NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 275

15 DECEMBER 2020

31 DECEMBER 2020

RALEIGH
2022

CITE THIS VOLUME

275 N.C. APP.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CHARLES BLUE, PLAINTIFF
v.
THAKURDEO MICHAEL BHIRO, PA, DIXIE LEE BHIRO, PA,
AND LAUREL HILL MEDICAL CLINIC, P.C., DEFENDANTS

No. COA20-159

Filed 15 December 2020

Civil Procedure—motion to dismiss—matters outside complaint considered—conversion to motion for summary judgment—remand required

In a medical malpractice action, where the trial court considered matters outside the complaint—including memoranda of law and arguments, both of which contained facts not alleged in the complaint—and the court made no attempt to exclude those matters when hearing and then granting defendants' Rule 12(b)(6) motion to dismiss, the court converted the motion to dismiss to a motion for summary judgment pursuant to Rule 56. The court's order was reversed and the matter remanded for the parties to have a reasonable opportunity to gather evidence and present arguments based on that evidence.

Judge HAMPSON dissenting.

Appeal by Plaintiff from Order entered 10 December 2019 by Judge Gale M. Adams in Scotland County Superior Court. Heard in the Court of Appeals 12 August 2020.

Dawson & Albritton, P.A., by Harry H. Albritton, Jr. and Darren M. Dawson, for plaintiff-appellant.

Batten Lee, PLLC, by Gloria T. Becker, for defendants-appellees.

MURPHY, Judge.

When a trial court hears matters beyond the facts in a complaint during a motion to dismiss under Rule 12(b)(6), the motion is converted into a motion for summary judgment under Rule 56. If such a conversion occurs, the parties must be given a reasonable opportunity to present relevant evidence on the motion for summary judgment. The failure to provide a reasonable opportunity to present this evidence requires remand for such an opportunity. Here, the trial court converted the motion to dismiss into a motion for summary judgment without providing the parties a reasonable opportunity to present evidence. We reverse the grant of the purported motion to dismiss and remand for an opportunity for the parties to conduct discovery and present evidence prior to the determination of the motion for summary judgment.

BACKGROUND

Charles Blue ("Blue") filed a *Complaint* alleging medical negligence on the part of Thakurdeo Bhiro, Dixie Bhiro, and Laurel Hill Medical Clinic (collectively "Defendants"). The *Complaint* alleged the following facts: Defendants were Blue's primary medical provider for around 20 years and provided him with generalized care, including preventative medicine. In January 2012, Mr. Bhiro ordered a prostate specific antigen ("PSA") blood test for Blue, which helps to determine the likelihood of someone having prostate cancer. Blue's PSA test result indicated he had 87.9 nanograms per milliliter of PSA enzymes in his blood. Although "[a] PSA of 4 nanograms per milliliter is considered abnormally high for most men and may indicate the need for further evaluation with a prostate biopsy[,]" Defendants did not provide any follow-up care or referrals despite receiving a copy of the test results. On 22 March 2018, Blue had another test indicating his PSA level was 1,763 nanograms per milliliter and soon thereafter was diagnosed with metastatic prostate cancer.

Blue sued Mr. Bhiro and Mrs. Bhiro for negligence in failing to follow up or refer Blue to a specialist after receiving his 2012 PSA test results, alleging as a result of their negligence Blue developed metastasized cancer, and experienced shortened life expectancy, pain, emotional distress, and loss of enjoyment of life. His claims against Laurel Hill Medical Clinic are based on vicarious liability.

Defendants filed a Rule 12(b)(6) motion to dismiss in their Answer on the basis of the statute of limitations. They contended the alleged negligence occurred in January 2012, meaning the three-year statute of limitations had expired prior to Blue bringing the suit. Their Answer also alleged contributory negligence. In response to the allegation of contributory negligence, Blue argued, in his *Reply*, Defendants had the last clear chance to avoid injuring Blue due to their superior knowledge and understanding of the first PSA test, and their continued medical treatment of Blue "for several years after the [2012 PSA test] . . . ."

At the hearing for the motion to dismiss, the parties submitted memoranda of law and orally argued their positions. Blue's memorandum of law and oral arguments included facts not included in his *Complaint*. After Blue discussed some of these facts, Defendants stated "much of which [Blue] has argued is not complained [of] in the [C]omplaint. And, Your Honor -- Or the [R]eply. And so I would just again remind that this is a motion to dismiss. And we're looking at the four corners of the [C]omplaint." Ultimately, "having heard arguments of parties and counsel for the parties and having reviewed the court file, pleadings, and memorandums of law submitted by both parties," the trial court granted Defendants' motion to dismiss.

ANALYSIS

Blue contends the trial court erred in granting Defendants' motion to dismiss pursuant to Rule 12(b)(6) based on the statute of limitations. Blue also contends the motion to dismiss was converted to a motion for summary judgment under Rule 56 due to the consideration of matters outside of the pleadings; whereas, Defendants contend the motion was not converted into a summary judgment motion, and at most was converted to a motion for judgment on the pleadings under Rule 12(c). We hold the motion to dismiss was converted to a motion for summary judgment, requiring remand for a reasonable opportunity to gather and present evidence, and therefore do not address the underlying statute of limitations issue.

A. Motion to Dismiss

As an initial matter, we must determine whether the trial court reviewed the *Complaint* under Rule 12(b)(6), the pleadings under Rule 12(c), or the pleadings and facts outside the pleadings under Rule 56. Although the order granting Defendants' motion to dismiss purported to act under Rule 12(b)(6), it was converted to a motion for summary judgment under Rule 56 by the consideration of matters outside the pleadings. Rule 12(b)(6) and Rule 12(c) read:

> If, on a motion [for judgment on the pleading under Rule 12(b)(6) or pleadings under Rule 12(c)], matters outside the [pleading or pleadings] are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C.G.S. §§ 1A-1, Rule 12(b) & (c) (2019).

The order granting Defendants' motion to dismiss states

> [t]he [c]ourt, *having heard arguments of parties and counsel for the parties* and *having reviewed* the court file, *pleadings*, and *memorandums of law* submitted by both parties, and [sic] finds that [Blue] failed to state a claim upon which relief can be granted and [] Defendants' [m]otion to [d]ismiss should be allowed pursuant to N.C. R. Civ. P. 12(b)(6).

(Emphasis added). According to the terms of the order, the trial court at least considered the pleadings, which would convert the Rule 12(b)(6) motion to a Rule 12(c) motion on the pleadings.

However, the trial court also considered the memoranda of law submitted by the parties and the arguments presented by the parties, both of which contained facts not alleged in the *Complaint*. Blue's memorandum of law opposing the motion to dismiss discussed the following facts not contained in the *Complaint* or *Reply*: "[Blue] complained of urological issues following the elevated [] PSA test"; "[Blue] sought treatment from Defendant[s] in November, 1996 through to January, 2019 for his primary medical concerns which included urological issues[]"; "[Blue] denies any such knowledge [of elevated PSA levels]"; "The evidence will show that [Blue's] last visit with Defendants prior to second PSA test was on [5 March 2018]." Similarly, in the arguments before the trial court on 12 November 2019, Blue alleged the following facts:

> Every time Mr. Blue saw them after that -- We allege he saw them up until January [2019]. And actually he saw them 41 times from '12 to [2019].
>
> . . .
>
> Not until [2018] was another test ordered by a urologist at that time[.]

. . .

> There was an allegation my client knew about the PSA. He had no idea. He didn't know about it until we told him about it. And we found it in the medical records. We gave it to the urologist to help them with the cancer treatment.
>
> No one knew about this PSA. And I didn't allege that in the [C]omplaint. The allegation was he got it on that day. And there was a conversation about prostate cancer on that day. That was it.

Following this information, Defendants stated, "much of which [Blue] has argued is not complained [of] in the [C]omplaint. And, Your Honor -- Or the [R]eply. And so I would just again remind that this is a motion to dismiss. And we're looking at the four corners of the [C]omplaint." Despite this, the trial court never excluded any facts or stated it would not consider matters outside the scope of the pleadings. Nor did the trial court's order granting the motion to dismiss exclude any matters.

"[T]he trial court was not required to convert the Rule 12 motion into one for summary judgment under Rule 56[]" if it is clear the trial court did not consider matters outside of the pleadings. *Privette v. Univ. of N.C. at Chapel Hill*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989); *Estate of Belk ex rel. Belk v. Boise Cascade Wood Prods., L.L.C.*, 263 N.C. App. 597, 599, 824 S.E.2d 180, 183 (2019). Additionally, memoranda of law and arguments of counsel are generally "not considered matters outside the pleading[s] for purposes of converting a Rule 12 motion into a Rule 56 motion." *Privette*, 96 N.C. App. at 132, 385 S.E.2d at 189 (citations and internal marks omitted). Despite this, the consideration of memoranda of law and arguments of counsel can convert a Rule 12 motion into a Rule 56 motion if the memoranda or arguments "contain[] any factual matters not contained in the pleadings." *Privette*, 96 N.C. App. at 132, 385 S.E.2d at 189; *Brantley v. Watson*, 113 N.C. App. 234, 237, 438 S.E.2d 211, 212-213 (1994) ("Because the trial judge heard evidence in the form of oral arguments and undisputed facts from counsel, this Rule 12(b)(6) was converted into a Rule 56 motion for summary judgment."); *Erie Ins. Exch. v. Builders Mut. Ins. Co.*, 227 N.C. App. 238, 243-44, 742 S.E.2d 803, 809 (2013) ("Having reviewed the briefs submitted by the parties at the hearing below, we agree with [the] plaintiffs that the briefs are simply memoranda of points and authorities and contain no factual allegations outside of those presented in the complaint. Thus, the trial court's consideration of the parties' briefs in the present case did not convert [the] plaintiffs' Rule 12(c) motion into a Rule 56 motion for summary judgment.").

Here, nothing indicates the trial court did not consider the facts presented beyond the pleadings. Instead, the terms of the order indicate the trial court considered matters beyond the pleadings in considering the arguments of the parties and reviewing memoranda of law. Although Defendants informed the trial court the facts went beyond those in the *Complaint*, the trial court never excluded any facts at the hearing or in the terms of the order. The failure to exclude the matters that went beyond the facts contained in the *Complaint* converted the motion to dismiss into a motion for summary judgment under Rule 56.

When a Rule 12 motion is converted into a Rule 56 motion "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." N.C.G.S. §§ 1A-1, Rule 12(b) & (c) (2019). Here, because the trial court did not recognize the conversion of the Rule 12 motion into a Rule 56 motion, no such opportunity was given to the parties. In particular, Defendants strictly adhered to the evidentiary constraints of Rule 12 and attempted to keep the motion restricted to allegations in the *Complaint*; whereas, Blue presented matters beyond the Rule 12 evidentiary limitations. In the absence of a reasonable opportunity for the parties to gather and present pertinent evidence for a Rule 56 motion, it would be improper for us to make a determination of the statute of limitations issue on the current evidence because "we believe that such a determination cannot properly be made at the present time in light of the incomplete factual record that currently exists." *See Premier, Inc. v. Peterson*, 232 N.C. App. 601, 610, 755 S.E.2d 56, 62 (2014).

Due to the lack of a reasonable opportunity for the parties, and particularly Defendants, "to present all material made pertinent to such a motion by Rule 56[]" we reverse the trial court's order granting Defendants' motion to dismiss and remand "so as to allow the parties full opportunity for discovery and presentation of all pertinent evidence." *Kemp v. Spivey*, 166 N.C. App. 456, 462, 602 S.E.2d 686, 690, (2004) (citing N.C.G.S. § 1A-1, Rule 12(b) (2004)).

B. Blue's Request to Amend the Complaint

At the hearing, Blue stated "if Your Honor does not believe I included enough factual information in the [C]omplaint, we'd request leave to amend the [C]omplaint [to include more facts]." The trial court took the matter under advisement, but otherwise did not address this motion to amend at the hearing or in its order granting the motion to dismiss. Now on appeal, Blue argues "[i]f [we are] inclined to agree with the trial court in that [Blue's] Complaint, on its face, does not allege sufficient facts to establish a claim for medical negligence that is not barred by the statute

of limitations," then he should have been able to amend his *Complaint*. Since we reverse the trial court's motion to dismiss order, without agreeing or disagreeing with the trial court's underlying action, the contingency referred to—our agreement with the grant of the motion to dismiss—has not occurred and we do not reach this issue. N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs.").

CONCLUSION

The trial court converted Defendants' motion to dismiss under Rule 12 into a motion for summary judgment under Rule 56, but failed to provide the parties a reasonable opportunity to present evidence for resolution of the motion for summary judgment. We reverse the order granting the purported motion to dismiss and remand for a reasonable opportunity to gather and present evidence on a motion for summary judgment.

REVERSED AND REMANDED.

Judge YOUNG concurs.

Judge HAMPSON dissents with separate opinion.

HAMPSON, Judge, dissenting.

In my view, the trial court's Order should be affirmed. I reach this conclusion for three reasons: (I) the trial court's recitation it considered pleadings, memoranda, and arguments of the parties did not necessarily require converting Defendants' Motion to Dismiss to a Summary Judgment Motion or a Motion for Judgment on the Pleadings; (II) the trial court properly granted Defendants' Rule 12(b)(6) Motion to Dismiss on the basis Plaintiff's Complaint was time-barred; and (III) the trial court did not abuse its discretion in not ruling on Plaintiff's oral request for leave to amend the Complaint made at the conclusion of the hearing as a request for alternative relief in the event the trial court deemed Plaintiff's allegations insufficient to survive a Motion to Dismiss. For these reasons, I respectfully dissent.

I.

First, the trial court's recitation in its Order Granting Defendants' Motion to Dismiss that it "heard arguments of parties and counsel for the parties and . . . reviewed the court file, pleadings, and memorandums of law submitted by both parties" did not necessarily require converting

the Motion to Dismiss brought under Rule 12(b)(6) into a Motion for Summary Judgment. *See Carlisle v. Keith*, 169 N.C. App. 674, 688, 614 S.E.2d 542, 551 (2005). Although it is true the parties—and in particular, Plaintiff—may have included in both written and/or oral argument before the trial court additional arguments on what the evidence might show, references to additional pleadings, or facts not alleged in the Complaint, these were merely arguments of counsel. No evidentiary materials—discovery, exhibits, affidavits, or the like—were offered or submitted to the trial court. There is no indication the trial court, in fact, considered any extraneous evidentiary materials in its ruling or based its decision on anything other than the allegations made in the Complaint. *See id.*; *see also Privette v. University of North Carolina*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989) ("Memoranda of points and authorities as well as briefs and oral arguments . . . are not considered matters outside the pleading for purposes of converting a Rule 12 motion into a Rule 56 motion" (citation and quotation marks omitted)).

