296 N.C. App.—No. 4 Pages 442-556

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 25, 2025

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

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COURT OF APPEALS

CASES REPORTED

FILED 19 NOVEMBER 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADMINISTRATIVE LAW

Contested case—whole-record test—listing on Child Maltreatment Registry—substantial evidence—In a contested case, the superior court did not err in applying the whole-record test upon judicial review to affirm the final decision of the Office of Administrative Hearings, which upheld the decision of the North Carolina Department of Health and Human Services (respondent) to list petitioner (a caregiver) on the North Carolina Child Maltreatment Registry, where testimony by an investigator for respondent—who described information she gathered during her investigation of a report that petitioner struck and verbally threatened a juvenile at the child care center of which petitioner was the owner, operator, and director—was corroborated by the testimony of two other witnesses, each of whom was present during the abusive incident. **Taylor-Coleman v. N.C. Dep't of Health & Hum. Servs. Div. of Child Dev. & Early Educ., 546.**

Petition for judicial review of final agency decision—sufficiency of service— In a contested case initiated by an architect (petitioner) after the North Carolina

Board of Architecture and Registered Interior Designers (respondent)—following an administrative hearing—concluded that petitioner had willfully violated a statute governing the practice of architecture, the superior court did not abuse its discretion by dismissing plaintiff's petition for judicial review where plaintiff served that petition on respondent via electronic mail in violation of N.C.G.S. § 150B-46 (requiring service by personal service or certified mail within 10 days of the filing of the petition), and where, to the extent plaintiff attempted to remedy this jurisdictional error by belatedly serving respondent by certified mail, the superior court, in its discretion, considered but rejected plaintiff's argument that there was good cause shown to extend the time for service of process. **Ferris v. N.C. Bd. of Architecture, 473.**

APPEAL AND ERROR

Interlocutory order—contested case—one claim still pending—no substantial right affected—An appeal from an order entered by the Office of Administrative Hearings (OAH) in a contested case was dismissed after the order, which dismissed petitioner's second and third claims with prejudice but allowed his first claim to proceed, was deemed interlocutory. Importantly, there was no merit to petitioner's argument that, because the dismissal of his third claim was the only one he could directly appeal to the appellate court instead of to the superior court, the OAH's order was a final judgment. Finally, petitioner's substantial right to appeal the dismissal of his third claim would not be lost absent immediate appellate review, since he could still appeal that dismissal once his other claims were no longer pending at the OAH or in the superior court. **Culpepper v. Off. of Admin. Hearings, 442.**

Interlocutory order—denying motions to dismiss and for judgment on the pleadings—sovereign immunity—substantial right—In a class action filed by a retired State employee (plaintiff) against the State Treasurer and various State retirement systems and officials (defendants), where defendants raised the defense of sovereign immunity in their motions to dismiss under Civil Procedure Rule 12(b)(1) for lack of subject matter jurisdiction and in a Rule 12(c) motion for judgment on the pleadings, the Court of Appeals had jurisdiction to review defendants' appeal from an interlocutory order denying those motions. Although the denial of a Rule 12(b)(1) motion based on sovereign immunity is not immediately appealable, the denial of a Rule 12(c) motion based on sovereign immunity is immediately appealable as affecting a substantial right. **Hughes v. Bd. of Trs. Tchrs.' & State Emps.' Ret. Sys., 478.**

Interlocutory order—substantial right—ecclesiastical entanglement—A church (defendant) had an immediate right to appeal the trial court's order denying its Civil Procedure Rule 12(b)(1) motion to dismiss plaintiff parishioner's claims—including negligent retention of a pastor who had sexual relations with plaintiff's wife—where the order, although interlocutory, affected a substantial right based on defendant's argument that the trial court impermissibly entangled itself in ecclesiastical matters and thereby violated defendant's First Amendment rights. Where defendant did not make the same substantial right argument with regard to the denial of its Civil Procedure Rule 12(b)(6) motion to dismiss, however, the appellate court did not have jurisdiction to review that order. **Exum v. St. Andrews-Covenant Presbyterian Church, Inc., 467.**

Jurisdiction—premature oral notice of appeal—writ of certiorari issued—Where defendant had given oral notice of appeal from her convictions on charges of

first-degree arson, larceny of a dog, and attempted first-degree murder before entry of the final judgment—in violation of Appellate Rule 4—the Court of Appeals did not have jurisdiction to hear defendant's direct appeal, but the appellate court, in its discretion, allowed defendant's petition for writ of certiorari in order to reach the merits of her arguments. **State v. Jones, 512.**

Notice of appeal—failure to list one of the appellants—intent—"fairly inferred" doctrine—In a class action filed by a retired State employee (plaintiff) against the State Treasurer and various State retirement systems and officials (defendants), defendants' appeal from an order denying their motions to dismiss and for judgment on the pleadings was not subject to dismissal, even though they failed to name one of the defendants as an appellant in their notice of appeal. Plaintiff could fairly infer the omitted defendant's intent to appeal the order and conceded that he was neither misled nor prejudiced by the mistake, particularly where all of the named defendants argued in their brief about the omitted defendant's entitlement to sovereign immunity from plaintiff's suit. **Hughes v. Bd. of Trs. Tchrs.' & State Emps.' Ret. Sys., 478.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Adjudication order vacated—petitions not dismissed—evidentiary record sufficient—remanded—In an abuse, neglect and dependency proceeding involving two siblings, although the district court's adjudication order was vacated because the court's findings of fact did not supports its ultimate conclusions of law—and thus the adjudications—the record contained evidence that could permit findings of fact sufficient to support conclusions of law and adjudications of abuse, neglect, and/or dependency; accordingly, the juvenile petitions were not required to be dismissed, and the matter was remanded. **In re L.B., 498.**

Adjudication—conclusion that a child was an abused juvenile—finding of bruising alone insufficient—In an abuse, neglect and dependency proceeding, the district court's findings of fact—specifically, that a child had suffered multiple bruises and that respondents claimed those injuries were present when they picked the child up from daycare, in the absence of any findings about whether the court found respondents' claims credible or other findings that would support an inference that respondents were responsible for the injuries—did not meet the "clear and convincing" standard of proof necessary to sustain the court's adjudication of the child as an abused juvenile. **In re L.B., 498.**

Adjudication—conclusion that children were dependent juveniles—statutorily required findings absent—In an abuse, neglect and dependency proceeding involving two siblings, the district court's findings of fact did not address either prong of the statutory definition of a dependent juvenile as set forth by N.C.G.S. § 7B-101(9)—that the juveniles' parents (1) were unable to provide care and supervision and (2) lacked an appropriate alternative child care arrangement—and thus could not support the court's conclusion of law that the children were dependent juveniles. **In re L.B., 498.**

Adjudication—conclusion that children were neglected juveniles—findings of fact insufficient—In an abuse, neglect and dependency proceeding involving two siblings, the district court's findings of fact—specifically, that one child had suffered multiple bruises and that respondents claimed those injuries were present when they picked the child up from daycare, in the absence of any findings about whether the court found respondents' claims credible, about the severity of the

bruises, or other findings that would support an inference that respondents were responsible for the injuries or allowed an injurious environment to be created for either the bruised child or his sibling—were insufficient to support the court's adjudication of the children as neglected juveniles. **In re L.B., 498.**

CHURCHES AND RELIGION

Subject matter jurisdiction—negligent retention of pastor—ecclesiastical entanglement not implicated—The trial court did not err by denying defendant church's motion to dismiss pursuant to Civil Procedure Rule 12(b)(1) plaintiff parishioner's claims for negligent retention, negligent infliction of emotional distress, and breach of fiduciary duty for the hiring of a pastor with a history of misconduct who had sexual relations with plaintiff's wife. Although defendant argued that resolution of the claims would require the trial court to interpret church doctrine in violation of the ecclesiastical entanglement doctrine under the First Amendment, where the claims were all based on alleged negligence of the church in placing in a leadership position a person it knew or should have known had a history of and propensity to engage in sexual misconduct—not conduct that was part of the practices of the church—there was no need for the trial court to interpret or weigh religious doctrine and, therefore, the First Amendment was not implicated. **Exum v. St. Andrews-Covenant Presbyterian Church, Inc., 467.**

CONSTITUTIONAL LAW

Competency to stand trial—failure to order competency hearing—In a prosecution for first-degree arson, larceny of a dog, and attempted first-degree murder, the trial court did not err by failing to order a competency hearing sua sponte in the presence of an allegedly bona fide doubt as to defendant's competency to stand trial because: (1) the statutory right to a competency hearing set forth in N.C.G.S. § 15A-1001(a) is waived by the failure to assert that right at trial, and nothing in the record indicated that the prosecutor, defense counsel, defendant, or the court raised the question of defendant's capacity to proceed at any point during the proceedings, nor was any motion made detailing the specific conduct supporting such an allegation; and (2) the evidence cited by defendant on appeal—having heard voices in her head that she believed were caused by the victim's use of "voice-to-skull technology," driven to the victim's home, knocked on his doors repeatedly, sat in her car in his driveway for hours, sounded her car horn for half an hour, cut his pool, and attempted to set his porch on fire—did not constitute substantial evidence that defendant lacked competence at the time of trial, where defendant was able to confer with her attorney about pertinent issues of law, respond directly and appropriately to questions from the trial court, testify in a manner responsive to questions, and demonstrate a clear understanding of the proceedings against her. **State v. Jones, 512.**

CONTEMPT

Civil—violation of no contact order—no finding of violation at time of hearing—The trial court's order finding defendant in civil contempt for violating a no contact order (obtained by his next-door neighbor pursuant to Chapter 50C of the General Statutes of North Carolina prohibiting defendant from being within 100 feet of plaintiff even while on his own property) was reversed where the court did not

various State retirement systems and officials (defendants), where plaintiff sought a declaratory judgment that he was entitled to cost-of-living adjustments to his retirement benefits comparable to active State employees pursuant to N.C.G.S. § 135-5(o), the trial court erred in denying defendants' motion for judgment on the pleadings, in which defendants asserted sovereign immunity from suit. Nothing in the Declaratory Judgment Act constitutes a waiver of sovereign immunity, and no other waiver of sovereign immunity had been proven. **Hughes v. Bd. of Trs. Tchrs.' & State Emps.' Ret. Sys., 478.**

Sovereign—state employee retirement benefits—cost-of-living adjustments—no statutory waiver—no statutory cause of action—In a class action filed by a retired State employee (plaintiff) against the State Treasurer and various State retirement systems and officials (defendants), where plaintiff argued that he was entitled to cost-of-living adjustments to his retirement benefits comparable to active State employees pursuant to N.C.G.S. § 135-5(o) and that section 135-5(n) (providing a statute of limitations for suing the State or the State employees' retirement system for underpayment of vested contractual rights) constituted a waiver of defendants' sovereign immunity, the trial court erred in denying defendants' motion for judgment on the pleadings. Section 135-5(n) neither waived defendants' immunity nor created a cause of action for asserting a proactive vested right to cost-of-living increases for retirees. **Hughes v. Bd. of Trs. Tchrs.' & State Emps.' Ret. Sys., 478.**

JUDGMENTS

Renewal—filed after bankruptcy stay lifted—ten-year statute of limitations—not tolled by stay—dismissal appropriate—Addressing an issue of first impression, the Court of Appeals affirmed the trial court's order granting defendant's motion to dismiss, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's complaint (filed in 2022) to renew a judgment against defendant (obtained in 2010) where, after defendant's intervening petition for bankruptcy protection was denied and an automatic stay against enforcement (issued pursuant to 11 U.S.C. § 362(a)) was lifted, plaintiff's complaint was not filed within the ten-year statute of limitations period in N.C.G.S. § 1-47; contrary to plaintiff's argument, the bankruptcy automatic stay did not toll the limitations period for renewal of the state judgment. Further, there was no merit to plaintiff's contention that the statute of limitations was tolled pursuant to N.C.G.S. § 1-23, which was not applicable. **East Bay Co., Ltd. v. Baxley, 444.**

MEDICAL MALPRACTICE

Summary judgment—Civil Procedure Rule 9(j)—expert testimony—standard of care—In a proceeding on medical malpractice and loss of consortium claims brought against a hospital, two nurses, and a certified nursing assistant (defendants) by the widow of a man whose death from complications of an aggressive brain cancer was allegedly exacerbated by a fall he suffered while hospitalized following an earlier brain surgery and subsequent fall while recovering at home, the trial court did not err in excluding testimony from an expert witness—offered to satisfy the applicable standard of care requirement set forth in Civil Procedure Rule 9(j)—because the tendered expert failed to establish the statutorily required connection between the national standard of care she applied in forming her opinion to the community where the alleged malpractice occurred (or a place similarly situated). In light of the exclusion of testimony from the sole standard-of-care witness proffered

by plaintiff, the court did not err in granting summary judgment in favor of defendants. **Est. of Dobson v. Sears, 452.**

PENSIONS AND RETIREMENT

Retired state employee—entitlement to cost-of-living adjustments—breach of contract claim—In a class action filed by a retired State employee (plaintiff) against the State Treasurer and various State retirement systems and officials (defendants), where plaintiff argued that the defendants breached his employment contract by failing to provide cost-of-living adjustments (COLAs) to his retirement benefits that were comparable to those of active employees pursuant to N.C.G.S. § 135-5(o), the trial court erred in denying defendants' motion for judgment on the pleadings. Although defendants' theory of sovereign immunity was inapplicable, since it is well-settled that the State waives immunity by entering into a contract, the language in section 135-5(o) was not part of plaintiff's contract and therefore did not create a contractual obligation to fund plaintiff's retirement COLAS pursuant to that language. Importantly, plaintiff only had a contractual right to rely on the terms of his retirement plan as those terms existed at the time his contractual rights became vested; under North Carolina law, state employees have a vested right to retirement benefits (as deferred compensation) but not necessarily to future COLAs, especially where the plain language of section 135-5(o) indicates that such COLAs are discretionary rather than mandatory. **Hughes v. Bd. of Trs. Tchrs.' & State Emps.' Ret. Sys., 478.**

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.

WILLIAM T. CULPEPPER, III, PETITIONER
v.
OFFICE OF ADMINISTRATIVE HEARINGS, RESPONDENT

No. COA24-811

Filed 19 November 2024

Appeal and Error—interlocutory order—contested case—one claim still pending—no substantial right affected

An appeal from an order entered by the Office of Administrative Hearings (OAH) in a contested case was dismissed after the order, which dismissed petitioner's second and third claims with prejudice but allowed his first claim to proceed, was deemed interlocutory. Importantly, there was no merit to petitioner's argument that, because the dismissal of his third claim was the only one he could directly appeal to the appellate court instead of to the superior court, the OAH's order was a final judgment. Finally, petitioner's substantial right to appeal the dismissal of his third claim would not be lost absent immediate appellate review, since he could still appeal that dismissal once his other claims were no longer pending at the OAH or in the superior court.

Appeal by petitioner from decision filed 25 March 2024 by Administrative Law Judge Beecher R. Gray in the Office of Administrative Hearings ("OAH").

No brief filed for petitioner.

No brief filed for respondent.

PER CURIAM.

On 17 September 2024, Respondent Office of Administrative Hearings ("Respondent OAH") moved that the appeal of Petitioner William T. Culpepper, III, in this matter be dismissed. For the reasoning below, we conclude that Petitioner's appeal is interlocutory and otherwise not ripe for review at this time. Accordingly, we file this order by opinion granting OAH's motion to dismiss Petitioner's appeal as being interlocutory.

I. Background

Petitioner has filed three sets of claims in a contested case in the OAH. Petitioner contends that any direct appeal from a decision in

the OAH regarding two of his claims is to the superior court but that any direct appeal from a decision in the OAH regarding his third claim is to our Court.

Respondent OAH moved to dismiss Petitioner's claims. By decision entered 25 March 2024, the administrative law judge dismissed Petitioner's second and third claims with prejudice; however, he allowed Petitioner's first claim to proceed in the OAH.

On 24 April 2024, Petitioner noticed an appeal to our Court on the dismissal of his third claim. Respondent OAH moved to dismiss the appeal, contending that the appeal was from an interlocutory order.

II. Analysis

"Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment." *City of Raleigh v. Edwards*, 234 N.C. 528, 529 (1951). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361–62 (1950).

Generally, an *interlocutory* order may be appealed only where the trial judge has certified its order for immediate review, pursuant to N.C.G.S. § 1A-1, Rule 54, or where the order "deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 437 (1974) (construing N.C.G.S. § 1-277).

Petitioner's first claim is still pending before the OAH. Petitioner, however, noticed an appeal to our Court from the OAH's dismissal of his third claim at this time. He contends that the appeal is a "final judgment," as his third claim is the only claim that has a direct appeal to our Court. We conclude that his appeal is interlocutory and remains interlocutory as long as either his first or second claim is pending at the OAH or in the superior court.

Alternatively, Petitioner also argues that his appeal is from an order which affects a substantial right, namely his right to appeal from the dismissal by the administrative law judge of his third claim. He contends that his right to appeal could be lost if not appealed at this time, as "he would run the very real risk of the Court of Appeals subsequently finding that such right of appeal had been lost." We, however, conclude that Petitioner's right to appeal the dismissal of his third claim would not be lost if not appealed at this time. Rather, he may appeal that dismissal

when his other claims are no longer pending at the OAH or in the superior court.

APPEAL DISMISSED.

Panel consisting of Chief Judge DILLON and Judges WOOD and STADING.

EAST BAY COMPANY, LTD., PLAINTIFF
v.
BRANDON SCOTT BAXLEY, DEFENDANT

No. COA23-639

Filed 19 November 2024

Judgments—renewal—filed after bankruptcy stay lifted—ten-year statute of limitations—not tolled by stay—dismissal appropriate

Addressing an issue of first impression, the Court of Appeals affirmed the trial court's order granting defendant's motion to dismiss, pursuant to Civil Procedure Rule 12(b)(6), plaintiff's complaint (filed in 2022) to renew a judgment against defendant (obtained in 2010) where, after defendant's intervening petition for bankruptcy protection was denied and an automatic stay against enforcement (issued pursuant to 11 U.S.C. § 362(a)) was lifted, plaintiff's complaint was not filed within the ten-year statute of limitations period in N.C.G.S. § 1-47; contrary to plaintiff's argument, the bankruptcy automatic stay did not toll the limitations period for renewal of the state judgment. Further, there was no merit to plaintiff's contention that the statute of limitations was tolled pursuant to N.C.G.S. § 1-23, which was not applicable.

Appeal by plaintiff from judgment entered 8 February 2023 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 24 September 2024.

Buckmiller Boyette & Frost, PLLC, by Matthew W. Buckmiller, and Blake Younger Boyette, for the plaintiff-appellant.

Everett Gaskins Hancock, LLP, by William H. Kroll, for the defendant-appellee.

TYSON, Judge.

East Bay Company, Ltd. ("Plaintiff") appeals from order allowing Brandon Scott Baxley's ("Defendant") motion to dismiss. We affirm.

I. Background

Plaintiff is a South Carolina registered corporation. Defendant is a resident of Wake County. Plaintiff obtained a judgment against Defendant in Wake County Superior Court for a principal amount of $359,998.43; $24,097.70 in interest accrued from 27 August 2009 at the South Carolina legal rate of 7.25% per annum; and, $123,197.96 in attorney's fees, costs, and expenses on 30 July 2010 in file number 08-CVS-14349. The judgment entered totaled $507,294.09 plus interest at the North Carolina legal rate of eight percent (8%) from 30 July 2010 until satisfaction. *See* N.C. Gen. Stat. § 24-1 (2023).

Defendant filed a voluntary petition for bankruptcy protection under United States Bankruptcy Code Chapter 7 in the United States Bankruptcy Court for the Eastern District of North Carolina on 8 July 2018. Defendant's Chapter 7 filing was assigned case number 18-03406-5-DMV. The Bankruptcy Court denied Defendant's discharge and terminated the automatic stay against enforcement on 19 June 2020. *See* 11 U.S.C. § 362(c)(2)(C) (2018).

The Bankruptcy Court entered an order ruling: "the automatic stay pursuant to 11 U.S.C. § 362(d) is lifted and modified to permit [Plaintiff] to proceed with an action to renew the State Court judgment."

Plaintiff filed this action to renew its Judgment against Defendant from 08-CVS-14349 on 10 June 2022. Defendant filed a motion on 29 August 2022 to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Following a hearing on Defendant's motion on 8 February 2023, the trial court entered an order dismissing Plaintiff's complaint. Plaintiff appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issue

Plaintiff argues the trial court erred by granting Defendant's Rule 12(b)(6) motion.

IV. Defendant's Rule 12(b)(6) Motion

A. Standard of Review

"A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." *Kemp v. Spivey*, 166 N.C. App. 456, 461, 602 S.E.2d 686, 690 (2004) (citation and quotation marks omitted). "When considering a [Rule] 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (citation and quotation marks omitted).

This Court "consider[s] the allegations in the complaint [as] true, construe[s] the complaint liberally, and only reverse[s] the trial court's denial of a motion to dismiss if [the] plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Christmas v. Cabarrus Cnty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (citation omitted).

"On appeal from a motion to dismiss under Rule 12(b)(6) this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]" *Id.* (ellipses in original) (citation and internal quotation marks omitted).

B. Ten-year Statute of Limitations

Plaintiff contends the automatic stay imposed by Plaintiff's bankruptcy Chapter 7 filing in 11 U.S.C § 362(a) tolls the ten-year statute of limitations period in N.C. Gen. Stat. § 1-47 (2023).

11 U.S.C. § 362 provides, *inter alia*:

> **(a)** Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title [11 USC § 301, 302, or 303], or *an application filed* under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USC § 78eee(a)(3)], *operates as a stay*, applicable to all entities, of—
>
> **(1)** *the commencement or continuation*, *including the issuance or employment of process*, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been *commenced before the commencement of the case under this title*, *or to recover a claim against the debtor that arose before the commencement of the case under this title*;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) *any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case* under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

. . .

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title [11 USC §§ 701 et seq.] concerning an individual or a case under chapter 9, 11, 12, or 13 of this title [11 USC §§ 901 et seq., 1101 et seq., 1201 et seq., or 1301 et seq.], the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13 [11 USC §§ 701 et seq., 1101 et seq., or 1301 et seq.], and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) [11 USC § 707(b)]—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 [11 USC §§ 701 et seq., 1101 et seq., and 1301 et seq.] in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 [11 USC §§ 701 et seq., 1101 et seq., and 1301 et seq.] in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—

> **(aa)** file or amend the petition or other documents as required by this title [11 USC §§ 101 et seq.] or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);
>
> **(bb)** provide adequate protection as ordered by the court; or
>
> **(cc)** perform the terms of a plan confirmed by the court; or
>
> **(III)** there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 [11 USC §§ 701 et seq., 1101 et seq., or 1301 et seq.] or any other reason to conclude that the later case will be concluded—
>
> **(aa)** if a case under chapter 7 [11 USC §§ 701 et seq.], with a discharge; or
>
> **(bb)** if a case under chapter 11 or 13 [11 USC §§ 1101 et seq. or 1301 et seq.], with a confirmed plan that will be fully performed; and
>
> **(ii)** as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

11 U.S.C. § 362(a) and (c) (2018) (emphasis supplied).

11 U.S.C. § 108(c) provides:

> **(c)** Except as provided in section 524 of this title [11 USC § 524], if applicable nonbankruptcy law, *an order entered in a nonbankruptcy proceeding*, or an agreement *fixes a period for commencing or continuing a civil action* in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title [11 USC § 1201 or 1301], and such period has not expired before the date of the filing of the petition, then such period *does not expire until the later of*—

> **(1)** the *end of such period*, including any suspension of such period occurring on or after the commencement of the case; *or*
>
> **(2)** *30 days after notice of the termination* or expiration of the stay under section 362, 922, 1201, or 1301 of this title [11 USC § 362, 922, 1201 or 1301], as the case may be, with respect to such claim.

11 U.S.C. § 108(c) (2018) (emphasis supplied).

C. 11 U.S.C. § 362(a) & N.C. Gen. Stat. § 1-47

N.C. Gen. Stat. § 1-47 provides for a ten-year statute of limitations to renew a judgment for an additional ten (10) years. N.C. Gen. Stat. § 1-47(1) (2023). ("Within ten years an action— (1) Upon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its entry. No such action may be brought more than once, or have the effect to continue the lien of the original judgment.").

When this Court reviews an issue of first impression, it is appropriate to look to decisions from other jurisdictions for persuasive guidance. *See Skinner v. Preferred Credit*, 172 N.C. App. 407, 413, 616 S.E.2d 676, 680 (2005) ("Because this case presents an issue of first impression in our courts, we look to other jurisdictions to review persuasive authority that coincides with North Carolina's law."), *aff'd*, 361 N.C. 114, 638 S.E.2d 203 (2006).

In reconciling the automatic stay of 11 U.S.C. § 362(a) and the ten-year statute of limitations period in N.C. Gen. Stat. § 1-47, it is helpful to review persuasive authorities and determine how other courts have addressed this issue. Our review has revealed the following:

1. Smith v. Lachter

A Bankruptcy Appellate Panel for the United States Court of Appeals for the Ninth Circuit held a judgment creditor's inability to enforce a judgment due to bankruptcy, did not extend the deadline imposed by Arizona Rev. Stat. §§ 12-1551 and 12-1612 to file a renewal affidavit. *Smith v. Lachter* (*In re Smith*), 352 B.R. 702, 705-06 (B.A.P. 9th Cir. 2006). The court further held 11 U.S.C. § 108(c)(1) does not extend additional time for creditors to renew their judgment. *Id.*

2. Aslanidis v. United States Lines

The United States Court of Appeals for the Second Circuit also held 11 U.S.C. § 108(c) does not provide for the tolling of any externally-imposed

statute of limitations, but only calls for applicable time deadlines to be extended for 30 days after termination of the bankruptcy stay, provided such a deadline would have fallen on an earlier date. *Aslanidis v. United States Lines*, 7 F.3d 1067, 1072-73 (2d Cir. 1993) ("Commencing with the plain meaning, we observe that by its terms § 108(c) does not provide for tolling of any externally imposed time bars, such as those found in the two maritime statutes of limitations. The bankruptcy section only calls for applicable time deadlines to be extended for 30 days after the termination of a bankruptcy stay, if any such deadline would have fallen on an earlier date. The reference in § 108(c)(1) to 'suspension' of time limits clearly does not operate in itself to stop the running of a statute of limitations; rather, this language merely incorporates suspensions of deadlines that are expressly provided in *other* federal or state statutes.").

Section 108(c)(2) provides for thirty (30) additional days to renew the judgment after the bankruptcy stay is lifted. The stay was lifted on 19 June 2020. Thirty days after the stay was lifted occurred on 20 July 2020. Since the original North Carolina Statute of Limitations had not expired when the stay was lifted, Plaintiff had forty days after the stay was lifted to file the extension before the deadline to renew expired. Plaintiff only would have been granted the thirty days extension after dismissal of his bankruptcy petition, if the ten-year deadline had expired while the stay remained in effect. 11 U.S.C. § 108(c). Plaintiff's argument is overruled. *Id.*

3. N.C. Gen. Stat. § 1-23

Plaintiff further asserts N.C. Gen. Stat. § 1-23 (2023) operates to toll the statute of limitations. N.C. Gen. Stat. § 1-23 provides: "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." *Id.* The commencement of the action to renew the judgment was not "stayed by [an] injunction or statutory prohibition." *Id.*

A prior panel of this Court examined the tolling provision of the 10-year statute of limitations under N.C. Gen. Stat. § 1-47 to determine whether it tolled a judgment filed *nunc pro tunc* following a motion to amend the judgment. *K&S Res., LLC v. Gilmore*, 284 N.C. App. 78, 83-85, 875 S.E.2d 538, 542-44 (2022). This Court held N.C. Gen. Stat. §§ 1-15, 1-23, 1-234 (2023) and N.C. R. App. P. 62(a) and 62(b) did not provide for tolling. *Id.* There was no "existence of any statutory tolling provision affecting the applicable 10-year statute of limitations in this action." *Id.* N.C. Gen. Stat. § 1-23 does not apply. N.C. Gen. Stat. § 1-23. Plaintiff's argument is overruled.

