of $1,066.00 ($2,027.99 multiplied by .6667, resulting in $1,352.06 which exceeds the applicable maximum weekly compensation rate for 2020). Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds this result is fair and just to both parties and this method of computation is appropriate.

The Commission also made the following unchallenged findings of fact:

> 17. Tim Clark, who was the dispatcher at Local 421 at the time Plaintiff was hired for the Merck jobsite, sent Plaintiff

an email dated May 13, 2020 with the opportunity to begin work for Southland at the Merck project. The email provided information regarding required documentation, location, parking, time and date of arrival, shift information, per diem, hotel information, and contact information; it did not provide an end date or an estimated length of assignment. Mr. Clark testified that other contractors were continuing to perform pipefitting work at the Merck jobsite at least as of December 2020 and jobs for those contractors were available through Local 421. He testified that pipefitting work continued at the Merck site at the time of the hearing and that Plaintiff would have been qualified for the ongoing pipefitting work with other contractors if he had been able to return to work. As with Plaintiff's hiring in May 2020, no specific end date for the work had been provided for the ongoing pipefitting work. He testified that "but for [Plaintiff] being injured and Southland being kicked off the job, [Plaintiff] could have been on the Merck site for a total of two years now." Southland did not have other work for pipefitters in the Local 421 geographic area until January 2022. Mr. Clark testified that if Plaintiff had been able to work, Plaintiff could have taken a job with Southland anywhere in the United States and remain a member of Local 421. Southland could have hired Plaintiff for another project elsewhere even if one was unavailable in the Local 421 area. He further testified that Southland, a national company, did have other ongoing projects outside the Local 421 region.

18. Keith Batson, the business agent for Local Union 421 at the time of Plaintiff's hiring, and who was the financial secretary for the Union at the time of his testimony, testified that he attended the pre-job meeting with Southland representative, Samir Mustafa, in October 2019 to discuss the details of the upcoming Merck project. He testified that the job was expected to last until the first quarter of 2021, and that there was no discussion at the meeting of the job potentially ending in August 2020. Both Mr. Batson and Mr. Clark testified that at the pre-job meeting Mr. Mustafa indicated that the Merck project was estimated for completion in the first quarter of 2021. Mr. Batson testified consistently with Mr. Clark that "but for [Plaintiff] being injured, that he would have been qualified potentially to go back to work on the jobsite."

> 19. As of the date of the hearing in this matter, Plaintiff was still employed with Southland, although he had not worked since his injury. But for his July 25, 2020 accident and resulting injury, Plaintiff could have and most likely would have continued to earn money working for Southland as a journeyman plumber and pipefitter for an indefinite period. Furthermore, but for Plaintiff's July 25, 2020 accident and resulting injury, if not working with Southland within the Local Union 421 area at the Merck project he could have and most likely would have continued to earn money working as a journeyman plumber and pipefitter for Southland for an indefinite period in an area outside the Local Union 421 area. Alternatively, but for Plaintiff's July 25, 2020 accident and resulting injury, Plaintiff could have and most likely would have continued to earn money working as a journeyman plumber and pipefitter for a subsequent contractor at the Merck project or for another contractor on projects within or without the Local Union 421 for an indefinite period.

Contrary to Defendant's arguments, the above unchallenged findings of fact identify Plaintiff's ability to continue working for the Union. Unlike in the facts in *Hendricks v. Hill Realty Grp., Inc.*, 131 N.C. App. 859, 509 S.E.2d 801 (1998) or *Conyers v. New Hanover Cty. Sch.*, 188 N.C. App. 284, 409 S.E.2d 103 (1991), the Commissions' unchallenged findings of fact do not show a limited temporal nature of Plaintiff's employment.

The Commission found Method 3 provides the method for calculating Plaintiff's average weekly wages which "*most nearly approximate[s] the amount which [Plaintiff] would be earning . . . in the employment in which he was working at the time of his injury.*" *Liles*, 244 N.C. at 658, 94 S.E.2d at 794. The Commission found and concluded Method 3 is "fair and just to both parties and this method of computation is appropriate." N.C. Gen. Stat. § 97-2(5). Defendants' argument is overruled.

VI. Conclusion

In descending order of preference, Method 3 of N.C. Gen. Stat. § 97-2(5) provides a "fair and just" calculation for both parties under these facts. *Id.* The Commission's unchallenged findings and conclusion that Method 3 provides the best method for calculating Plaintiff's average weekly wage is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge DILLON and Judge WOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 1 October 2024)

HADLEY v. ROLLINGWOOD HOMEOWNERS ASS'N No. 24-193	Wake (22CVD5064-910)	Dismissed
IN RE I.W. No. 24-83	Burke (21JT84)	Affirmed
IN RE J.B. No. 23-1053	Guilford (19JT506-509) (21JT523-524)	Affirmed in part, and Dismissed in part.
IN RE K.H. No. 24-315	Rowan (22JT33)	Affirmed
IN RE K.J.M. No. 24-213	Yadkin (21JT34)	Affirmed
IN RE L.R.M. No. 24-154	Transylvania (23JT8)	Reversed
MASTANDUNO v. NAT'L FREIGHT INDUS. No. 23-981	N.C. Industrial Commission (Y22434)	Affirmed
PATTERSON v. PATTERSON No. 23-1145	Stanly (20CVD571)	Vacated and Remanded
SALYER v. SALYER No. 24-37	Wake (21CVD16904)	Vacated and Remanded
STATE v. COLLINS No. 24-57	Yadkin (20CRS50583) (21CRS69) (22CRS123-33) (22CRS135)	Affirmed
STATE v. EDWARDS No. 21-778	Mecklenburg (17CRS221491)	Vacated in Part; Reversed in Part
STATE v. GRAY No. 23-1131	Mecklenburg (19CRS212974)	No Error
STATE v. HINES No. 22-824-2	Lenoir (14CRS51201)	Affirmed in Part, Vacated in Part, and Remanded

STATE v. JACOBS No. 23-1152	Mecklenburg (20CRS212334)	No Error
STATE v. O'NEIL No. 24-105	Cleveland (22CRS362522)	Dismissed
STATE v. POWELL No. 23-1009	Wake (19CRS212419) (19CRS212420)	Affirmed
STATE v. RICE No. 24-101	Union (19CRS54457)	No Error
STATE v. ROBERTS No. 24-142	Buncombe (20CRS80474)	No Error
STATE v. SMITH No. 24-203	Forsyth (19CRS54103)	Dismissed
STATE v. VASS No. 24-409	Vance (23CRS230249)	Remanded for Correction of Clerical Error
STATE v. WARNER No. 23-477	Wilson (21CRS1452) (21CRS50350)	No Error

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