II.

Second, in any event, the trial court properly allowed the Motion to Dismiss under Rule 12(b)(6). In reviewing a trial court's dismissal under Rule 12(b)(6), this Court conducts "a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673-74 (2003). "A statute of limitations or repose defense may be raised by way of a motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994) (citations omitted). "Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (citation omitted).

Here, Plaintiff's Complaint alleges Defendants ordered a PSA test for Plaintiff on 24 January 2012, which showed Plaintiff had an elevated PSA level; however, Defendants failed to provide any follow-up care or referrals as a result of this test. Plaintiff further alleged his PSA levels were tested again on or about 22 March 2018. Plaintiff does not allege who ordered this new test. The March 2018 test revealed a much higher PSA level and soon after Plaintiff was diagnosed with metastatic prostate cancer. Plaintiff did not file suit until 17 June 2019.

Generally, medical malpractice claims are subject to the three-year statute of limitations for personal injury actions in N.C. Gen. Stat.

§ 1-52(16). N.C. Gen. Stat. § 1-52(16) (2019). However, relevant to this case, N.C. Gen. Stat. § 1-15(c) provides in medical malpractice actions:

> a cause of action for malpractice arising out of the performance of or failure to perform professional services *shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made*: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. *Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]*

N.C. Gen. Stat. § 1-15(c) (2019) (emphasis added).

Plaintiff repeatedly argues on appeal Defendants never made him aware of the results of the January 2012 PSA test. Plaintiff, however, did not make such an allegation in his Complaint. Nevertheless, assuming Plaintiff was not made aware of the test results in 2012 or, further, that the significance of these test results was not readily apparent, and, even further, that Plaintiff reasonably should not have discovered the elevated PSA levels until two or more years after the January 2012 testing, Plaintiff's Complaint is, on its face, time-barred under N.C. Gen. Stat. § 1-15(c).

This is so for two reasons. First, Plaintiff's Complaint alleges Plaintiff discovered the injury in March 2018, when the subsequent PSA test was performed. Plaintiff, however, did not file his Complaint until June 2019, more than one year from discovery of the injury. Perhaps more to the point, there is no allegation in the Complaint that Plaintiff did not, in fact, discover the injury on or after June 2018 rendering the Complaint timely filed in June 2019. Second, Defendants' negligent act occurred in 2012 and suit was, again, not filed until 2019. This is more than four

years from the negligent act. Thus, the suit is time-barred under N.C. Gen. Stat. § 1-15(c).

Plaintiff, however, argues the Complaint alleges a continuing course of treatment by Defendants through January 2019. Therefore, Plaintiff contends the last act of the Defendants giving rise to the cause of action did not occur until January 2019, at which time the action accrued. Thus, in Plaintiff's view, his Complaint was not time-barred under N.C. Gen. Stat. § 1-15(c).

"The 'continuing course of treatment' doctrine has been accepted as an exception to the rule that 'the action accrues at the time of the defendant's negligence.' " *Stallings v. Gunter*, 99 N.C. App. 710, 714, 394 S.E.2d 212, 215 (1990) (citation omitted). "According to this doctrine, the action accrues at the conclusion of the physician's treatment of the patient, so long as the patient has remained under the continuous treatment of the physician for the injuries which gave rise to the cause of action." *Id.* "To take advantage of the continuing course of treatment doctrine, plaintiff must show the existence of a *continuing* relationship with his physician, and . . . that he received *subsequent* treatment from that physician." *Id.* at 715, 394 S.E.2d at 216 (citation and quotation marks omitted). "Mere continuity of the general physician-patient relationship is insufficient to permit one to take advantage of the continuing course of treatment doctrine." *Id.*

Here, Plaintiff alleges only that Defendants "continued as Plaintiff's primary medical care providers until January 2019." There is no allegation, however, Plaintiff actually received any subsequent treatment from Defendants. Thus, Plaintiff has alleged only "[m]ere continuity of the general physician-patient relationship[,]" which is insufficient to invoke the continuing course of treatment doctrine. *Id.* Thus, on the face of the Complaint, Plaintiff's claims against Defendants are time-barred under N.C. Gen. Stat. § 1-15(c). Consequently, the trial court did not err in dismissing Plaintiff's Complaint under Rule 12(b)(6). *See Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970) ("If the complaint discloses an unconditional affirmative defense which defeats the claim asserted or pleads facts which deny the right to any relief on the alleged claim it will be dismissed.").

III.

Third, and finally, the trial court did not abuse its discretion by failing to permit Plaintiff to amend the Complaint. Plaintiff did not file a written motion to amend the Complaint, but rather, towards the conclusion of the hearing, orally requested: "And if Your Honor does not believe

I included enough factual information in the complaint, we'd request leave to amend the complaint[.]" It is not clear this issue is even properly before us, as Plaintiff did not obtain any ruling on his oral request. *See* N.C. R. App. P. 10(a)(1) (2020). Even assuming the trial court's dismissal of the Complaint automatically constitutes a denial of the oral request for leave to amend the Complaint, as Plaintiff contends, Plaintiff's oral request was insufficient to require the trial court to permit amendment of the Complaint. *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 486, 593 S.E.2d 595, 602 (2004) ("plaintiffs' oral offer that they 'would be willing to amend the petition and get more facts' at the Rule 12(b)(6) hearing is not a sufficient request for leave to amend").

Accordingly, for the foregoing reasons, the trial court's Order should be affirmed.

IN THE MATTER OF A.J.L.H., C.A.L.W., M.J.L.H.

No. COA20-267

Filed 15 December 2020

1. Child Abuse, Dependency, and Neglect—adjudication of neglect and abuse—father's appeal—standing only as to biological daughter

A father had standing to appeal from an order adjudicating his biological daughter as neglected, but not to appeal from the order adjudicating his two stepchildren neglected and abused, since he was not the legal or putative father of either of those children.

2. Child Abuse, Dependency, and Neglect—adjudication of neglect and abuse—hearsay—child's out-of-court statement—no exception—findings unsupported

In a child neglect and abuse adjudication matter regarding three children, several of the trial court's findings of fact were not supported by competent evidence to the extent they were based on hearsay consisting of out-of-court statements attributed to one of the children where there was no indication the declarant was unavailable to testify, and the statements were inadmissible pursuant to any hearsay exception. Other findings were erroneous for not being supported by any evidence at all.

3. Child Abuse, Dependency, and Neglect—abuse—serious physical injury—sufficiency of evidence

There was no clear and convincing evidence to support a trial court's conclusion that a child was abused where the parents' discipline—which consisted of spanking that resulted in temporary marks on the child, making the child stand in a corner for a long time or on one leg while doing homework, or having her sleep on the floor as a punishment—did not constitute serious physical injury pursuant to N.C.G.S. § 7B-101.

4. Child Abuse, Dependency, and Neglect—abuse—grossly inappropriate procedures—hearsay—out-of-court statement

The trial court's adjudication of a child as abused was not supported by competent evidence where it was based on an out-of-court statement that was made by the child to a social worker that her mother tried to choke her, because the statement constituted inadmissible hearsay and no other evidence was presented that the child was subjected to grossly inappropriate procedures pursuant to N.C.G.S. § 7B-101.

5. Child Abuse, Dependency, and Neglect—neglect—sufficiency of evidence to support findings

The trial court's adjudication of a child as neglected was vacated where the court's findings were based on inadmissible evidence, including hearsay. The matter was remanded for a new hearing and for the court to make findings of fact based on competent, admissible evidence.

6. Child Abuse, Dependency, and Neglect—neglect—harm or risk of harm—lack of evidence

In a child abuse and neglect case where one child in the home was alleged to have been subjected to inappropriate discipline, the adjudication of the child's two siblings as neglected was reversed for lack of supporting evidence that the children had been harmed or were at risk of being harmed. The trial court was directed to dismiss the petitions and return the two children to their parents' care.

7. Child Abuse, Dependency, and Neglect—disposition order—complete denial of visitation—abuse of discretion

In an abuse and neglect matter, the trial court abused its discretion in denying respondent-parents any visitation with their three children where the court's adjudication of one child as abused and of all three children as neglected was based on incompetent and

inadmissible evidence. The disposition order was vacated and the matter remanded for a new order on visitation.

Appeal by respondents from order entered 13 December 2019 by Judge Tonia A. Cutchin in Guilford County District Court. Heard in the Court of Appeals 17 November 2020.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Social Services.

Benjamin J. Kull for respondent-father appellant.

Tin, Fulton, Walker & Owen, PLLC, by Cheyenne N. Chambers, for respondent-mother appellant.

TYSON, Judge.

Respondent-mother and Respondent-stepfather (collectively "Respondents") appeal from the trial court's adjudication and disposition order. Respondents argue the trial court erred by adjudicating their minor children, Margaret, age ten, Chris, age four, and Anna, age one, as abused and neglected, and by prohibiting visitation. *See* N.C. R. App. P. 42(b) (permitting the use of pseudonyms to protect the identity of the child throughout the opinion). Respondents are the biological parents of Anna. Respondent-stepfather is stepfather to Respondent-mother's daughters, Margaret and Chris, born of previous relationships.

We vacate the adjudications of abuse and neglect and remand. We also vacate the disposition order regarding Chris and Anna and dismiss the petitions and remand for entry of an order to provide Respondents visitation with Margaret.

I. Background

Guilford County Department of Health and Human Services ("GDHHS") received a report on 21 May 2019 alleging then nine-year-old Margaret had been disciplined with a belt, which had left marks on her skin. Social worker, Lisa Joyce ("Joyce") was assigned to investigate. On 22 May 2019, another report was filed of a new injury the size of a silver dollar on Margaret's upper back. Joyce testified Margaret was hiding under a desk when she arrived to interview her and asserted Margaret did not want to go home because they "were going to hurt her."

Respondent-mother acknowledged she had disciplined Margaret for lying and being untruthful about following directions, by having her

inter alia, sleep upon the floor, allowing her to eat only crunchy peanut butter sandwiches, having her stand in the corner at home for long periods, prohibiting her from watching TV or playing outside, and by having Respondent-stepfather discipline her by using corporal punishment. Respondent-mother explained the marks were accidental, because Margaret had moved around a lot and the belt meant for her buttocks had landed on her back. Joyce informed Respondent-mother that GDHHS felt the discipline was "a little bit extreme." Respondents immediately agreed to a safety plan. The plan placed Margaret with her maternal grandparents, but left Chris and Anna in the home in Respondents' care.

During her investigation, Joyce received two reports from Randolph County Department of Social Services ("RDSS") filed during 2015 and 2017, involving Respondent-mother. Respondent-mother had also been charged with misdemeanor child abuse and Respondent-stepfather had been charged with assault on a child under the age of twelve stemming from the actions related to the present petition. Respondents' charges were pending at the time of this order on appeal.

On 8 August 2019, GDHHS held a Child and Family Team meeting. At the meeting, GDHHS decided to petition for custody of all three children, even though GDHHS had gathered all relevant family history information in May and all home visits with the intact family from May through August had revealed no concerns. GDHHS case workers had made multiple home visits. No new or ongoing concerns were raised or noted. The safety plan was never violated.

During adjudication, Joyce testified the decision resulted from "information learned during the assessment," RDSS records received in May; and GDHHS' disagreement with Respondents "admitting that they did not feel . . . their disciplinary measures and actions were unusual or cruel."

On 9 August 2019, GDHHS filed juvenile petitions alleging Margaret was abused and neglected. Her siblings, four-year-old Chris, and one-year-old, Anna, were alleged to be neglected. The court determined a need for GDHHS to take nonsecure custody of all three children.

At the filing of the petition, Margaret remained in an out-of-home kinship placement with her maternal grandparents and Chris and Anna remained at home with Respondents. Subsequently Margaret was moved to foster care and then was moved into the home of her maternal grandmother by court order, and Chris and Anna were removed from Respondents' home and to foster care.

The adjudication and disposition hearing was held on 8 November 2019. By order entered 13 December 2019, the court concluded Margaret was an abused juvenile and all three children were neglected. The court denied Respondents any visitation with the children. Respondents timely appealed.

II. Jurisdiction

Jurisdiction lies in this Court from an appeal of the adjudication and disposition order pursuant to N.C. Gen. Stat. § 7B-1001(a)(3) (2019).

III. Issues

Respondents argue the trial court erred by: (1) admitting hearsay evidence, (2) adjudicating Margaret abused and neglected, and Chris and Anna neglected and (3) arbitrarily denying Respondents any visitation with all three children.

IV. Respondent-stepfather's Standing

[1] Margaret, Chris, and Anna are children of different biological fathers. Respondent-stepfather is not the legal or putative father of Margaret or Chris. Respondent-stepfather is the biological father of Anna. Only Respondent-stepfather is a party to this appeal. This Court has made a distinction between a parent and stepparent.

> N.C. Gen. Stat. § 7B-101(8) defines caretaker as a person other than a parent, guardian, or custodian who is responsible for the health and welfare of a juvenile, and specifies that this term includes a stepparent. N.C. Gen. Stat. § 7B-1002(4) does not authorize an appeal by a stepparent in the absence of record evidence that the stepparent has become the child's parent through adoption or is otherwise qualified under the statute.

In re M.S., 247 N.C. App. 89, 93-94, 785 S.E.2d 590, 593 (2016) (alternations, citations, and internal quotations omitted). Respondent-stepfather has standing to appeal only on behalf of his biological daughter, Anna. He has no standing to appeal the order regarding either Margaret or Chris.

V. Analysis

A. Parental Rights

> We have long recognized that the [Fourteenth] Amendment's Due Process Clause, like its Fifth Amendment counterpart, guarantees more than fair process. The Clause also

> includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests. The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.

Troxel v. Granville, 530 U.S. 57, 65, 147 L. Ed. 2d 49, 56 (2000) (alterations, internal citations and quotation marks omitted). The Supreme Court of the United States also held "the liberty protected by the Due Process Clause includes the right of parents to establish a home and bring up children and to control the education of their own." *Id.*

Both of the holdings in *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551 (1972) and *Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599 (1982) also demonstrate that under fundamental common law and Constitutional protections, "the parents' right to retain custody of their child and to determine the care and supervision suitable for their child, is a 'fundamental liberty interest' which warrants due process protection." *In re Montgomery*, 311 NC 101, 106, 316 S.E.2d 246, 250 (1984).