V. Conclusion

The deadline to file for the 10-year extension of the judgment expired on 29 July 2020. The dismissal of Defendant's bankruptcy proceeding and lifting the automatic stay did not allow renewal of the judgment beyond the 29 July 2020 deadline. The trial court properly granted Plaintiff's motion to dismiss. The order of the trial court is affirmed. *It is so ordered.*

AFFIRMED.

Judges COLLINS and GRIFFIN concur.

THE ESTATE OF JAMES STEVENSON DOBSON AND SHEILA DOBSON, INDIVIDUALLY, PLAINTIFFS
v.
DEBORAH E. SEARS, R.N., MONIQUE M. ELLIS, R.N., ABIGAIL M. MAYTON, AND THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, A NORTH CAROLINA HOSPITAL AUTHORITY, D/B/A ATRIUM HEALTH, CAROLINAS HEALTHCARE SYSTEM, CAROLINAS MEDICAL CENTER NORTHEAST, AND CAROLINAS HEALTHCARE SYSTEM NORTHEAST, DEFENDANTS

No. COA24-277

Filed 19 November 2024

1. Evidence—motion to strike—medical malpractice—affidavit from tendered expert witness—contradictory to deposition testimony

In a proceeding on medical malpractice and loss of consortium claims brought against a hospital, two nurses, and a certified nursing assistant (defendants) by the widow of a man whose death from complications of an aggressive brain cancer was allegedly exacerbated by a fall he suffered while hospitalized following an earlier brain surgery and subsequent fall while recovering at home, the trial court did not abuse its discretion by granting defendants' motions to strike an affidavit from a tendered expert witness (a registered nurse) attached to briefs in opposition to defendants' motions to exclude the tendered expert's testimony and for summary judgment. The affidavit contradicted the tendered expert's prior deposition testimony regarding the community demographic data she had reviewed when forming her opinion as to the pertinent standard of

care; specifically, the deposition testimony cited data from 2011 and 2012—six to seven years before the hospital fall at the center of this tort action—while the affidavit stated that she had reviewed 2018 demographic data.

2. Medical Malpractice—summary judgment—Civil Procedure Rule 9(j)—expert testimony—standard of care

In a proceeding on medical malpractice and loss of consortium claims brought against a hospital, two nurses, and a certified nursing assistant (defendants) by the widow of a man whose death from complications of an aggressive brain cancer was allegedly exacerbated by a fall he suffered while hospitalized following an earlier brain surgery and subsequent fall while recovering at home, the trial court did not err in excluding testimony from an expert witness—offered to satisfy the applicable standard of care requirement set forth in Civil Procedure Rule 9(j)—because the tendered expert failed to establish the statutorily required connection between the national standard of care she applied in forming her opinion to the community where the alleged malpractice occurred (or a place similarly situated). In light of the exclusion of testimony from the sole standard-of-care witness proffered by plaintiff, the court did not err in granting summary judgment in favor of defendants.

3. Evidence—expert testimony—Evidence Rule 702(e)—no showing in record of extraordinary circumstances

In a proceeding on medical malpractice and loss of consortium claims brought against a hospital, two nurses, and a certified nursing assistant (defendants) by the widow of a man whose death from complications of an aggressive brain cancer was allegedly exacerbated by a fall he suffered while hospitalized following an earlier brain surgery and subsequent fall while recovering at home, the trial court did not abuse its discretion in excluding testimony by a registered nurse who was tendered as an expert witness pursuant to Evidence Rule 702(e)—permitting testimony "on the appropriate standard of health care by a witness who does not meet the requirements of [other subsections of the Rule], upon [among other things] the showing by the movant of extraordinary circumstances"—where the record was devoid of evidence of such circumstances.

Appeal by plaintiffs from judgment entered 6 October 2024 by Judge R. Stuart Albright in Cabarrus County Superior Court. Heard in the Court of Appeals 24 September 2024.

The Law Office of Christopher A. Walker, PLLC, by Christopher A. Walker, for the plaintiffs-appellants.

Parker Poe Adams & Bernstein LLP, by Chip Holmes and Jessica C. Dixon, for the defendants-appellees.

Huff Powell & Bailey, PLLC, by Katherine Hilkey-Boyatt and Jonathan Earnest, for the defendants-appellees.

Beth Reeves, for the defendants-appellees.

TYSON, Judge.

James Steven Dobson, a fifty-eight-year-old man, had recently undergone brain surgery to remove a malignant tumor. He fell while recovering at his home. After being taken to the hospital and admitted as a patient, he fell again and subsequently died. His wife, both individually and as Executrix of her husband's estate, sued the hospital system, two nurses, and one certified nursing assistant for medical malpractice and loss of consortium. The trial court granted summary judgment and dismissed the claims after striking portions of an expert witness's affidavit and excluding the expert witness's testimony. Plaintiffs appeal. We affirm.

I. Background

Sheila Dobson ("Wife" or "Executrix") was married to James Dobson ("Decedent"). Decedent was born on 31 July 1960. Decedent was diagnosed with Grade III Anaplastic Astrocytoma, an aggressive brain cancer. He underwent a left frontotemporal craniotomy surgery to remove the tumor at the Charlotte Mecklenburg Hospital Authority ("CHMA") on 13 August 2018.

Decedent was released from a CHMA rehabilitation hospital on 5 September 2018, but he needed assistance and supervision while bathing, dressing, and toileting, and for bed-to-chair transfers. Decedent was able to walk 500 feet with no assistive devices and minimal supervision.

Five days after being released from the rehabilitation center, Decedent fell off the bottom two steps of his front porch. Decedent fell face first on his right side and did not attempt to catch himself. He had abrasions on the right side of his face and his right shoulder. Emergency Medical Services arrived at 4:56 p.m. and transported him to CHMA's hospital in Concord.

While at the hospital, Decedent reported he was getting up from sitting on the porch, began to have visual changes, felt dizzy, and fell forward. Decedent presented at the emergency room as a code trauma and underwent multiple images. His CT scan revealed no acute abnormalities were present.

Decedent was admitted to the hospital at 7:45 p.m. with his Wife present. Deborah Sears ("Sears"), a Registered Nurse ("RN"), was assigned to Decedent's care. She evaluated him as scoring 125 on the Morse Fall Risk scale at 10:14 p.m. She noted Decedent was wearing a Fall Risk armband, and she implemented the following precautions: ensuring adequate room lighting, keeping the patient's bed in a low position, and placing the call device and personal items within the patient's reach. Sears also instructed Decedent to only get out of bed with assistance. Both Decedent and Wife indicated they understood Sears' instructions.

Monique Ellis ("Ellis") and Abigail Mayton ("Mayton") were also assigned to care for Decedent. Ellis is also a RN, and Mayton is a certified nursing assistant ("CNA"). Mayton checked on Decedent during her rounds at 9:09 p.m. and 11:00 p.m. on the evening of 10 September 2018, and at 1:12 a.m. on the morning of 11 September 2018. During these rounds, Mayton documented the following environmental safety precautions had been implemented: "Adequate room lighting, bed in low position, call device within reach, encourage handrail/safety bar use, encourage personal mobility support item use, encourage sensory support item use, non-slip footwear, personal items within reach, sensory aids within reach, traffic path in room free of clutter, wheels locked."

At approximately 1:25 a.m. on 11 September 2018, thirteen minutes after Mayton's last round, Ellis responded to Decedent's hospital room. Decedent had fallen and suffered a laceration above his left eye and a laceration on his left elbow. Ellis documented Wife was present in the room when her husband had fallen, and she told Ellis she had "heard a loud thud and he hit the floor."

The on-call physician tended to Decedent's lacerations and ordered a head CT scan immediately. The CT scan showed no changes or abnormalities. After the CT scan, Decedent was returned to his room around 2:30 a.m. The medical record reveals a bed alarm was placed on Decedent's bed after his fall at the hospital. A bed alarm was not mentioned in the prior records.

A subsequent MRI scan taken four days later, on 15 September 2018, revealed a fluid collection over Decedent's left cerebral convexity had slightly increased in size. Decedent was discharged on 28 September

2018, but he continued to decline neurologically. He was unable to receive radiation or chemotherapy, and he died on 13 June 2019 from complications due to recurrent astrocytoma.

Plaintiff, individually and as Executrix of Decedent's estate (collectively "Plaintiffs"), filed a complaint on 23 August 2023 against CHMA, Sears, Mayton, and Ellis (collectively "Defendants"). Plaintiffs did not allege Decedent's fall at the hospital had caused his death. Rather, Plaintiffs alleged Sears, Mayton, and Ellis were negligent pursuant to N.C. Gen. Stat. § 90-21.1(2)(a) (2023) by failing to activate Decedent's bed alarm after he was assessed to be a high fall risk according to the Morse Fall Risk scale and failing to consider and utilize other fall risk precautions. The complaint alleged the acts of Sears, Mayton, and Ellis "are imputed to their employer," CHMA, and CHMA is vicariously liable. Plaintiffs contended "[a]s a direct and proximate result of the joint and concurrent negligence" by Defendants, "Decedent fell out of his hospital bed, suffered disfigurement indicated by a gash requiring staples, neurological decline, [and] incurred a longer hospital stay and medical bills." Plaintiffs further alleged Defendants were grossly negligent, and sought compensatory and punitive damages.

Plaintiffs also filed a corporate negligence claim pursuant to N.C. Gen. Stat. § 90-21.1(2)(b) (2023). Plaintiffs alleged the hospital or nurse administrator should have advocated for Decedent by recommending the implementation of additional safety interventions for the patient. Wife also asserted a claim for loss of consortium.

CHMA, Ellis, and Mayton filed motions to exclude the expert testimony of Plaintiffs' tendered expert, Natalie Mohammed, RN, and for summary judgment on 31 August 2023. Sears also filed a motion to strike Nurse Mohammed's testimony and a motion for summary judgment on 5 September 2023.

Mayton, Ellis and CMHA filed additional materials in support of their Motions to Exclude Expert Testimony and for Summary Judgment on 27 September 2023 and served a brief in support of their motions. Plaintiffs served briefs in opposition to Defendants' respective motions to exclude expert testimony and for summary judgment on 27 September 2023. Plaintiffs attached an affidavit of Nurse Mohammed ("Mohammed Affidavit") dated 27 September 2023 to their briefs.

Mayton, Ellis, and CMHA filed a Motion to Strike the Mohammed Affidavit on 28 September 2023, asserting the statements in the affidavit contradicted Nurse Mohammed's prior sworn testimony. Sears filed a similar motion to strike Mohammed's Affidavit on or about

29 September 2023. Plaintiffs filed a motion to allow expert testimony of Nurse Mohammed pursuant to Rule 702(e) on 3 October 2023.

A hearing on all motions was held on 3 October 2023, and an order was entered sixteen days later. The trial court granted in part and denied in part Defendants' motions to strike Mohammed's Affidavit, and struck paragraphs 12, 13, 16, 17 and 18 as contradictory to what she testified to during her depositions. The trial court granted CHMA's, Ellis', and Mayton's motion to exclude expert testimony. The trial denied Plaintiffs' motion to allow the expert testimony of Nurse Mohammed pursuant to Rule 702(e) and granted Defendants' motions for summary judgment. Plaintiffs timely entered notice of appeal on 3 November 2023.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Issues

Plaintiffs present three arguments on appeal asserting the trial court erred by: (1) granting Defendants' motions to strike, because no contradiction existed between the Mohammed Affidavit and Nurse Mohammed's prior testimony; (2) granting Sears' motions to exclude expert testimony and for summary judgement and CHMA's, Ellis', and Mayton's motion for summary judgment, because Nurse Mohammed made the statutorily required connection between the community in which the alleged malpractice took place and a similarly situated community; and, (3) denying Plaintiffs' motion to allow expert testimony pursuant to Rule of Evidence 702(e), because "it would in no way frustrate the purpose of Rule 9(j) or Rule 702 to qualify Mohammed as an expert in this case under Rule 702(e)."

IV. Motion to Strike

A. Standard of Review

[1] "Rulings on motions to strike, including motions to strike affidavits, are reviewed more deferentially for abuse of discretion." *Zander v. Orange Cnty., NC*, 289 N.C. App. 591, 598, 890 S.E.2d 793, 799 (2023) (citation omitted).

"A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Hamilton v. Thomasville Med. Assocs.*, 187 N.C. App. 789, 793, 654 S.E.2d 708, 710 (2007) (citation and quotation marks omitted).

B. Analysis

Nurse Mohammed was deposed on two occasions, 21 April 2023 and 25 May 2023. After her depositions were taken, Defendants filed motions for summary judgment. Plaintiffs attached Mohammed's Affidavit, dated 27 September 2023, to their responsive briefs.

The trial court ruled paragraphs 12, 13, 16, 17, and 18 of Mohammed's Affidavit were contradictory to her earlier deposition testimony. The trial court relied upon *Pinczkowski v. Norfolk S. Ry. Co.*, 153 N.C. App. 435, 440, 571 S.E.2d 4, 7 (2002), and *Hawkins v. Emergency Med. Physicians of Craven Cnty., PLLC*, 240 N.C. App. 337, 342, 770 S.E.2d 159, 163 (2015), in its rulings.

This Court in *Pinczkowski* prohibited a plaintiff from "creat[ing] issues of fact by a last-minute filing of an affidavit which is contradictory to his deposition testimony as a whole." 153 N.C. App. at 441, 571 S.E.2d at 7 (citation omitted). "[W]e have held that a party opposing a motion for summary judgment cannot create a genuine issue of material fact by filing an affidavit contradicting his prior sworn testimony." *Id.* at 440, 571 S.E.2d at 7.

Here, the trial court ruled Plaintiff had attempted to create a last-minute issue of material fact by reviewing Cabarrus County and Concord 2018 demographic information for the first time. At Nurse Mohammed's deposition in April 2023, her opinion of required standard of care was based upon her review of Cabarrus County's demographic information for 2011 and 2012, six to seven years before Decedent fell at CHMA.

Nurse Mohammed's affidavit contradicted her prior deposition testimony about the demographic data she reviewed when forming her opinion of required standard of care. In paragraph 12 of Mohammed's Affidavit, which was filed one week prior to the hearing on Defendants' motions, Nurse Mohammed testified for the first time that she had reviewed Cabarrus County's and Concord's 2018 demographic information. In paragraph 13 of Mohammed's Affidavit, she also testified for the first time she was aware of the resources in place at the Concord CHMA hospital where Decedent had fallen.

Nurse Mohammed opined in paragraphs 16, 17, and 18 of her affidavit Mayton had breached the applicable standard of care and she had formed this opinion as early as January 2021. This statement also contradicts Nurse Mohammed's prior deposition testimony.

When asked which healthcare providers she would offer opinions about in this case during her 21 April 2023 deposition, she provided the following responses:

> Q: I want to know what the names of – which providers you are going to be offering opinions to.
>
> A: The two nurses, Monique Ellis and Deborah Sears.
>
> Q: Are those the only two providers that you intend to offer opinions to today?
>
> A: Yes.

During her second deposition on 23 May 2022, Nurse Mohammed testified she had formed an opinion about Mayton after reviewing Mayton's deposition, which happened between her two depositions taken in April and May 2023.

In her affidavit on 27 September 2023, Nurse Mohammed stated "contrary to the line of questioning in my May 2023 deposition, I did form an opinion regarding the breach of the standard of care by Defendant Mayton . . . that I completed in January 2021." She further stated "[i]t was only after Ms. Mayton's deposition did I have more factual information regarding her role in treating [Decedent] and could give a full ('constructive') opinion." In paragraph 18, she attempted to explain her exclusion of Mayton in the list of providers she was offering an opinion, by asserting Mayton was included in the "catch all phrase of 'all nurses.' " Mayton, although a certified nursing assistant, was not a registered nurse when caring for Decedent.

Given the contradictions between Nurse Mohammed's earlier deposition statements and her affidavit attached to Plaintiffs' responsive briefs, Plaintiffs have failed to show the trial court abused its discretion by striking contradictory paragraphs 12, 13, 16, 17, and 18 from Mohammed's affidavit. *See Pinczkowski*, 153 N.C. App. at 440, 571 S.E.2d at 7; *Hawkins*, 240 N.C. App. at 342, 770 S.E.2d at 163; *Zander*, 289 N.C. App. at 598, 890 S.E.2d at 799; *Hamilton*, 187 N.C. App. at 792, 654 S.E.2d at 710. Plaintiffs cannot "create issues of fact by a last-minute filing of an affidavit which is contradictory to [their] deposition testimony as a whole." *Pinczkowski*, 153 N.C. App. at 441, 571 S.E.2d at 7. Plaintiffs' arguments are overruled.

V. Motion for Summary Judgment

A. Standard of Review

[2] The party moving for summary judgment "bears the burden of bringing forth a forecast of evidence which tends to establish that there are no triable issues of material fact." *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (citation omitted). We consider the evidence

in the light most favorable to the nonmoving party, and "any doubt as to the existence of an issue of triable fact must be resolved in favor of the party against whom summary judgment is contemplated." *Id.*

We review an order granting summary judgment *de novo*. *See Bryan v. Kittinger*, 282 N.C. App. 435, 437, 871 S.E.2d 560, 562 (2022). We determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen Stat. § 1A-1, Rule 56(c) (2023).

"Generally, the trial court's decision to allow or disqualify an expert 'will not be reversed on appeal absent a showing of abuse of discretion.' " *DaSilva v. WakeMed*, 375 N.C. 1, 4, 846 S.E.2d 634, 638 (2020) (quoting *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016)).

B. Analysis

1. Statutory Standard of Care

Our statutes provide for two forms of medical malpractice. A plaintiff may bring a claim under N.C. Gen. Stat. § 90-21.11(2)(a) "for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11(2)(a) (2023). A plaintiff may also assert a medical malpractice claim under N.C. Gen. Stat. § 90-21.11(2)(b) "against a hospital," or other statutorily allowed health care facility, for breaching their "administrative or corporate duties to the patient," if it "arises from the same facts or circumstances as a claim under" § 90-21.11(2)(a). N.C. Gen. Stat. § 90-21.11(2)(b) (2023).

"Because questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony." *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 671-72 (2003) (citations omitted).

If a plaintiff asserts a claim under N.C. Gen. Stat. § 90-21.11(2)(a), the health care provider shall not be liable unless the trier of fact finds the care provided "was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action." N.C. Gen. Stat. § 90-21.12(a) (2023).

If a plaintiff asserts a claim under N.C. Gen. Stat. § 90-21.11(2)(b), the health care provider shall not be liable for "action or inaction" unless the care provided "was not in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action." N.C. Gen. Stat. § 90-21.12(a).

This Court has explained, "[b]y adopting the 'similar community' rule in G.S. 90-21.12 it was the intent of the General Assembly to avoid the adoption of a national or regional standard of care for health providers. . . ." *Pager v. Wilson Mem'l Hosp.*, 49 N.C. App. 533, 535, 272 S.E.2d 8, 10 (1980).

2. N.C. Gen. Stat. § 1A-1, Rule 9(j)

Rule 9(j) requires a plaintiff asserting a medical malpractice complaint under N.C. Gen. Stat. § 90-21.12 to have the medical care and all medical records in question reviewed by "a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2023).

"Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action." *Preston v. Movahed*, 374 N.C. 177, 182, 840 S.E.2d 174, 182 (2020) (quoting *Vaughan v. Mashburn*, 371 N.C. 428, 434, 817 S.E.2d 370, 375 (2018)). Our General Assembly intended "to provide a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)'s requirement of expert certification prior to the filing of a complaint." *Thigpen v. Ngo*, 355 N.C. 198, 203-04, 558 S.E.2d 162, 166 (2002).

"Because Rule 9(j) requires certification at the time of filing that the necessary expert review has occurred, compliance or noncompliance with the Rule is determined at the time of filing." *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012).

Our Rules of Civil Procedure have special pleading requirements for claims brought under N.C. Gen. Stat. § 90-21.11(2):

> (j) Medical malpractice.--Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*.

N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (italics supplied).

3. N.C. Gen. Stat. § 8C-1, Rule 702(b)

Rule 702(b) of the Rules of Evidence sets forth special standards for admission of standard of care expert witnesses in the medical malpractice context:

> (b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:
>
> (1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
>
> a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or

> b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.
>
> (2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:
>
> a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
>
> b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

N.C. Gen. Stat. § 8C-1, Rule 702(b) (2023).

If a plaintiff fails to obtain an expert certification pursuant to Rule 9(j) of Civil Procedure, which incorporates the requirements of Rule 702(b) for standard of care expert witness qualification, the plaintiff has failed to meet the requirements to assert a medical malpractice claim under N.C. Gen. Stat. § 90-21.11(2)(a) or (b).

4. "Same or Similar Community"

A plaintiff fails to assert a viable claim under N.C. Gen. Stat. § 90-21.11(a) or (b) without an expert who can testify to the "same or similar" requirements in N.C. Gen. Stat. § 90-21.12(a).

This Court affirmed a trial court's decision to grant a directed verdict in favor of the defendant-health care provider, because the plaintiffs' standard of care expert witness had attempted to apply a national

standard of care. *See Henry v. Se. OB-GYN Assocs., P.A.*, 145 N.C. App. 208, 212-13, 550 S.E.2d 245, 248, *aff'd*, 354 N.C. 570, 557 S.E.2d 530 (2001). In *Henry*, the plaintiffs argued its desired expert, an obstetrics and gynecological physician, who practiced in Spartanburg, South Carolina, could "competently testify to the prevailing standard of pre-natal and obstetrical care in Wilmington, because he was familiar with the applicable national standard of care." *Id.* at 209, 550 S.E.2d at 246.

This Court held plaintiffs' expert "was unfamiliar with the relevant standard of care, his opinion as to whether defendants met that standard [wa]s unfounded and irrelevant, and thus [held] that the trial court properly excluded Dr. Chauhan's testimony." *Id.* at 213, 550 S.E.2d at 248.

"To adopt plaintiffs' argument, this Court would have to ignore the plain language of N.C. Gen. Stat. § 90-21.12 and its evidentiary requirement that the 'similar community' rule imposes, as well as well-established case law." *Id.* at 212, 550 S.E.2d at 248. *See also* John M. Tyson, *Statutory Standards of Care for North Carolina Health Care Providers*, 1 Campbell L. Rev. 111, 115-25 (1979); Elizabeth J. Armstrong, *Nurse Malpractice in North Carolina: The Standard of Care*, 65 N.C. L. Rev. 579, 581 (1987); Robert G. Byrd, *The North Carolina Medical Malpractice Statute*, 62 N.C. L. Rev. 711, 716 (1984).

During Nurse Mohammed's first deposition, she explained she was applying a national standard of care:

> Q. Okay. Is the standard of care as you are applying it in this case the same for a nurse practicing in New York as it would be for a nurse practicing in Houston, Texas?
>
> A. Yes.
>
> Q. So it's a national standard of care that you are applying?
>
> A. Correct.

The trial court found Nurse Mohammed, as Plaintiffs' "sole standard of care expert," had "failed to make the statutorily required connection to the community in which the alleged malpractice took place or to a similarly situated community." The trial court further held Nurse Mohammed had "failed to demonstrate that she was sufficiently familiar with the standard of care among members of the same healthcare profession with similar training and experience situated in the same or similar communities at the time of the alleged act[.]" Because Nurse Mohammed was Plaintiffs' sole standard of care expert witness proffered, the "exclusion of testimony from [Nurse] Mohammed renders

Plaintiff[s] unable to establish an essential element of her claims, and summary judgment in favor of Defendants [was] appropriate."

Given Nurse Mohammed's express deposition testimony about applying a national standard of care, the trial court did not err by excluding her testimony. *Id.* at 212-13, 550 S.E.2d at 248. Without a competent expert witness to establish the applicable standard of care and negligence, Defendants were entitled to summary judgment as a matter of law. *Id.*

VI. Rule 702(e)

A. Standard of Review

[3] "[T]his Court has uniformly held that the competency of a witness to testify as an expert is a question primarily addressed to the court, and his discretion is ordinarily conclusive, that is, unless there be no evidence to support the finding, or unless the judge abuse[d] his discretion." *State v. Moore*, 245 N.C. 158, 164, 95 S.E.2d 548, 552 (1956).

"Generally, the trial court's decision to allow or disqualify an expert will not be reversed on appeal absent a showing of abuse of discretion." *DaSilva v. WakeMed*, 375 N.C. 1, 4, 846 S.E.2d 634, 638 (2020) (citation and internal quotation marks omitted). "The standard of review remains the same whether the trial court has admitted or excluded the testimony—even when the exclusion of expert testimony results in summary judgment and thereby becomes 'outcome determinative.' " *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1, 11 (2016) (quoting *General Electric Co. v. Joiner*, 522 U.S. 136, 142-43, 139 L. Ed. 2d 508 (1997)).

"A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Hamilton*, 187 N.C. App. at 792, 654 S.E.2d at 710 (internal quotations omitted).

B. Analysis

Plaintiffs argue Nurse Mohammed should have been allowed to testify pursuant to Rule 702(e) of the Rules of Evidence. Rule 702(e) permits a trial court to allow an expert to testify:

> on the appropriate standard of health care by a witness who does not meet the requirements of subsection (b) or (c) of this Rule, but who is otherwise qualified as an expert witness, upon a showing by the movant of extraordinary circumstances and a determination by the court that the motion should be allowed to serve the ends of justice.

N.C. Gen. Stat. § 8C-1, Rule 702(e) (2023).

Plaintiffs argue "[t]here simply cannot be any legitimate or credible argument that [Nurse] Mohammed is not qualified to render an opinion on the subject of Morse Fall Risk Protocol Implementation and Interventions." Plaintiffs assert Nurse Mohammed is not a "hired gun," and Plaintiffs should "be entitled at a minimum to have [their] day in court."

The record on appeal is devoid of any extraordinary circumstances to support the certification or admission of Nurse Mohammed under Rule 702(e), nor do Plaintiffs argue such circumstances exist. *See Knox v. Univ. Health Sys. of E. Carolina, Inc.*, 187 N.C. App. 279, 284, 652 S.E.2d 722, 725 (2007) (citing N.C. Gen. Stat. § 8C-1, Rule 702(e)). Plaintiffs' argument is overruled.

VII. Conclusion

Contradictions existed between Nurse Mohammed's earlier depositions' statements and the affidavit attached to Plaintiffs' responsive briefs. *Pinczkowski*, 153 N.C. App. at 440, 571 S.E.2d at 7; *Hawkins*, 240 N.C. App. at 342, 770 S.E.2d at 163; *Zander*, 289 N.C. App. at 598, 890 S.E.2d at 799; *Hamilton*, 187 N.C. App. at 792, 654 S.E.2d at 710. Plaintiffs' decision to file an affidavit, which was contrary to the expert witness's prior deposition testimony, at the "last-minute" does not create a genuine issue of material fact to deny summary judgment. *Pinczkowski*, 153 N.C. App. at 441, 571 S.E.2d at 7. Plaintiffs have failed to show the trial court abused its discretion by striking contradictory paragraphs 12, 13, 16, 17, and 18 from Mohammed's affidavit.

The trial court did not err by excluding Nurse Mohammed's deposition testimony. She testified to applying a national standard of care during her deposition contrary to the statutory standard of care. *Henry*, 145 N.C. App. at 212-13, 550 S.E.2d at 248. Without an expert witness to establish standard of care and negligence, Defendants were entitled to summary judgment as a matter of law. *Id.*

Plaintiff has failed to present any "extraordinary circumstances" to justify the certification of Nurse Mohammed under Rule 702(e). *See Knox*, 187 N.C. App. at 284, 652 S.E.2d at 725. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges COLLINS and GRIFFIN concur.

EXUM v. ST. ANDREWS-COVENANT PRESBYTERIAN CHURCH, INC.

[296 N.C. App. 467 (2024)]

ROBERT EXUM, PLAINTIFF
v.
ST. ANDREWS-COVENANT PRESBYTERIAN CHURCH, INC.; THE PRESBYTERY OF COASTAL CAROLINA, INC.; THE SYNOD OF THE MID-ATLANTIC OF THE PRESBYTERIAN CHURCH (U.S.A.), INC.; PRESBYTERY OF CHARLOTTE, INC., PRESBYTERIAN CHURCH (U.S.A.); AND MYERS PARK PRESBYTERIAN CHURCH, INC., DEFENDANTS

No. COA24-126

Filed 19 November 2024

1. Appeal and Error—interlocutory order—substantial right—ecclesiastical entanglement

A church (defendant) had an immediate right to appeal the trial court's order denying its Civil Procedure Rule 12(b)(1) motion to dismiss plaintiff parishioner's claims—including negligent retention of a pastor who had sexual relations with plaintiff's wife—where the order, although interlocutory, affected a substantial right based on defendant's argument that the trial court impermissibly entangled itself in ecclesiastical matters and thereby violated defendant's First Amendment rights. Where defendant did not make the same substantial right argument with regard to the denial of its Civil Procedure Rule 12(b)(6) motion to dismiss, however, the appellate court did not have jurisdiction to review that order.

2. Churches and Religion—subject matter jurisdiction—negligent retention of pastor—ecclesiastical entanglement not implicated

The trial court did not err by denying defendant church's motion to dismiss pursuant to Civil Procedure Rule 12(b)(1) plaintiff parishioner's claims for negligent retention, negligent infliction of emotional distress, and breach of fiduciary duty for the hiring of a pastor with a history of misconduct who had sexual relations with plaintiff's wife. Although defendant argued that resolution of the claims would require the trial court to interpret church doctrine in violation of the ecclesiastical entanglement doctrine under the First Amendment, where the claims were all based on alleged negligence of the church in placing in a leadership position a person it knew or should have known had a history of and propensity to engage in sexual misconduct—not conduct that was part of the practices of the church—there was no need for the trial court to interpret or weigh religious doctrine and, therefore, the First Amendment was not implicated.

Appeal by Defendant St. Andrews-Covenant Presbyterian Church, Inc. from order entered 13 September 2023 by Judge Tiffany Powers in New Hanover County Superior Court. Heard in the Court of Appeals 24 September 2024.

Ellis & Winters LLP, by Alex J. Hagan and Joseph D. Hammond, for Defendant-Appellant.

Dowling PLLC, by Troy D. Shelton, and Mason, Mason, & Smith, by Amanda B. Mason and Sarah C. Thomas, for Plaintiff-Appellee.

COLLINS, Judge.

Defendant St. Andrews-Covenant Presbyterian Church, Inc., appeals from the trial court's order denying its motion to dismiss. St. Andrews-Covenant argues that the trial court's denial of its Rule 12(b)(1) motion violates St. Andrews-Covenant's First Amendment rights because the adjudication of Plaintiff Robert Exum's claims requires inquiry into St. Andrews-Covenant's religious doctrine. This argument lacks merit. Because neutral principles of law can be applied to adjudicate Exum's claims, without inquiring into ecclesiastical matters, the trial court did not err. St. Andrews-Covenant's remaining arguments, based on the trial court's denial of its Rule 12(b)(6) motion, are dismissed as interlocutory. Accordingly, we affirm in part, dismiss in part, and remand for further proceedings.

I. Background

Exum commenced this action on 23 November 2022 by filing a complaint for negligent retention, negligent infliction of emotional distress, and breach of fiduciary duty against the following defendants: St. Andrews-Covenant; The Presbytery of Coastal Carolina, Inc. ("Presbytery Coastal"); The Synod of the Mid-Atlantic of the Presbyterian Church (U.S.A.), Inc. ("The Synod"); Presbytery of Charlotte, Inc., Presbyterian Church (U.S.A.) ("Presbytery Charlotte"); and Myers Park Presbyterian Church, Inc. ("Myers Park Presbyterian"). In his complaint, Exum alleges the following:

Exum and his former Wife were married from 26 September 1987 until their divorce on 21 October 2021. Exum and Wife were regular attendees of St. Andrews-Covenant, located in Wilmington, North Carolina. In September 2017, Pastor Derek Macleod was transferred to St. Andrews-Covenant from Myers Park Presbyterian. Macleod had served as associate pastor at Myers Park Presbyterian since 2014 and

had had inappropriate sexual relations with parishioners while there. In or around early 2020, Macleod, who was also married, began a romantic relationship with Wife. Macleod and Wife kept their relationship a secret from their respective spouses. In February 2020, Macleod encouraged Wife to travel without Exum to El Salvador on a missionary trip, where further marital misconduct between Macleod and Wife transpired. This missionary trip occurred under the leadership of Myers Park Presbyterian and Presbytery Charlotte. Within three days of returning from this trip, Wife informed Exum that she planned to leave their marriage. Exum inadvertently saw explicit messages between Wife and Macleod on 31 March 2021. Wife and Macleod confirmed the existence of their relationship to Exum a few weeks later.

Macleod resigned from St. Andrews-Covenant in December 2020 and became an interim pastor at Presbytery Coastal. Presbytery Coastal oversees St. Andrews-Covenant, and Presbytery Charlotte oversees Myers Park Presbyterian. The Synod has authority over Presbytery Coastal and Presbytery Charlotte. Presbytery Coastal, Presbytery Charlotte, and The Synod all had authority over Macleod and placed him at St. Andrews-Covenant, despite his past misconduct while on staff at Myers Park Presbyterian. Macleod resigned from his position at Presbytery Coastal in September 2022.

The Synod filed a motion for summary judgment, while Presbytery Coastal, Presbytery Charlotte, and Myers Park Presbyterian all filed motions to dismiss Exum's claims. St. Andrews-Covenant filed a motion to dismiss Exum's claims pursuant to Rules 12(b)(1) and 12(b)(6). The trial court granted The Synod's motion for summary judgment[1] and the other defendants' motions to dismiss. In a separate order, the trial court denied St. Andrews-Covenant's motion to dismiss. St. Andrews-Covenant appeals.

II. Discussion

A. Appellate Jurisdiction

[1] As an initial matter, we address our jurisdiction over the issues before us. First, the trial court's order denying St. Andrews-Covenant's Rule 12(b)(1) and Rule 12(b)(6) motion to dismiss is interlocutory. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action,

1. While the order granting The Synod's motion for summary judgment does not appear in the record, the parties reference this order in their briefs and the order is not at issue on appeal.

which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.") (citation omitted). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Clements v. Clements*, 219 N.C. App. 581, 583, 725 S.E.2d 373, 375 (2012) (quotation marks and citation omitted). An interlocutory order may, however, be immediately appealable "if the order implicates a substantial right of the appellant that would be lost if the order was not reviewed prior to the issuance of a final judgment." *Keesee v. Hamilton*, 235 N.C. App. 315, 320, 762 S.E.2d 246, 249 (2014) (citation omitted); N.C. Gen. Stat. § 7A-27(b)(3)(a) (2023).

A trial court's denial of a church's Rule 12(b)(1) motion to dismiss based on an assertion that "a civil court action cannot proceed [against a church defendant] without impermissibly entangling the court in ecclesiastical matters" is immediately appealable because the defendant would be "irreparably injured if the trial court becomes entangled in ecclesiastical matters from which it should have abstained." *Harris v. Matthews*, 361 N.C. 265, 270-71, 643 S.E.2d 566, 569-70 (2007).

Here, St. Andrews-Covenant argues that the trial court's order violated its First Amendment rights by entangling itself with ecclesiastical matters, thus affecting a substantial right. Accordingly, the trial court's order denying St. Andrews-Covenant's Rule 12(b)(1) motion to dismiss is immediately appealable.

Next, Exum contends that St. Andrews-Covenant's appeal, as it pertains to the trial court's denial of its Rule 12(b)(6) motion, should be dismissed. Our appellate rules require an appellant, when appealing an interlocutory order, to provide this Court with a jurisdictional statement "contain[ing] sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P. 28(b)(4) (2023). In its appeal, St. Andrews-Covenant argues only that the trial court's denial of its Rule 12(b)(1) motion is an appealable interlocutory order; St. Andrews-Covenant makes no such argument as to its Rule 12(b)(6) motion. When addressing the merits of its appeal, however, St. Andrews-Covenant raises arguments that pertain to a Rule 12(b)(6) analysis and that St. Andrews-Covenant had previously raised in the trial court under Rule 12(b)(6). This Court does not have jurisdiction over those arguments. Accordingly, we dismiss all arguments stemming from the trial court's denial of St. Andrews-Covenant's Rule 12(b)(6) motion to dismiss.

Finally, Exum invites us to "note in [our] opinion that the trial court should reconsider, under Civil Rule 54(b), whether the claims against

the other defendants should be reinstated." We have no jurisdiction over this issue and decline this invitation.

B. Rule 12(b)(1) Motion to Dismiss

[2] St. Andrews-Covenant argues that Exum's claims should have been dismissed pursuant to Rule 12(b)(1) because the trial court's adjudication of Exum's claims requires inquiry into St. Andrews-Covenant's religious doctrine and thus violates the First Amendment. We disagree.

This Court reviews a trial court's denial of a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction de novo. *Harris*, 361 N.C. at 271, 643 S.E.2d at 570. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *McAdoo v. Univ. of N.C. at Chapel Hill*, 225 N.C. App. 50, 51, 736 S.E.2d 811, 814 (2013) (quotation marks and citations omitted).

The First Amendment to the United States Constitution protects against any law "respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. "The United States Supreme Court has interpreted this clause to mean that the civil courts cannot decide disputes involving religious organizations where the religious organizations would be deprived of interpreting and determining their own laws and doctrine." *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 397 (1998) (citation omitted).

As applied to the states through the Fourteenth Amendment, the First Amendment also prohibits state tribunals from adjudicating actions based on religious doctrine. *See Doe v. Diocese of Raleigh*, 242 N.C. App. 42, 47, 776 S.E.2d 29, 34-35 (2015). State courts are therefore prohibited "from becoming entangled in ecclesiastical matters and have no jurisdiction over disputes which require an examination of religious doctrine and practice in order to resolve the matters at issue." *Id.* at 47, 776 S.E.2d at 34-35 (quotation marks and citations omitted); *see also W. Conf. of Original Free Will Baptists of N.C. v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 627 (1962) ("The legal or temporal tribunals of the State have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies . . . .") (citation omitted).

The First Amendment, however, does not grant immunity to religious organizations from all claims. *See Smith*, 128 N.C. App. at 494, 495 S.E.2d at 397. It is well-established that "the [a]pplication of a secular standard to secular conduct that is tortious is not prohibited by the Constitution." *Id.* (quotation marks and citations omitted). "The dispositive question is whether resolution of the legal claim requires the

court to interpret or weigh church doctrine. If not, the First Amendment is not implicated and neutral principles of law are properly applied to adjudicate the claim." *Id.* at 494, 495 S.E.2d at 398 (citing *Serbian E. Orthodox Diocese for the U.S. and Canada v. Milivojevich*, 426 U.S. 696, 710 (1976)).

In *Smith*, the plaintiffs brought a negligent retention and supervision claim against certain church defendants based on their alleged negligence in retaining and supervising a pastor accused of committing acts of sexual misconduct against the plaintiffs. 128 N.C. App. at 491-92, 495 S.E.2d at 396. The issue was "whether the [c]hurch [d]efendants knew or had reason to know of [the pastor's] propensity to engage in sexual misconduct, . . . conduct that the [c]hurch [d]efendants d[id] not claim [wa]s part of the tenets or practices of the Methodist Church." *Id.* at 495, 495 S.E.2d at 398 (citation omitted).

Reversing the trial court's dismissal of the church defendants under Rule 12(b)(1), the Court explained, "[T]here is no necessity for the court to interpret or weigh church doctrine in its adjudication of the [p]laintiffs' claim for negligent retention and supervision. It follows that the First Amendment is not implicated and does not bar the [p]laintiffs' claim against the [c]hurch [d]efendants." *Id.* The Court emphasized that a contrary holding "would go beyond First Amendment protection and cloak such [religious] bodies with an exclusive immunity greater than that required for the preservation of the principles constitutionally safeguarded." *Id.* (citation omitted).

Here, Exum brought claims against St. Andrews-Covenant for negligent retention, negligent infliction of emotional distress, and breach of fiduciary duty. As St. Andrews-Covenant concedes, each of these claims is premised on alleged negligence in placing and retaining Macleod at St. Andrews-Covenant.

The allegations made by Exum mirror those made by the plaintiffs in *Smith*. Exum alleges that St. Andrews-Covenant was negligent in allowing Macleod's tortious conduct to occur because St. Andrews-Covenant knew or should have known that Macleod had engaged in similar misconduct in his capacity as a church leader in prior roles. Therefore, Exum alleges, St. Andrews-Covenant knew or should have known that the bringing and retaining Macleod as an employee of its church would present a danger to parishioners.

Exum's claims thus present the issue of whether St. Andrews-Covenant knew or had reason to know of Macleod's propensity to engage in sexual misconduct with married members of the congregation. As

in *Smith*, "there is no necessity for th[is] [C]ourt to interpret or weigh church doctrine in its adjudication of" Exum's claims premised on alleged negligence in placing and retaining Macleod at St. Andrews-Covenant. *Id.* "It follows that the First Amendment is not implicated and does not bar" Exum's claims against St. Andrews-Covenant. *Id.* As the Court in *Smith* explained, a contrary holding "would go beyond First Amendment protection and cloak such [religious] bodies with an exclusive immunity greater than that required for the preservation of the principles constitutionally safeguarded." *Id.* (citation omitted).

III. Conclusion

The trial court did not err by denying St. Andrews-Covenant's Rule 12(b)(1) motion to dismiss. St. Andrews-Covenant's appeal, to the extent it is based on the trial court's denial of its Rule 12(b)(6) motion, is dismissed. Accordingly, we affirm in part, dismiss in part the trial court's order, and remand for further proceedings.

AFFIRMED IN PART; DISMISSED IN PART; AND REMANDED.

Judges TYSON and GRIFFIN concur.

ROBERT WARD FERRIS, PETITIONER
v.
NORTH CAROLINA BOARD OF ARCHITECTURE, RESPONDENT

No. COA24-303

Filed 19 November 2024

Administrative Law—petition for judicial review of final agency decision—sufficiency of service

In a contested case initiated by an architect (petitioner) after the North Carolina Board of Architecture and Registered Interior Designers (respondent)—following an administrative hearing—concluded that petitioner had willfully violated a statute governing the practice of architecture, the superior court did not abuse its discretion by dismissing plaintiff's petition for judicial review where plaintiff served that petition on respondent via electronic mail in violation of N.C.G.S. § 150B-46 (requiring service by personal service or certified mail within 10 days of the filing of the petition), and where, to the extent plaintiff attempted to remedy this jurisdictional

error by belatedly serving respondent by certified mail, the superior court, in its discretion, considered but rejected plaintiff's argument that there was good cause shown to extend the time for service of process.

Appeal by petitioner from order entered 27 September 2023 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 24 September 2024.

The Charleston Group, by R. Jonathan Charleston and Jose A. Coker, for petitioner-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by A. Grant Simpkins and M. Jackson Nichols, for respondent-appellee.

ZACHARY, Judge.

This case concerns the sufficiency of service of a petition for judicial review of a final agency decision pursuant to N.C. Gen. Stat. § 150B-46 (2023). Petitioner Robert Ward Ferris appeals from the superior court's order granting the motion to dismiss his petition for judicial review filed by Respondent North Carolina Board of Architecture and Registered Interior Designers ("the Board"). After careful review, we affirm.

I. Background

"A detailed factual background is not needed for this case as the only issue on appeal is service." *N.C. State Bd. of Educ. v. Minick*, 289 N.C. App. 369, 370, 890 S.E.2d 193, 194 (2023).

On 23 and 24 March 2023, the Board conducted an administrative hearing as to whether Petitioner had violated various statutes and rules governing the practice of architecture in North Carolina. On 24 March 2023, the Board issued a final agency decision in which it concluded, *inter alia*, that Petitioner willfully violated N.C. Gen. Stat. § 83A-15, as specifically set forth in 21 N.C. Admin. Code 02.0203(8)(g). The Board served the final agency decision upon Petitioner on 17 April 2023, which Petitioner received by certified mail two days later.

On 19 May 2023, Petitioner timely filed a petition for judicial review ("the Petition") of the Board's final agency decision in Wake County Superior Court. That same day, Petitioner served the Board's counsel, administrative counsel, and executive director—the Board's registered agent for service of process—by email. Thereafter, on 12 June 2023,

Petitioner served a copy of the Petition upon the Board's counsel and administrative counsel by certified mail.

On 19 June 2023, the Board filed a motion to dismiss the Petition. The Board argued that "Petitioner failed to comply with N.C. Gen. Stat. § 150B-46 by serving the Board with the Petition via electronic mail and serving counsel for the Board via certified mail." On 21 June 2023, Petitioner served the Board's registered agent for service of process by certified mail, and the next day, Petitioner served the Board by personal service via courier. Petitioner filed an affidavit of service detailing the above history on 10 July 2023.

On 15 August 2023, the Board's motion to dismiss came on for a hearing. At the conclusion of the hearing, the superior court granted the Board's motion to dismiss and denied Petitioner's motion for additional time to serve the Petition. On 27 September 2023, the superior court entered an order memorializing its decision. Petitioner filed his notice of appeal on 26 October 2023.

II. Discussion

Petitioner argues that the superior court erred by granting the Board's motion to dismiss the Petition and by denying his motion for an extension of time to serve the Board. We disagree.

A. Standards of Review

Whether the trial court erroneously dismissed a petition for judicial review due to improper service of process is a question of law, which this Court reviews de novo on appeal. *Minick*, 289 N.C. App. at 372, 890 S.E.2d at 195. "Strict compliance with the service requirement of [N.C. Gen. Stat.] § 150B-46 is necessary for the [superior] court to acquire personal jurisdiction over an appeal from an administrative agency . . . ." *Id.* at 373, 890 S.E.2d at 196.

Moreover, here, while conducting de novo review of the superior court's overall decision, we must also be mindful that "[t]he determination of whether good cause exists to extend the time for service rests within the sound discretion of the superior court." *Aetna Better Health of N.C., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 279 N.C. App. 261, 267, 866 S.E.2d 265, 269 (2021). "When we review for an abuse of discretion, this Court cannot reverse the trial court's decision unless the appellant shows the decision was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (cleaned up).

B. Analysis

Petitioner argues that the superior court erred by granting the Board's motion to dismiss because the court "relied on cases where the petitioner did not request additional time to serve the petition for judicial review." However, Petitioner's argument fails to persuade. As the Board correctly notes, "[t]he dispositive issue in this case is whether there was strict compliance with N.C. Gen. Stat. § 150B-46." In the present case, there was not.

For approximately 70 years, our Supreme Court has held that "there can be no appeal from the decision of an administrative agency except pursuant to specific statutory provisions therefore. Obviously then, the *appeal must conform to the statute granting the right* and regulating the procedure." *Minick*, 289 N.C. App. at 373, 890 S.E.2d at 196 (citation omitted). The failure to do so is fatal because the "[s]ervice requirements under [N.C. Gen. Stat.] § 150B-46 are jurisdictional; a case is properly dismissed where a party is not properly served." *Id.*

Here, Petitioner had the statutory right to appeal the Board's final agency decision pursuant to N.C. Gen. Stat. § 150B-43. Yet in conjunction with that statutory right, there came the responsibility of complying with the specific service-of-process provisions of N.C. Gen. Stat. § 150B-46. *See id.* Section 150B-46 provides that "[w]ithin 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings." N.C. Gen. Stat. § 150B-46.

Petitioner was thus required to serve the Board by personal service or certified mail within ten days of filing the Petition in Wake County Superior Court. *See id.* This, Petitioner indisputably did not do. Within the jurisdictional ten-day period, Petitioner served the Board's registered agent for service of process, counsel, and administrative counsel *by email*, which § 150B-46 does not authorize. *See id.*; *see also Aetna*, 279 N.C. App. at 268, 866 S.E.2d at 270 (affirming the superior court's denial of the petitioner's motion for an extension of time to serve a petition for judicial review where the petitioner "did not accomplish proper service" by serving the respondent's counsel via email).

Moreover, to the extent that Petitioner attempted to remedy this jurisdictional error by belatedly serving the Board's counsel and administrative counsel via certified mail, that effort was ineffective. This Court has consistently affirmed dismissals of petitions for judicial review where "petitioners failed to comply with [N.C. Gen. Stat.] § 150B-46

because they failed to personally serve respondents as parties to the administrative proceedings below but instead served an attorney representing the respondents." *Minick*, 289 N.C. App. at 376, 890 S.E.2d at 198. Our precedent instructs that this is insufficient under § 150B-46, which "requires service upon a party of record, and not upon an attorney representing the party's interests." *Id.* at 375, 890 S.E.2d at 197; *see also* N.C. Gen. Stat. § 150B-46.

In *Follum v. North Carolina State University*, for example, the petitioner served the respondent's counsel of record, rather than its registered agent for service of process. 198 N.C. App. 389, 394, 679 S.E.2d 420, 423 (2009). This Court determined that the counsel of record was "an employee of the Department of Justice and a member of the Attorney General's staff, not of NCSU." *Id.* As such, the counsel of record did not qualify as a "person at the agency" under § 150B-46. *Id.*; *see also*, *e.g.*, *Butler v. Scotland Cnty. Bd. of Educ.*, 257 N.C. App. 570, 578, 811 S.E.2d 185, 191 (affirming the dismissal of a petition for judicial review where the petitioner "failed to comply with N.C. Gen. Stat. § 150B-46's service requirements in that instead of personally serving the Board with his petition within the ten-day time limit he simply served a copy of his petition upon the *attorney* for the Board"), *disc. review denied*, 371 N.C. 339, 813 S.E.2d 853 (2018).

Petitioner's service by email upon the Board's registered agent for service of process, rather than by personal service or certified mail, was statutorily insufficient. *See* N.C. Gen. Stat. § 150B-46. This failing subjected the Petition to dismissal. *See Minick*, 289 N.C. App. at 373, 890 S.E.2d at 196. And to the extent that Petitioner attempted to remedy this jurisdictional flaw, his subsequent and untimely service by certified mail was still ineffective under § 150B-46. *See*, *e.g.*, *Butler*, 257 N.C. App. at 578, 811 S.E.2d at 191.

Nevertheless, Petitioner relies upon *North Carolina Department of Public Safety v. Owens*, in which this Court held that "the superior court has the authority to grant an extension in time, for good cause shown, to a party to serve the petition beyond the ten days provided for under [N.C. Gen. Stat. §] 150B-46." 245 N.C. App. 230, 234, 782 S.E.2d 337, 340 (2016). Petitioner contends that the superior court abused its discretion by denying his motion for an extension of time and granting the Board's motion to dismiss because "there was good cause to allow [him] additional time to serve [his] timely filed Petition by certified mail[.]"

"When the [superior] court acts within its discretion, this Court may not substitute its own judgment for that of the [superior] court." *Aetna*,

279 N.C. App. at 268, 866 S.E.2d at 270 (cleaned up). In this case, the superior court considered Petitioner's good-faith argument, but concluded that "Petitioner has failed to offer or show good cause for his failure to timely and properly serve" the Petition on the Board. Accordingly, and in the proper exercise of its discretion, the superior court declined to extend the time for service of process.

"The [superior] court's decision was not arbitrary. It was a reasoned decision rendered after careful evaluation of the parties' competing positions." *Id.* Petitioner has not demonstrated that "the decision was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 267, 866 S.E.2d at 269. Therefore, Petitioner "has shown no abuse of discretion in the superior court's good cause determination. [His] argument is overruled." *Id.* at 268, 866 S.E.2d at 270 (citation omitted).

III. Conclusion

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

AFFIRMED.

Judges STROUD and HAMPSON concur.

MICHAEL HUGHES, ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED, PLAINTIFF
v.
BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM, A NORTH CAROLINA BODY POLITIC AND CORPORATE; TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA; CONSOLIDATED JUDICIAL RETIREMENT SYSTEM OF NORTH CAROLINA; LEGISLATIVE RETIREMENT SYSTEM OF NORTH CAROLINA; STATE TREASURER DALE R. FOLWELL, EX OFFICIO CHAIR OF THE BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM (IN HIS OFFICIAL CAPACITY); AND STATE OF NORTH CAROLINA, DEFENDANTS

No. COA24-263

Filed 19 November 2024

1. Appeal and Error—notice of appeal—failure to list one of the appellants—intent—"fairly inferred" doctrine

In a class action filed by a retired State employee (plaintiff) against the State Treasurer and various State retirement systems and officials (defendants), defendants' appeal from an order denying

their motions to dismiss and for judgment on the pleadings was not subject to dismissal, even though they failed to name one of the defendants as an appellant in their notice of appeal. Plaintiff could fairly infer the omitted defendant's intent to appeal the order and conceded that he was neither misled nor prejudiced by the mistake, particularly where all of the named defendants argued in their brief about the omitted defendant's entitlement to sovereign immunity from plaintiff's suit.

2. Appeal and Error—interlocutory order—denying motions to dismiss and for judgment on the pleadings—sovereign immunity—substantial right

In a class action filed by a retired State employee (plaintiff) against the State Treasurer and various State retirement systems and officials (defendants), where defendants raised the defense of sovereign immunity in their motions to dismiss under Civil Procedure Rule 12(b)(1) for lack of subject matter jurisdiction and in a Rule 12(c) motion for judgment on the pleadings, the Court of Appeals had jurisdiction to review defendants' appeal from an interlocutory order denying those motions. Although the denial of a Rule 12(b)(1) motion based on sovereign immunity is not immediately appealable, the denial of a Rule 12(c) motion based on sovereign immunity is immediately appealable as affecting a substantial right.

3. Pensions and Retirement—retired state employee—entitlement to cost-of-living adjustments—breach of contract claim

In a class action filed by a retired State employee (plaintiff) against the State Treasurer and various State retirement systems and officials (defendants), where plaintiff argued that the defendants breached his employment contract by failing to provide cost-of-living adjustments (COLAs) to his retirement benefits that were comparable to those of active employees pursuant to N.C.G.S. § 135-5(o), the trial court erred in denying defendants' motion for judgment on the pleadings. Although defendants' theory of sovereign immunity was inapplicable, since it is well-settled that the State waives immunity by entering into a contract, the language in section 135-5(o) was not part of plaintiff's contract and therefore did not create a contractual obligation to fund plaintiff's retirement COLAS pursuant to that language. Importantly, plaintiff only had a contractual right to rely on the terms of his retirement plan as those terms existed at the time his contractual rights became vested; under North Carolina law, state employees have a vested right to retirement benefits (as deferred compensation) but not necessarily

to future COLAs, especially where the plain language of section 135-5(o) indicates that such COLAs are discretionary rather than mandatory.