> [T]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations . . . . there is a constitutional dimension to the right of parents to direct the upbringing of their children. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the [S]tate can neither supply nor hinder.

Troxel, 530 U.S. at 65, 147 L. Ed. 2d at 56.

B. Hearsay Evidence

[2] The North Carolina Constitution and General Statutes mandate the trial court must protect the due process and parental rights of the juvenile's parent and of the juvenile throughout the adjudicatory hearing. N.C. Gen. Stat. § 7B-802 (2019). "Where the juvenile is alleged to be abused, neglected, or dependent, the rules of evidence in civil cases shall apply." N.C. Gen. Stat. § 7B-804 (2019).

Respondents assert inadmissible and prejudicial hearsay was admitted at the hearing. "Hearsay is 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." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2019) (internal quotation marks omitted). "Hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2019).

1. Hearsay Exceptions

Hearsay may be admissible if the statement meets the requirement of a statutory exception. "A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity." N.C. Gen. Stat. § 8C-1, Rule 801(d) (2019).

2. Inadmissible Hearsay

Margaret did not appear nor testify at the hearing. Nothing in the record shows she was unavailable as a witness. Respondents assert findings of fact 12-15 of the adjudication and disposition order are based on inadmissible and prejudicial hearsay and repeat parts of GDHHS' petition's allegations *verbatim*.

Findings of facts 12 and 13 relayed the reports made to Child Protective Services (CPS) asserting Margaret had bruises on 21 May 2019, and new bruises on 22 May 2019. Margaret did not want to state who had disciplined her. GDHHS points out these findings are intended as recitations of historical accounts of the background events leading up to the filing of the juvenile petition.

Respondents assert finding of fact 14 and portions of finding 15 rest upon hearsay. Respondents assert Margaret's out-of-court statements were inadmissible hearsay. The trial court found:

> 14. On May 22, 2019, [Joyce] interviewed [Margaret] . . . [Margaret] informed . . . Joyce that she got up early after Respondent-stepfather, went to work . . . She said that she did not know if she missed the bus, so she started walking to school . . . [Margaret said] the neighbor took her to school . . . [and] she was afraid to go home yesterday because she took (sic) her head wrap off because it was hurting her. Margaret stated that her mother told her if she took her head wrap off, she would get a whipping . . . She said that the marks on her back were from getting a whipping from her stepfather, who whipped her with a belt buckle . . . She said normally she gets whipped on her legs and back . . . marks are left every time. . . . [Joyce] observed the juvenile had marks on her lower back and a mark near her neck area.

> 15. . . . . She was told that [Margaret] was afraid to go home and that there were marks on her back from physical discipline. [Respondent-mother] confirmed that she did physically discipline [Margaret] by whipping her and [Respondent-stepfather] also physically disciplined her because of her lying. [Respondent-mother] stated that the bruises were an accident (sic) because [Margaret] was moving around while [Respondent-stepfather] was trying to discipline her. She confirmed that she disciplines [Margaret] by making her eat crunchy peanut butter sandwiches as a form of punishment for lying because [Margaret] does not like crunchy peanut butter sandwiches. [Respondent-mother] further stated that she takes the juvenile's bed privileges away for lying, and she stands in the corner from 3:30pm until dinner-around 6:00pm, then after eating she makes the juvenile stand in the corner until time to go to bed at 8:00pm; the juvenile has to sleep on the floor. [Respondent-mother] indicated that these disciplinary acts are used when the juvenile lies; however, that did not normally occur every day, but had been occurring every day lately. She indicated that [Margaret] had been lying about her headwrap. [Respondent-mother] stated that [Margaret's] hair is hard to manage, and she makes her wear a headwrap to keep from pulling at her hair. She informed [Joyce] that she did not see anything wrong with her means of discipline. [Joyce] informed [Respondent-mother] that the Department could not condone her disciplinary practices[.]

At adjudication, Respondents objected to the introduction of hearsay evidence eleven times. Ten of those objections were overruled without any finding or ruling on a proper hearsay exception to allow their admission. Here, the issues are whether abuse and neglect of the minor children had occurred. Respondents assert the trial court's findings on the alleged abuse are based upon out-of-court statements offered to prove the matter asserted and these statements did not meet any exception to be admitted.

The findings of fact rely upon out-of-court statements used to prove the truth of purported abuse and neglect of Margaret and piggyback those inadmissible hearsay statements to show purported neglect of Chris and Anna. No competent evidence whatsoever was presented to support the purported finding that Margaret was afraid to go home or fearful of retaliation.

GDHHS argues both respondents admitted to the details Margaret shared about their discipline. As such, GDHHS asserts the Respondents' statements are permitted as admissions of a party-opponent pursuant to N.C. Gen. Stat. § 8C-1, Rule 801 (permitting hearsay if a statement is offered against a party and it is his own statement).

Respondents' statements may be admissible as a statement by a party opponent pursuant to N.C. Gen. Stat. § 8C-1, Rule 801(d). However, finding 14 is replete with the out-of-court statements purportedly made by Margaret to Joyce. Margaret was not found to be unavailable as a witness. GDHHS never argued any hearsay exception applied to prevent Margaret from appearing and testifying as a witness based upon her age, competency, or otherwise.

Finding of fact 14 and portions of finding of fact 15 are based upon inadmissible hearsay statements attributed to Margaret. These findings are erroneous and unsupported by clear and convincing evidence.

Here, the trial court's finding that GDHHS had asserted inappropriate discipline of Margaret is arguably supported by Respondents' statements, to overcome the prejudice of incompetent evidence. *See In re McMillon*, 143 N.C. App. 402, 411, 546 S.E.2d 169, 175 (holding the admission of incompetent evidence is not prejudicial where there is other competent evidence to support the district court's findings), *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

C. Remaining Findings of Fact

Respondents assert that two sentences of finding of fact 17 are unsupported. Respondents assert no evidence identifies the names of all attendees at the Child and Family Team meeting or that Respondents had required Margaret to do her homework on one leg. GDHHS concedes no evidence supports the challenged statements. These two statements of finding of fact are unsupported by any evidence.

Respondent-mother also challenges finding of fact 20 that she has an extensive CPS history in Randolph County and Guilford County. Finding of fact 20 lists three previous reports involving Margaret. Respondent-mother argues finding 20 details GDHHS' process and is hearsay and cannot be used for the truth of the matter asserted.

GDHHS argues these reports are permitted pursuant to N.C. Gen. Stat. § 8C-1 Rule 803(6) (business records of regularly conducted activity are not excluded by the hearsay rule). A business record may be admitted when:

> [A] proper foundation . . . is laid by . . . a witness who is familiar with the . . . records and the methods under which they were made so as to satisfy the court that . . . the sources of information, and the time of preparation render such evidence trustworthy.

In re S.D.J., 192 N.C. App. 478, 482, 665 S.E.2d 818, 821 (2008).

At the adjudication, Joyce testified to the proper foundation of receipt of these records and Respondent-mother's records in Randolph County fall within the business records exception to the hearsay rule. Respondent-mother's challenge to this finding is overruled.

Findings 23 and 24 are the alleged criminal histories of Margaret's and Chris' putative fathers, but no records were provided or presented to the court to support these findings. These criminal histories are presumably presented to prove the children are neglected by proxy, by actions of non-party "caretaker[s] [who do] not provide proper care, supervision, or discipline . . . or who lives in an environment injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15)(ii) (2019). Findings 23 and 24 are irrelevant as neither of these men are parties in the appeal before us.

Finding 26 states Respondent-stepfather did not believe the disciplinary actions were inappropriate, and he never disclosed he would not discipline Chris and Anna in the same manner he had disciplined Margaret. Finding 26 is an arbitrary presumption of a forecast of how Respondent-stepfather may discipline Chris and Anna in the future and is unsupported by testimony or other evidence.

The statements and hearsay which support findings of fact 14, 17, 23-24 and 26 were improperly allowed. Findings 15 and 20 are based upon hearsay but may be properly admitted with proper foundations under established exceptions.

D. Abuse and Neglect

1. Standard of Review

> The role of this Court in reviewing a trial court's adjudication of neglect and abuse is to determine whether the findings of fact are supported by clear and convincing evidence, and whether the legal conclusions are supported by the findings of fact. If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary.

In re T.H.T., 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (alterations, internal citations and quotation marks omitted).

2. Juvenile Code

An abused juvenile is one whose parent "inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means [or] creates 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)(a)-(b) (2019). A neglected juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15).

"In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252.

"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 Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (emphasis supplied).

3. Margaret

a. Serious Physical Injury

[3] GDHHS alleged and asserted Margaret had suffered "serious physical injury by other than accidental means" or faced "a substantial risk" of suffering it. N.C. Gen. Stat. § 7B-101(1)(a)-(b). GDHHS provided evidence tending to show: (1) Joyce observed marks on Margaret's lower back and a mark near her neck, and (2) Respondent-mother admitted the bruises were an accident prompted by Margaret's movement while being disciplined with a belt.

This Court, when determining whether a "serious physical injury" exists in the context of an abuse adjudication, has held "the nature of the injury is dependent on the facts of each case." *In re L.T.R.*, 181 N.C. App. 376, 383, 639 S.E.2d 122, 126 (2007).

This Court has previously and repeatedly declined to find spanking that resulted in a temporary bruise constitutes abuse. *See Scott v. Scott*, 157 N.C. App. 382, 387, 579 S.E.2d 431, 435 (2003) (no conclusive

evidence of abuse where spanking with a belt left temporary red marks on child's back and buttocks).

This Court is bound by these precedents. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). No evidence was presented to show Margaret suffered anything other than temporary marks or bruising from the spanking. The evidence and findings mandate the same conclusion here that spanking with temporary marks and bruises are not "serious physical injury" under the statute to support an adjudication of abuse. N.C. Gen. Stat. § 7B-101.

Clear and convincing evidence must support a finding and conclusion that Margaret suffered or will suffer "serious physical injury" to support an adjudication of abuse or neglect under either the statute or our precedents. *Scott*, 157 N.C. App. at 387, 579 S.E.2d at 435. Presuming the juvenile was corporally punished, forced to eat crunchy peanut butter sandwiches, stand in the corner for a lengthy time or upon one leg while doing homework, or sleep upon the floor as punishments for lying, none of those actions, standing alone or taken together, are sufficient to show clear and convincing evidence of abuse or neglect.

b. Grossly Inappropriate Procedures

[4] The Juvenile Code includes in its definition of abuse that the parent "uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior." N.C. Gen. Stat. § 7B-101(1)(c) (2019).

The trial court received into evidence the Guardian *ad Litem's* exhibit number one, a letter purportedly written by Margaret stating she wanted to stay with her grandmother, and "only once my mom tried to choke me." As noted above, Margaret was not found to be unavailable and was not called as a witness. "[P]recedent requires that the trial court enter sufficient findings of fact to support its conclusion of unavailability." *In re B.W.*, 274 N.C. App. 280, 287, 852 S.E.2d 428, 433, 2020 WL 6733479, at *5 (2020); *see also State v. Fowler*, 353 N.C. 599, 610, 548 S.E.2d 684, 693 (2001); *State v. Clonts*, 254 N.C. App. 95, 115, 802 S.E.2d 531, 545, *aff'd*, 371 N.C. 191, 813 S.E.2d 796 (2018).

No argument was asserted that a hearsay exception applied to prevent her from appearing and testifying as a witness based on her age or competency. This exhibit is inadmissible hearsay presented to prove the truth of a matter asserted in the form of a purported letter from Margaret addressed to the trial court. This letter is inadmissible hearsay and should not have been received into evidence.

Inadmissible hearsay cannot support a finding and certainly is not clear and convincing evidence to show Margaret had been choked or subjected to "cruel or grossly inappropriate" discipline by Respondents. N.C. Gen. Stat. § 7B-101(1)(c). *See Rholetter v. Rholetter*, 162 N.C. App. 653, 656-61, 592 S.E.2d 237, 239-42 (2004).

While the trial court's remaining findings which are supported by competent, admissible evidence contain discussion of other alleged disciplinary measures imposed upon Margaret, it is also apparent the trial court's abuse adjudication is heavily reliant and intertwined with its findings based on inadmissible evidence. Consequently, we vacate the adjudication of Margaret as an abused juvenile and remand this matter for a new hearing at which the trial court should make findings on properly admitted clear and convincing evidence and make new conclusions of whether Margaret is an abused juvenile under the statute.

c. Neglect of Margaret

[5] Based on the same findings, the trial court also adjudicated Margaret as a neglected juvenile. This adjudication of neglect was also a product of the trial court's reliance, in significant part, on its findings based on inadmissible evidence. We also vacate the adjudication of Margaret as a neglected juvenile and remand the matter to the trial court for a new hearing following which the trial court should make findings of fact supported by competent, admissible evidence found to be clear and convincing and, further, to make a new conclusion whether or not Margaret is a neglected juvenile.

4. Neglect of Chris and Anna

[6] Respondents argue Chris and Anna are not neglected juveniles because there was no indication they had ever been harmed or were at any risk of harm. Standing alone, the unsupported adjudication of abuse of Margaret cannot support adjudications for her younger siblings in the absence of evidence of their neglect.

> [I]n 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 . . . . [T]he fact of prior abuse, *standing alone*, is not sufficient to support an adjudication of neglect. Instead, this Court has generally required the presence of other factors to suggest that the neglect or abuse will be repeated.

In re J.C.B., 233 N.C. App. 641, 644, 757 S.E.2d 487, 489 (2014) (emphasis supplied) (internal quotation marks and citations omitted).

Nothing in the record indicates Chris or Anna had been harmed or were at risk of being harmed. Joyce testified there were no concerns with Chris or Anna while they had remained in Respondents' care. The trial court concluded Chris and Anna were neglected based solely on its conclusion Margaret was purportedly abused and neglected. We reverse the trial court's conclusion that Chris and Anna are neglected juveniles and dismiss those petitions.

VI. Dispositional Order

A. Standard of Review

A dispositional order is reviewed for abuse of discretion. "[A]buse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re T.N.G.*, 244 N.C. App. 398, 408, 781 S.E.2d 93, 100 (2015) (quotation omitted). Dispositional findings must be supported by competent evidence. *In re B.C.T.*, 265 N.C. App. 176, 185, 828 S.E.2d 50, 57 (2019). "The court may prohibit visitation or contact by a parent when it is in the juvenile's best interest consistent with the juvenile's health and safety." *In re J.L.*, 264 N.C. App. 408, 421, 826 S.E.2d 258, 268 (2019).