4. Immunity—sovereign—declaratory judgment action—no statutory waiver

In a class action filed by a retired State employee (plaintiff) against the State Treasurer and various State retirement systems and officials (defendants), where plaintiff sought a declaratory judgment that he was entitled to cost-of-living adjustments to his retirement benefits comparable to active State employees pursuant to N.C.G.S. § 135-5(o), the trial court erred in denying defendants' motion for judgment on the pleadings, in which defendants asserted sovereign immunity from suit. Nothing in the Declaratory Judgment Act constitutes a waiver of sovereign immunity, and no other waiver of sovereign immunity had been proven.

5. Immunity—sovereign—state employee retirement benefits—cost-of-living adjustments—no statutory waiver—no statutory cause of action

In a class action filed by a retired State employee (plaintiff) against the State Treasurer and various State retirement systems and officials (defendants), where plaintiff argued that he was entitled to cost-of-living adjustments to his retirement benefits comparable to active State employees pursuant to N.C.G.S. § 135-5(o) and that section 135-5(n) (providing a statute of limitations for suing the State or the State employees' retirement system for underpayment of vested contractual rights) constituted a waiver of defendants' sovereign immunity, the trial court erred in denying defendants' motion for judgment on the pleadings. Section 135-5(n) neither waived defendants' immunity nor created a cause of action for asserting a proactive vested right to cost-of-living increases for retirees.

Judge HAMPSON dissenting.

Appeal by defendant from judgment entered 4 December 2023 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 23 October 2024.

Millberg Coleman Bryson Phillips Grossman, PLLC, by Matthew E. Lee, Mark Sigmon, Jeremy R. Williams, and Jacob M. Morse, and Maginnis Howard, PLLC, by Edward H. Maginnis and Karl S. Gwaltney, for the plaintiff-appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney Generals Mary W. Scruggs, and Olga Vysotskaya de Brito, for the defendant-appellants.

TYSON, Judge.

Appeal by State Treasurer Dale R. Folwell, in his official capacity as *ex officio* chair of the Board of Trustees Teachers' and State Employees' Retirement System; the Board of Trustees of the Teachers' and State Employees' Retirement System, Teachers' and State Employees' Retirement System of North Carolina; Consolidated Judicial Retirement System of North Carolina; Legislative Retirement System of North Carolina; and, the State of North Carolina (collectively "Defendants") from orders denying their motions to dismiss and for judgment on the pleadings. We reverse and remand.

I. Background

Michael Hughes ("Plaintiff") was employed in 1994 by the State as a mechanical engineer for the North Carolina Department of Administration. Plaintiff retired in 2012, and he began drawing $1,823.53 monthly in retirement benefits from the Teachers' and State Employees' Retirement System ("TSERS").

Plaintiff has received seven cost of living adjustments ("COLAs") by act of the General Assembly since retiring in 2012:

Year	Percent increase	Legal Source
2014	1% in perpetuity	S.L. 2014-100, § 35.14.(a)
2016	1.6% one-time	S.L. 2016-94, § 36.21.(a)
2017	1% allowance	S.L. 2017-57, § 35.19.A.(a)
2018	1% one-time	S.L. 2018-5, § 35.28.(a)
2021	2% one-time	S.L. 2021-180, § 39.23.(a)
2022	3% one-time	S.L. 2022-74, § 39.20.(a)
2023	4% one-time	S.L. 2023-134, § 39.26.(e)

Plaintiff filed a class action complaint on behalf of himself and other similarly- situated plaintiffs against Defendants on 13 April 2022, seeking: (1) a declaratory judgment holding N.C. Gen. Stat. § 135-5(o) (2023) "entitles Plaintiff to cost-of-living adjustments comparable to those of active state employees" and the requirements of N.C. Gen. Stat. § 135-5(o) have not been met; (2) alleging a violation of N.C. Gen. Stat. § 135-5 based on the "inadequate number of times" and amounts Defendants have requested for cost-of-living adjustments for state retirees; and, (3) alleging a breach of Defendants' employment contract. *See* N.C. Gen. Stat. § 1A-1, Rule 23 (2023).

Defendants filed a motion to dismiss Plaintiff's complaint pursuant to Rule 12(b)(1) of our Rules of Civil Procedure and for judgment on the pleadings pursuant to Rule 12(c) of our Rules of Civil Procedure on 25 September 2023. *See* N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(c) (2023). Defendants argued Plaintiff's complaint is barred by sovereign immunity. The trial court heard arguments on Defendants' motions on 9 November 2023 and by order entered 4 December 2023 it denied Defendants' motions. The trial court also ordered *sua sponte* for Plaintiff to add a judicial retirement system plaintiff and a legislative retirement system plaintiff within 90 days. Defendants appeal.

II. Jurisdiction

A. Defendants' Notice of Appeal

[1] Defendants noticed their appeal on 2 January 2024. Defendants' notice of appeal did not list the Consolidated Judicial Retirement System of North Carolina ("CJRS") in the body of the Notice of Appeal. *See* N.C. R. App. P. 3(d) ("Content of Notice of Appeal. The notice of appeal required to be filed and served . . . shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.").

"In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure." *Stephenson v. Bartlett*, 177 N.C. App. 239, 241, 628 S.E.2d 442, 443 (2006) (citing *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000)).

"The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737 (1997)

(citation omitted). However, this Court in *Stephenson v. Bartlett*, 177 N.C. App. 239, 242, 628 S.E.2d 442, 444 (2006), recognized "[m]istakes by appellants in following all the subparts of Appellate Procedure Rule 3(d) have not always been fatal to an appeal." "[A] mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake." *Smith v. Indep. Life Ins. Co.*, 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979) (citation omitted) (emphasis supplied).

Failure to comply with Rule 3(d) does not warrant dismissal of an appeal "where the plaintiff's intent to appeal can be fairly inferred and the [appellees] are not misled by the [appellant's] mistake." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011) (citation omitted). This Court further held: "The 'fairly inferred' doctrine ensure[s] that a violation of Rule 3(d) results in dismissal only where the appellee is prejudiced by the appellant's mistake." *Id.*

In *Phelps Staffing, LLC*, the appellant did not designate the court to which the appeal was taken or the judgment or order from which the appeal was taken. *Id.* at 410-11, 720 S.E.2d at 791. This Court has not applied the "fairly inferred" doctrine to a violation of Rule 3(d) where an appellant fails to designate an appellant in the body of the notice of appeal. Defendants timely filed notice of appeal to this Court.

Plaintiff could fairly infer CJRS' intent to appeal to this Court. Plaintiff concedes he was not misled or prejudiced by Defendants' error. Plaintiff agrees "all Defendants appealed distinction between CJRS and the other Defendants as to its entitlement to sovereign immunity" and the omission is immaterial. Defendants' mistake in failing to name CJRS in its notice of appeal does not warrant dismissal of their appeal. *Id.*

B. Interlocutory Appeal

[2] Sovereign immunity shields the State of North Carolina and its agencies with immunity from suit, absent consent or waiver of immunity. *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997). Sovereign immunity is "more than a mere affirmative defense, as it shields a defendant entirely from having to answer for its conduct at all in a civil suit for damages." *Craig v. New Hanover Cty. Bd. Of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 525 86 L. Ed. 2d 411, 424 (1985)).

Defendants appeal from the trial court's denial of their Rule 12(c) motion for judgment on the pleadings and Rule 12(b)(1) motion to dismiss based on sovereign immunity. The trial court's order is interlocutory. "As a general rule, interlocutory orders are not immediately appealable." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citation omitted). The reason for "[t]he rule against interlocutory appeals seeks to prevent fragmentary, premature and unnecessary appeals by allowing the trial court to bring a case to final judgment before its presentation to the appellate courts." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) (citation omitted).

Interlocutory orders can be immediately appealable "when the appeal involves a substantial right of the appellant[,] and the appellant will be injured if the error is not corrected before final judgment." *N.C. Dep't of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 47-48, 619 S.E.2d 495, 496 (2005) (citations omitted). *See also* N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a) (2023).

"Orders denying dispositive motions based on the defenses of governmental and public official's immunity affect a substantial right and are immediately appealable." *Thompson v. Town of Dallas*, 142 N.C. App. 651, 653, 543 S.E.2d 901, 903 (2001) (citation omitted). The denial of a motion for judgment on the pleadings "on grounds of sovereign immunity is immediately appealable, though interlocutory, because it represents a substantial right, as the entitlement is an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial." *Craig*, 363 N.C. at 338, 678 S.E.2d at 354 (citation, quotation marks, and alterations omitted).

"Nevertheless, this Court has declined to address interlocutory appeals of a lower court's denial of a Rule 12(b)(1) motion to dismiss despite the movant's reliance upon the doctrine of sovereign immunity." *Green v. Kearney*, 203 N.C. App. 260, 265-66, 690 S.E.2d 755, 760 (2010).

This distinction between personal and subject matter jurisdiction is important in our State's courts because N.C. Gen. Stat. § 1-277(b) (2023) "allows the immediate appeal of a denial of a Rule 12(b)(2) motion but not the immediate appeal of a denial of a Rule 12(b)(1) motion." *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327-28, 293 S.E.2d 182, 184 (1982) ("Although the federal courts have tended to minimize the importance of the designation of a sovereign immunity defense as either a Rule 12(b)(1) motion regarding subject matter jurisdiction or a Rule 12(b)(2) motion regarding jurisdiction over the person, the distinction becomes crucial in

North Carolina because G.S. 1-277(b) allows the immediate appeal of a denial of a Rule 12(b)(2) motion but not the immediate appeal of a denial of a Rule 12(b)(1) motion.").

The Supreme Court of North Carolina in *Teachy* did not determine whether sovereign immunity is an issue of subject matter or personal jurisdiction. This Court has held because "N.C. Gen. Stat. § 1-277(b) allows only for an immediate appeal of the denial of a motion to dismiss based on personal jurisdiction, not subject matter jurisdiction" that "an appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction, and is therefore immediately appealable." *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 384-85, 677 S.E.2d 203, 207 (2009) (citing *Data Gen. Corp. v. City of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001)). This Court further held the "appeal from the denial of [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." *Id.* at 385, 677 S.E.2d at 207.

Defendants also seek review of the trial court's denial of their Rule 12(c) motion for judgment on the pleadings asserting sovereign immunity from Plaintiff's action. Defendants' claim is interlocutory and involves a substantial right. *Stagecoach Vill.*, 360 N.C. at 47-48, 619 S.E.2d at 496.

This Court possesses appellate jurisdiction to review Defendants' argument. In the exercise of our discretion, we dismiss Defendants' petition for writ of *certiorari* as moot.

III. Issues

Defendants argue the trial court erred in denying their motion for judgment on the pleadings based upon sovereign immunity.

IV. Standard of Review

"Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Groves v. Cmty. Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (internal citations and quotations omitted). "All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted).

This Court reviews a grant of a motion for judgment on the pleadings *de novo*. *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764 (2008).

V. Sovereign Immunity

"Sovereign immunity is a legal principle which states in its broadest terms that the sovereign will not be subject to any form of judicial action without its express consent." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 535, 299 S.E.2d 618, 625 (1983) (citation omitted). "It has long been established that an action cannot be maintained against the State of North Carolina *or an agency thereof* unless it consents to be sued or upon its waiver of immunity, and that *this immunity is absolute and unqualified*." *Id.* at 534, 299 S.E.2d at 625 (citations omitted). "Sovereign immunity embraces the State and its agencies[.]" *Est. of Graham v. Lambert*, 385 N.C. 644, 651-52, 898 S.E.2d 888, 896 (2024).

> It is an 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. 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.

Can Am S., LLC v. State, 234 N.C. App. 119, 125, 759 S.E.2d 304, 309, *disc. review denied*, 367 N.C. 791, 766 S.E.2d 624 (2014) (citations and internal quotation marks omitted).

Defendants allege sovereign immunity bars Plaintiff's breach of contract claim, declaratory judgment action, and Plaintiff's purported N.C. Gen. Stat. § 135-5 claim. N.C. Gen. Stat. § 135-5 (2023).

A. Breach of Contract

[3] Plaintiff alleges when he "entered into employment with the [S]tate, all benefits and compensation set by statute existing at that time are meant to be read into each employee's contract." Defendant asserts the discretionary adjustments made pursuant to N.C. Gen. Stat. § 135-5(o) do not vest a contractual right to cost-of-living adjustment to a retirement benefit.

This Court has long held employees have a vested contractual right to retirement benefits, which are presently earned, but are deferred compensation:

> A pension paid a governmental employee . . . is a deferred portion of the compensation earned for services rendered. If a pension is but deferred compensation, already in effect earned, merely transubstantiated over time into a retirement allowance, then an employee has contractual rights to it. The agreement to defer the compensation is the contract. Fundamental fairness also dictates this result. A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished. Plaintiffs, as members of the North Carolina Local Governmental Employees' Retirement System, had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested.

Simpson v. N.C. Local Gov't Emps.' Ret. Sys., 88 N.C. App. 218, 223-24, 363 S.E.2d 90, 94 (1987) (citation and internal quotation marks omitted), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988).

Our Supreme Court and this Court have re-affirmed the central holding in *Simpson* by concluding members of a retirement system have "a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested," in disability plan and in pensions. *Id.*; *See Faulkenbury v. Tchrs' & State Emps.' Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997); *Miracle v. N.C. Local Gov't Emps.' Ret. Sys.*, 124 N.C. App. 285, 477 S.E.2d 204 (1996) (plaintiffs had a vested contractual right to pension terms at time of vesting).

Our Supreme Court re-affirmed this principle of a vested right in *Bailey v. State*, holding "[t]his respect for *individual* rights has manifested itself through the expansion of situations in which courts have held contractual relationships to exist, and in which they have held these contracts to have been impaired by subsequent state legislation." *Bailey v. State*, 348 N.C. 130, 143, 500 S.E.2d 54, 61 (1998) (emphasis supplied).

Plaintiff seeks a proactive and absolute contractual right to cost of living increases accorded to active employees. Here, and unlike in *Bailey*, *Miracle*, *Faulkenbury*, and *Simpson*, Defendants have not demonstrated any vested right either existed or was hindered. Plaintiff has a "contractual right to rely on the terms of the retirement plan as these

terms existed *at the moment their retirement rights became vested*" not a proactive or future vested right to cost of living increases. *Simpson*, 88 N.C. App. at 224, 363 S.E.2d at 94 (emphasis supplied).

The dissenting opinion argues the trial court correctly denied Defendants' motion asserting Plaintiff's claims are barred by "sovereign immunity." The gist of its argument asserts Plaintiff does not have a contractual right to COLA increases under N.C. Gen. Stat. § 135-5, and Defendants otherwise have no obligation to fund COLA increases based upon the plain language of N.C. Gen. Stat. § 135-5. N.C. Gen. Stat. § 135-5.

Technically, a waiver of sovereign immunity may not be the appropriate argument. Plaintiff asserts his right to retirement benefits arises under his employment contract with the State, and the well-settled law that sovereign immunity has been waived when the State has entered into a contract. *See*, *e.g.*, *Smith v. State*, 289 N.C. 303 (1976). More specifically, the dispute concerns, in relevant part, whether the COLA language in N.C. Gen Stat. § 135-5 is part of Plaintiff's contract. In deciding on Defendants' Rule 12(c) motion on the pleadings, it is appropriate for us to review that statute. *Id.*

Even if "sovereign immunity" is technically not the correct theory, Defendants all along have conceded Plaintiff has a contractual relationship with the State, but have also argued Plaintiff's claims should be dismissed based upon the theories the language in N.C. Gen. Stat. § 135-5(o) is not a part of Plaintiff's contract and, otherwise, no statutory or contractual obligation exists mandating our General Assembly to fund Plaintiff's retirement COLAs based on the formula set by that body in N.C. Gen Stat. 135-5(o). *Id.*

1. N.C. Gen. Stat. § 135-5(o)

Defendant asserts the language of N.C. Gen. Stat. § 135-5(o) shows the General Assembly did not intend to contractually bind Defendants. N.C. Gen. Stat. § 135-5(o). Plaintiff contends the statute creates a binding contractual obligation, mandating when retirees are provided COLAs, and they must be comparable to the cost-of-living adjustments provided to active employees. N.C. Gen. Stat. § 135-5(o) provides:

> **Post-Retirement Increases in Allowances**. — As of December 31, 1969, the ratio of the Consumer Price Index to such index one year earlier shall be determined. If such ratio indicates an increase that equals or exceeds three per centum (3%), each beneficiary receiving a retirement allowance as of December 31, 1968, shall be entitled to

have his allowance increased three per centum (3%) effective July 1, 1970.

As of December 31, 1970, the ratio of the Consumer Price Index to such index one year earlier shall be determined. If such ratio indicates an increase of at least one per centum (1%), each beneficiary on the retirement rolls as of July 1, 1970, shall be entitled to have his allowance increased effective July 1, 1971 as follows:

Increase in Index	*Increase in Allowance*
1.00 to 1.49%	1%
1.50 to 2.49%	2%
2.50 to 3.49%	3%
3.50% or more	4%

As of December 31, 1971, an increase in retirement allowances shall be calculated and made effective July 1, 1972, in the manner described in the preceding paragraph. As of December 31 of each year after 1971, the ratio (R) of the Consumer Price Index to such index one year earlier shall be determined, and each beneficiary on the retirement rolls as of July 1 of the year of determination shall be entitled to have his allowance increased effective on July 1 of the year following the year of determination by the same percentage of increase indicated by the ratio (R) calculated to the nearest tenth of one per centum, but not more than four per centum (4%); provided that any such increase in allowances shall become effective only if the additional liabilities on account of such increase do not require an increase in the total employer rate of contributions.

The allowance of a surviving annuitant of a beneficiary whose allowance is increased under this subsection shall, when and if payable, be increased by the same per centum.

> Any increase in allowance granted hereunder shall be permanent, irrespective of any subsequent decrease in the Consumer Price Index, and shall be included in determining any subsequent increase.
>
> For purposes of this subsection, Consumer Price Index shall mean the Consumer Price Index (all items — United States city average), as published by the United States Department of Labor, Bureau of Labor Statistics.
>
> Notwithstanding the above paragraphs, retired members and beneficiaries may receive cost-of-living increases in retirement allowances if active members of the system receive across-the-board cost-of-living salary increases. Such increases in post-retirement allowances shall be comparable to cost-of-living salary increases for active members in light of the differences between the statutory payroll deductions for State retirement contributions, Social Security taxes, State income withholding taxes, and federal income withholding taxes required of each group. The increases for retired members shall include the cost-of-living increases provided in this section. The cost-of-living increases allowed retired and active members of the system shall be comparable when each group receives an increase that has the same relative impact upon the net disposable income of each group.

N.C. Gen. Stat. § 135-5(o).

Defendants assert the first sentence of the fourth paragraph: "Notwithstanding the above paragraphs, retired members and beneficiaries *may receive* cost-of-living increases in retirement allowances if active members of the system receive across-the-board cost-of-living salary increases," does not provide a contractual right. *Id.* (emphasis supplied). Plaintiffs assert the second sentence provides for "comparability" between retirees and active State employees: "Such increases in post-retirement allowances shall be comparable to cost-of-living salary increases for active members in light of the differences between the statutory payroll deductions for State retirement contributions, Social Security taxes, State income withholding taxes, and federal income withholding taxes required of each group." *Id.* To address the parties' respective arguments concerning the meaning and applicability of N.C. Gen. Stat. § 135-5(o), we are guided by several well-established principles and precedents of statutory construction.

2. Canons of Statutory Construction

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation omitted). "The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted).

As is held and re-stated many times: "When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). "The use of the word 'may' has been interpreted by our Supreme Court to connote discretionary power, rather than an obligatory one." *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 250-51, 652 S.E.2d 713, 717 (2007) (citing *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 402-03, 584 S.E.2d 731, 737 (2003); *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978); *Felton v. Felton*, 213 N.C. 194, 198, 195 S.E.2d 533, 536 (1938)).

"It is well established that the word 'shall' is generally imperative or mandatory when used in our statutes." *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cty.*, 368 N.C. 360, 365, 777 S.E.2d 733, 737 (2015) (citation and internal quotation marks omitted). "The word 'shall' is defined as 'must' or used in laws, regulations, or directives to express what is mandatory." *Internet E., Inc. v. Duro Commc'ns Inc.*, 146 N.C. App. 401, 405-06, 553 S.E.2d 84, 87 (2001) (citation omitted).

"[S]tatutes in *pari materia* must be read in context with each other." *Cedar Creek Enters. Inc. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976) (citation omitted). "Interpretations . . . [which] create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (internal quotation marks, citations, and alterations omitted).

Further, our Supreme Court has repeatedly held, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control[.]" *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation omitted).

Here, the word "may" is the auxiliary verb to the main verb, "receive." The plain language of this sentence stating retired members "may receive increases in retirement allowance" is discretionary and are not

mandatory. N.C. Gen. Stat.§ 135-5(o). The second sentence, explaining the prior sentence states the increases "shall be comparable to cost-of-living salary increases for active members" provides the amount of the increases, *if any*, appropriated by the General Assembly. These two sentences read together plainly provide retirees "may receive" cost-of-living increases, and, if and when appropriated, they shall be comparable to those of active employees under the statutory formulas. *Id.* The trial court erred in denying Defendants' motion for judgment on the pleadings. *Id.*

3. Persuasive Authorities

Courts in other jurisdictions have held a retiree has no vested right to COLAs:

> Almost every court to have considered the issue has rejected claims that statutory pension schemes and provisions about COLAs created contract rights subject to constraints of the Contract Clause. *See*, *e.g.*, *Me. Ass'n of Retirees*, 758 F.3d at 31 (finding that the statutory language was at best ambiguous, and therefore the retirees could not meet their burden to show that the legislature unmistakably intended to create contractual rights to COLAs according to the formula in effect at the time they retired); *Am. Fed'n of Teachers-N.H. v. State of N.H.*, 167 N.H. 294, 111 A.3d 63, 72 (N.H. 2015) (pension plan members did not have vested rights to a COLA where the court was "not persuaded that the statutory language established a contractual obligation to provide a COLA."); *Justus v. State*, 336 P.3d 202, 211-12, 2014 CO 75 (Colo. 2014) (statute does not contain "contractual or durational language stating or suggesting a clear legislative intent to bind itself, in perpetuity, to paying . . . a specific COLA formula"); *Bartlett v. Cameron*, 2014- NMSC 002, 316 P.3d 889, 895 (N.M. 2013) (finding that several amendments to the statute's COLA provision showed the legislature's intent to promote public policy, and not a clear and unambiguous intent to protect a vested contract right to paying a specific COLA).
>
> Only in very limited circumstances have courts found that state pensioners had a right to a specific COLA formula. For example, in *Hon. Fields v. Elected Officials' Ret. Plan*, 234 Ariz. 214, 320 P.3d 1160 (Ariz. 2014), the Arizona

> Supreme Court looked to the state's constitution, which said that public retirement benefits "shall not be diminished or impaired." *Id.* at 1163 (quoting Ariz. Const. art. XXIX, § 1(C)). Based on that provision, the court held that changes to the statutory formula for pension benefit increases violated the state constitution, and rejected the argument that the term "benefit" "only includes the right to receive payments in the amount determined by the most recent calculation." *Id.* at 1165.
>
> Rather, the court explained, the "benefit" protected by the state constitution's Pension Clause "necessarily includes the right to use the statutory formula" and that formula included COLA increases. *Id.* at 1166. The court held that the plaintiff (a retired judge) "has a right in the existing formula by which his benefits are calculated as of the time he began employment and any beneficial modifications made during the course of his employment." *Id.* Therefore, the court concluded, the increase in COLA benefits was a "benefit" for purposes of the constitution's Pension Clause. *Id.*

Puckett v. Lexington-Fayette Urban Cnty. Gov't, 833 F.3d 590, 603-04 (6th Cir. 2016). *See also NARFE v. Horner*, 633 F. Supp. 511 (D.D.C. 1986) (dismissing complaint by retiree alleging contractual right to COLA increases prescribed by statute); *Zucker v. United States*, 758 F.2d 637 (Fed. Cir. 1985) (affirming summary judgment against retirees claiming right to COLA increases); *Wash. Educ. Ass'n. v. Dep't of Ret. Sys.*, 332 P.3d 439 (Wash. 2014) (holding that change in COLA statute did not impair contract rights of retirees); *Berg v. Christie*, 137 A.3d 1143 (N.J. 2016) (same). Plaintiff's argument is overruled.

B. Waiver

[4] Defendants further and alternatively argue the trial court erred in denying their motion for judgment on the pleadings because Plaintiff's declaratory judgment action is barred by sovereign immunity. Defendants assert nothing contained in the Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 to 1-267 (2023) is a waiver of sovereign immunity.

Sovereign immunity is not waived by the Declaratory Judgment Act. As held above no contractual right exists nor is there any waiver of sovereign immunity proven. The trial court erred in denying Defendants' motion for judgment on the pleadings.

C. N.C. Gen. Stat. § 135-5

[5] Defendants also argue the trial court erred in denying their motion for judgment on the pleadings for Plaintiff's claims under N.C. Gen. Stat. § 135-5(n) (2023). N.C. Gen. Stat. § 135-5(n) provides:

> No action shall be commenced against the State or the Retirement System by any retired member or beneficiary respecting any deficiency in the payment of benefits more than three years after such deficient payment was made, and no action shall be commenced by the State or the Retirement System against any retired member or former member or beneficiary respecting any overpayment of benefits or contributions more than three years after such overpayment was made. This subsection does not affect the right of the Retirement System to recoup overpaid benefits as provided in G.S. 135-9.

Id. Plaintiffs assert this statute is a waiver of sovereign immunity. While this section provides a statute of limitations for actions brought, it does not waive immunity, establish nor provide a cause of action for a proactive, or an absolute contractual right to cost of living increases for retirees. *Id.* This section provides a statute of limitations for asserting underpayment of vested contractual rights. As held above, Plaintiff has a "contractual right to rely on the terms of the retirement plan as those terms existed at the moment their retirement rights became vested" and not a proactive vested right to cost of living increases. *Simpson*, 88 N.C. App. at 224, 363 S.E.2d at 94. The trial court erred in denying Defendants' motion for judgment on the pleadings. N.C. Gen. Stat. § 1A-1, Rule 12(c).

VI. Conclusion

This interlocutory appeal is not dismissed and is properly before us. Defendants properly pled and asserted sovereign immunity as an absolute bar to Plaintiff's claims. The trial court erred in denying Defendants' motion for judgment on the pleadings.

Neither N.C. Gen. Stat. §§ 135-5(o) nor 135-5(n) create a proactive vested right to COLAs for retirees or active employees. The trial court erred in denying Defendants' motions to dismiss. N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(c). The order of the trial court is reversed, and this cause is remanded for entry of dismissal of Plaintiff's claims with prejudice. *It is so ordered.*

REVERSED AND REMANDED.

Chief Judge DILLON concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

The sole issue properly before this Court is whether Plaintiff's claims are barred by sovereign immunity based on the face of the pleadings.[1] They are not.

Our Supreme Court has held sovereign immunity is implicitly waived by the State when the State enters into a contract with a private party.

> We hold, therefore, that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract. Thus, in this case, and in causes of action on contract arising after the filing date of this opinion, 2 March 1976, the doctrine of sovereign immunity will not be a defense to the State. The State will occupy the same position as any other litigant.

Smith v. State, 289 N.C. 303, 320, 222 S.E.2d 412, 423–24 (1976).

Here, Plaintiff alleges—and Defendants deny—he entered into an employment contract with the State and fulfilled his obligations under the contract by working for the State for the requisite number of years. As part of that contract, Plaintiff alleges all retirement benefits and compensation provided by statute existing at the time he entered the employment contract are meant to be read into the employment contract. Plaintiff further alleges Defendants acted in breach of that contract by acting contrary to the statutory mandate of N.C. Gen. Stat. § 135-5(o). Plaintiff's pleading is sufficient, at this stage, to survive Defendants' defense of sovereign immunity.