B. Visitation Prohibition

[7] The trial court concluded GDHHS had "made reasonable efforts to prevent the assumption of custody of the juveniles" pursuant to N.C. Gen. Stat. § 7B-903(a)(3). This conclusion was based upon GDHHS' interview with Margaret, contact with formerly involved police departments, contact with the school and interviews with the Respondent-mother and Respondent-stepfather.

Based on those factors, the trial court denied Respondents *any contact* with any of their children. Anna was eight months-old when this order was filed, and she spent her first birthday apart from her parents. Chris was not yet four when the order denying visitation was filed. This lack of contact occurred despite the absence of *any evidence* to support Chris or Anna had been abused or neglected.

The trial court concluded it was in the children's best interest, consistent with their health and safety, for them to be denied any visitation with their parents, relying on incompetent and inadmissible evidence concerning Margaret presented during adjudication. The trial court failed to follow North Carolina statutes, and the rules of evidence. Further, the court abused its discretion by denying any contact between the children and their mother and Anna with her father. The court abused its discretion by making an unsupported finding it is in "the best interest of the

juvenile consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905.1(a) (2019).

We vacate the prohibition of visitation and remand to the trial court to order generous and increasing visitation between Margaret and her mother. *See* N.C. Gen. Stat. § 7B-905.1(b) (2019) (permitting the court to arrange visitation by court order). The dispositional no contact order for Chris and Anna is vacated and those petitions are dismissed.

VII. Conclusion

Respondent-stepfather maintains standing to challenge the finding and conclusions regarding his daughter, Anna. The trial court failed to follow the rules of evidence regarding inadmissible hearsay evidence and used unsupported findings of fact to sustain findings 12-14, 17, 23-24 and 26, which do not support its conclusions. The trial court failed to properly find and conclude Chris and Anna were abused and neglected. Further, the trial court failed to admit or find clear and convincing evidence that the discipline of Margaret rose to the level of a "serious physical injury" as a result of the corporal punishment or other means of parental discipline.

We vacate the adjudication and disposition order and remand for dismissal of the petitions concerning Chris and Anna. Chris and Anna are to be immediately returned to their mother and stepfather.

We also vacate the denial of visitation for Respondent-mother and remand for entry of an order of increasing visitation for Respondent-mother and Margaret. Any new hearing on remand must be conducted in accordance with the Constitutional and due process rights of the Respondents as parents, including live testimony of witnesses in the absence of a supported finding of unavailability in accordance with, the applicable statutes, the rules of evidence, and our precedents. *It is so ordered.*

VACATED AND REMANDED.

Judges STROUD and HAMPSON concur.

IN RE D.C.

[275 N.C. App. 26 (2020)]

IN THE MATTER OF D.C.

No. COA20-235

Filed 15 December 2020

Child Abuse, Dependency, and Neglect—permanency planning—cessation of reunification efforts—required statutory findings

In a juvenile proceeding, the trial court erred by ceasing reunification efforts and omitting reunification from the child's permanent plan without making the required statutory findings. The trial court failed to make sufficient findings, as required by N.C.G.S. § 7B-902.6(d), and failed to make the ultimate finding required by N.C.G.S. § 7B-902.6(b)—that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health or safety.

Appeal by Respondent-Father from orders entered 12 December 2019 by Judge James Randolph in Rowan County District Court. Heard in the Court of Appeals 17 November 2020.

Jane R. Thompson for petitioner-appellee Rowan County Department of Social Services.

Rebecca J. Yoder for appellee Guardian ad Litem.

Peter Wood for respondent-appellant Father.

COLLINS, Judge.

Respondent-Father appeals from orders terminating jurisdiction in a juvenile proceeding and awarding custody of his minor child "Donna" to Mr. and Mrs. "Brown."[1] Respondent argues that the trial court erred by implicitly ceasing reunification efforts in its 24 October orders without making statutory findings under N.C. Gen. Stat. § 7B-906.2. We vacate the orders and remand for further proceedings consistent with this opinion.

I. Factual Background and Procedural History

Donna was born on 26 March 2018. The next day, Rowan County Department of Social Services ("RCDSS") received a report from the

1. We use pseudonyms for the juvenile and the persons awarded custody throughout to protect the juvenile's identity. *See* N.C. R. App. P. 42(b). The minor child's mother is not a party to this appeal.

hospital nursing staff concerning Donna's welfare. Over the following 11 months, RCDSS attempted to assist the family with nutritional, parenting education, and mental health resources. During that time, RCDSS received additional reports concerning the adequacy of Donna's care, Donna's wellbeing, and the safety and stability of Respondent's household.

On 5 February 2019, RCDSS filed a juvenile petition alleging that Donna was neglected. The trial court granted RCDSS nonsecure custody; RCDSS placed Donna with Mrs. Brown, with whom Donna had been living since 15 August 2018. On 11 April 2019, Respondent and Mother (together, "the Parents") admitted that Donna was neglected as alleged in the juvenile petition.[2] In a consent order, the parties agreed that RCDSS would have custody of Donna and be responsible for her placement and care. The Parents also agreed to participate in mental health and substance abuse assessments and treatment, undergo drug screenings, and remain engaged in Donna's care.

Following the consent order, the trial court entered an "Adjudication/Disposition Order." In that order, the trial court made findings of fact, adjudicated Donna neglected, and incorporated the terms of the consent order. The trial court continued custody of Donna with RCDSS, found that RCDSS had made reasonable efforts to achieve reunification, and directed that reunification efforts should continue. The trial court also noted that "[t]he initial permanent plan will be set at the first permanency planning review."

RCDSS subsequently moved for review of custody and permanency planning on 24 July 2019. After two continuances, the trial court held a hearing "to review [Donna's] custody, placement, and permanent plan" on 24 October 2019. At the hearing, RCDSS recommended that the Browns be granted custody of Donna.

Following the hearing, the trial court entered both a Juvenile Order and a Custody Order. The Juvenile Order, entered in the juvenile proceeding, terminated the trial court's jurisdiction in the matter. This order included the following pertinent findings of fact:

> 3. . . . [Donna] was placed with non-relative kinship providers, [the Browns]. [Donna] continues to thrive and flourish in the home of Mr. and Mrs. [Brown]. She is in a safe and appropriate home and is bonded with the

2. Respondent and Mother denied only the allegation that there was domestic violence between them.

> [Browns] and their family. Mr. and Mrs. [Brown] are committed to providing permanent care for [Donna].
>
> 4. [The Parents] have not made adequate progress within a reasonable period of time under the plan, have not adequately participated or cooperated with the plan, or have not acted in a manner consistent with the health and safety of the juvenile.
>
> 5. The RCDSS recommends that custody of [Donna] be awarded to [the Browns]. Mr. and Mrs. [Brown] are ready and willing to provide permanence for [Donna]. The [Browns] understand the legal significance of having custody of [Donna] and have adequate resources to care appropriately for [Donna].
>
> 6. There is not a need for continued State intervention on behalf of the juvenile through this juvenile proceeding.
>
> 7. On this date, the court has entered an order pursuant to N.C.G.S. § 50-13.1, 50-13.2, 50-13.5, and 50-13.7, as provided in N.C.G.S. § 7B-911, considering that [Donna] has been safe and appropriate in [the Browns'] home for at least one year. The undersigned, RCDSS, and GAL are in agreement with the entry of both the civil custody order and this order terminating jurisdiction in the juvenile case.

The trial court then made the following conclusions of law:

> 1. The court has exclusive, continuing jurisdiction under N.C.G.S. § 50A-202 and has jurisdiction over the parties. Juvenile court jurisdiction will terminate with the entry of this order.
>
> 2. It is in the best interests of the juvenile, [Donna], for custody to be awarded to [the Browns], in a separate custody order.
>
> 3. Continuation of the court's jurisdiction in this matter is not necessary in order to protect the juvenile.

The Custody Order was entered in a new civil custody action, pursuant to N.C. Gen. Stat. § 7B-911. This order contained more extensive findings of fact concerning the fitness of the Parents and the quality of Donna's care. Based on these findings, the order awarded legal custody to the Browns.

The trial court signed both orders on 12 December 2019. Respondent gave written notice of appeal on 19 December.

II. Discussion

On appeal, Respondent argues that the trial court erred by implicitly ceasing reunification efforts in its 24 October orders without making the required statutory findings under N.C. Gen. Stat. § 7B-906.2.[3]

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re M.T.-L.Y.*, 265 N.C. App. 454, 466, 829 S.E.2d 496, 505 (2019) (citation omitted). The failure to make statutorily-mandated findings constitutes reversible error. *In re J.L.H.*, 224 N.C. App. 52, 60, 741 S.E.2d 333, 338 (2012).

After an initial dispositional hearing in an abuse, neglect, or dependency proceeding, the trial court must conduct regular review hearings. *See* N.C. Gen. Stat. § 7B-906.1(a) (2019) (prescribing a review hearing within 90 days of the initial dispositional hearing and at least every six months thereafter). "Within 12 months of the date of the initial order removing custody, there shall be a review hearing designated as a permanency planning hearing." *Id.* "At the conclusion of each permanency planning hearing, the court shall make specific findings as to the best permanent plans to achieve a safe, permanent home for the juvenile within a reasonable period of time." *Id.* § 7B-906.1(g) (2019).

"At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan." N.C. Gen. Stat. § 7B-906.2(b) (2019). "Reunification shall be a primary or secondary plan" except in three circumstances: (1) the court makes findings under N.C. Gen. Stat. § 7B-901(c) or § 7B-906.1(d)(3), (2) "the permanent plan is or has been achieved in accordance with [§ 7B-906.2(a1)]," or (3) "the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b).

To cease reunification efforts under section 7B-906.2(b) on grounds that such efforts "clearly would be unsuccessful or would be inconsistent

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3. The parties consider the Juvenile Order and the Custody Order together to assess whether the trial court made the findings required by section 7B-906.2. We therefore do not address whether the Juvenile Order, standing alone, must include the findings required by section 7B-906.2.

with the juvenile's health or safety," the trial court must assess the considerations set forth in section 7B-906.2(d). *In re S.B.*, 268 N.C. App. 78, 85, 834 S.E.2d 683, 689 (2019); *In re D.A.*, 258 N.C. App. 247, 253, 811 S.E.2d 729, 734 (2018). That section requires the court to

> make written findings as to each of the following, which shall demonstrate the degree of success or failure toward reunification:
>
> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2019).

We first address, as a threshold matter, whether the trial court ceased reunification efforts and omitted reunification from Donna's permanent plan. Respondent argues that the trial court implicitly ceased reunification efforts "by granting custody of Donna to the [Browns], not adopting a concurrent plan of reunification, and waiving all further review hearings." The Juvenile Order did not provide that reunification remained in Donna's permanent plan. The decretal portion of the Juvenile Order directed that the "Attorneys . . . , the GAL, and the RCDSS are hereby relieved of responsibility in this matter." By relieving RCDSS of its responsibilities, the trial court ceased reunification efforts. *See In re T.W.*, 250 N.C. App. 68, 73, 796 S.E.2d 792, 795-96 (2016) ("Only when reunification is eliminated from the permanent plan is the department of social services relieved from undertaking reasonable efforts to reunify the parent and child.").

Because the trial court ceased reunification efforts and omitted reunification from the permanent plan, it was required to satisfy section 7B-906.2(b). In this case, the parties do not argue that the trial court made findings under N.C. Gen. Stat. § 7B-901(c) or § 7B-906.1(d)(3) such that reunification need not have been a primary or secondary plan.

RCDSS and the GAL argue that reunification need not have been a primary or secondary plan because the permanent plan had been

achieved. RCDSS and the GAL contend that at the time the trial court entered the Juvenile Order, "RCDSS had been working with the parents on their reunification case plan for 19 months." In its own 11 April 2019 report to the trial court, however, RCDSS acknowledged that the permanent plan had not yet been established and recommended that the "initial" permanent plan be set at the first permanency planning hearing. The trial court's Adjudication/Disposition Order likewise found that "[t]he initial permanent plan will be set at the first permanency planning review." The first and only permanency planning hearing was not held until 24 October 2019.[4] While the Custody Order found that "the permanent plan for the juvenile was reunification with a parent" as of 10 April 2019, this finding was not supported by credible evidence, as no previous orders of the trial court had adopted a permanent plan. As such, RCDSS's contention that the permanent plan had been achieved at the time the trial court entered the Juvenile Order is without merit.

The trial court was thus required to find "that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety," N.C. Gen. Stat. § 7B-906.2(b), prior to ceasing reunification efforts and omitting reunification from the permanent plan. In its Juvenile Order, the trial court made the following pertinent findings of fact:

> [The Parents] have not made adequate progress within a reasonable period of time under the plan, have not adequately participated in or cooperated with the plan, or have not acted in a manner consistent with the health and safety of the juvenile.

These findings of fact are insufficient, in part because the trial court failed to address all of the considerations under section 7B-906.2(d). Specifically, the trial court made no findings concerning "[w]hether the parent[s] remain[ed] available to the court, the department, and the guardian ad litem for the juvenile." N.C. Gen. Stat. § 7B-906.2(d)(3). While the trial court found that the Parents "have not adequately participated in or cooperated with the plan," it did not address whether the Parents had cooperated with either RCDSS or the Guardian ad Litem as required by section 7B-906.2(d)(2). More fundamentally, the trial court omitted the crucial ultimate finding under section 7B-906.2(b) that "reunification

4. The trial court's Juvenile Order described the 24 October hearing as one "to review and implement the permanent plan for the minor child," its Custody Order described the hearing as one "to review the custody, placement, and permanent plan of the minor child."

efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety."

A trial court's findings pursuant to section 7B-906.2(b) "need not recite the statutory language verbatim," and an order will be sufficient so long as it "make[s] clear that the trial court considered the evidence in light of" the relevant standard. *In re L.M.T.*, 367 N.C. 165, 166, 167-68, 752 S.E.2d 453, 454-55 (2013) (examining the required statutory findings under the statutory provision antecedent to section 7B-906.2(b)). But here, the Juvenile Order does not address the ultimate question of whether reunification would be unsuccessful or inconsistent with Donna's safety. Nor does it contain any more detailed findings of fact pertinent to that question beyond the few listed above.