Indeed, as the majority recognizes, employees of the State have a vested contractual right in their existing statutorily provided retirement benefits. "[A]t the time the plaintiffs started working for the state or local government, the statutes provided what the plaintiffs' compensation in

1. This is the only substantial right advanced by Defendants. Defendants make no argument any other aspect of their 12(c) motion is before this Court.

the way of retirement benefits would be. The plaintiffs accepted these offers when they took the jobs. This created a contract." *Faulkenbury v. Tchrs.' & State Emps.' Ret. Sys. of N. Carolina*, 345 N.C. 683, 690, 483 S.E.2d 422, 427 (1997).

Specific to this case, Plaintiff contends Defendants are in breach of N.C. Gen. Stat. § 135-5(o) (2023), which addresses post-retirement increases in allowances. In relevant part, the statute provides:

> Notwithstanding the above paragraphs, retired members and beneficiaries may receive cost-of-living increases in retirement allowances if active members of the system receive across-the-board cost-of-living salary increases. Such increases in post-retirement allowances shall be comparable to cost-of-living salary increases for active members in light of the differences between the statutory payroll deductions for State retirement contributions, Social Security taxes, State income withholding taxes, and federal income withholding taxes required of each group. The increases for retired members shall include the cost-of-living increases provided in this section. The cost-of-living increases allowed retired and active members of the system shall be comparable when each group receives an increase that has the same relative impact upon the net disposable income of each group.

N.C. Gen. Stat. § 135-5(o) (2023).

Contrary to the majority's assertion, Plaintiff is not "seek[ing] a proactive and absolute contractual right to cost of living increases." Indeed, Plaintiff agrees there is no guaranteed right to such cost-of-living increases under this provision. Rather, Plaintiff contends more narrowly that this statutory provision requires that *if* retired members and beneficiaries receive a cost-of-living increase under this provision, that increase must be "comparable" to the cost-of-living increase provided as across-the-board cost-of-living salary increases to active members. This is consistent with the plain language of the statute, which provides: "Such increases in post-retirement allowances *shall* be comparable to cost-of-living salary increases for active members in light of the differences between the statutory payroll deductions for State retirement contributions, Social Security taxes, State income withholding taxes, and federal income withholding taxes required of each group." *Id.* (emphasis added). The statute goes on to establish that "[t]he cost-of-living increases allowed retired and active members of the system shall be comparable when each group receives an increase

that has the same relative impact upon the net disposable income of each group." *Id.* It is these mandatory provisions Plaintiffs contend Defendants have breached by failing to provide cost-of-living increases that are "comparable."[2]

Whether or not the contractual terms should be interpreted as Plaintiff contends or whether Defendants have complied with or breached these contractual provisions is simply not before us. Any declaration of what the disputed terms mean and whether the State has acted in violation of the statute or in breach of the contract should first be resolved by the trial court. The majority errs in delving into the merits of Plaintiff's contract-based claims at this stage[3]:

> This Court has consistently held that we are not to consider the merits of a claim when addressing the applicability of sovereign immunity as a potential defense to liability. *See Archer v. Rockingham Cnty.*, 144 N.C. App. 550, 558, 548 S.E.2d 788, 793 (2001) (noting that, when considering the applicability of sovereign immunity as a defense to breach of a governmental employment contract, "[this Court is] not now concerned with the merits of plaintiff's contract action. whether plaintiffs are ultimately entitled to relief [is a] question[ ] not properly before us"); *see also Smith*, 289 N.C. at 322, 222 S.E.2d at 424 ("We are not now concerned with the merits of the controversy.... We have no knowledge, opinion, or notion as to what the true facts are. These must be established at the trial. Today

2. To be fair, it is true that Plaintiff's Complaint alleges both that Defendants violated the statute by "the inadequate number of times" and "the inadequate amount of increase" in benefits Defendant requested for retirees. However, merely alleging alternate theories does not subject Plaintiff's Complaint to a sovereign immunity defense. Indeed, taken as a whole, Plaintiff's Complaint is more fairly read as challenging Defendants' compliance with the comparability provisions of the statute—whether on a theory of quantity of increased benefits or on a theory Defendants might otherwise have resolved any alleged comparability disparity through more intermittent increases, or both. For their part, Defendants read the Complaint too narrowly and ignore Plaintiff's allegations regarding the comparability requirement. For example, Plaintiff's Complaint plainly alleges: "The two, one-percent COLAs enacted for Retiree's [sic] is far from comparable to the seven across-the-board COLAs given to active state employees . . . ."

3. In fact, Defendants moved to dismiss under Rule 12(b)(6) before Defendants filed an answer and moved to dismiss under Rule 12(b)(1) and (c) on sovereign immunity grounds. The 12(b)(6) Motion was denied. Defendants have not appealed that order or sought review of that ruling in this Court. Thus, whether Plaintiff alleged valid claims against Defendants is quite clearly not before this Court at this stage.

> we decide only that plaintiff is not to be denied his day in court because his contract was with the State.").

Can Am S., LLC v. State, 234 N.C. App. 119, 127, 759 S.E.2d 304, 310 (2014).[4]

Thus, here, Plaintiff's allegations are sufficient to allege an implied waiver of sovereign immunity based on the State's entry into the alleged contract. Therefore, the trial court properly denied Defendants' Motion to Dismiss under Rule 12(b)(1) and for Judgment on the Pleadings under Rule 12(c) based on an assertion of sovereign immunity. Consequently, the trial court should be affirmed. Accordingly, I respectfully dissent from the Opinion of the Court.

IN THE MATTER OF L.B., A.B.

No. COA24-380

Filed 19 November 2024

1. Child Abuse, Dependency, and Neglect—adjudication—conclusion that a child was an abused juvenile—finding of bruising alone insufficient

In an abuse, neglect and dependency proceeding, the district court's findings of fact—specifically, that a child had suffered multiple bruises and that respondents claimed those injuries were present when they picked the child up from daycare, in the absence of any findings about whether the court found respondents' claims credible or other findings that would support an inference that respondents were responsible for the injuries—did not meet the "clear and convincing" standard of proof necessary to sustain the court's adjudication of the child as an abused juvenile.

2. Child Abuse, Dependency, and Neglect—adjudication—conclusion that children were dependent juveniles—statutorily required findings absent

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4. The Supreme Court recently noted that in certain cases involving a defense of sovereign immunity in constitutional claims against the State some review of the merits may be needed. *See Kinsley v. Ace Speedway Racing, Ltd.*, 386 N.C. 418, 423, 904 S.E.2d 720, 725 (2024). Here, though, we are concerned only with the existence of claims arising from an alleged contract with the State.

In an abuse, neglect and dependency proceeding involving two siblings, the district court's findings of fact did not address either prong of the statutory definition of a dependent juvenile as set forth by N.C.G.S. § 7B-101(9)—that the juveniles' parents (1) were unable to provide care and supervision and (2) lacked an appropriate alternative child care arrangement—and thus could not support the court's conclusion of law that the children were dependent juveniles.

3. Child Abuse, Dependency, and Neglect—adjudication—conclusion that children were neglected juveniles—findings of fact insufficient

In an abuse, neglect and dependency proceeding involving two siblings, the district court's findings of fact—specifically, that one child had suffered multiple bruises and that respondents claimed those injuries were present when they picked the child up from daycare, in the absence of any findings about whether the court found respondents' claims credible, about the severity of the bruises, or other findings that would support an inference that respondents were responsible for the injuries or allowed an injurious environment to be created for either the bruised child or his sibling—were insufficient to support the court's adjudication of the children as neglected juveniles.

4. Child Abuse, Dependency, and Neglect—adjudication order vacated—petitions not dismissed—evidentiary record sufficient—remanded

In an abuse, neglect and dependency proceeding involving two siblings, although the district court's adjudication order was vacated because the court's findings of fact did not supports its ultimate conclusions of law—and thus the adjudications—the record contained evidence that could permit findings of fact sufficient to support conclusions of law and adjudications of abuse, neglect, and/or dependency; accordingly, the juvenile petitions were not required to be dismissed, and the matter was remanded.

Appeal by respondent-mother from order entered 9 January 2024 by Judge Mark L. Killian in Caldwell County District Court. Heard in the Court of Appeals 8 October 2024.

Stephen M. Schoeberle for petitioner-appellee Caldwell County Department of Social Services.

Brittany T. McKinney for guardian ad litem.

BJK Legal, by Benjamin J. Kull, for respondent-appellant mother.

THOMPSON, Judge.

Respondent-mother appeals from the trial court's order, *inter alia*, adjudicating her minor child A.B. (Annette)[1] to be a neglected and dependent juvenile and her minor child L.B. (Lincoln) to be an abused, neglected, and dependent juvenile. After careful review, we vacate the order and remand for further proceedings consistent with this opinion.

I. Factual Background and Procedural History

Annette was born in May 2021, and Lincoln was born in January 2023. On 21 September 2023, Caldwell County Department of Social Services (DSS) obtained nonsecure custody of Annette and Lincoln (the children) and filed juvenile petitions alleging that Annette was a neglected and dependent juvenile and that Lincoln was an abused, neglected, and dependent juvenile. The juvenile petitions alleged that the children were together in the same home and that Lincoln had bruising along his head, neck, back, and stomach. Respondent-mother and her husband (respondent-caretaker),[2] who had a prior child protective services history, did not seek medical attention for Lincoln after learning of his bruises.

The juvenile petitions came on for hearing on both adjudication and disposition on 13 December 2023 in Caldwell County District Court. On 9 January 2024, the trial court entered an adjudication order adjudicating Annette to be a neglected and dependent juvenile and adjudicating Lincoln to be an abused, neglected, and dependent juvenile. That same day, the trial court entered a separate disposition order continuing the children's custody with DSS. From these orders, respondent-mother filed timely written notice of appeal.

II. Discussion

On appeal, respondent-mother alleges the following issues:

> I. Are portions of the adjudication findings unsupported by the adjudication evidence?
>
> II. Do the properly made adjudication findings support the conclusions of law required for adjudications of

1. Pseudonyms are used throughout the opinion to protect the identity of the juveniles and for ease of reading.

2. Respondent-caretaker is not the children's biological father.

> Lincoln and [Annette], when those findings only establish the mere fact of Lincoln's bruises?
>
> III. Must the juvenile petitions be dismissed because there is no adjudication evidence from which sufficient findings could hypothetically be made on remand?

We will address respondent-mother's arguments, as necessary, in the analysis to follow.

A. Standard of review

Appellate review of the trial court's adjudication and disposition order requires us "to determine whether the trial court's findings of fact are supported by clear and convincing competent evidence and whether the court's findings support its conclusions of law." *In re K.L.*, 272 N.C. App. 30, 36, 845 S.E.2d 182, 188 (2020) (internal quotation marks and citation omitted). "The clear and convincing standard is greater than the preponderance of the evidence standard required in most civil cases." *Id.* at 36, 845 S.E.2d at 188–89 (internal quotation marks and citation omitted). "Clear and convincing evidence is evidence which should fully convince." *Id.* at 36, 845 S.E.2d at 189 (internal quotation marks and citation omitted). "Whether a child is [dependent,] abused[,] or neglected is a conclusion of law . . . and we review a trial court's conclusions of law de novo." *Id.* "Under a de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (internal quotation marks and citation omitted).

B. Adjudication Order

Respondent-mother argues that "the properly made adjudication findings only establish the mere fact of Lincoln's bruises, [and] those findings do not support the conclusions of law required for the adjudications of either Lincoln or [Annette]." For the reasons stated herein, we agree.

1. Abuse

[1] We first address the trial court's conclusion of law that Lincoln was an abused juvenile. The Juvenile Code defines an abused juvenile as any juvenile "whose parent, guardian, custodian, or caretaker . . . [i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means" or "[c]reates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means[.]" N.C. Gen. Stat. § 7B-101(1) (2023). "At its core, the nature of abuse, based upon its statutory definition, is the existence or serious risk of some nonaccidental harm inflicted or allowed by one's

caretaker." *In re A.J.L.H.*, 384 N.C. 45, 53, 884 S.E.2d 687, 693 (2023) (citation and internal quotation marks omitted).

"This Court has previously upheld adjudications of abuse where a child sustains non-accidental injuries, even where the injuries were unexplained, where clear and convincing evidence *supported the inference* that the respondent-parents inflicted the child's injuries or allowed them to be inflicted." *K.L.*, 272 N.C. App. at 39, 845 S.E.2d at 190 (internal quotation marks, brackets, and citation omitted) (emphasis added). However, "[i]n each of these cases, though the exact cause of the child's injury was unclear, the trial court's findings of fact—or other evidence in the record—*supported the inference* that the respondent-parents were responsible for the unexplained injury." *Id.* at 40, 845 S.E.2d at 191 (emphasis added). Although "the caselaw does not require a pattern of abuse or the presence of risk factors, we do require clear and convincing evidence to support this inference." *Id.* (internal quotation marks, brackets, and citation omitted).

In *In re K.L.*, this Court reversed the trial court's adjudication of abuse because "[u]nlike those instances in which this Court has upheld an abuse adjudication based on unexplained injuries," there, "the trial court's detailed findings of fact . . . d[id] not sufficiently support the conclusion that [the] [r]espondents inflicted or allowed the infliction of [the minor child]'s injuries." *Id.* at 45–46, 845 S.E.2d at 194. Here, as in *K.L.*, "[t]he trial court was rightly concerned that [r]espondent[-mother and respondent-caretaker] were unable to explain [Lincoln]'s fractures[,] [b]ut that alone, as a matter of law, cannot support the trial court's conclusion that [r]espondents were responsible for [Lincoln']s injuries" or that they "allowed them to be inflicted." *Id.* at 46, 845 S.E.2d at 194.

Here, the injuries found by the trial court included "multiple bruises on [Lincoln's] head and neck, and smaller bruises on his abdomen." The trial court also found that respondent-mother and respondent-caretaker claimed that the bruises were on Lincoln when they picked him up from daycare, but the trial court made no findings as to whether it found these claims credible. There are simply not sufficient findings of fact—or other evidence in the record—to support the inference that respondent-parents were responsible for the unexplained injury to Lincoln. Also absent from the trial court's adjudication order are *any* findings regarding the severity of the bruises found on Lincoln's body, whether the bruises sustained by Lincoln were the result of non-accidental means, whether respondent-mother or respondent-caretaker inflicted the injuries, *or* whether respondent-mother and respondent-caretaker allowed the injuries to be inflicted upon Lincoln at his daycare, as they had alleged.

A finding of fact that Lincoln had suffered multiple bruises—absent *any* other findings of fact demonstrating that Lincoln was an abused juvenile—simply does not overcome the "clear and convincing" standard that is necessary to support the trial court's conclusion of law that Lincoln was an abused juvenile. Therefore, we conclude that the trial court erred in adjudicating Lincoln an abused juvenile.

2. Dependency

[2] Next, we consider the trial court's conclusion of law that Lincoln and Annette are dependent juveniles. The Juvenile Code defines a dependent juvenile, in pertinent part, as a "juvenile in need of assistance or placement because . . . the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9). Moreover, although N.C. Gen. Stat. § 7B-101(9) "uses the singular word 'the parent' when defining whether 'the parent' can provide or arrange for adequate care and supervision of a child, our caselaw has held that a child cannot be adjudicated dependent where she has at least '*a* parent' capable of doing so." *In re V.B.*, 239 N.C. App. 340, 342, 768 S.E.2d 867, 868 (2015) (brackets and citation omitted) (emphasis added).

"In determining whether a juvenile is dependent, the trial court *must* address *both* (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re T.B.*, 203 N.C. App. 497, 500, 692 S.E.2d 182, 184 (2010) (internal quotation marks and citation omitted) (emphases added). "Findings of fact addressing both prongs *must* be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings *will* result in reversal of the court." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007) (emphases added). "When a trial court is required to make findings of fact, it must make the findings of fact specially." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003). "The trial court may not simply recite allegations, but must through processes of logical reasoning from the evidentiary facts find the ultimate facts essential to support the conclusions of law." *Id.* (internal quotation marks and citation omitted).

In the present case, the trial court did not sufficiently address *either* prong of dependency—whether respondent-mother *or* respondent-father[3] had the ability to provide care or supervision for the minor

3. As will be discussed below, respondent-father was a party to the adjudication hearing before the trial court.

—nor did the trial court consider whether respondents had appropriate alternative child care arrangements. The juvenile petition named respondent-father as the children's father and alleged that his "[whereabouts] [are] unknown at this time." In its adjudication order, however, the trial court found that respondent-father was personally served with the juvenile petition on 17 October 2023, that he had appeared at the adjudicatory hearing, and that he was represented by counsel.

Indeed, the trial court made *no findings of fact* to support its conclusion of law that respondent-mother *or* respondent-father was unable to provide care or supervision, *or* that respondent-mother and respondent-father lacked an alternative child care arrangement. The *only* finding of fact that could be construed as bearing on the question of whether the children were dependent is Finding of Fact Fourteen, which simply mirrors the aforementioned statutory definition of dependency, that "the juveniles are dependent juveniles . . . in that the juveniles' parent, guardian, or custodian is unable to provide for the juveniles' care or supervision and lacks an alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9).

Aside from Finding of Fact Fourteen, the trial court made *no* additional findings of fact regarding respondents' ability to provide for the minor children's care or supervision, *or* that respondents lacked an alternative appropriate child care arrangement. The mere fact that there were multiple parents in the present case who *did not live with one another*, necessitated findings by the trial court as to *both* parents and their ability to provide care or supervision, and *both* parents' ability to provide alternative child care arrangements because "a child cannot be adjudicated dependent where she has at least '*a* parent' capable of doing so." *V.B.*, 239 N.C. App. at 342, 768 S.E.2d at 868 (emphasis added). The trial court made no such findings.

Again, in reviewing an adjudication on appeal, we must determine whether the trial court's findings of fact are supported by clear and convincing competent evidence, "evidence which should fully convince[,]" that Lincoln and Annette were dependent. The dearth of findings of fact in the adjudication order—to support the trial court's conclusion of law that the minor children were dependent—fails to fully convince; for this reason, we conclude that the trial court erred in adjudicating the minor children as dependent juveniles.

3. Neglect

[3] Next, we review the trial court's conclusion of law that Lincoln and Annette are neglected juveniles. A neglected juvenile is defined, in

pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker . . . [d]oes not provide proper care, supervision, or discipline[,]" "[h]as abandoned the juvenile," or "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15). "In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home . . . where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." *Id.*

"In order to adjudicate a juvenile neglected, our courts have additionally required that there be some physical, mental, or emotional impairment of the juvenile or *a substantial risk of such impairment* as a consequence of the failure to provide proper care, supervision, or discipline." *In re A.W.*, 377 N.C. 238, 243, 856 S.E.2d 841, 847 (2021) (citation omitted) (emphasis in original). "In determining whether a child is neglected based upon the abuse or neglect of a sibling, the trial court *must* assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re D.B.J.*, 197 N.C. App. 752, 755, 678 S.E.2d 778, 781 (2009) (internal quotation marks and citation omitted) (emphasis added). "Severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile may include alcohol or substance abuse by the parent, driving while impaired with a child as a passenger, or physical abuse or injury to a child inflicted by the parent." *Id.* (brackets, internal quotation marks, and citation omitted).

Here, the trial court found that Lincoln sustained multiple bruises on various parts of his body, but the trial court made no findings as to the severity of the bruises, whether Lincoln sustained those bruises as a result of respondent-mother, respondent-father, or respondent-caretaker's failure to provide proper care, supervision, or discipline of Lincoln, or whether respondent-mother, respondent-father, or respondent-caretaker created or allowed to be created a living environment injurious to Lincoln's welfare. *See generally In re J.C.M.J.C.*, 268 N.C. App. 47, 834 S.E.2d 670 (2019) (reversing adjudication of neglect where, although the children had multiple absences from school, there were no findings regarding the reason they missed classes, how many of their absences were unexcused, or to what degree the children were academically behind).

Indeed, the trial court failed to make "affirmative findings of fact that would support a conclusion that the children are neglected"; in other words, "[t]hese findings do not support a conclusion that [r]espondents did not 'provide proper care, supervision, or discipline[,]' or that

the children were living in an environment injurious to their welfare." *Id.* at 58, 834 S.E.2d at 678. There are simply no findings in the adjudication order that bear on the question of whether the children were neglected—aside from the fact that Lincoln had multiple bruises on various parts of his body. Again, this finding, standing alone, is insufficient to establish that Lincoln was neglected.

Furthermore, the finding that respondent-caretaker and respondent-mother "led the children out of the home and placed them in [DSS's] car" is insufficient to show that they abandoned the children. *See In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) ("Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.").

Finally, very few of the trial court's findings concern Annette. The trial court found that she was in the same home as Lincoln and that she was "emotionless" and "singing in the backseat" when DSS drove the children away from their home. It appears that the trial court based its adjudication of Annette as a neglected juvenile upon its conclusions that Lincoln was an abused, neglected, and dependent juvenile—simply because Annette shared a home with Lincoln—she was by proxy, neglected and dependent.

However, as established above, the trial court erred in concluding that Lincoln was an abused, dependent, or neglected juvenile, and the trial court's conclusions of law that Annette was neglected or dependent—based on the trial court's adjudication of Lincoln—were also erroneous. Again, *the only* findings of fact in the adjudication order relating to Annette found that "[t]he juveniles were emotionless when they left home" and that Annette "was singing in the backseat." These two findings, *standing alone*, are simply insufficient to support the trial court's conclusion of law that Annette was a neglected juvenile.

Moreover, assuming that Annette was adjudicated neglected based upon the abuse of Lincoln, the trial court *also* failed to assess whether there was a substantial risk of future abuse or neglect to Annette based on the historical facts of the case, as is *required* by our caselaw to adjudicate a minor child neglected based upon abuse of a sibling. For the aforementioned reasons, we conclude that the trial court erred in concluding that Lincoln and Annette are neglected juveniles.

Because we vacate the trial court's adjudications, we must also vacate the 9 January 2024 disposition order and remand for entry of a disposition, if warranted by the proceedings on remand. *See In re S.C.R.*,

217 N.C. App. 166, 170, 718 S.E.2d 709, 713 (2011) ("Since we [vacate] the adjudication order, the disposition order must also be [vacat]ed . . . .").

C. Juvenile petition

[4] Finally, respondent-mother argues that "the juvenile petitions must be dismissed because there is no adjudication evidence from which sufficient findings could hypothetically be made on remand." We do not agree.

Here, the evidentiary record before the trial court *could* have been sufficient to support the trial court's conclusions of law that Lincoln was an abused, neglected, and dependent juvenile, and that Annette was a dependent and neglected juvenile; the trial court's order to that effect was simply insufficient. Indeed, the trial court heard testimonial evidence that respondent-mother and respondent-caretaker continued to send Lincoln to a daycare where he had suffered several bruises, without offering a reasonable explanation as to why they would continue to subject their child to this *potentially* injurious environment. "The trial court has the duty of determining the credibility and weight of all the evidence, and only the trial court can make the findings of fact resolving any conflicts in the evidence." *In re A.H.D.*, 287 N.C. App. 548, 564, 883 S.E.2d 492, 504 (2023). Consequently, we conclude that the juvenile petitions are not *required* to be dismissed because the trial court heard evidence from which it *could* have made the challenged conclusions of law.

III. Conclusion

We conclude that the adjudication order's findings of fact do not support the trial court's conclusions of law that Lincoln was an abused, neglected, and dependent juvenile, or that Annette was a neglected and dependent juvenile. However, because the record contains evidence that could support the trial court's adjudications, we vacate the 9 January 2024 adjudication order and remand the matter to the trial court for additional findings of fact.

VACATED AND REMANDED.

Judges MURPHY and GRIFFIN concur.

ANDREA POCOROBA, PLAINTIFF
v.
PHILLIP JAMES GREGOR, DEFENDANT

No. COA24-219

Filed 19 November 2024

Contempt—civil—violation of no contact order—no finding of violation at time of hearing

The trial court's order finding defendant in civil contempt for violating a no contact order (obtained by his next-door neighbor pursuant to Chapter 50C of the General Statutes of North Carolina prohibiting defendant from being within 100 feet of plaintiff even while on his own property) was reversed where the court did not include a finding that defendant continued to be in violation of the order at the time of the hearing, since civil contempt, unlike criminal contempt, applies to ongoing noncompliance and may not be used to punish a past violation.

Appeal by defendant from order entered 21 August 2023 by Judge Louis Meyer in Wake County District Court. Heard in the Court of Appeals 11 September 2024.

No brief filed on behalf of plaintiff-appellee.

Phillip James Gregor for pro se defendant-appellant.

DILLON, Chief Judge.

I. Background

Defendant Phillip James Gregor is a disabled veteran who lives on the property directly adjacent to Plaintiff Andrea Pocoroba's home. Their homes are separated by a fence. In July 2022, Plaintiff obtained a No Contact Order for Stalking or Nonconsensual Sexual Conduct ("the 50C Order") against Defendant after Defendant had purportedly attempted to break into Plaintiff's home while wearing a bathrobe. Under the terms of the 50C Order, Defendant is not to come within 100 feet of Plaintiff, even while on his own property, unless he is inside of his own home.

The following year, on 21 August 2023, the trial court entered an order (the "Contempt Order"), finding Defendant to be in *civil* contempt of the 50C Order. In its Contempt Order, the trial court found that

Defendant on two occasions—one in November 2022 and the other in May 2023—violated the 50C Order when he was outside his own home on his own property at a time he knew Plaintiff was at her home. The trial court determined that Defendant could purge his civil contempt by paying $500.00 to Plaintiff, which he did in the courtroom at the conclusion of the hearing. Defendant noticed his appeal from the Contempt Order.

In his brief on appeal, Defendant contests the validity of *both* orders. We dismiss his arguments as to the validity of the initial 50C Order, as his Notice of Appeal does not reference *that* order and the time has elapsed to appeal that order and he has not otherwise petitioned our Court for a writ of *certiorari* to review that order. We, however, reverse the Contempt Order, as the trial court made no finding that Defendant was in violation of the 50C Order *at the time of the hearing*.

II. Standard of Review

A trial court's conclusions of law in a civil contempt order are reviewed *de novo*. *Walter v. Walter*, 279 N.C. App. 61, 66 (2021). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the district court." *In re Appeal of Greens of Pine Glen Ltd.*, 356 N.C. 642, 647 (2003).

III. Analysis

In Defendant's brief, he essentially argues that the trial court erred by finding him in *civil* contempt of the 50C Order. For the reasons below, we agree and reverse the Contempt Order.

We note Defendant's arguments that he cannot be held in violation of an invalid order. Indeed, our Supreme Court has held that one cannot be held in contempt of an order where the court lacked jurisdiction to enter the order. *See Corey v. Hardison*, 236 N.C. 147, 153 (1952) ("When a court has no authority to act, its acts are void, and may be treated as nullities anywhere, at any time, and for any purpose."). Defendant's contention on this point, however, is *not* that the trial court lacked jurisdiction to enter the 50C Order, but rather that the 50C Order itself contains errors of law, e.g., that it is inappropriate that Defendant could be held in contempt for being on his own property. *See State v. Sams*, 317 N.C. 230, 236 (1986) (stating that a voidable order stands until set aside).

Our General Assembly has provided that one in willful violation of an order may either be in *criminal* contempt, *see* N.C.G.S. § 5A-11 (2024), or *civil* contempt, *see* N.C.G.S. § 5A-21 (2024). However, they are not the same. *Mauney v. Mauney*, 268 N.C. 254, 256 (1966) ("Civil contempt and criminal contempt are distinguishable.").

The purpose of criminal contempt is to punish a party for violating an order, where the violation may not be ongoing but occurred in the past. *See id.* (stating that criminal contempt is appropriate to punish a party for "an act already accomplished").

Civil contempt, however, "is applied to a continuing act [of disobedience.]" *Rose's Stores, Inc. v. Tarrytown Ctr., Inc.*, 270 N.C. 206, 214 (1967). Our Supreme Court has explained that "[t]he purpose of civil contempt is not to punish," but rather "its purpose is to use the court's power to impose fines or imprisonment as a method of coercing [a party] to comply with an order of the court." *Jolly v. Wright*, 300 N.C. 83, 92 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 125 (1993).

And when a party is found to be in civil contempt—that is, to be in current violation of an order—the trial court must get the contemnor means to purge the contempt:

> A person imprisoned for civil contempt must be released when his civil contempt no longer continues. The order of the court holding a person in contempt must specify how the person may purge himself of the contempt.

N.C.G.S. § 5A-22 (2024).

However, there can be no finding of *civil* contempt if, by the time of the hearing, the person is no longer in violation of the order. *See Ruth v. Ruth*, 158 N.C. App. 123 (2003). For instance, in *Ruth*, we held it was not appropriate for a mother to be held in civil contempt of a custody order when it was conceded she had returned the children to the father as required by the custody order and was, therefore, no longer in violation of the custody order. *Id.* at 126.

Here, the trial court made no finding that Defendant was in violation of the 50C Order at the time of the hearing. Rather, the trial court merely found that Defendant had, in the past, violated the 50C Order because on one occasion he stared at Plaintiff through her window from outside of his house, smiling, while she was administering medication below her panty line, and because, on other occasions, he had spent time outside of his home to perform various tasks when he should have known that Plaintiff was at home.

Presuming the 50C Order is otherwise valid, the trial court's findings *may* support a finding of criminal contempt. However, they do not support a finding of civil contempt, as there was no finding Defendant was in violation of the 50C Order at the time of the contempt hearing.

However, it is inappropriate for us to modify the contempt order to find Defendant to be in criminal contempt, as the trial court did not find Defendant in contempt of the 50C Order beyond reasonable doubt.

Indeed, the burden of proof for finding one in criminal contempt is like any other criminal proceeding—beyond a reasonable doubt. *See* N.C.G.S. § 5A-15(f) (2024) (to hold a party in criminal contempt, "[t]he facts must be established beyond a reasonable doubt."). And one found to be in criminal contempt, generally, is subject to censure, imprisonment for "up to 30 days," and/or a fine not to exceed $500.00." N.C.G.S. § 5A-12(a) (2024).

However, the burden of proof for finding one in civil contempt is lower than that for criminal contempt—preponderance of the evidence—though the party on whom the burden rests varies depending on whether the hearing is precipitated by an order of a judicial officer or by a motion of an aggrieved party. The hearing may be precipitated by an order upon a judicial finding of probable cause, N.C.G.S. § 5A-23(a), whereupon the burden is on the alleged contemnor to show by a preponderance of the evidence why he should *not* be held in civil contempt. *State v. Coleman*, 188 N.C. App. 144, 149–50, (2008); *Grissom v. Cohen*, 261 N.C. App. 576, 585 (2018). But where the hearing is held on motion by an aggrieved party, the burden rests upon the aggrieved party to show by a preponderance of the evidence why the alleged contemnor should be held in civil contempt. N.C.G.S. § 5A-21(a1) (2024).

Accordingly, we must reverse the trial court's order finding Defendant in civil contempt of the 50C Order.

REVERSED.

Judges TYSON and WOOD concur.

STATE OF NORTH CAROLINA
v.
CHRISTIE JONES

No. COA24-241

Filed 19 November 2024

1. Appeal and Error—jurisdiction—premature oral notice of appeal—writ of certiorari issued

Where defendant had given oral notice of appeal from her convictions on charges of first-degree arson, larceny of a dog, and attempted first-degree murder before entry of the final judgment—in violation of Appellate Rule 4—the Court of Appeals did not have jurisdiction to hear defendant's direct appeal, but the appellate court, in its discretion, allowed defendant's petition for writ of certiorari in order to reach the merits of her arguments.

2. Constitutional Law—competency to stand trial—failure to order competency hearing

In a prosecution for first-degree arson, larceny of a dog, and attempted first-degree murder, the trial court did not err by failing to order a competency hearing sua sponte in the presence of an allegedly bona fide doubt as to defendant's competency to stand trial because: (1) the statutory right to a competency hearing set forth in N.C.G.S. § 15A-1001(a) is waived by the failure to assert that right at trial, and nothing in the record indicated that the prosecutor, defense counsel, defendant, or the court raised the question of defendant's capacity to proceed at any point during the proceedings, nor was any motion made detailing the specific conduct supporting such an allegation; and (2) the evidence cited by defendant on appeal—having heard voices in her head that she believed were caused by the victim's use of "voice-to-skull technology," driven to the victim's home, knocked on his doors repeatedly, sat in her car in his driveway for hours, sounded her car horn for half an hour, cut his pool, and attempted to set his porch on fire—did not constitute substantial evidence that defendant lacked competence at the time of trial, where defendant was able to confer with her attorney about pertinent issues of law, respond directly and appropriately to questions from the trial court, testify in a manner responsive to questions, and demonstrate a clear understanding of the proceedings against her.

STATE v. JONES

[296 N.C. App. 512 (2024)]

Appeal by Defendant from judgment entered 3 August 2023 by Judge Joseph N. Crosswhite in Rowan County Superior Court. Heard in the Court of Appeals 24 September 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sarah N. Cibik, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Brandon Mayes, for Defendant-Appellant.

COLLINS, Judge.

Defendant Christie Jones appeals from judgment entered upon guilty verdicts for first-degree arson, larceny of a dog, and attempted first-degree murder. Defendant argues that the trial court erred by not ordering sua sponte a competency hearing, and that this error violated Defendant's due process rights. We find no error.

I. Background

Defendant was indicted for first-degree arson, larceny of a dog, assault with a deadly weapon, and attempted first-degree murder. Defendant's case came on for trial on 1 August 2023.

At the conclusion of the State's evidence, the trial court asked defense counsel if Defendant wished to testify. After some discussion at the defense table, defense counsel indicated that his client would testify. Before Defendant took the stand, she was sworn in by the clerk and addressed by the trial court. The trial court explained Defendant's Fifth Amendment rights to her and stated, "I do want to make sure you've had a full opportunity to discuss this with your lawyer. Have you had a chance to talk to him about it?" Defendant responded in the affirmative. When asked if she wished to ask her lawyer any more questions about her decision to testify, Defendant responded, "No." When asked if she intended to waive her Fifth Amendment privileges and offer testimony in the trial, Defendant responded, "Yes."

On direct examination, Defendant testified to the following:

At one point in her life, she heard voices in her head, which she believed was caused by "voice-to-skull" technology. Defendant knew Derek Mowry had served in the military and suspected he possessed the "voice-to-skull technology." Defendant drove to the Mowrys' home to ask them to stop the "voice-to-skull technology." Defendant repeatedly knocked on both the front and back doors, but she received no answer.

Defendant then sat in her car in the Mowrys' driveway for several hours. At one point, Defendant laid on the horn for half an hour. Defendant returned to knocking on the Mowrys' doors and windows and begged Derek to come out. Defendant told Derek that if he did not come out, she would cut his pool. Derek did not come out, and Defendant cut the pool.

Defendant went to her car to get a bottle of water and something to eat. While walking back to the Mowrys' house, Defendant saw Derek come out of the house and turn off the pool pump. Defendant walked back to her car to get a lighter and a notebook to set the edge of the Mowrys' porch on fire. Defendant attempted to burn the porch, but it was just smoking and would not catch fire. Defendant then made a makeshift leash and collar and walked the Mowrys' dog to her car so the dog would not breathe in smoke. Defendant was by her car for about two hours when she saw Derek approaching. Shortly thereafter, first responders arrived. Defendant then left.

On cross-examination, Defendant testified that she had started to hear the voices in her head around 2018 or 2019. She also testified that in 2018 or 2019, she had started using Methamphetamine to help her function.

Prior to instructing the jury, the trial court asked defense counsel whether there was any competency issue. Defense counsel informed the court that Defendant was competent and conscious. The following exchange took place between the trial court and defense counsel:

> THE COURT: I think just based on that testimony yesterday and I think you asked your client about it when she was testifying, but I just want to make sure that in your opinion there's no issue as to any competency and to give you a chance to get anything else on the record that you would like to get on the record?
>
> [DEFENSE COUNSEL]: Your Honor, in my opinion in all my dealings with her she was very articulate. I, in fact, early on discussed with her about getting a forensic evaluation. I think we both agreed that she is competent and understood what was going on. That's all I have to say, Your Honor.
>
> THE COURT: Okay. Yes, sir, thank you.

Defendant was found guilty of first-degree arson, larceny of a dog, and attempted first-degree murder. Defendant gave oral notice of appeal after the jury returned its verdicts but before Defendant was sentenced.

During the sentencing hearing, defense counsel made the following statement to the trial court:

> Your Honor, what she tells me that, as far as the voices, she says she is no longer experiencing, has not experienced them since she's been incarcerated. She says that she feels healthier. You look at her, I look at her from the time I first met her, saw her, even in looking at the photographs and seeing her today, she is healthier. Nothing further, Your Honor.

The trial court sentenced Defendant to 240 to 300 months' imprisonment and recommended that Defendant take advantage of any treatment options, counseling, therapy, and anything else that may be available while in custody.

Defendant filed a petition for writ of certiorari with this Court.

II. Discussion

A. Appellate Jurisdiction

[1] As a threshold issue, we must determine whether we have jurisdiction to hear this appeal.

"Notice of appeal shall be given within the time, in the manner[,] and with the effect provided in the rules of appellate procedure." N.C. Gen. Stat. § 15A-1448(b) (2023). Rule 4(a) of the North Carolina Rules of Appellate Procedure provides that an appeal in a criminal case may be taken by either "giving oral notice of appeal at trial" or filing a written notice of appeal within 14 days after entry of judgment. N.C. R. App. P. 4(a). An oral notice of appeal given before entry of the final judgment violates Rule 4 and does not give this Court jurisdiction to hear the defendant's direct appeal. *See State v. Smith*, 898 S.E.2d 909, 912 (N.C. Ct. App. 2024); *State v. Lopez*, 264 N.C. App. 496, 503 (2019).

In this case, after verdicts but prior to sentencing, defense counsel stated, "Your Honor[,] [Defendant] would enter notice of appeal." The trial court responded, "Yes, sir, we'll accept notice of appeal[.]" After sentencing, the trial court again noted Defendant's notice of appeal and appointed the Appellate Defender. As Defendant prematurely entered oral notice of appeal before entry of the final judgment in violation of Rule 4, this Court does not have jurisdiction to hear the Defendant's direct appeal. *See Lopez*, 264 N.C. App. at 503.

Acknowledging this defect, Defendant filed a petition for writ of certiorari. This Court may issue a writ of certiorari "in appropriate

circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). In our discretion, we grant Defendant's petition for writ of certiorari and reach the merits of her appeal.

B. Competency Hearing

[2] Defendant contends that the trial court erred by failing to order a competency hearing sua sponte when there was substantial evidence of a bona fide doubt as to Defendant's competency to stand trial.

One of the fundamental pillars of our criminal justice system is that a defendant must be competent to stand trial. *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975). Thus, "the criminal trial of an incompetent defendant violates due process." *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). Our General Statutes contain a statutory competency requirement:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C. Gen. Stat. § 15A-1001(a) (2023). However, "the statutory right to a competency hearing is waived by the failure to assert that right at trial." *State v. Badgett*, 361 N.C. 234, 259 (2007).

Here, nothing in the record indicates that the prosecutor, defense counsel, Defendant, or the court raised the question of Defendant's capacity to proceed at any point during the proceedings, nor was there any motion made detailing the specific conduct supporting such an allegation. *See* N.C. Gen. Stat. § 15A-1002(a) (2023). Defendant thus waived her statutory right to a competency hearing. *See Badgett*, 361 N.C. at 259.

Nevertheless, under the Due Process Clause of the United States Constitution, "[a] criminal defendant may not be tried unless he is competent." *Godinez v. Moran*, 509 U.S. 389, 396 (1993). "In order to possess the competence necessary to stand trial, a defendant must have the 'capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense.' " *State v. Hollars*, 376 N.C. 432, 441-42 (2020) (quoting *Drope*, 420 U.S. at 171).

While "a competency determination is necessary only when a court has reason to doubt the defendant's competence," *Godinez*, 509 U.S. at

401 n.13, "a trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *Badgett*, 361 N.C. at 259 (quoting *State v. King*, 353 N.C. 457, 467 (2001) (brackets omitted)).

"Substantial evidence which establishes a bona fide doubt as to a defendant's competency may be established by considering 'a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial.' " *Hollars*, 376 N.C. at 442 (quoting *Drope*, 420 U.S. at 180). "Regardless of the circumstances that constitute substantial evidence of a defendant's incompetence, the relevant period of time for judging a defendant's competence to stand trial is 'at the time of trial.' " *Id.* (citation omitted).

In *Badgett*, the trial court did not err by not instituting a competency hearing sua sponte because the evidence was insufficient to raise a bona fide doubt as to his competency. 361 N.C. at 260. The defendant asserted the following evidence of his behavior was sufficient to raise a bona fide doubt:

> (1) [he] wrote numerous letters to the trial court and the district attorney expressing his desire for a speedy trial resulting in the death sentence; (2) [he] read a statement to the jury during the penalty phase in which he impliedly asked for a death sentence; and (3) [he] had an emotional outburst coupled with verbal attacks on the assistant district attorney who delivered the state's closing argument during the sentencing proceeding.

Id. at 259-60.

On the other hand, however, the record contained the following evidence of the defendant's competence to stand trial: the defendant appropriately interacted with his attorneys, discussed relevant issues of law with his attorneys, responded to the trial court's questions, illustrated a strong understanding of the proceedings, and addressed the trial court with deference. *Id.* at 260. This Court concluded that "the evidence referenced by [the] defendant did not constitute 'substantial evidence' requiring the trial court to institute a competency hearing, and that [the] evidence was outweighed by substantial evidence indicating that [the] defendant was competent to stand trial." *Id.*

Here, Defendant asserts the following evidence tending to show her behavior was sufficient to raise a bona fide doubt as to her competence to stand trial: (1) she heard voices in her head that she believed was

caused by "voice-to-skull technology" owned by Derek; (2) she drove to the Mowrys' home and repeatedly knocked on both the front and back doors; (3) she sat in her car, which was in the Mowrys' driveway for several hours; (4) she laid on the horn for half an hour; (5) she cut the Mowrys' pool; and (6) she attempted to set the Mowrys' porch on fire.

This was even less evidence of Defendant's lack of competence *at the time of trial* than there was in *Badgett*. While in *Badgett*, the defendant relied on evidence of his behavior at trial to show his incompetence, here, the evidence that Defendant relies on occurred prior to trial. As in *Badgett*, however, that evidence "was outweighed by substantial evidence indicating that [D]efendant was competent to stand trial." *Id.* Defendant conferred with her attorney about issues of law applicable to her case, most specifically about waiving her Fifth Amendment rights to remain silent. Defendant responded directly and appropriately to the trial court's questioning during its inquiries into her decision to testify. Furthermore, the record demonstrates Defendant's clear understanding of the proceedings against her and shows her ability to address the trial court with appropriate deference and intelligent responses. Defendant's testimony was responsive and appropriate to the questions, even if her responses indicated that her troubling thoughts led to her actions in this case.

As the evidence referenced by Defendant "did not constitute 'substantial evidence' requiring the trial court to institute ex mero motu a competency hearing," *id.*, and any such evidence "was outweighed by substantial evidence indicating that [D]efendant was competent to stand trial," *id.*, the trial court did not err by failing to institute a competency hearing sua sponte.

III. Conclusion

For the stated reasons above, Defendant's argument is meritless. We find no error.

NO ERROR.

Judge TYSON and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
DARREN LANCASTER

No. COA24-152

Filed 19 November 2024

Contempt—criminal—two counts—repeated use of profanity—evidence of two separate outbursts

The trial court did not err by adjudicating defendant of two counts of direct criminal contempt where the record showed that defendant's use of profanity in court consisted of two separate outbursts—one in response to the trial court's refusal to grant defendant an earlier court date, and one in response to the first contempt conviction—each one of which violated the clear prohibition in N.C.G.S. § 5A-11(a) against willful behavior tending to interrupt or interfere with court proceedings.

Appeal by Defendant from orders entered 27 September 2023 by Judge Joshua W. Willey, Jr., in Craven County Superior Court. Heard in the Court of Appeals 9 October 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Thomas J. Campbell, for the State-Appellee.

John W. Moss for Defendant-Appellant.

COLLINS, Judge.

Defendant Darren Lancaster appeals from orders entered upon his adjudication of two counts of direct criminal contempt. Defendant argues that his behavior warranted only one contempt adjudication. Because N.C. Gen. Stat. § 5A-11(a) is unambiguous and Defendant's contemptuous behavior consisted of two separate outbursts, we find no error.

I. Background

Defendant was present in the courtroom on 27 September 2023 for a pre-trial hearing on unrelated matters. Defendant's counsel asked the court to inquire of Defendant whether he wished to proceed pro se, as Defendant had filed several pro se motions on the matter. Defendant expressed dissatisfaction with his attorney but ultimately stated that he wished to proceed with counsel. Defendant then asserted that he

wished to have his case heard on 9 October 2023, less than two weeks later. Defendant's counsel noted that he had not yet received discovery from the State and told the trial court that he could not endorse a 9 October trial date. The trial court instructed the State to send discovery and continued Defendant's case until 28 November 2023.

Defendant, dissatisfied with his lawyer and his new court date, urged the trial court to reconsider. The following interaction ensued:

> THE DEFENDANT: And I'm saying, I mean, if he don't want to represent me on October 9, I'll represent myself.
>
> THE COURT: Well, if you want to fire him, you can. I'm not going to set the case for October 9th.
>
> THE DEFENDANT: Fuck y'all anyway --
>
> THE COURT: All right.
>
> THE DEFENDANT: -- fuck y'all and trumping all over my rights --
>
> THE COURT: Wait a minute, sir --
>
> THE DEFENDANT: I'm good, man --
>
> THE COURT: Sir, sir. You're not good.
>
> THE DEFENDANT: I'm good. I mean, y'all violate all a man's rights. You know what I'm saying? I had a trial date set. You know what I'm saying? How -- set by another judge. You just did that, and you're going to just say "F" him because -- just go sit. Man, I'm good --
>
> THE COURT: You already used the "F" word. You're not good. I'm -- I'm --
>
> THE DEFENDANT: It's okay. It's okay. You already violated a man's rights --
>
> THE COURT: It is not okay. Restrain him and get him in front of me.
>
> I'm considering holding you in contempt of court for thirty days --
>
> THE DEFENDANT: Restrain me for what?
>
> THE COURT: For using profanity in this courtroom. Anything you wish to say in response to that?

> THE DEFENDANT: No.
>
> THE COURT: All right. The Court finds the defendant's use of profanity in this courtroom has disrupted the proceedings. He is found to be in contempt of court --
>
> THE DEFENDANT: And I'll appeal that. Let's go, man.
>
> THE COURT: He will do 30 days.
>
> THE DEFENDANT: I'll appeal that. Let's go, man. I don't want to hear this shit. I don't want to hear this shit --
>
> THE COURT: All right. He's again used profanity in this courtroom. I'm considering holding you in contempt for another 30 days for your continued use of profanity. Anything you wish to say?
>
> THE DEFENDANT: Let me go, man.
>
> THE COURT: All right.
>
> THE DEFENDANT: I don't want to hear nothing you guys say.
>
> THE COURT: The Court finds him in contempt of court a second time. Thirty days at the expiration of the first one.
>
> THE DEFENDANT: And I will appeal all of that. Contempt -- I'll appeal all that.

The trial court entered a written order for each contempt adjudication. In the first order, the trial court found that Defendant "use[d] profanity in the courtroom causing a disruption in the courtroom and impeding [the] administration of justice" and sentenced Defendant to thirty days' imprisonment. In the second order, the trial court found that Defendant "use[d] profanity in the courtroom for a second time after having been found in contempt causing a disruption in the courtroom and impeding [the] administration of justice" and sentenced Defendant to a consecutive term of thirty days' imprisonment. Defendant appeals.

II. Discussion

Defendant contends that the trial court erred by adjudging him in contempt of court on two separate counts. Specifically, Defendant argues that the term "behavior" in N.C. Gen. Stat. § 5A-11(a) is ambiguous because his repeated use of profanity within a short period of time "could reasonably be interpreted as one episode of contempt." We find no merit in Defendant's argument.

This Court reviews a trial court's contempt order for "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *State v. Mastor*, 243 N.C. App. 476, 480-81 (2015) (citation omitted). "The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*." *Curran v. Barefoot*, 183 N.C. App. 331, 335 (2007) (citation omitted). Moreover, issues of statutory construction are conclusions of law to be reviewed de novo. *State v. Patterson*, 266 N.C. App. 567, 570 (2019).

"When interpreting statutes, our principal goal is to effectuate the purpose of the legislature." *State v. Jones*, 358 N.C. 473, 477 (2004) (quotation marks and citation omitted). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Id.* (citation omitted).

N.C. Gen. Stat. § 5A-11(a) provides, in pertinent part,

> each of the following is criminal contempt:
>
> > (1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
> >
> > (2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.
> >
> > (3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

N.C. Gen. Stat. §§ 5A-11(a)(1)-(3) (2023).

"Behavior" is defined as "the way in which someone conducts oneself or behaves" or "an instance of such behavior." Behavior, Merriam-Webster.com, https://www.merriam webster.com/dictionary/behavior (last visited November 5, 2024). Our criminal contempt statute was enacted to protect trial courts' ability to keep peace in the courtroom and punish those who intentionally interfere with the administration of justice. *See File v. File*, 195 N.C. App. 562, 565-66 (2009). "A person guilty of any of the acts or omissions enumerated in [this section] may be punished for contempt because such acts or omissions have a direct tendency to interrupt the proceedings of the court or to impair the respect due to its authority." *Luther v. Luther*, 234 N.C. 429, 431 (1951).

Defendant was twice adjudged in direct criminal contempt for his use of profanity in the courtroom. Defendant's first contempt adjudication was based on the following exchange:

> THE DEFENDANT: And I'm saying, I mean, if he don't want to represent me on October 9, I'll represent myself.
>
> THE COURT: Well, if you want to fire him, you can. I'm not going to set the case for October 9th.
>
> THE DEFENDANT: Fuck y'all anyway --
>
> THE COURT: All right.
>
> THE DEFENDANT: -- fuck y'all and trumping all over my rights --

Defendant was adjudicated in contempt for his use of profanity in response to the trial court's refusal to grant Defendant an earlier court date. The outburst interrupted court proceedings and impeded the trial court's administration of justice. *See File*, 195 N.C. App. at 565; N.C. Gen. Stat. § 5A-11(a)(1). Defendant noted his appeal from this contempt adjudication.

Defendant's second contempt adjudication was based on his reaction to the first contempt conviction:

> THE COURT: All right. The Court finds the defendant's use of profanity in this courtroom has disrupted the proceedings. He is found to be in contempt of court --
>
> THE DEFENDANT: And I'll appeal that. Let's go, man.
>
> THE COURT: He will do 30 days.
>
> THE DEFENDANT: I'll appeal that. Let's go, man. I don't want to hear this shit. I don't want to hear this shit --

As Defendant's behavior in response to his first contempt adjudication further interrupted court proceedings, the trial court found Defendant in direct criminal contempt again to preserve the administration of justice. *See id.* Defendant noted his appeal from this second contempt adjudication.

Each of Defendant's outbursts were separate episodes of behavior delineated by separate adjudications of contempt under N.C. Gen. Stat. § 5A-11(a) and separate notices of appeal. The statute is unambiguous, and Defendant's attempt to compress two separate incidents

of contempt into one would in effect give him a "free ride" on the second of the two instances of profanity uttered to the court. That result does not comport with the language of the statute or the legislature's purpose in enacting it. Furthermore, Defendant's reliance on extra jurisdictional jurisprudence interpreting different statutes as applied to different factual circumstances than those before us is neither binding nor persuasive.

III. Conclusion

The trial court did not err by adjudicating Defendant of two counts of criminal contempt.

NO ERROR.

Chief Judge DILLON and Judge CARPENTER concur.

STATE OF NORTH CAROLINA
v.
ADRIAN OBRIAN MYERS

No. COA24-435

Filed 19 November 2024

Homicide—attempted murder—jury instructions—self-defense—evidentiary support—new trial

After an altercation outside of a convenience store, which escalated into a frantic exchange of gunfire after defendant's friend "pistol whipped" the victim's friend, defendant was entitled to a new trial for attempted first-degree murder and related charges where the trial court failed to instruct the jury on self-defense. Defendant presented sufficient competent evidence to support at least an instruction on imperfect self-defense, including evidence that: defendant approached the victim's friend without trying to initiate a conflict; defendant, who kept a gun in his pocket, noticed that the victim's friend was also carrying a gun; after the victim's friend was assaulted and defendant saw the victim running to a vehicle to retrieve a gun, defendant followed and tried to prevent the victim from accessing the weapon; and defendant heard gunshots, saw that the victim was armed, and fired at the victim because he "was scared" and believed the victim was going to shoot him.

STATE v. MYERS

[296 N.C. App. 524 (2024)]

Appeal by defendant from judgment entered 24 August 2023 by Judge Jonathan Wade Perry in Union County Superior Court. Heard in the Court of Appeals 23 October 2024.

North Carolina Attorney General Joshua H. Stein, by Assistant Attorney General Matthew Baptiste Holloway, for the State.

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

TYSON, Judge.

Adrian Obrian Myers ("Defendant") appeals from judgments entered upon a jury's verdicts of guilty of attempted first-degree murder, discharging a weapon into an occupied property, and assault with a deadly weapon inflicting serious injury. We reverse Defendant's convictions, vacate the judgments, and grant him a new trial.

I. Background

Defendant was cooking out with his fiancé; children; his father; his fiancé's brother, Rashad Colton; and, his friend, Zearious Miller, on 14 December 2021. Defendant's cousin was visiting from out of town and had called and asked to see him. Miller offered to drive Colton and Defendant to see Defendant's cousin in exchange for gas money.

Defendant carried a .40 caliber handgun in his jacket pocket. Defendant had a round loaded inside the chamber. Miller also had a firearm.

On the way to meet Defendant's cousin, Miller, Colton, and Defendant stopped at Monroe Discount Beverage ("Joe's Store"). Colton needed to use the automated teller machine for cash, and Miller wanted to purchase some snacks.

Miller was completing his purchase at the cash register when Defendant saw Deoveon Byrd standing outside of Joe's Store. Byrd had gone to Joe's Store with Raquan Neal. Defendant believed he recognized Byrd from an Instagram Live video, where Byrd had talked of retaliating against "a little guy" after a fight between the "little guy" and Byrd's friend at a CookOut Restaurant. Defendant believed Byrd was involved with a gang because he was wearing a burgundy or red flag. In the video Byrd had said he knew the "little guy" and had threatened to shoot up Defendant's home, where the "little guy" was purportedly located.

The "little guy" helped Defendant with small chores around his home. Defendant approached Byrd to tell him not to do anything to his home in retaliation, because his children live there and play outside the home. Defendant testified he "wasn't trying to start nothing . . . or get into any type of beef or fight[.]"