Like the Juvenile Order, the Custody Order contains the following findings of fact:

> Neither parent has made adequate progress within a reasonable period of time, has adequately participated in or cooperated with the plan, or has acted in a manner consistent with the health and safety of the juvenile.

Again, these findings of fact do not fully address the required considerations under section 7B-906.2(d).

The Custody Order does contain additional findings regarding domestic violence between the Parents, Respondent's completion of parenting and anger management programs, Respondent's failure to complete a Batterer's Intervention program, Mother's participation in counseling, and the Parents' inconsistent visitation with Donna. But even if construed liberally, these additional findings do not "make clear that the trial court considered the evidence in light of" the relevant standard. *In re L.M.T.*, 367 N.C. at 167-68, 752 S.E.2d at 454. Specifically, it is unclear that the trial court considered the degree to which the Parents "remain[ed] available to the court, the department, and the guardian ad litem for the juvenile." N.C. Gen. Stat. § 7B-906.2(d)(3).

Moreover, the Custody Order suffers the same defect as the Juvenile Order—it fails to address the ultimate question of whether reunification would be unsuccessful or inconsistent with Donna's safety. Even if we were to construe the Custody Order's findings as satisfying section 7B-906.2(d), and those findings "support[ed] an ultimate finding under N.C. Gen. Stat. § 7B-906.2(b), it is not the role of the reviewing court to draw inferences or make ultimate findings on the trial court's behalf." *In re T.W.*, 250 N.C. App. at 76, 796 S.E.2d at 797; *see also In re D.A.*, 258

N.C. App. at 254, 811 S.E.2d at 734 (holding a trial court's order ceasing reunification efforts was insufficient where it "contain[ed] no findings that embrace the requisite ultimate finding that 'reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety").

Because the trial court ceased reunification efforts without making sufficient findings pertinent to section 7B-906.2(d) and the ultimate finding required by section 7B-906.2(b), we vacate the trial court's orders and remand for further proceedings. *See Sherrick v. Sherrick*, 209 N.C. App. 166, 169-70, 704 S.E.2d 314, 317 (2011) (stating that an order properly entered under section 7B-911 is a jurisdictional prerequisite to transferring the proceeding to a Chapter 50 custody action).

III. Conclusion

Because the trial court ceased reunification efforts and omitted reunification from Donna's permanent plan without making the requisite statutory findings, we vacate the Juvenile Order and Custody Order and remand for further proceedings consistent with this opinion. The trial court is to make the necessary statutory findings–supported by clear, cogent and convincing evidence–and conclusions to determine whether to cease reunification efforts.

VACATED AND REMANDED.

Judges DIETZ and ZACHARY concur.

IN RE Q.M.

[275 N.C. App. 34 (2020)]

IN THE MATTER OF Q.M., JR.

No. COA19-1133

Filed 15 December 2020

1. Appeal and Error—untimely appeal—petition for writ of certiorari—adjudication of dependency

The Court of Appeals dismissed respondent-mother's appeal from the trial court's orders adjudicating her infant son as dependent and maintaining his custody with the county department of social services where her amended notice of appeal (filed to correct the first notice of appeal's lack of proper signature) was untimely filed. But her petition for writ of certiorari requesting review of the merits was allowed in the court's discretion.

2. Child Abuse, Dependency, and Neglect—dependency—availability of alternative arrangements—failure to make adequate findings—father's paternity established

The trial court erred by adjudicating respondent-mother's infant son as dependent where a number of the trial court's findings were unsupported by the evidence and the findings failed to adequately address the availability of alternative arrangements for the child. Importantly, the father established paternity after the juvenile petition was filed and expressed interest in having the child placed with him.

Appeal by Respondent-Mother from Orders entered 24 June 2019, by Judge Leonard W. Thagard and 19 September 2019, by Judge Timothy Smith in Sampson County District Court. Heard in the Court of Appeals 3 November 2020.

Elizabeth Myrick Boone and Warrick, Bradshaw & Lockamy, PA, by Frank L. Bradshaw, for petitioner-appellee Sampson County Department of Social Services.

Surratt Thompson & Ceberio PLLC, by Christopher M. Watford, for respondent-appellant mother.

Matthew D. Wunsche for guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Mother appeals from Orders adjudicating her son Q.M., Jr. (Quan)[1] a dependent juvenile under N.C. Gen. Stat. §7B-101 (Adjudication Order) and maintaining the child in the custody of Sampson County Department of Social Services (DSS) (Disposition Order). The Record reflects the following:

On 25 October 2018, Respondent-Mother gave birth to Quan. At the time of Quan's birth, Respondent-Mother was a ward of the Cumberland County Department of Social Services. Respondent-Mother had a history of mental health issues and had been appointed a Guardian ad litem pursuant to Rule 17 of the North Carolina Rules of Civil Procedure.

Four days after Quan's birth, on 29 October 2018, DSS filed a petition alleging Quan was a dependent juvenile. The Petition identified Quan's putative father (Respondent-Father),[2] who had informed DSS he was Quan's father and was willing to take a paternity test. The same day, DSS obtained an Order for Nonsecure Custody and placed Quan into foster care. On or about 9 November 2018, the trial court ordered Respondent-Father to submit to paternity testing, which he completed on 17 January 2019, and which was transmitted to the trial court on 28 January 2019. On 14 February 2019, the trial court held a hearing to establish paternity; however, the trial court did not enter a formal written Judgment of Paternity adjudicating Respondent-Father as Quan's father until 3 June 2019.

In the meantime, DSS maintained nonsecure custody of Quan and he remained with his foster family. The trial court held Quan's adjudication hearing on 23 May 2019. Respondent-Mother was not present at the hearing but was represented by counsel and her Guardian ad litem. On 24 June 2019, the trial court entered its written Adjudication Order. In the Adjudication Order, the trial court found:

> 1. That pursuant to N.C. Gen. Stat. § 7B-801, this matter came on for adjudication upon a Petition filed by [DSS] on February 14, 2019.
>
> . . . .

1. Quan is the stipulated pseudonym used to protect the identity of the juvenile under Rule 42. N.C.R. App. P. 42 (2020).

2. The Record reflects Respondent-Father was present and represented by counsel at the adjudication hearing; however, Respondent-Father does not appeal the trial court's Adjudication Order or subsequent Disposition Order.

3. That the Respondent Mother was previously appointed [a] Rule 17 Guardia[n] ad Litem.

4. That the father of the Juvenile, [Respondent-Father], was personally served with the Petition and Summons on February 14, 2019.

. . . .

6. That [DSS] received a report of potential abuse, neglect, and/or dependency on October 25, 2018.

7. That the Respondent Mother was previously adjudicated to be incompetent and is currently a ward of the Cumberland County Department of Social Services.

. . . .

10. That the Respondent Mother refused to work a service agreement with [DSS] with respect to the other juvenile.

11. That due to her behaviors and the safety of the other Juvenile, the mother's visitations with respect to the other child were terminated.

12. That there were no additional family members that were available for placement of the juvenile at the time of the filing of the petition and the Respondent Father was merely a putative father at the time.

13. That the Juvenile is a dependent juvenile pursuant to N.C. Gen. Stat. §7B-101(9) in that: (i) the Juvenile needs assistance or placement because the Juvenile has no parent, guardian, or custodian responsible for the Juvenile's care or supervision; and (ii) 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.

The trial court ultimately adjudicated Quan as a dependent juvenile under N.C. Gen. Stat. § 7B-101(9).

On 1 August 2019, the trial court held its dispositional hearing and on 19 September 2019, entered its written Disposition Order. The Disposition Order set a primary plan of reunification and a concurrent, secondary plan of guardianship. The Disposition Order ordered Quan's legal custody remain with DSS; however, it set Quan's physical placement

with Respondent-Father. The Disposition Order provided, "there shall be no visitation between the Juvenile and Respondent Mother unless otherwise ordered by this Court."

On 17 October 2019, Respondent-Mother filed written Notice of Appeal from the Adjudication and Disposition Orders. The 17 October Notice of Appeal was signed by Respondent-Mother's trial counsel but was not signed by Respondent-Mother or her Guardian ad litem. On 23 October 2019, the trial court noted the appeal, and on 7 November 2019, the Office of the Parent Defender was appointed to represent Respondent-Mother on appeal. On 4 December 2019, DSS filed a Motion to Dismiss the appeal for violations of N.C. Gen. Stat. §§ 7B-1001(a)(3), (b), and (c), in that the 17 October Notice of Appeal was not signed by Respondent-Mother or her Guardian ad litem. Then, on 10 December 2019 Respondent-Mother filed an Amended Notice of Appeal, this time bearing her counsel's signature as well as the signature of Respondent-Mother's Guardian ad litem.

Contemporaneous with her brief, Respondent-Mother filed a Petition for Writ of Certiorari to this Court seeking our review of the Adjudication and Disposition Orders despite the untimely Amended Notice of Appeal on 27 January 2020. On 31 January 2020, DSS again filed a Motion to Dismiss Respondent-Mother's appeal.

Appellate Jurisdiction

[1] As an initial matter, Respondent-Mother's Notice of Appeal and Amended Notice of Appeal are procedurally defective. Under N.C. Gen. Stat. § 7B-1001, "[a]ny initial order of disposition and the adjudication order upon which it is based" is appealable to this Court provided: (1) the notice of appeal is given in writing by a proper party *and* made within 30 days after entry and service, and (2) the notice of appeal is signed by both the appealing party and counsel for the appealing party. N.C. Gen. Stat. § 7B-1001(a)-(c) (2019). The first Notice of Appeal was not signed by Respondent-Mother, a violation of N.C. Gen. Stat. § 7B-1001(c), nor was it signed by Respondent-Mother's Guardian ad litem. This defect was subsequently corrected in the Amended Notice of Appeal, which was signed by Respondent-Mother's Guardian ad litem. N.C. Gen. Stat. § 7B-1001(c) (2019); *see* N.C. Gen. Stat. § 1A-1, Rule 17(e) (2019) ("Any guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules[.]"). However, the Amended Notice of Appeal was filed on 10 December 2019, making it untimely. N.C. Gen. Stat. § 7B-1001(b). Therefore, because

Respondent-Mother's Amended Notice of Appeal is untimely in violation of Section 7B-1001(b), we allow DSS's Motion to Dismiss.

However, Respondent-Mother also filed a Petition for Writ of Certiorari requesting this Court grant her appeal on the merits despite the defects in her Amended Notice of Appeal. N.C. Gen. Stat. § 7A-32(c), as implemented through Rule 21 of our Rules of Appellate Procedure, provides this Court the authority to issue a writ of certiorari "when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1) (2020); N.C. Gen. Stat. § 7A-32(c) (2019). Moreover, this Court has granted certiorari in cases akin to the present. *See In re A.S.*, 190 N.C. App. 679, 683, 661 S.E.2d 313, 316 (2008) ("Although the order at issue involves only an initial adjudication of neglect, the disposition could be read as ordering DSS to cease reunification efforts with respondent . . . . Given the serious consequences of the adjudication order, . . . we believe that review pursuant to a writ of certiorari is appropriate."). In our discretion, we grant Respondent-Mother's petition in order to review the merits of Respondent-Mother's case.

Issue

[2] The dispositive issue on appeal is whether the trial court erred in adjudicating Quan as a dependent juvenile.

Standard of Review

This Court reviews a trial court's adjudication of dependency "to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact[.]" *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citations and quotation marks omitted). Unchallenged findings of fact are binding on appeal. *In re V.B.*, 239 N.C. App. 340, 341, 768 S.E.2d 867, 868 (2015) (citation omitted). "The conclusion that a juvenile is abused, neglected, or dependent is reviewed *de novo*." *Id.* (citations omitted).

Analysis

I. Adjudication of Dependency

A dependent juvenile is a juvenile "in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) 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) (2019). "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 childcare arrangements." *In re T.B.*, *C.P.*, *& I.P.*, 203 N.C. App. 497, 500, 692 S.E.2d 182, 184 (2010) (emphasis added) (citation and quotation marks omitted). "Adjudicatory hearings for dependency are limited to determining only 'the existence or nonexistence of any of the conditions alleged in [the] petition.' " *In re V.B.*, 239 N.C. App. at 341, 768 S.E.2d at 868 (citing N.C. Gen. Stat. § 7B-802 (2013)).

Respondent-Mother challenges several of the trial court's findings of fact, asserting they are not supported by clear and convincing evidence, and further, that the findings do not support the trial court's ultimate conclusion Quan is a dependent juvenile under N.C. Gen. Stat. § 7B-101(9).

First, Respondent-Mother challenges Finding 1, which purports to find DSS filed the underlying Petition in this case on 14 February 2019. Our review of the Record reflects DSS filed a petition alleging Quan was dependent on 29 October 2018. Indeed, DSS concedes this Finding is erroneous and contends it is a typographical error. Finding of Fact 1, although not of significant consequence to the outcome of this case, is therefore not supported by clear and convincing evidence.

In Finding 6, the trial court found "[DSS] received a report of potential abuse, neglect, and/or dependency on October 25, 2018." Respondent-Mother contends this Finding is not supported by the evidence as "the trial court received no live testimony or took notice of any written document that established the existence of a report and the basis for that report being alleged 'abuse, neglect, and/or dependency on October 25, 2018.' " DSS contends this Finding is supported by clear and convincing evidence because "this finding was in the verified Petition in the Record." The Petition incorporates by reference "Exhibit A." Exhibit A states, "on October 25, 2018, [DSS] received a report of neglect dependency and injurious environment regarding the Juvenile [Quan]." Thus, Finding 6 is supported.

Respondent-Mother next challenges Finding 10—that she "refused to work a service agreement with [DSS] with respect to the other juvenile"—as unsupported by the evidence. At the dependency hearing, Social Worker LeTyssa Stokes (Stokes) testified as the foster care worker for both Quan and Respondent-Mother's older child. Counsel for DSS inquired: "And was [Respondent-Mother] able to complete a service agreement with the Department in the other case?" To which Stokes responded, "Yes, she was." Stokes stated problems arose with Respondent-Mother during that case and testified during visitations

Respondent-Mother "had tried to take [the other juvenile] with her" and then that "[Respondent-Mother] tried to hit me at one point when I had [the other juvenile] in my possession." Despite Stokes' testimony that there were problems with Respondent-Mother's other case, the Record and testimony elicited at the hearing does not support the trial court's finding Respondent-Mother "refused to work a service agreement with DSS . . . ." To the contrary, Stokes' testimony established Respondent-Mother did in fact complete a service agreement with respect to her other child. Therefore, Finding 10 is not supported by clear and convincing evidence.