Defendant testified he saw a gun present in the waistband of Byrd's shorts. Miller and Neal approached the two men. Miller pulled a firearm from his sweatshirt pocket and "pistol whipped" Byrd.

Defendant pulled out his firearm. Neal ran to his car to retrieve a weapon. Defendant followed Neal to the car, saying "bro, don't, don't pull that gun out, don't pull that gun out." Neal pulled the gun out "but not all the way" and "as soon as he [was] about to pull it out [Defendant] smacked his arm down."

Defendant walked to the rear of the vehicle where Neal could not see or shoot at him. Defendant took the safety off his gun as he backed away. Miller approached Neal and tried to grab his gun. Defendant believed he heard five shots and thought Miller and Neal were shooting at each other. Defendant racked the slide on his gun and it ejected a round, surprising him. Defendant testified he normally did not keep a round loaded in the chamber for safety purposes.

Miller fell down after having been shot. Defendant pointed his gun at Neal because he believed Neal was going to shoot at him. Defendant saw Neal in possession of a weapon with a thirty-round magazine.

Neal ran into Joe's Store and Defendant fired at him. Defendant testified he was not trying to kill Neal. He "was just scared. I shot because I was scared." Defendant fired eight times at Neal. Neal, injured from gunfire, found refuge inside Joe's Store and called for emergency assistance. Defendant took Miller to the hospital, but he did not remain at the hospital fearing retaliation.

The next day Defendant met with law enforcement, gave a statement and turned over his .40 caliber handgun and Miller's handgun. Defendant was indicted with attempted first-degree murder, discharging a weapon into occupied property, injury to personal property, and assault with a deadly weapon inflicting serious bodily injury on 7 February 2022.

The State dismissed the injury to personal property charge. Defendant was convicted of attempted first-degree murder, discharging a weapon into occupied property, and assault with a deadly weapon inflicting serious injury. Defendant's sentences for attempted first-degree murder and assault with a deadly weapon inflicting serious injury were consolidated

for judgment and Defendant was sentenced to an active imprisonment term of 157 to 201 months. Defendant was also sentenced to 20 to 26 months for his conviction for discharging a weapon into occupied property, to run consecutive to his other judgment. Defendant appeals.

II. Jurisdiction

Jurisdiction lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Issues

Defendant argues the trial court erred by failing to instruct the jury on self-defense and by allowing the jury to view Neal's medical records for the first time during deliberations when they had not been published during the evidentiary portion of Defendant's trial.

IV. Self-Defense

A. Standard of Review

A defendant is entitled to a self-defense instruction when "competent evidence of self-defense is presented at trial." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (emphasis omitted). Defendant's evidence, taken as true, is sufficient to support the instruction, even if contradictory evidence exists. *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010). "[T]he evidence is to be viewed in the light most favorable to the defendant." *Id.* (citation omitted). "[A] defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision." *State v. Bass*, 371 N.C. 535, 542, 819 S.E.2d 322, 326 (2018) (emphasis supplied).

Determining whether a trial court erred in instructing the jury is a question of law reviewed *de novo*. *State v. Voltz*, 255 N.C. App. 149, 156, 804 S.E.2d 760, 765 (2017) (citation omitted). "Under a *de novo* review, the 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) (citation and quotation marks omitted).

B. Analysis

Defendant argues the trial court erred by failing to instruct the jury on self-defense. Defendant asserts he should have received the self-defense instruction for both his attempted first-degree murder and for assault with a deadly weapon inflicting serious injury. *See State v. Clay*, 297 N.C. 555, 565, 256 S.E.2d 176, 183 (1979), *overruled on other grounds by State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982) ("In cases involving assault

with a deadly weapon, trial judges should, in the charge, instruct that the assault would be excused as being in self-defense[.]").

Defendant's counsel presented proposed jury instructions, including instructions on self-defense. During the charge conference, the trial court and Defendant's attorney engaged in the following exchange:

> The Court: Let me do this, just for the record, after overnight review of the materials submitted by both attorneys, my review of the testimony and then some additional research I did into the issue, [Defendant's counsel], I don't think I even have discretion to exercise. Based on the testimony and the case law I think I'm precluded from giving the instruction on self defense. That's my understanding of the law.
>
> [Defendant's counsel]: Well, we obviously disagree and would point out that we feel like it's probable in the discretion of the jury to make that determination and there's some evidence we would contend. And so we appreciate you looking at it but do object to it. And please note our exception if you do not include it as part of the jury instructions.
>
> The Court: Sure. And again, I think as I indicated, I don't think that stops an argument made in closing arguments about self defense, I just think the legal instruction is not entitled to be included at this point.

Self-defense is a substantial and essential feature of a case, and a defendant who presents competent evidence of self-defense at trial is entitled to a jury instruction on this defense. *See Morgan*, 315 N.C. at 643, 340 S.E.2d at 95. "Where there is evidence that defendant acted in self-defense, *the court must charge* on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) (emphasis supplied) (citations omitted).

In North Carolina, the right to use deadly force to defend oneself is provided and strictly protected both by statute and case law. Under our General Statutes:

> (a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's

> imminent use of unlawful force. However, *a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies*:
>
> > *(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.*
> >
> > *(2) Under the circumstances permitted pursuant to G.S. 14-51.2.*

N.C. Gen. Stat. § 14-51.3(a) (2023) (emphasis supplied).

There are two forms of self-defense available to a defendant: perfect self-defense and imperfect self-defense. Our Supreme Court has explained the difference:

> Perfect self-defense excuses a killing altogether, while imperfect self-defense may reduce a charge of murder to voluntary manslaughter. For defendant to be entitled to an instruction on either perfect or imperfect self-defense, the evidence must show that defendant believed it to be necessary to kill his adversary in order to save himself from death or great bodily harm. In addition, defendant's belief must be reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.

State v. Ross, 338 N.C. 280, 283, 449 S.E.2d 556, 559-60 (1994) (internal quotation marks and citations omitted).

A defendant is entitled to an instruction on perfect self-defense when the following four elements are satisfied at the time of the attempted killing:

> (1) It appeared to defendant and he believed it necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e. he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Bush, 307 N.C. 152, 158, 297 S.E.2d 563, 568 (1982) (citing *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981)).

Our Supreme Court has examined the applicability of imperfect self-defense and the overlay of imperfect self-defense and perfect self-defense:

> [I]f defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter.
>
> An imperfect right of self-defense is thus available to a defendant who reasonably believes it necessary to kill the deceased to save himself from death or great bodily harm even if defendant (1) might have brought on the difficulty, provided he did so *without* murderous intent, and (2) might have used excessive force. Imperfect self-defense therefore incorporates the first two requirements of perfect self-defense, but not the last two.
>
> If one brings about an affray with the intent to take life or inflict serious bodily harm, he is not entitled even to the doctrine of imperfect self-defense; and if he kills during the affray he is guilty of murder. If one takes life, though in defense of his own life, in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy into which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder. But, if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his own act, but his offense is reduced from murder to manslaughter.

State v. Mize, 316 N.C. 48, 52-53, 340 S.E.2d 439, 441-42 (1986) (internal citation omitted).

"A defendant cannot benefit from perfect self-defense and can only claim imperfect self-defense, if he was the aggressor or used excessive force." *State v. Broussard*, 239 N.C. App. 382, 385, 768 S.E.2d 367, 369-70 (2015) (citing *State v. Bush*, 307 N.C. 152, 158-59, 297 S.E.2d 563, 568 (1982)).

The evidence, viewed in the light most favorable to Defendant, tended to show Defendant approached Byrd outside of Joe's Store. Defendant and Byrd began talking. Defendant was not trying to initiate a fight or was in disagreement with Byrd. Defendant had a weapon and saw Byrd had a gun present in the waistband of his shorts. Neal and Miller approached Defendant and Byrd.

Shortly after talking Miller began to assault Byrd by "pistol whipping" him. Defendant took out his gun. Neal went to Byrd's vehicle to retrieve a gun, Defendant followed and attempted to prevent him from accessing and using his weapon. Defendant heard shots as Miller and Neal fought. Defendant saw Neal possessing a weapon. Defendant fired at Neal as he went into the store. Defendant testified he "was scared" and believed Neal was going to point the gun and shoot at him. Defendant further testified he was trying to "defend himself."

Viewed in the light most favorable to Defendant, the evidence is sufficient to support an instruction of at least imperfect self-defense, if not perfect self-defense. Presuming a conflict in the evidence of the identity of the initial aggressor exists, it is be resolved by the jury, after being fully and properly instructed. *See Moore*, 363 N.C. at 796, 688 S.E.2d at 449. We decline to address Defendant's remaining argument on Neal's medical records as it is unlikely to recur on remand.

V. Conclusion

Defendant presented competent evidence tending to show he was acting in self-defense. The trial court was required to instruct the jury on self-defense. *See Morgan*, 315 N.C. at 643, 340 S.E.2d at 95. The trial court's failure to provide the requested instructions on self-defense was error and prejudicial. Defendant is entitled to a new trial with full and proper instructions on self-defense, if submitted to the jury. *It is so ordered.*

NEW TRIAL.

Chief Judge DILLON and Judge HAMPSON concur.

STATE OF NORTH CAROLINA
v.
HORACE DEVON TEEL, DEFENDANT

No. COA24-233

Filed 19 November 2024

1. Criminal Law—jury instructions—voluntary manslaughter—omission of not guilty option—no plain error

In a prosecution arising from a fatal shooting, where the trial court included a "not guilty" option in its instructions to the jury on first-degree murder and second-degree murder but not in the instruction for voluntary manslaughter—for which defendant was ultimately convicted—the omission did not constitute invited error or plain error. Although defendant worked collaboratively with the State to draft the instruction and did not object to it when it was given, he did not specifically request it; therefore, he did not invite the error. However, because defendant did not object to the instruction as given, which he maintained was not required, his argument was not preserved and was reviewed for plain error. Since a not guilty option appeared in other parts of the jury instructions as well as on the verdict sheet, the omission of the not guilty option from the manslaughter instruction was not prejudicial and therefore not plain error.

2. Evidence—hearsay—excited utterance—shooting admission—no prejudice from exclusion—not reversible error

In a prosecution arising from a fatal shooting that took place among a group of people, a statement that defendant sought to introduce by another participant in the incident—"Man, I shot him"—qualified as an excited utterance exception to the hearsay rule because it was made minutes after the shooting occurred and appeared to be a spontaneous reaction. Although the trial court erroneously excluded the statement as impermissible hearsay, no reversible error occurred because defendant was not prejudiced. Based on the entirety of the evidence—which showed that the victim was shot once from the front and once from the back from two different caliber weapons; either wound could have been fatal to the victim; and defendant admitted shooting the victim—there was no reasonable likelihood that, but for the exclusion of the proffered statement, another outcome would have resulted.

3. Criminal Law—cumulative error—no violation of right to fair trial

In a prosecution arising from a fatal shooting, defendant failed to show the existence of cumulative prejudicial error depriving him of a fair trial and requiring reversal of his conviction for voluntary manslaughter. Where there was no prejudicial or reversible error in each of defendant's substantive claims on appeal, there could be no cumulative error.

Appeal by defendant from judgment entered 18 April 2023 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 9 October 2024.

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

Office of the Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for defendant-appellant.

FLOOD, Judge.

Defendant, Horace Devon Teel, appeals from the trial court's judgment finding him guilty of voluntary manslaughter. Defendant argues on appeal: (A) the trial court erred or plainly erred in failing to provide a "not guilty" mandate for the voluntary manslaughter instruction, (B) the trial court erred by ruling a hearsay statement was not an excited utterance and was therefore inadmissible, and (C) the cumulative effect of the trial court's errors deprived Defendant of a fair trial. Upon review, we conclude the trial court's failure to provide a "not guilty" mandate for the voluntary manslaughter instruction did not prejudice Defendant's case, and the trial court did not plainly err. Further, the trial court's exclusion of the hearsay statement—although admissible under the excited utterance exception—was not prejudicial to Defendant, and as such, not reversible error. Finally, upon our review of the entire Record, we conclude the trial court did not commit cumulative error.

I. Factual and Procedural Background

In the afternoon of 25 September 2021, Edward Eugene "Eddie" Morrow and his girlfriend, Shenee Davenport, were "planning on going out" with friends. The group had decided to go to the Rose Bar in Raleigh, where Morrow worked as a bouncer, and among the group was Davenport's brother, Marcus. The group went to the bar later that

night, and upon arrival, Marcus remained in the parked car while the rest entered the bar. After approximately fifteen minutes, Marcus called Davenport by cell phone to report that he had been "jumped." All but Morrow exited the bar to help Marcus, and as Davenport approached the car driven by Marcus, she did not see him but observed "a lot of blood on" the car. Davenport eventually located Marcus in a nearby parking lot, and observed his arm was dripping blood. Davenport then received a call from Morrow; after Morrow learned what had happened, he exited the Rose Bar at approximately 2:00 a.m. to meet the group in the nearby parking lot.

Soon thereafter, Morrow began to approach the group in the nearby parking lot, whereupon Davenport "s[aw] him start tussling with . . . someone[.]" Davenport did not see who had started the fight, but observed that the other combatant was of a "heavier build[,]" had long hair, and his skin tone was "about three shades darker" than Morrow's. Morrow and the other combatant then began fighting up against a car, at which point Davenport "hear[d] a gunshot and then [her] legs got weaker as [she] got scared, and then [she] went to the floor." Davenport crawled on the ground around the front of the car towards the passenger side, and saw Morrow, who was lying on his back, bloodied, and "obviously hurt." Davenport covered Morrow's body with her own, and saw a "light-skinned" black man standing over her with a gun, whom she later identified as Defendant. At this point, Defendant, and the group of three other people who were with him at the time, walked away from the scene, entered their car that was parked approximately eighty-five feet away from the scene of the fight, and drove away.

Soon after the shooting, police officers arrived on the scene; Marcus and Morrow were transported to the hospital, and near where Morrow was shot, the officers found two pistol cartridge casings—one 9-millimeter, and the other .40 caliber. After police officers searched and secured the scene of the shooting, Detective Jared Silvious of the Raleigh Police Department ("RPD") was assigned to this case; he proceeded to the hospital where Marcus and Morrow had been taken, where he observed Marcus alive but with a gunshot wound to his arm, and ascertained that Morrow had died. Detective Silvious then traveled to the Rose Bar, where he obtained and copied the surveillance footage, and ascertained from the footage the night and time of the incident.

Law enforcement examined the surveillance footage and were able to identify all four occupants of the car who fled the scene after the shooting, among whom was Defendant. Photos from the surveillance footage were given to RPD's public information office to distribute a

"[b]e on the lookout" to the local news media and RPD's social networking sites. Four days later, on 30 September 2021, RPD received a call from the Spring Hope Police Department because "[t]here were some folks at the Spring Hope Police Department that wanted to identify themselves as being in those photos[,]" including Defendant.

On 25 October 2021, a grand jury issued a bill of indictment charging Defendant with first-degree murder, and on 3 April 2023, this matter came on for hearing before the trial court. During evidence, the State presented fourteen witness testimonies, including that of Davenport. The State also presented the expert testimony of Dr. Paul Yell, who had conducted an autopsy on Morrow's corpse. From the autopsy, Dr. Yell determined that Morrow had sustained two gunshot wounds—one "high on the chest on the right side," and a second "on the left lower back." The chest wound showed no signs of soot or gunpowder stippling, indicating that the gunshot came from "probably greater than two or three feet away." The entrance wound on Morrow's back, however, exhibited stippling—"abrasions from unburned gunpowder particles that are hitting the skin and causing these . . . little red injuries"—which indicated to Dr. Yell that the gunshot to the back was fired from between six inches and three feet away. As both gunshot wounds were "potentially lethal," Dr. Yell listed Morrow's cause of death as multiple gunshot wounds.

After the State rested, Defendant took the stand in his own defense. Defendant testified he lived near Greenville, North Carolina, and on the night of the shooting, he had come to Raleigh with a group of friends to celebrate a birthday; among the group was Duane Tabron, Tabron's girlfriend, and Defendant's girlfriend. The group went to the Rose Bar, and before entering, Defendant and Tabron—both of whom were armed—stored their firearms in a friend's car. At around 2:00 a.m., after spending time in the Rose Bar, Defendant, Tabron, and their girlfriends left the bar; Defendant and Tabron retrieved their firearms, placing them in their waistbands. As they were walking back to their car, a man—later identified as Morrow—attacked Tabron from the back, and the pair began to fight. Then, according to Defendant's testimony: Defendant fired a "warning shot," but Morrow "persisted in attacking Tabron"; Tabron and Morrow continued to fight and eventually "hit the ground"; Defendant heard a gunshot, which made him fear for Tabron's safety; and Defendant "went over" to the combatting pair and "fired at the victim."

During Defendant's testimony, defense counsel tried to introduce a hearsay statement that Tabron had admitted to shooting Morrow, and the State objected to introduction of this statement. Outside the

presence of the jury, defense counsel argued the statement was admissible as an excited utterance, and conducted a voir dire of Defendant regarding this argument:

> [Defense counsel:] All right. At some point while y'all were in the car and before you've driven off, does [Tabron] say something?
>
> [Defendant:] Yes, sir.
>
> [Defense counsel:] What does he say?
>
> [Defendant:] He was like, "Man, I shot him. I shot him. I ain't even mean to, but I don't know what happened." He was like, "I'm sorry. I'm sorry." He said he shot him.
>
> [Defense counsel:] How was [Tabron] acting as he was saying this?
>
> [Defendant:] He was very hysterical, in near tears.
>
> [Defense counsel:] Okay. Then what happens?
>
> [Defendant:] He . . . called his cousin on the phone and let him know what happened, and he backed up and we turned around and we left.

On voir dire by the State, Defendant confirmed that "some minutes had passed" before Tabron made this alleged statement, and during those minutes, both Defendant and Tabron ran to their car, and Tabron took a longer time to get there. After hearing from both defense counsel and the State, the trial court sustained the State's objection, ruling that Tabron's statement did not constitute an excited utterance and that Defendant "will not be allowed to say that."

Following the trial court's exclusion of Tabron's statement, the jury was brought back into the courtroom, after which Defendant was subjected to direct and cross-examination. During cross-examination, Defendant had the following colloquy with the State's attorney:

> [State's attorney:] You believe that . . . [Tabron] shot . . . [Morrow]?
>
> [Defendant:] Yeah.
>
> [State's attorney:] So you think [Tabron] had time to pull a gun from his waistband and shoot . . . [Morrow]?
>
> [Defendant:] It's very possible, yes.

During the charge conference, the parties discussed jury instructions, and the trial court asked the parties to "help" finalize the instructions. To expedite the process, the trial court asked the clerk to put the draft jury instructions on the courtroom screen so all parties could participate in finalizing the instructions, and provided,

> the only reason, [State attorney] and [defense counsel,] . . . we're putting it on the screen is so that with the edits, no one can say that one person did it. We all see it. Now, it is on the screen. Your question was [whether] there were some other concerns about, yes, this instruction. I threw everything in there as far as lesser includeds [sic].

The parties then discussed the lesser included offenses of first-degree murder, and the "State [was] opposed to the instruction on voluntary manslaughter" and believed that Defendant is "either guilty of first-degree murder or guilty of second-degree murder or not guilty[.]" Thereafter, the trial court instructed the parties to "each create[and] edit the instructions dealing with" the pattern jury instructions on first-degree murder and its lesser included offenses. The following morning, the trial court recounted a number of emails sent back and forth between the parties during the night and early morning, which demonstrated they had worked collaboratively on a set of jury instructions. The instructions were finalized, and the trial court asked both parties if they agreed to the jury instructions; defense counsel objected only to the instruction on accomplice liability. The trial court overruled this objection and asked defense counsel if he had any other objections to the instructions, to which defense counsel replied "[n]o, sir."

Following the charge conference and closing arguments, the trial court instructed the jury on first-degree murder, second-degree murder, voluntary manslaughter, and defense of a third person, and the instructions were entirely consistent with the instructions discussed and agreed upon during the charge conference. As part of these instructions, the trial court specifically provided, in relevant part:

> Defendant has been charged with first-degree murder. Under the law and evidence in this case, it is your duty to return one of the following verdicts: First, guilty of first-degree murder.
>
> Second, guilty of second-degree murder;
>
> Third, guilty of voluntary manslaughter;
>
> And fourth, not guilty.

> . . . .
>
> Defendant would not be guilty of any murder or manslaughter if . . . Defendant acted in self-defense of another and did not use excessive force under the circumstances.
>
> . . . .
>
> [I]f you find from the evidence beyond a reasonable doubt that on or about the alleged date . . . Defendant intentionally and not in defense of others wounded the victim with a deadly weapon and thereby proximately caused the victim's death, but the State has failed to satisfy you beyond a reasonable doubt that . . . Defendant did not act in the heat of passion upon adequate provocation, it would be your duty to return a verdict of guilty of voluntary manslaughter.

While not included in its final instruction on voluntary manslaughter, the trial court, in its final instructions on first-degree murder and second-degree murder, instructed on a "not guilty" mandate for those counts.

On 17 April 2023, the jury found Defendant guilty of voluntary manslaughter, and the following day, Defendant entered a plea agreement with the State, whereby he stipulated to the existence of an aggravating factor and agreed to an active sentence of sixty-eight to ninety-four months' imprisonment. Consistent with the jury's verdict and the plea agreement, the trial court sentenced Defendant to sixty-eight to ninety-four months' imprisonment. Defendant timely appealed.

II. Jurisdiction

Defendant's appeal is properly before this Court as an appeal from a final judgment of a superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Analysis

Defendant argues on appeal: (A) the trial court erred or plainly erred in failing to provide a "not guilty" mandate for the voluntary manslaughter instruction, (B) the trial court erred by ruling Tabron's out-of-court statement was not an excited utterance and therefore inadmissible, and (C) the cumulative effect of the trial court's errors deprived Defendant of a fair trial. We address each argument, in turn.

A. Voluntary Manslaughter Instruction

[1] Defendant contends the trial court erred by failing to instruct the jury it was required to return a verdict of not guilty if the State failed

to prove the elements of voluntary manslaughter beyond a reasonable doubt. Before addressing Defendant's contention, as the voluntary manslaughter instruction was consistent with the instruction agreed upon by Defendant and the State, we first consider whether the alleged instructional error was invited error, and if not, whether Defendant preserved this argument for our appellate review.

1. Invited Error and Standard of Review

As a general rule, we review jury instructions for plain error when the defendant failed to object at trial. *See State v. Hooks*, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001) ("Having failed to object to his instruction at trial, [the] defendant did not properly preserve his issue for review; therefore, we review the record to determine whether the instruction constituted plain error."); *see also* N.C. R. App. P. 10(a)(4). Under the invited error doctrine, however, "a party cannot complain of a charge given at his request, or which is in substance the same as one asked by him," *Sumner v. Sumner*, 227 N.C. 610, 613, 44 S.E.2d 40, 41 (1947) (citations omitted), and a defendant who invites error "has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Crane*, 269 N.C. App. 341, 343, 837 S.E.2d 607, 608 (2020) (citation and internal quotation marks omitted). While error is clearly invited when a defendant requests the instruction at issue, *see State v. McPhail*, 329 N.C. 636, 643–44, 406 S.E.2d 591, 596 (1991) (finding invited error where the defendant specifically requested the trial court read the pattern jury instruction on confessions), this Court has held that defense counsel's mere failure to object to proposed instruction does not constitute invited error.

Specifically, in *State v. Harding*, we considered whether the trial court's allegedly erroneous jury instruction constituted invited error where the defendant "failed to object, actively participated in crafting the challenged instruction, and affirmed it was 'fine.' " 258 N.C. App. 306, 311, 813 S.E.2d 254, 259 (2018). Upon review, we found the defendant's conduct did not constitute invited error, providing that,

> [e]ven where the "trial court gave a defendant multiple opportunities to object to the jury instructions outside the presence of the jury, and each time the defendant indicated his satisfaction with the trial court's instructions," our Supreme Court has not found the defendant invited his alleged instruction error but applied plain error review.

Id. at 311, 813 S.E.2d at 259 (quoting *Hooks*, 353 N.C. at 633, 548 S.E.2d at 505) (cleaned up); *see also State v. Chavez*, 270 N.C. App. 748, 757, 842

S.E.2d 128, 135 (2020) (finding the invited error doctrine inapplicable where the defendant "did not request the conspiracy instruction, but merely consented to it").

Here, Defendant's participation in crafting the voluntary manslaughter instruction does not amount to invited error. Defendant did not specifically request the instruction; rather, as demonstrated in the Record, defense counsel and the State worked collaboratively on the instruction, which was ultimately unobjected to by Defendant and delivered *verbatim* by the trial court. As this Court has held a challenged instruction is not invited error where the defendant failed to object to, and actively participated in, the crafting of the instruction, it cannot be said Defendant's conduct, here, constituted invited error. *See Harding*, 258 N.C. App. at 311, 813 S.E.2d at 259; *see also Chavez*, 270 N.C. App. at 757, 842 S.E.2d at 135.

As to the proper standard of review, Defendant contends this issue is properly preserved for our appellate review, as "our Courts have held that a trial court's deviation from an agreed upon pattern instruction is preserved without objection." While this is a correct statement of law, in the instant case, it is inapposite. *See State v. Jaynes*, 353 N.C. 534, 556, 549 S.E.2d 179, 196 (2001) ("[W]hen the instruction actually given by the trial court varied from the pattern language, [the] defendant was not required to object in order to preserve this question for appellate review." (citation omitted)). Defense counsel worked collaboratively with the State in crafting the voluntary manslaughter instruction, and as such, any deviation in the pattern instruction was one to which Defendant impliedly consented. *See Chavez*, 270 N.C. App. at 757, 842 S.E.2d at 135. Further, Defendant failed to object to the trial court's omission of a "not guilty" mandate in its voluntary manslaughter instruction, meaning he failed to preserve his argument for our appellate review, and it is therefore subject to our plain error review. *See Harding*, 258 N.C. App. at 311, 813 S.E.2d at 259; *see also Hooks*, 353 N.C. at 633, 548 S.E.2d at 505.

To demonstrate plain error, a defendant must show that "a fundamental error occurred at trial." *State v. Hunt*, 250 N.C. App. 238, 247, 792 S.E.2d 552, 559 (2016). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* at 247, 792 S.E.2d at 559.

2. Prejudice

"Our Supreme Court has held that the failure of the trial court to provide the option of acquittal or not guilty in its charge to the jury can

constitute reversible error." *State v. McHone*, 174 N.C. App. 289, 295, 620 S.E.2d 903, 907 (2005) (citation omitted). In *State v. Gosnell*, however, this Court concluded that the trial court did not plainly err where the trial court's first-degree murder instruction did not expressly state that the jury could find the defendant "not guilty[,]" but did expressly discuss the "not guilty" option in its second-degree murder instruction. 231 N.C. App. 106, 109–10, 750 S.E.2d 593, 595–96 (2013) ("The trial court did not commit plain error in failing to instruct that the jury would or must return a 'not guilty' verdict if it did not conclude that [the d]efendant committed first-degree murder on the basis of premeditation and deliberation."). In reaching this conclusion, we also highlighted the significance of the verdict sheet providing a space for a "not guilty" verdict on the first-degree murder count. *Id.* at 110, 750 S.E.2d at 596; *see also State v. Calderon*, 242 N.C. App. 125, 134, 774 S.E.2d 398, 406 (2015) (finding no plain error, and noting that each verdict sheet contained a space for a "not guilty" option).