In Finding 11, the trial court found Respondent-Mother's visitations with her other child were terminated due to her behaviors and the safety of the other juvenile. Again, this Finding is not supported by clear and convincing evidence. Stokes briefly testified that during visitations Respondent-Mother "had tried to take [the other juvenile] with her" and then "[Respondent-Mother] tried to hit me at one point when I had [the other juvenile] in my possession." However, Stokes did not offer any testimony to support a finding Respondent-Mother's visitation was terminated. The Record is similarly devoid of evidence Respondent-Mother's visitation was *terminated*. DSS contends that a GAL report contained in the Record and admitted at a hearing supports the Finding; however that report merely states "[the other juvenile] has no contact with the birth parents nor any siblings outside of the home or paternal or maternal grandparents' aunts or uncles." Although there is evidence and testimony describing behavioral issues during Respondent-Mother's visitation, we cannot infer from that testimony Respondent-Mother's visitation was, in fact, terminated. Accordingly, Finding 11 is not supported by clear and convincing evidence.

Finding 12 found "there were no additional family members that were available for placement of [Quan] at the time of the filing of the petition and the Respondent-Father was merely a putative father at the time." DSS contends this Finding is supported because the Father was listed only as "putative" on the Petition and because he was not listed on the birth certificate. However, despite Respondent-Father's label as putative, which is not disputed, Exhibit A as incorporated into the Petition states Respondent-Father "claim[ed] to be Respondent Father." At the dependency hearing DSS social worker Megan Snell acknowledged Respondent-Father was Quan's father and testified she spoke with Respondent-Father on 29 October 2018, at which time he stated "if he were to be the father of [Quan] and he were to get custody of him, he would not leave [Quan] unsupervised with [Respondent-Mother]."

Similarly, there is no evidence of additional family members that were available for placement; however, there is also no evidence of any efforts on behalf of DSS to locate any additional family members.

"[P]ost-petition evidence generally is not admissible during an adjudicatory hearing . . . . However, this rule is not absolute." *Id.* at 344, 768 S.E.2d at 869-70. This is particularly so in the context of post-petition evidence regarding paternity because "paternity is not a discrete event or one-time occurrence. It is a fixed and ongoing circumstance[.]" *Id.*, 239 N.C. App. at 344, 768 S.E.2d at 870.

We find this Court's reasoning in *In re V.B.* persuasive. It is worth noting the Petition in the present case was filed merely four days after Quan's birth. Based on the timeline in which DSS filed the Petition alone, under DSS's position, Respondent-Father had only a four-day window from the time Quan was born to conclusively establish paternity that would then not be excluded as post-petition evidence. At the adjudication hearing, Quan's social worker testified regarding her conversation with Respondent-Father where he indicated he suspected he was the father *and* described measures he would take regarding Quan's supervision and care were he to have custody. Indeed, Respondent-Father's counsel questioned Stokes: "Had he been the father at [the] time [the Petition was filed], the Department would have taken proactive measures to see if he would potentially be a placement for that child before filing a petition?" To which Stokes responded, "Yes." Thus, despite the fact Respondent-Father was only identified as the "putative" father at the time of the filing of the Petition, in light of this Court's holding in *In re V.B.* and the undisputed evidence Respondent-Father established paternity, we conclude there is not clear and convincing evidence to support Finding 12.

Respondent-Mother challenges Finding 13 and contends it operates more as a conclusion of law concluding Quan is a dependent juvenile. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) ("As a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." (citations omitted)). We agree, and accordingly, we review the conclusion de novo and discern whether the trial court's remaining findings of fact support the conclusion.

Finding 13 provides:

> [T]he Juvenile is a dependent juvenile pursuant to N.C. Gen. Stat. §7B-101(9) in that: (i) the Juvenile needs assistance or placement because the Juvenile has no parent, guardian,

> or custodian responsible for the Juvenile's care or supervision; and (ii) 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.

"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. at 500, 692 S.E.2d at 184 (citation and quotation marks omitted). "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 V.B.*, 239 N.C. App. at 342, 768 S.E.2d at 868 (citations and quotation marks omitted). "Moreover, although N.C.G.S. § 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." *Id.* (citation omitted).

Accordingly, in light of the trial court's unsupported findings, we vacate the trial court's Adjudication Order. The crux of the trial court's conclusion rests upon the fact Respondent-Mother was a ward of Cumberland County DSS and had been diagnosed with multiple mental health issues, rendering her unable to be responsible for or provide for Quan's care. Although such findings are unchallenged on appeal, Respondent-Mother's inability to care for Quan on her own does not create a sufficient basis to adjudicate Quan dependent where Respondent-Father was known to DSS and, in fact, spoke with Quan's social worker in direct contemplation of caring for Quan. *See id.* 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. at 500, 692 S.E.2d at 184 (emphasis added) (citation omitted). The trial court's findings do not adequately address the availability of alternative arrangements for Quan. Thus, the trial court erred in concluding Quan was dependent without making findings supported by the evidence to then support its Conclusions of Law. Therefore, we remand this matter to the trial court to make proper findings supported by the clear and convincing evidence in the Record and to re-evaluate whether Quan is a dependent juvenile as defined by N.C. Gen. Stat. § 7B-101(9).

II. Disposition

Respondent-Mother also challenges the trial court's Disposition Order. Because we vacate the Adjudication Order, we also vacate the

trial court's Disposition Order. *See In re S.C.R.*, 217 N.C. App. 166, 170, 718 S.E.2d 709, 713 (2016).

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court's Adjudication Order and Disposition Order and remand this matter to the trial court for further findings of fact supported by the evidence and a new determination as to whether Quan is a dependent juvenile.

VACATED AND REMANDED.

Judges TYSON and MURPHY concur.

THOMAS KEITH AND TERESA KEITH, PLAINTIFFS-APPELLEES/CROSS-APPELLANTS
v.
HEALTH-PRO HOME CARE SERVICES, INC., DEFENDANT-APPELLANT/CROSS-APPELLEE

No. COA19-118

Filed 15 December 2020

1. Negligence—robbery by home health aide—claim brought against employer—ordinary negligence versus negligent hiring, retention, and supervision

The trial court erred in allowing plaintiffs' action against a home health agency to proceed on a theory of ordinary negligence where plaintiffs' allegations and the evidence at trial only supported a claim of negligent hiring, retention, and supervision (based on the actions of a home health aide employed by the agency who committed an off-duty break-in and robbery of plaintiffs' home after working there). Defendants' request for the jury to be instructed on negligent hiring should have been allowed and the denial of that request was clearly prejudicial. The matter was reversed and remanded for entry of an order granting defendants' motion for judgment notwithstanding the verdict on the ordinary negligence claim.

2. Negligence—robbery by home health aide—claim against employer—negligent hiring, retention, and supervision

In an action alleging that a home health agency was negligent for providing a home health aide who committed an off-duty break-in and robbery of plaintiffs' home after working there, plaintiffs were required to prove elements from *Little v. Omega Meats I., Inc.*,

171 N.C. App. 583 (2005), establishing that defendants owed a duty of care to protect plaintiffs from their employee's actions and that a reasonable person would have foreseen the employee's actions. The evidence presented, however, was insufficient to prove those elements or to demonstrate proximate cause, and the trial court should have granted defendants' motion for judgment notwithstanding the verdict on negligent hiring, retention, and supervision.

Judge DILLON dissenting.

Appeal by Defendant from order entered 26 March 2018 by Judge Marvin K. Blount in Superior Court, Pitt County. Heard in the Court of Appeals 4 June 2019.

Ward and Smith, P.A., by Jeremy M. Wilson, Alexander C. Dale, and Christopher S. Edwards, for Plaintiffs-Appellees and Plaintiffs-Cross-Appellants.

Hedrick Gardner Kincheloe & Garafalo LLP, by M. Duane Jones, Michael S. Rothrock, and Linda Stephens, for Defendant-Appellant and Defendant-Cross-Appellee.

McGEE, Chief Judge.

Defendant-Employer Health-Pro Home Care Services, Inc. ("Defendant" or "Health-Pro") appeals from the denial of its motions for directed verdict and its motion for a judgment notwithstanding the verdict ("JNOV") on the negligence claim of Plaintiffs Thomas Keith ("Mr. Keith") and Teresa Keith ("Mrs. Keith," together with Mr. Keith, "Plaintiffs"). Because this Court holds that Plaintiffs' claim was one pursuant to the doctrine of negligent hiring, retention, or supervision, not, as argued by Plaintiffs, one in ordinary negligence, we agree with Defendant, reverse, and remand for entry of a JNOV in Defendant's favor. We further dismiss Plaintiffs' conditional cross-appeal as moot.

I. Facts

In relevant part, the substantial evidence introduced at trial supporting Plaintiffs' negligence complaint included the following facts: Defendant "provides in-home health care for disabled and elderly individuals." Plaintiffs "are an elderly couple who live alone at their home in Pitt County[.]" Plaintiffs "hired [Defendant] approximately three years [prior to filing this action] to provide in-home care." "Originally,

Health-Pro aides were scheduled to come to [Plaintiffs'] home from 8:00 a.m. to 2:00 p.m. and then again from 6:00 p.m. to 11:00 p.m." However, Plaintiffs "eventually" requested that "Health-Pro aides" provide services "for the entire day." "Health-Pro aides" such as Deitra Clark ("Ms. Clark") would "provide the following services to [Plaintiffs], among others: laundry; retrieving the mail and newspaper; preparing meals; washing, bathing, and dressing Mrs. Keith; cleaning the house; and running various errands for [Plaintiffs], including driving Mrs. Keith to the store and to doctor appointments." Aides such as Ms. Clark were employees of Defendant. Naturally, due to the nature of the job, "[Ms.] Clark was able to gain extensive information about [Plaintiffs] and their home including, but not limited to, how to enter and exit the home, details of [Plaintiffs'] personal property and other assets, and the location of valuables within the home."

"In the fall of 2015, [Plaintiffs] discovered that approximately $90.00 in rolled coins had been stolen from a box inside their home." "In July or August 2016, approximately . . . $1,200.00 was stolen from [Mrs. Keith's] dresser drawer, and $90.00 was stolen from Mr. Keith's wallet." At the time Plaintiffs noticed the missing money in August, they informed "Sylvester Bailey [("Mr. Bailey")], one of the officers and owners of Health-Pro, of the" money missing from Mr. Keith's wallet, the money missing from Mrs. Keith's dresser drawer, as well as the "missing rolled coins" allegedly stolen in "the fall of 2015." In response, "[Mr.] Bailey stated that he would take appropriate action, including determining which employee might be responsible and responding accordingly." "[Mr.] Bailey identified two employees who may have been working for Plaintiffs "in the fall of 2015" as well as "[i]n July or August 2016," one of whom was Ms. Clark, the other Clementine Little ("Ms. Little") and "assured [Plaintiffs] that neither [employee would] again [ ] be assigned to [Plaintiffs'] home. [Plaintiffs and their son, Frederick Keith ("Frederick"),] specifically told [Mr.] Bailey that they did not want [Ms.] Clark assigned as an aide [ ] in their home." However, two or three weeks later, Defendant "again assigned [Ms.] Clark to [work as an aide in Plaintiffs'] home." Plaintiffs allege that because they "relied on Health-Pro aides to take care of them, including to assist with various activities of daily living and to transport Mrs. Keith to the medical appointments," Plaintiffs "essentially were forced to accept aide assignments made by [Defendant]."

Sometime "between 12:00 midnight and 1:00 a.m. on September 29, 2016," Plaintiffs were the victims of "a home invasion [ ] robbery" perpetrated by Ms. Clark and two male accomplices. "[Ms.] Clark [knew the location of] a key to [Plaintiffs'] home which, upon information and

belief, was used to enter the home[.]" "The male accomplices forced their way inside [Plaintiffs'] home[and one of the men] held a gun to Mr. Keith's head. One male accomplice then forced Mr. Keith at gunpoint to drive him to an ATM, where he forced Mr. Keith to withdraw $1,000.00 in cash." "The other male accomplice held Mrs. Keith at the home as a hostage during the time." "In addition to the $1,000.00 in cash, [Ms.] Clark and the two male accomplices stole over $500.00 in coins as well as a gun from [Plaintiffs'] home." Ms. Clark did not enter Plaintiffs' home and, at the time of the robbery and kidnapping, Plaintiffs did not know Ms. Clark was involved.

"Following the robbery, [Ms.] Clark and one of her accomplices went to Wal-Mart, spent some of the money they had stolen from [Plaintiffs], and then tried to 'cash in' the rolled coins. [Ms.] Clark and her two male accomplices were all subsequently arrested." Mr. Bailey's wife Doris Bailey ("Ms. Bailey"), "the director of Health-Pro, came to [Plaintiffs'] home the morning following the robbery. [Ms.] Bailey admitted that [Ms.] Clark was involved in the robbery and as a result was being terminated by [Defendant]. [Ms.] Bailey also revealed that [Defendant] had some prior knowledge of a criminal record concerning [Ms.] Clark."

Plaintiffs included two claims in their complaint—a claim of "negligence," and a claim for "punitive damages." Defendant moved for summary judgment on 7 September 2017, which motion was denied on 12 December 2017. Defendant stipulated before trial that Ms. Clark "was an employee of Defendant . . . on September 29, 2016"—the date of the criminal acts perpetrated against Plaintiffs—and that Ms. Clark "was involved with, and had responsibility for, the . . home invasion and robbery of Plaintiffs[.]" "Plaintiffs' contested issue[ ] to be tried by the jury" was set forth by Plaintiffs as: "Were [ ] Plaintiffs . . . injured by the negligence of Defendant[.]" This matter went to trial on 19 March 2018.

At trial, Defendant objected to the introduction of certain screenshots from Ms. Clark's Facebook page, stating that it was Defendant's "understanding Plaintiffs intend to introduce [the] screenshots . . . [and] argue that [Ms. Clark's Facebook account] was one of the things [ ] *Defendant should have checked when hiring her and also having her as an employee*." (Emphasis added). Defendant's attorney argued that Ms. Clark posted the contested Facebook posts *while* she was employed by Defendant, *not before*, and that "there is no legal authority which I am aware of that requires perspective employers to utilize social media as a screening tool for job applicants and there's no legal authority which I am aware of that requires a current employer to continually screen an employee's social media account." Plaintiffs argued the Facebook posts were relevant because "Defendants themselves *create a duty two*

separate ways. One, they had a *background check policy* that said if there were any sort of charges or even misdemeanors but before someone is hired there needed to be an investigation of exactly what happened" and, two, "these *posts are the one threat* . . . during the time [Ms. Clark] was in [Plaintiffs'] home when money started going missing[.]" (Emphasis added).

After the close of Plaintiffs' evidence, Defendant moved for a directed verdict, arguing that Plaintiffs had failed to introduce sufficient evidence to support a claim for negligent hiring, supervision, or retention,[1] or for punitive damages. Plaintiffs countered that their claim was one based upon "ordinary" negligence, not negligent hiring. The trial court denied Defendant's motion. At the close of all the evidence, Defendant renewed its motion which was again denied. However, the trial court granted Defendant's motion for a directed verdict on Plaintiff's claim for punitive damages.

The trial court instructed the jury, in relevant part, as follows: "W[ere] [ ] Plaintiff[s] . . . injured by the negligence of [ ] Defendant[.]" "This means that [ ] Plaintiff[s'] must prove by the greater weight of the evidence that [ ] Defendant was negligent and that such negligence was a proximate cause of [ ] Plaintiff[s'] injury." "[N]egligence refers to a person's or company's failure to follow a duty of conduct imposed by law. Every person or company is under a duty to use ordinary care to protect himself and others from injury." The trial court instructed that "ordinary care" meant "that degree of care which a reasonable and prudent person would use under the same or similar circumstances[.]" The trial court defined proximate cause as "a cause which in natural and continuous sequence produces a person's injury and is a cause which a reasonable and prudent person could have foreseen would probably produce such injury or some similar injurious result." The jury found in favor of Plaintiffs, awarded Mr. Keith $500,000.00 in damages, and Mrs. Keith $250,000.00. Defendant moved for a JNOV, which the trial court denied. Defendant appeals, and Plaintiffs include a conditional cross-appeal from the trial court's grant of a directed verdict in favor of Defendant on Plaintiffs' claim for punitive damages.

II. Analysis

Defendant argues on appeal that the trial court erred in allowing Plaintiffs' action to go to the jury as one in "ordinary" negligence, and

1. For the sake of simplicity, we will sometimes use "negligent hiring" as shorthand for the legal doctrine that includes negligent hiring as well as negligent supervision and negligent retention.

in instructing the jury accordingly. Defendant contends Plaintiffs' action should have been submitted to the jury as one based on the doctrine of negligent hiring, supervision, or retention. Defendant further argues that "the trial court erred in denying Defendant's motions for directed verdict" and Defendant's motion for a JNOV, because the evidence was insufficient to support a verdict against Defendant for either ordinary negligence or negligent hiring.

A. *Standard of Review*

It is well established:

> A motion for directed verdict . . . tests the legal sufficiency of the evidence to take the case to the jury. In ruling on a defendant's motion for directed verdict, the trial court must take plaintiff's evidence as true, considering plaintiff's evidence in the light most favorable to him and giving him the benefit of every reasonable inference. Defendant's motion for a directed verdict should be denied "unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." Given these principles it is clear that a defendant in a negligence action is not entitled to a directed verdict unless the plaintiff has failed, as a matter of law, to establish the elements of actionable negligence.

Little v. Omega Meats I, Inc., 171 N.C. App. 583, 586, 615 S.E.2d 45, 47-48, *aff'd per curiam*, 360 N.C. 164, 622 S.E.2d 494 (2005).

> A JNOV motion seeks entry of judgment in accordance with the movant's earlier motion for directed verdict, notwithstanding the contrary verdict returned by the jury. *See* G.S. § 1A–1, Rule 50(b). A ruling on such motion is a question of law, and presents for appellate review the identical issue raised by a directed verdict motion, *i.e.*, whether the evidence considered in the light most favorable to the non-movant was sufficient to take the case to the jury and to support a verdict for the non-movant.

Bahl v. Talford, 138 N.C. App. 119, 122, 530 S.E.2d 347, 350 (2000) (citations omitted). Therefore, our decision on the trial court's denial of Defendant's motion for a JNOV will also decide Defendant's motions for a directed verdict. However, in order to decide whether the trial court properly denied Defendant's motion for a JNOV, we must first decide

whether Plaintiffs' case was appropriately presented to the jury as an "ordinary" negligence claim instead of an action for negligent hiring. We therefore review the law of this state, and consider the law from other jurisdictions, regarding an employer's liability for torts committed by one of its employees.

B. *Law of Employer Liability for Tortious Acts of Employees*

As noted, Defendant argues in part: "Plaintiffs contend their claims against [Defendant] arise in *[ordinary] common law negligence*, yet their arguments and the evidence they rely on demonstrate that Plaintiffs' claims are for the negligent hiring, supervision, and retention of an employee." (Emphasis added). We first want to clarify that an action for negligent hiring is a "common law" remedy based in negligence. Before the common law development of negligent hiring expanded employer liability for the injuries sustained by third parties due to the negligent acts of employees, the sole common law remedy was to bring an action based upon the well-established doctrine of *respondeat superior*. *Respondeat superior* is not a direct action against the employer based on the employer's negligence, instead, the employer's liability is predicated on establishing (1) agency—the tortfeasor was employed by the employer, and was acting in the course of that employment—and (2) negligence—*the employee's* negligent actions were the proximate cause of the third party's injury and damages.

North Carolina courts have been reticent to impose liability on employers for the acts of their employees. The early cases from our Supreme Court mainly concerned situations where one employee injured another employee, or where an employee injured a customer while acting as the employer's agent in the furtherance of the employer's business interests. The doctrine of negligent hiring was developed and became universally recognized in this country as a common law remedy, developed from common law negligence principles in order to provide relief where the relevant facts of a case precluded recovery pursuant to *respondeat superior*. The doctrine of negligent hiring is a proper cause of action in limited circumstances—when the *negligence of the employer* is the legal proximate cause of its employee's wrongful actions, and the employee's wrongful acts result in damages to a third party.

The common law development of a "new" cause of action for negligent hiring allowed plaintiffs, in certain circumstances, to hold an employer liable for the negligent or intentional acts of its employee, even when the employee was not acting within the scope of employment. Because both negligent hiring and *respondeat superior* are "common law" actions requiring the plaintiff to establish negligence,

they are actions in "common law" negligence.[2] Therefore, what is sometimes referred to as "common law" negligence we will refer to as "ordinary" negligence.

As noted by our Supreme Court: "To state a claim for [all theories of] common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Stein v. Asheville City Bd. Of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006) (citations omitted.) Judge Cardozo stated in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (1928), the seminal opinion concerning an employer's liability for the acts of its employees: "Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. 'Proof of negligence in the air, so to speak, will not do.' 'Negligence is the absence of care, according to the circumstances.' " *Palsgraf*, 162 N.E. at 99 (citations omitted). In *Palsgraf*, the court recognized that *the existence of the legal duty itself* requires that a reasonable person in the defendant's position would reasonably *foresee* the likelihood that the defendant's act or omission would result in the kind of injury suffered by the plaintiff. " 'In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury.' " *Id.* at 99-100. Citing *Palsgraf*, our Supreme Court noted: "*[T]he threshold question is whether plaintiffs successfully allege [the employer] had a legal duty to avert the attack on [the injured plaintiff]. Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 342-44, 162 N.E. 99, 99-100 (1928)." *Stein*, 360 N.C. at 328, 626 S.E.2d at 267-68 (emphasis added).

Our Supreme Court has adopted the theory of duty as set forth in *Palsgraf* in *Stein*, 360 N.C. at 328, 626 S.E.2d at 267-68, and has recognized the requirement that the plaintiff prove the injury complained of was the foreseeable result of the employer's alleged acts or omissions in order to prove the employer owed the plaintiff a legal duty of care: "*No legal duty* exists unless *the injury* to the plaintiff *was foreseeable* and avoidable through due care." *Stein*, 360 N.C. at 328, 626 S.E.2d at 267 (emphasis added) (citations omitted). The Court also noted: "Whether a plaintiff's injuries were foreseeable depends on the facts of the particular case." *Id.* at 328, 626 S.E.2d at 267-68 (citation omitted).

Plaintiffs in this case contend that *respondeat superior* and negligent hiring are simply *alternative* theories, *in addition to* ordinary

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2. *Respondeat superior* is based upon both agency and the negligence of the employee, which is an element that must be proven by the plaintiff.

negligence, by which a plaintiff may sue an employer for the negligent or intentional acts of its employees. Defendant argues on appeal that Plaintiffs' action was in reality an action pursuant to the doctrine of negligent hiring, that the trial court erred in instructing the jury under ordinary negligence instead of negligent hiring, and that Plaintiffs' evidence was insufficient to survive Defendant's motions for directed verdicts and a JNOV under any theory of Defendant's alleged liability for the criminal acts of its employee, Ms. Clark. Plaintiffs contend they only pled "ordinary" negligence, they tried the case as an ordinary negligence claim and, therefore, the trial court properly denied Defendant's negligent hiring instruction and instructed the jury on ordinary negligence. We therefore consider the relevant theories of negligence in the context of the facts of this case—looking to Plaintiffs' complaint and the evidence presented at trial within the context of precedent governing both ordinary negligence and negligent hiring.

1. **Plaintiffs' Complaint**

Although Plaintiffs contend they only pled ordinary negligence, the nature of Plaintiffs' cause of action is not controlled by how Plaintiffs labeled it in their complaint—"*it is not the titular designation that controls*; the nature of the cause of action is determined by the facts alleged." *Burton v. Dixon*, 259 N.C. 473, 477, 131 S.E.2d 27, 30 (1963); *see also*, *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 52, 790 S.E.2d 657, 660 (2016). Plaintiffs' complaint properly alleged an employer/employee relationship between Defendant and Ms. Clark, that Ms. Clark was assigned to work at Plaintiffs' home by Defendant, and that Ms. Clark was responsible for the events of 29 September 2016. Plaintiffs further alleged that they "relied on Health-Pro to assign quality aides to their home who would . . . treat [Plaintiffs] properly, and who would not steal or otherwise engage in inappropriate or harmful behavior." Ms. Clark "was able to gain extensive information about [Plaintiffs] and their home including, but not limited to, how to enter and exit the home, details of [Plaintiffs'] personal property and other assets, and the location of valuables within the home[,]" therefore it "was reasonably foreseeable, including to Health-Pro, that [Ms.] Clark would have access to this information as a result of her being assigned to" work in Plaintiffs' home. "In the fall of 2015, [Plaintiffs] discovered that approximately $90.00 in rolled coins had been stolen from a box inside their home." "In July or August 2016, . . . [a]pproximately $1,200.00 was stolen from [Mrs. Keith's] dresser drawer, and $90.00 was stolen from Mr. Keith's wallet." "Mr. Keith [ ] told [Mr.] Bailey of the missing funds. [Mr.] Bailey identified two potential employees whom he suspected, one

of whom was [Ms.] Clark[.]" Mr. Bailey "assured [Plaintiffs] that neither [of the two employees] would be assigned to [Plaintiffs'] home" in the future. "Unfortunately, Health-Pro again assigned [Ms.] Clark to [Plaintiffs'] home." Plaintiffs contended that because "they relied on Health-Pro aides to take care of them," they "essentially were forced to accept aide assignments made by Health-Pro." "[Ms.] Clark orchestrated [the 29 September 2016] home invasion and robbery of [Plaintiffs] along with two male accomplices." "[Ms.] Clark and the two male accomplices stole" the $1,000.00 from the ATM, and "over $500.00 in coins as well as a gun[.]"

"[T]he morning following the robbery[,] [Ms.] Bailey admitted that [Ms.] Clark was involved . . . and . . . was being terminated[.] [Ms.] Bailey also revealed that Health-Pro had some prior knowledge of a criminal record concerning [Ms.] Clark." Plaintiffs alleged Ms. Bailey made a public statement "that Health-Pro . . . had conducted an 'extensive background check' on [Ms.] Clark and that the background check was clean." "Upon information and belief, Health-Pro did not perform a criminal background check on [Ms.] Clark before assigning her to [Plaintiffs'] home" but, if it did, "Health-Pro ignored the results in assigning [Ms.] Clark to perform work on behalf of [Plaintiffs]." Plaintiffs alleged Ms. Clark's criminal history prior to 29 September 2016 consisted of the following convictions: "2008: found guilty of driving while license revoked;" "2009: found guilty of possession of drug paraphernalia;" and "2010: found guilty of criminal contempt[.]" Plaintiffs also included charges for which Ms. Clark was not convicted: "2010: charge for possession of drug paraphernalia;" "2010: charge for communicating threats (dismissed because of non-cooperating witness);" and "2011: charge for communicating threats (dismissed because of non-cooperating witness)."

Plaintiffs stated "upon information and belief, Health-Pro did not perform a driver's license check on [Ms.] Clark before assigning her to work . . . in [Plaintiffs'] home, including to drive [Mrs. Keith.]" "If Health-Pro did perform a driver's license check on [Ms.] Clark, Health-Pro ignored the results in assigning her to work as an aide in [Plaintiffs'] home," even though Ms. Clark "did not have a valid driver's license." Plaintiffs further alleged that "[Ms.] Clark also maintained a public Facebook page, which Health-Pro easily could have accessed. The Facebook page contains several posts further suggesting that [Ms.] Clark should not have been assigned to work as an in-home aide[,]" though "[i]t may have been acceptable for Health-Pro to hire [Ms.] Clark and assign her to another position besides providing in-home care services, such as an 'office only' position." Plaintiffs concluded that "Health-Pro knew or should have known of [Ms.] Clark's criminal background and lack of a valid

driver's license, as well as related facts establishing that [Ms.] Clark should not have been assigned to provide in-home care to [Plaintiffs,]" and "Health-Pro continued to assign [Ms.] Clark to provide in-home care to [Plaintiffs]" despite these facts.

Plaintiffs alleged that Defendant "had a duty to assign employees as aides to [Plaintiffs'] home with reasonable care, including properly screening its employees in order to decide which employees could be assigned to such positions[.]" Further,

> Health-Pro had a duty to not assign [Ms.] Clark to work as an aide providing in-home care on behalf of Health-Pro when it became aware of, or in the exercise of reasonable care should have become aware of, [Ms.] Clark's criminal record and driving record, as well as any other pertinent facts associated with her background or her actions on behalf of Health-Pro, including any inappropriate behavior, theft, or other concerns.