Here, upon our review of the trial court's voluntary manslaughter instruction, it appears the trial court failed to comport with the requirement of instructing the jury that it could return a verdict of not guilty if the State failed to prove the elements of voluntary manslaughter beyond a reasonable doubt. *See McHone*, 174 N.C. App. at 295, 620 S.E.2d at 907. The trial court, however, comported with this requirement in its final mandates on first-degree and second-degree murder; set forth the option of "not guilty" in other parts of its instructions, specifically providing that one of the four possible verdicts the jury may reach is "not guilty" and that "Defendant would *not be guilty* of any murder or *manslaughter* if . . . [he] acted in self-defense of another"; and included on the verdict sheet a "not guilty" option. Per the standard set forth in *Gosnell*, the presence of these factors demonstrates that the trial court's failure to provide a "not guilty" mandate in its voluntary manslaughter instruction had no probable impact on the jury's finding of guilt. 231 N.C. App. at 109–10, 750 S.E.2d at 595–96; *see also Hunt*, 250 N.C. App. at 247, 792 S.E.2d at 559. Accordingly, Defendant's case was not prejudiced, and the trial court did not plainly err. *See Hunt*, 250 N.C. App. at 246–47, 792 S.E.2d at 559.

B. Excited Utterance

[2] Defendant next contends that Tabron's statement "[m]an, I shot him" was an excited utterance, and as such, the trial court erred and prejudicially erred in excluding the statement as inadmissible hearsay. We disagree.

This Court reviews de novo "a trial court's decision with regard to the admission of evidence alleged to be hearsay[.]" *State v. Lowery*, 278 N.C. App. 333, 338, 860 S.E.2d 332, 336 (2021) (citation and internal quotation marks omitted). "Under a *de novo* review, [this C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Clapp*, 235 N.C. App. 351, 359–60, 761 S.E.2d 710, 717 (2014) (citation and internal quotation marks omitted). Even where this Court finds the trial court's evidentiary decision was in error, however, "evidentiary error does not necessitate a new trial unless the erroneous admission was prejudicial." *State v. Wilkerson*, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009) (citations omitted). "A defendant is prejudiced by evidentiary error when there is a reasonable probability that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *Id.* at 415, 683 S.E.2d at 194 (citation and internal quotation marks omitted).

1. Evidentiary Error

Under North Carolina law, a hearsay statement is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted[,]" and such statements are inadmissible at trial. *Sterling v. Gil Soucy Trucking, Ltd.*, 146 N.C. App. 173, 177, 552 S.E.2d 674, 677 (2001) (citation and internal quotation marks omitted). "Numerous exceptions to the hearsay rule exist, however, so that out-of-court statements may be admissible under some circumstances[,]" and one such exception is that for "excited utterances[.]" *State v. Nicholson*, 355 N.C. 1, 35, 558 S.E.2d 109, 133 (2002) (citation and internal quotation marks omitted).

"The excited utterance hearsay exception allows admission of out-of-court statements relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* at 35, 558 S.E.2d at 133 (citation and internal quotation marks omitted). "To qualify as an excited utterance, the statement must relate (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *Id.* at 35, 558 S.E.2d at 133 (citation and internal quotation marks omitted). "If the facts indicate a lapse of time sufficient to manufacture a statement and that the statement lacked spontaneity, the statement is inadmissible under" the excited utterance exception. *State v. Riley*, 154 N.C. App. 692, 695, 572 S.E.2d 857, 859 (2002) (citation and internal quotation marks omitted).

In *State v. Allen*, this Court assessed whether witness statements given twenty minutes after a shooting were properly admitted into

evidence under the excited utterance exception. 162 N.C. App. 587, 593, 592 S.E.2d 31, 37 (2004). In making this assessment, we considered evidence that the witnesses were under "extreme stress" when they made their out-of-court statements, as one witness appeared to have been crying before making her statement, and the other stopped crying just before making hers. *Id.* at 593, 592 S.E.2d at 37. Based on this evidence, and as the witnesses' "statements were made only twenty minutes after the shootings and the statements related to the startling events at issue," the statements were properly admitted under the excited utterance exception. *Id.* at 593, 592 S.E.2d at 37. Likewise, in *State v. Pickens*, our Supreme Court concluded a hearsay statement made at a "still-chaotic scene" was properly admitted under the excited utterance exception, where the hearsay declarant "had just witnessed the shooting of a child and was still experiencing the effects of the extremely startling event. There was no time to reflect on his thoughts or fabricate a story between the . . . shooting and the statement, thus making the declaration spontaneous." 346 N.C. 628, 644–45, 488 S.E.2d 162, 171 (1997).

Here, in consideration of the first factor for an excited utterance statement—that it relates a sufficiently startling experience suspending reflective thought—Record evidence demonstrates Tabron made the hearsay statement in the minutes after being involved in a lethal shooting. Per our assessments of the excited utterance exception in *Allen* and *Pickens*—where the hearsay declarants made their statements after witnessing a shooting—the first factor is certainly met. *See Allen*, 162 N.C. App. at 593, 592 S.E.2d at 37; *see also Pickens*, 346 N.C. at 644–45, 488 S.E.2d at 171. Next, as to the second factor—that the statement be a spontaneous reaction, not resulting from reflection or fabrication—per Defendant's testimony, following the shooting, it took "some minutes" for Defendant and Tabron to run from the scene of the shooting to their vehicle, and when Tabron made the hearsay statement he was "very hysterical, in near tears." Again, per *Allen*—where the hearsay statements were made twenty minutes after the shooting, the declarants were under "extreme stress," and they were crying just before making their statements—and *Pickens*—where the hearsay statement was made at a "still-chaotic" scene, and the declarant had just witnessed a shooting—Tabron's hearsay statement was certainly one of spontaneity. *See Allen*, 162 N.C. App. at 593, 592 S.E.2d at 37; *see also Pickens*, 346 N.C. at 644–45, 488 S.E.2d at 171. Although "some minutes" had passed between the shooting and the hearsay statement, Tabron was "still experiencing the effects of the" shooting, and the second factor is therefore met. *Pickens*, 346 N.C. at 644–45, 488 S.E.2d at 171; *see also Allen*, 162 N.C. App. at 593, 592 S.E.2d at 37.

As Tabron's hearsay statement meets both requirements to constitute an excited utterance, we conclude his statement was "one related to a startling event or condition made while . . . under the stress of excitement caused by the event or condition[.]" *See Nicholson*, 355 N.C. at 35, 558 S.E.2d at 133. Tabron's hearsay statement falls squarely under the excited utterance exception, and as such, it was error for the trial court to exclude the statement as inadmissible hearsay. *See id.* at 35, 558 S.E.2d at 133; *see also Clapp*, 235 N.C. App. at 359–60, 761 S.E.2d at 717.

2. Prejudice

Having concluded the trial court committed evidentiary error in excluding Tabron's hearsay statement, we now must consider whether the error prejudiced Defendant. *See Wilkerson*, 363 N.C. at 415, 683 S.E.2d at 194. Upon our de novo review of the Record, we discern no prejudice. *Lowery*, 278 N.C. App. at 338, 860 S.E.2d at 336.

In addition to Defendant's testimony, the State presented testimony from Davenport, wherein she provided that, at some point during the fight, Morrow was shot, and that she saw Defendant standing over Morrow's body, armed with a gun. Further, Defendant and Morrow each possessed a firearm at the time of the shooting; the uncontroverted evidence demonstrates that Morrow was shot once from the front and once from the back with two firearms of different calibers—one chambered in 9mm and the other in .40 caliber; the front wound was from a bullet fired from a distance of "greater than two or three feet away," and the back wound from a bullet fired from six inches to three feet away; Dr. Yell testified that the front wound and the back wound were each "potentially lethal"; and Defendant himself admitted to shooting Morrow. From this evidence, a reasonable jury could conclude that Defendant had committed voluntary manslaughter of Morrow, and as such, there is not a reasonable probability that, but for the trial court's exclusion of Tabron's hearsay statement, the outcome of the proceeding would have been different. *See Wilkerson*, 363 N.C. at 415, 683 S.E.2d at 194; *see also State v. Simonovich*, 202 N.C. App. 49, 53, 688 S.E.2d 67, 71 (2010) ("Voluntary manslaughter is the killing of another human being without malice and without premeditation and deliberation under [1] the influence of some passion or [2] heat of blood produced by adequate provocation." (citation and internal quotation marks omitted)). The trial court's exclusion of the testimony was not reversible error.

C. Cumulative Error

[3] Defendant lastly contends that, even if the trial court's errors are not prejudicial on their own, the combined effect of these errors prejudiced Defendant and violated his right to a fair trial. We disagree.

Under the cumulative error doctrine, "[c]umulative errors lead to reversal when taken as a whole they deprived the defendant of his due process right to a fair trial free from prejudicial error." *Wilkerson*, 363 N.C. at 426, 683 S.E.2d at 201 (citation and internal quotation marks omitted) (cleaned up). As explained above, the only error committed by the trial court was its exclusion of Tabron's hearsay statement, and this error was not prejudicial. Further, even if the trial court did err in failing to provide a "not guilty" mandate in its voluntary manslaughter instruction, upon our review of the entire Record, and comparing the evidentiary error and alleged instructional error to the State's evidence, we conclude Defendant was not deprived of his due process right to a fair trial. *See id.* at 426, 683 S.E.2d at 201 ("We have reviewed the record as a whole and, after comparing the overwhelming evidence of [the] defendant's guilt with the evidence improperly admitted, we conclude that, taken together, these errors did not deprive [the] defendant of his due process right to a fair trial."). The trial court did not cumulatively err.

IV. Conclusion

Upon our review, we conclude that the trial court's failure to instruct on the "not guilty" option for voluntary manslaughter did not prejudice Defendant's case, and as such, the trial court did not plainly err. We further conclude that, although the trial court's exclusion of Tabron's hearsay statement was error under the excited utterance exception, the exclusion did not prejudice Defendant, and the trial court did not reversibly err. Finally, upon our review of the entire Record, we conclude the trial court did not cumulatively error.

NO ERROR and NO PLAIN ERROR.

Judges TYSON and GORE concur.

BRENETTA TAYLOR-COLEMAN, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH & HUMAN SERVICES DIVISION OF CHILD DEVELOPMENT AND EARLY EDUCATION, RESPONDENT

No. COA24-387

Filed 19 November 2024

Administrative Law—contested case—whole-record test—listing on Child Maltreatment Registry—substantial evidence

In a contested case, the superior court did not err in applying the whole-record test upon judicial review to affirm the final decision of the Office of Administrative Hearings, which upheld the decision of the North Carolina Department of Health and Human Services (respondent) to list petitioner (a caregiver) on the North Carolina Child Maltreatment Registry, where testimony by an investigator for respondent—who described information she gathered during her investigation of a report that petitioner struck and verbally threatened a juvenile at the child care center of which petitioner was the owner, operator, and director—was corroborated by the testimony of two other witnesses, each of whom was present during the abusive incident.

Judge STADING concurring in the result only.

Appeal by Petitioner from an order entered 4 October 2023 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 October 2024.

Mark Hayes for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Amber I. Davis, for respondent-appellee.

WOOD, Judge.

Brenetta Taylor-Coleman ("Petitioner") appeals from the superior court's order affirming a final decision of the North Carolina Office of Administrative Hearings ("OAH"). The North Carolina Department of Health and Human Services, Division of Child Development and Early Education (the "Division"), placed Petitioner on the Child Maltreatment

Registry. OAH upheld the placement, and the superior court affirmed the final decision. On appeal, Petitioner challenges the determination of her placement on the registry. For the reasons set forth below, we affirm the superior court's order.

I. Factual and Procedural Background

Petitioner was the owner, operator, and director of two licensed child care centers, namely: Ms. Chop's Child Development ("Ms. Chop's") and Ms. Chop #2 Academy ("Ms. Chop #2"). Both facilities were in Mecklenburg County and Ms. Chop's operated out of Petitioner's home. The Division is an agency that provides the mandatory licensing of North Carolina child care facilities. N.C. Gen. Stat. § 110-85. In relevant part, the Division has the duty to oversee these facilities, "ensur[e] that these facilities provide a physically safe and healthy environment where the developmental needs of these children are met[,]" and certify that the operators are qualified and of "good moral character." *Id*. Likewise, the Division is required to complete inspections of these facilities and investigate any reports or complaints filed. N.C. Gen. Stat. § 110-105.

On 28 June 2018, the Division received a report that an incident involving two children had occurred at Ms. Chop #2 two days prior. The report alleged Russ[1], a twelve-year-old child, "pulled another child's pants down and 'sucked' his private area." The other child, John[2], is Petitioner's grandson. The Division began its investigation into the complaint and assigned Rhonda Carey, an investigations consultant, to the matter. Ms. Carey conducted interviews with the individuals involved, the child care providers at Ms. Chop #2, Petitioner, John's mother, and Russ' foster parent. The investigation revealed: on 26 June 2018, Ms. Graham, a volunteer provider at the facility, was the only staff member outside supervising a group of eleven children whose ages ranged from three to twelve years old. Ms. Graham was unable to see and hear all the children at all times. Ms. Graham observed Russ and John playing in an area where they could not be seen and redirected them to the playground; she then observed John with his pants down and Russ "sucking on [John's] private part."

Ms. Graham immediately separated the children, took Russ inside, and notified Petitioner of the situation. The events that occurred next

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

2. See n.1.

were disputed at the hearing. Russ stated that "Aunt Net" hit him on the back of the head using her hand, but the children typically referred to Petitioner as "Ms. Chops." However, Ms. Carey's investigation revealed that it was Petitioner who hit Russ on the back of the head and yelled at him. Ms. Graham reported that Petitioner stated, "You know better[,]" "You better not ever put your mouth on my grandson[,]" and "I'll kill you[.]" Ms. Lowe, an employee who was inside the facility during the incident, corroborated Ms. Graham's statement that it had been Petitioner who hit Russ.

Based on Ms. Carey's findings during the investigation, the Division cited Ms. Chop #2 for numerous violations of North Carolina Law and the North Carolina Child Care Rules. The Division was then required to determine whether the case constituted "child maltreatment" which is defined as "[a]ny act or series of acts of commission or omission by a caregiver that results in harm, potential for harm, or threat of harm to a child." N.C. Gen. Stat. § 110-105.3(b)(3). The Division concluded evidence that Petitioner "used [her] hands and fists to hit [Russ] on the back of the head and threatened to kill [him]" was sufficient to support a finding of child maltreatment. Consequently, on 31 October 2018, the Division provided Petitioner with a Notice of Pending Placement on the North Carolina Child Maltreatment Registry (the "Registry") and Disqualification. The Notice informed Petitioner she was entitled to an administrative hearing prior to being placed on the Registry and that, effective immediately, Petitioner was prohibited from working in childcare in North Carolina.

In addition to the Division's action of starting the process to place Petitioner on the Registry, the Division issued three administrative actions, including one for the revocation of Petitioner's license to operate Ms. Chop #2. Subsequently, Petitioner filed four petitions for contested case hearings at OAH, appealing the Registry action and the three administrative actions by the Division: (1) Petitioner's placement on the Registry; (2) the Division's decision to summarily suspend Petitioner's license to operate Ms. Chop's; (3) the Division's decision to revoke Petitioner's license to operate Ms. Chop #2; and (4) the Division's decision to revoke Petitioner's license to operate Ms. Chop's. On appeal, Petitioner does not challenge the Division's revocation and closure of Ms. Chop's and Ms. Chop #2; rather, Petitioner challenges her placement on the Registry. Therefore, we do not address the alleged violations and conclusions of the Division as it relates to these facilities. *See Koufman v. Koufman*, 330 N.C. 93, 97-98, 408 S.E.2d 729, 731 (1991) ("Where no

exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." "Furthermore, the scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal." (citations omitted)).

On 9 August 2019, a hearing was held on Petitioner's petitions. On 2 October 2019, the administrative law judge at OAH issued a final decision, affirming the administrative actions filed by the Division. The judge concluded that the Division properly determined that Petitioner's actions rose to the level of child maltreatment and that her actions warranted placement on the Registry. Petitioner appealed and petitioned the superior court for judicial review of the final decision of the OAH. A hearing was conducted in the superior court on 29 August 2023. The court affirmed the OAH's final decision by order dated 3 October 2023. Petitioner filed notice of appeal to this Court on 31 October 2023.

II. Analysis

On appeal, Petitioner argues the superior court erred in affirming OAH's decision to place Petitioner on the Registry. Petitioner argues that the grounds for her placement on the Registry—that Petitioner struck Russ on the back of the head and threatened him—was unsupported by the evidence presented at the OAH hearing.

A. Standard of Review

When the superior court "acts in the capacity of an appellate court[,]" as it "exercises judicial review over an agency's final decision," "[t]he standard of review for our Court upon an appeal from an order of the superior court affirming or reversing an administrative agency decision is the same standard of review as that employed by the superior court." *N. Carolina Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 662, 599 S.E.2d 888, 896 (2004) (citations omitted); *Dorsey v. Univ. of N. Carolina-Wilmington*, 122 N.C. App. 58, 62-63, 468 S.E.2d 557, 560 (1996) (citation omitted). Our review "is limited to determining: (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard." *Mayo v. N. Carolina State Univ.*, 168 N.C. App. 503, 507, 608 S.E.2d 116, 120 (citation omitted). In this case, the superior court affirmed the final agency decision, applying the whole-record standard of review. Accordingly, we must first determine whether the whole-record test was the appropriate standard of review and whether the superior court *properly* applied it to the case.

"It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *Harris v. N. Carolina Dep't of Pub. Safety*, 252 N.C. App. 94, 99, 798 S.E.2d 127, 132 (2017) (citation omitted). Here, Petitioner's appeal challenges the sufficiency of the evidence to support the conclusion that her placement on the Registry was warranted; accordingly, pursuant to N.C. Gen. Stat. § 150B-51(b)(5) and (b)(6), we review Petitioner's appeal under the "whole-record test" standard of review. We conclude the superior court applied the correct standard of review satisfying the first prong under *Mayo*.

The whole-record test requires this Court to "examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (2004) (citation omitted). "Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Id.* (cleaned up). "This test does not allow the reviewing court to replace the [Division's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Mills v. N. Carolina Dep't of Health & Hum. Servs.*, 251 N.C. App. 182, 189, 794 S.E.2d 566, 570 (2016) (cleaned up). Thus, while we review the superior court's order affirming the OAH's final decision, the OAH "is the only fact-finding body of this proceeding," and we must employ the whole-record review to the OAH's final decision. *Fonvielle v. N. Carolina Coastal Res. Comm'n*, 288 N.C. App. 284, 288, 887 S.E.2d 93, 96 (2023).

Because the superior court applied the correct standard of review, we proceed to determine whether the superior court properly applied the whole-record test. We now turn our attention to a careful examination of the record evidence to determine whether substantial evidence justifies the final agency decision.

B. Placement on the Child Maltreatment Registry

The OAH concluded Petitioner's actions amounted to child maltreatment and warranted placement on the Registry. The superior court affirmed this conclusion. This Court and our Supreme Court have not previously addressed a caregiver's challenge to placement on the Registry. As such, this is a case of first impression. We are guided by our

standard of review and look to the statutory provisions and procedures proscribed by the Division.

As discussed *supra*, child maltreatment is the commission of an act by a caregiver "that results in harm, potential for harm, or threat of harm to a child." N.C. Gen. Stat. § 110-105.3(b)(3). When reviewing whether an act of maltreatment occurred, the Division considers five factors: (1) the severity of the incident; (2) the age and developmental ability of the child; (3) evident disregard of consequences; (4) maltreatment history and previous similar incidents; and (5) future risk of harm. If the Division determines the incident rose to the level of child maltreatment, the caregiver is placed on the Registry. The Registry was established to maintain "names of all caregivers who have been confirmed by the Department of having maltreated a child." N.C. Gen. Stat. § 110-105.5(a). Individuals listed on the Registry are prohibited from being a caregiver at any licensed child care facility. *Id.* §110-105.5(c). Stated differently, individuals on the Registry are banned for life from working in child care.

At the OAH hearing, the Division presented evidence supporting Petitioner's placement on the Registry through the testimony of Ms. Carey. By pre-trial order, the judge permitted Ms. Carey to testify about statements made by Russ and John during her investigation because the children were not called to testify. Ms. Carey further testified about Ms. Graham and Ms. Lowe's recollection of the incident, since both witnesses failed to appear at the hearing. Her testimony centered on the findings from her investigation and statements made by the individuals involved, as reported in her investigation documentation. Petitioner now argues that the judge "had no ability to assess the credibility of the actual sources of the statements upon which Ms. Carey's conclusions were based[,]" since none of these witnesses testified. Further, even if Ms. Carey's testimony was credible, her testimony failed to identify that Petitioner was the one who struck Russ, since Russ stated "aunt Net" was the one who hit him. For these reasons, Petitioner argues the judge erred in relying on statements from non-testifying witnesses, without the ability to assess their credibility, and for definitively determining that Petitioner was the one that struck Russ when he stated it was "aunt Net."

We are tasked therefore with determining whether there was substantial evidence presented, when viewing the record as a whole, which justifies the conclusion that Petitioner must be placed on the Registry. Such evidence must be "more than a scintilla or a permissible inference."

Lackey v. N. Carolina Dep't of Hum. Res., Div. of Med. Assistance, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982) (citation omitted). Further, the decision must have "a rational basis in the evidence." *ACT-UP Triangle v. Comm'n for Health Servs. of the State of N.C.*, 345 N.C. 699, 706-07, 483 S.E.2d 388, 392 (1997) (citations omitted).

We note, it is well settled that the judge presiding over the administrative hearing is left "to determine the weight and sufficiency of the evidence and the credibility of the witnesses" and "[t]he credibility of witnesses and the probative value of particular testimony are for the [ALJ] to determine, and [the ALJ] may accept or reject in whole or part the testimony of any witness." *Brewington v. N. Carolina Dep't of Pub. Safety, State Bureau of Investigation*, 254 N.C. App. 1, 13, 802 S.E.2d 115, 124 (2017) (citation omitted). Furthermore, Petitioner had the burden of proof in the hearing at OAH, and "the ALJ is to determine whether the petitioner ha[d] met its burden" of showing that the Division acted erroneously. *Britthaven, Inc. v. N. Carolina Dep't of Hum. Res., Div. of Facility Servs.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995). Thus, we must defer to the ALJ's determination about the weight and credibility assigned to the evidence and witnesses.

When reviewing the entire record, the findings of fact, and the conclusions of law, we conclude the OAH decision had a rational basis in the evidence. The ALJ based its decision on Ms. Carey's testimony and her investigation documentation. The documentation detailed information gathered from her interviews with the individuals involved throughout several months. Specifically, Ms. Graham reported during her interview that Petitioner struck and threatened Russ and Ms. Lowe confirmed Ms. Graham's statements. Further, Ms. Carey testified that, despite Russ' statement that "Aunt Net" hit him, her investigation later revealed Russ called Petitioner by this name. Therefore, Ms. Carey's determination was not solely based on Russ' statement but was confirmed by Ms. Graham and Ms. Lowe who witnessed the incident. At the hearing, Petitioner questioned Ms. Carey about the statements made by the non-testifying witnesses and the identity of who hit Russ; however, it was ultimately to the discretion of the judge to determine each witness' credibility. In light of this evidence, under the whole-record test, we hold there was substantial evidence to support the OAH decision.

As a final note, we cannot over emphasize the footnote in the superior court's order which states:

> This court, understanding how serious the findings were, is, however, very troubled by the apparent inability of

> our State's law to, at least, provide some future hope to the [Petitioner] to be removed from this registry; a person who ran her child care(s) for 21 years and who has a long-demonstrated care for and love of children. The court can offer no hope of her ever being removed from the Child Maltreatment Registry when we give sex offenders the right to petition to be removed from the Sex Offender Registry after ten (10) years, and when many criminals can have their felony convictions expunged from their court record.

The superior court articulated strong public policy issues that are persuasive to this Court. Notwithstanding, this Court is without the authority to redress this issue, as it rests solely within the policy-making authority granted to our legislature. We recognize the disparities of the laws governing the Child Maltreatment Registry and invite the General Assembly to speak to the issues raised and concerns expressed by the superior court and shared by this Court. While we are sympathetic to Petitioner's situation, as her placement on the Registry resulted from her emotional response to her four-year-old grandson being sexually assaulted by a twelve-year-old child, this Court is only permitted to exercise its judicial powers. Thus, we are constrained to hold Petitioner failed to prove her placement on the Registry was not warranted, as we are not permitted to "replace the [Division's] judgment as between two reasonably conflicting views." *Mills*, 251 N.C. App. at 189, 794 S.E.2d at 570. Accordingly, we affirm the superior court's order.

III. Conclusion

For the foregoing reasons, we affirm the superior court's order, affirming the final decision of the OAH. We conclude that under the whole-record test, there was substantial evidence sufficient to support OAH's order to uphold the Division's decision to list Petitioner on the Registry.

AFFIRMED.

Judge ARROWOOD concurs.

Judge STADING concurs in the result only.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 NOVEMBER 2024)

BROOKS v. BROOKS No. 23-1139	Caldwell (15CVD430)	Affirmed
COLONIAL PLAZA PHASE TWO, LLC v. CHERRY'S ELEC. TAX SERVS., LLC No. 23-159-2	Edgecombe (15CVD51)	No Error
IN RE A.C. No. 24-464	Union (16JT169) (16JT170)	Affirmed
IN RE A.L.S.R. No. 24-472	Henderson (21JT000103) (21JT000104) (21JT000105)	Affirmed
IN RE B.R.H. No. 24-215	Henderson (22JT84)	Affirmed
IN RE BALD HEAD ISLAND TRANSP., INC. No. 24-127	N.C. Utilities Commission (A-41) (SUB22)	Affirmed
IN RE K.F. No. 24-270	Stokes (23JA7-11)	Affirmed
STATE v. ADAMS No. 24-341	Cleveland (22CRS51352)	Affirmed and remanded for correction of clerical error
STATE v. ARELLANO No. 23-620	Forsyth (19CRS57124-25) (19CRS57165)	Vacated and Remanded
STATE v. AUDREY No. 24-634	Caldwell (21CRS052679,) (22CRS000272)	Affirmed
STATE v. COATS No. 24-350	Johnston (21CR53692-500)	No Error
STATE v. COLQUITT No. 24-187	Moore (20CRS50877)	No Error

STATE v. DEANS No. 24-377	Wilson (22CRS50803-05) (22CRS50862) (22CRS50948)	No Error
STATE v. FINGER No. 24-367	Iredell (20CRS50541-42) (20CRS50629,) (23CRS218)	No Error
STATE v. GARNER No. 24-310	New Hanover (20CRS3360)	No Error
STATE v. HUTSLAR No. 24-14	Haywood (22CRS51640)	No Error
STATE v. JORDAN No. 24-208	New Hanover (17CRS59176) (17CRS59217) (17CRS59223)	Affirmed
STATE v. McKINNEY No. 24-151	Transylvania (21CRS105-12) (21CRS118-22)	No Error
STATE v. NORMAN No. 23-697	Durham (20CRS51940) (21CRS1124-25) (21CRS54197) (21CRS54199)	No Error
STATE v. PRIDGEN No. 24-528	Forsyth (12CRS051379) (13CRS000153)	No Error
STATE v. SMITH No. 23-1073	Cumberland (20CRS60600)	No plain error in part; denied in part
STATE v. STURDIVANT No. 24-67	Mecklenburg (21CRS213031) (21CRS213033-34)	Reversed and Remanded
STATE v. WALKER No. 24-630	Cherokee (21CRS050348)	No Error
SUNRISE RENTALS, LLC v. POPOWICH No. 24-397	Richmond (22CVD638)	Affirmed

WEST v. GREVE No. 24-210	Durham (22CVS4120)	Affirmed.
ZANCHELLI v. DEP'T OF HEALTH & HUM. SERVS. No. 24-60	Office of Admin. Hearings (23OSP01640)	Affirmed

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