Plaintiffs then alleged that Defendant "carelessly and heedlessly was negligent in that it:" "failed to adopt and/or properly implement and enforce appropriate company policies regarding criminal background and driving record checks for employees . . . that would be assigned to work as in-home aides;" knew of Ms. Clark's unfitness to work as an in-home aide, or "failed to investigate and become aware of [Ms.] Clark's criminal background and driving record, including her lack of a driver's license, as well as other pertinent facts regarding her background before assigning her to work as an in-home aide;" "continued to assign [Ms.] Clark to provide in-home care to [Plaintiffs] after becoming aware of" these facts which made Ms. Clark unfit to work in Plaintiffs' home; and "knew of prior thefts at [Plaintiffs'] home, and that [Ms.] Clark was a primary suspect who consequently should have no longer been assigned to work at [Plaintiffs'] home," but "continued to assign [Ms.] Clark to provide in-home care to [Plaintiffs] despite . . . assurances it would no longer do so[.]"

Plaintiffs allege that Defendant's actions and inaction "recklessly created a dangerous situation for [Plaintiffs] . . . by continuing to assign to provide in-home care services an unsafe individual with a criminal history who lacked a valid driver's license[,]" the Defendant "had the ability to assign [Ms.] Clark to a different position other than providing in-home care services to . . . [Plaintiffs], but it recklessly continued to assign [Ms.] Clark to work as an in-home aide[,]" and that Defendant "knew or should have known that its actions and inactions described herein were reasonably likely to result in injury, damage, or other harm

to [Plaintiffs.]" Plaintiffs concluded: "The September 29, 2016 home invasion and robbery was a direct result of Health-Pro assigning [Ms.] Clark to provide in-home care services and thereby allowing her continuing access to [Plaintiffs] and their home[,]" and that Defendant's "conduct, undertaken with a reckless disregard for the safety of others . . ., was undertaken by Health-Pro's owners, officers, directors, or members of its management and, at the very least, was condoned by Health-Pro's owners and management."

2. **Evidence at Trial**

Defendant argued at trial that Plaintiffs' complaint alleged a cause of action for negligent hiring, not ordinary negligence, based in part on the testimonial evidence. For example, the following exchange occurred during the direct examination of Mr. Keith:

> Q. When you [Mr. Keith] hired Health-Pro did you ever speak to anybody from the company?
>
> A. Oh, yes, Mr. Bailey *and all the girls that worked for us*.
>
> Q. Do you remember anyone saying anything about *background checks*?
>
> A. *No*, not offhand, no.
>
> . . . .
>
> Q. [D]id you *have an understanding about background checks, about whether or not they would be run*?
>
> . . . .
>
> A. *I thought [background checks] had been [conducted]*, yes.
>
> . . . .
>
> Q. Did anyone from Health-Pro ever *tell you* if *she didn't have a driver's license*?
>
> A. *No*.
>
> . . . .
>
> Q. Did anyone *tell you* anything about her *Facebook posts*?
>
> A. *No*.

Q. When she was *assigned* to your home *did you assume that she had been fully screened* by Health-Pro?

A. *Yes*, I did.

. . . .

Q. Did you trust Health-Pro to *assign her only if she was going to be . . . safe* to have in the home?

A. I never really discussed that with them.

. . . .

Q. *Not pose a danger*?

A. *Yes*.

. . . .

Q. At some point, Mr. Keith, did y'all start having money missing from your home?

A. Yes.

. . . .

Q. Did anyone *tell Health-Pro* about this?

A. *I did*, *yes*.

Q. And *what happened*?

A. *I didn't see anything happen*. We were *told that they would look into it*. And after that nothing happened.

Q. Was [Ms.] Clark *pulled from the home for a period of time*?

A. *Yes*, *at one time she was*.

Q. Was that *when the money was missing*?

A. *Yes*.

Q. Was *that when Health-Pro said they would look into it*?

A. *Yes*.

. . . .

Q. *Do you know why she was put back in the home*?

A. I assume they needed her for the work.

. . . .

Q. Did *you assume that before she had been put back in the house that Health-Pro had done an investigation*?

A. I didn't know anything about an investigation. *I didn't know that there was any need for one.*

Q. Well, *when they pulled her* from the home when the money was missing *did you understand that they were looking into what happened*?

A. *Yes*, *they pulled two of the girls at the same time*, [Ms. Clark] and one other [Ms. Little].

. . . .

Q. That period in 2016 *when money was missing*, was *[Ms. Clark] working in your home* during that period?

A. She was working there, yes. *I don't know if she was in the house when it went missing or no*t.

(Emphasis added). Plaintiffs also introduced two letters from the Pitt County Child Support Agency requesting Ms. Clark's employment information because the agency was "required by law to investigate the possibilities of obtaining child support for child(ren) entitled to parental support. [The law] requires employers to provide certain . . . information so that child support may be collected or enforced." During cross-examination, Mr. Keith testified as follows:

Q. . . . . You were the one that had most of the business dealings with [Defendant] during the time that Health-Pro came in. And *during the time that you used their services from 2012 through the first half of 2016 you didn't have any concerns with the aides* they were sending into your home, *correct*?

A. *Yeah.*

Q. Okay. And, in fact, *you had no problems with any of the aides in your home until later in 2016*, correct?

A. We had *problems with one or two of them*, *but they were personality problems.*

. . . .

Q. *One of the aides* you had a problem with was *[Ms.] Little?*

A. *Yes.*

. . . .

A. [Ms. Little] had problems with my family not me.

. . . .

Q. I want to turn your attention to the money that went missing from your home around August 2016, sir.

. . . .

Q. *Is it fair to say that you don't know which aide, if any, took money from the home*?

A. *No, I didn't.*

. . . .

Q. At any given time there were usually three or four aides circulating through the home throughout the day?

A. Three or four aides during the day, there was only one at a time.

. . . .

Q. And you testified in your deposition *you were satisfied with how Mr. Bailey handled your complaints* about the missing money, correct?

A. *Yes.*

Q. And, sir, talking about Ms. Clark herself. *Prior to September 29th you had never had any concerns or problems with Ms. Clark in your home*, correct?

A. *No.*

. . . .

Q. [Ms. Clark] was *never verbally abusive to you or M[r]s. Keith*, correct?

A. *No.*

Q. She was *never physically abusive to you or M[r]s. Keith*?

A. No.

. . . .

Q. Do you recall testifying that in your deposition that your *daughter had an issue with Ms. Little*?

A. *Yes*.

Q. Okay. And *Ms. Little was removed from the home at the same time Ms. Clark* was, correct?

A. I assume so, *within days*.

Q. And *Ms. Little did not return to your home*, correct?

A. *No*.

. . . .

Q. You testified in your deposition that *you could have refused* to have Ms. Clark come back into the home, correct?

A. *Yes*.

Q. Okay. And you testified in your deposition that *you never felt forced to have Ms. Clark back into your home* at any point, correct?

A. *That's correct*.

(Emphasis added). Mrs. Keith's testimony was generally in line with Mr. Keith's testimony above, including the questions about whether Defendant had informed her about any background checks on Ms. Clark, told her Ms. Clark did not have a valid driver's license, informed her of any concerning Facebook posts, and asked her about the facts surrounding the missing money. She also testified:

Q. Did [Ms. Clark] ever drive you places?

A. I can't remember. At that time we were changing so many employees that I lost track who drove me where.

Q. Do you think if she was there during the day and you needed to go somewhere she might have been one of the ones to drive you somewhere?

A. It's possible, but I never had a problem with any of the drivers.

. . . .

> Q. Do you remember money going missing?
>
> . . . .
>
> A. I think it's my fault because I let someone see me take some money out of my dresser drawer and I didn't think much of it, but I was dumb enough to keep it where it was, same location and told Mr. Bailey about it and he asked permission to check my dresser drawer out, drawers. . . . . And after that there was nothing said about it, but [Ms. Clark] was absent for two days.[3] Then all of a sudden she was back and I was quite surprised.
>
> . . . .
>
> A. I didn't ask for her. They couldn't find someone and apparently she was there again. . . . *I didn't think she had any problems because she's back working for me again.*
>
> . . . .
>
> [A.] I had *thought that she had been checked out because – I just thought she had been* that's why she – wound up coming back.

(Emphasis added). Mrs. Keith testified on cross-examination:

> Q. *[Y]ou don't know if that person* [that Mrs. Keith believed she saw when she was removing some money from her dresser drawer] *was [Ms.] Clark*, right?
>
> A. *It's possible*, but I – all I saw was an arm and *at that time* [when she believed she saw one of the aides nearby as she was removing money], as I said previously, we were having *a changeover of personnel. Frankly, I don't remember who was on what nights.*
>
> . . . .
>
> Q. [W]hat it says [in your deposition is], *Did you suspect any particular aide of taking that money*, correct?
>
> A. *Yes.*
>
> Q. Okay. And then *your response up at the top was no*, correct?

3. The evidence shows that Ms. Clark was working at a different household for Defendant for at least two to three weeks before being returned to Plaintiffs' home.

A. *Yes*.

. . . .

Q. I want to talk about [Ms.] Clark, herself, with you. *You have characterized her in your deposition testimony as nice and pleasant*, correct?

A. *Yeah*.

Q. And prior to the night of September 29th *you never had any concerns about Ms. Clark being an aide in your home*, correct?

. . . .

A. *No*, I – because *they always mentioned we check our people out*.

Q. And you also testified previously that *when she returned* to your home in early September of 2016, that *you kept a closer eye on her but there wasn't anything going on*, correct?

A. No, but there had to be something going on.

Q. But *you didn't have any uneasy feeling or suspicion about Ms. Clark being in your home during that time frame*, correct?

A. *No*, . . . she never talked much. Very quiet.

Q. And do you recall . . . testifying in your deposition that . . . *there was nothing that Ms. Clark did that alerted you to her being involved in September 29th's events prior to those events*, correct?

A. I wouldn't know, *I never saw her do anything or take anything*, so –

(Emphasis added).

Plaintiffs' children, Frederick, Sarah Keith ("Sarah"), and Margret Keith ("Margret"), were also questioned thoroughly by Plaintiffs' attorney concerning whether they were informed by Defendant about Ms. Clark's criminal record, invalid driver's license, and Facebook posts.

During the charge conference, Defendant's attorney argued that the trial court should give an instruction on negligent hiring, supervision, or retention. Plaintiffs' attorney argued against giving that instruction,

contending that Plaintiffs' action was one of ordinary negligence. The trial court ruled in favor of Plaintiffs and only charged the jury on ordinary negligence.

3. **"Ordinary" Negligence**

[1] Plaintiffs contend that they properly pled ordinary negligence, and only ordinary negligence; in part because their complaint only included a claim titled "negligence," nowhere mentioned "negligent hiring"; and that "ordinary" negligence was the only claim they pursued at trial. They therefore argue that the trial court was correct to deny Defendant's motions for directed verdicts and a JNOV, that the trial court did not err in refusing Defendant's request to instruct on negligent hiring, and that the jury was properly instructed on "ordinary" negligence as the sole theory of Defendant's liability.

Defendant argues that Plaintiffs' allegations and the facts of this case constituted a claim for negligent hiring and, therefore, Plaintiffs were obligated under law to prosecute their claim as one for negligent hiring. We agree with Defendant.

In arguing that the general requirements of an action in ordinary negligence were appropriately applied in this case, Plaintiffs argue that "a contractual relationship can give rise to the duty of ordinary care." However:

> The law imposes upon every person who enters upon an active course of conduct the positive duty to use ordinary care to protect others from harm and a violation of that duty is negligence. *It is immaterial whether the person acts in his own behalf or under contract* with another. An act is negligent if the actor intentionally creates a situation which he knows, or should realize, is likely to cause a third person to act in such a manner as to create an unreasonable risk of harm to another. Restatement, Torts [§] 302, 303.

Toone v. Adams, 262 N.C. 403, 409, 137 S.E.2d 132, 136 (1964) (emphasis added) (citation omitted). Our Supreme Court in *Toone* further discussed the limited relevance of contractual obligations when the plaintiff decides to bring the action in tort instead of contract:

> It is well settled in North Carolina that where a contract between two parties is intended for the benefit of a third party, the latter may maintain an action in contract for its breach or in tort if he has been injured as a result of

> its negligent performance. The parties to a contract impose upon themselves the obligation to perform it; the law imposes upon each of them the obligation to perform it with ordinary care and they may not substitute a contractual standard for this obligation. *A failure to perform a contractual obligation is never a tort unless such nonperformance is also the omission of a legal duty.* The contract merely furnishes the occasion, or creates the relationship which furnishes the occasion, for the tort.

Id. at 407, 137 S.E.2d at 135 (emphasis added). Plaintiffs do not cite any authority that tends to show Defendant's duty to Plaintiffs was somehow more comprehensive due to the contract between them. We agree with Plaintiffs that, due to their contract with Defendant, Defendant had the duty of reasonable care in selecting applicants, including Ms. Clark, that were fit persons to work as in-home aides. However, that duty would exist even if there was no express contract between Plaintiffs and Defendant. *Id.* at 409, 137 S.E.2d at 136. Defendant's general duty to Plaintiffs in relation to the acts of Ms. Clark is no different because of the contractual relationship between Plaintiffs and Defendant—Defendant had a duty to exercise due care in hiring Ms. Clark, and that duty of due care continued throughout Ms. Clark's employment. *Id.* We note that the Rhode Island case cited by Plaintiffs, *Welsh Mfg. v. Pinkerton's, Inc.*, 474 A.2d 436 (R.I. 1984), was a negligent hiring or supervision case. *Id.*, at 442-44; *see also id.* at 441 (citation omitted) ("An employer's duty does not terminate once an applicant is selected for hire. Other courts have stated that an employer has a duty to retain in its service only those employees who are fit and competent."). That is not to say the terms of the contract cannot be considered as part of the factors establishing the *context* from which the trial court or jury determines the "reasonably prudent person" baseline.

Plaintiffs contend: "The duty of ordinary care applies to a broad range of conduct. Indeed, this Court has found an ordinary negligence instruction proper in a host of circumstances, including those implicating other areas of the law." However, Plaintiffs cite no case stating an employer can be held liable for the criminal actions of its employee in an ordinary negligence action. Plaintiffs provide the following legal precedent for their argument: "For example, in *Klinger v. SCI North Carolina Funeral Services., Inc.*, [189 N.C. App. 404, 659 S.E.2d 99 (2008)] (unpublished), this Court affirmed a trial court's use of an ordinary negligence instruction in a case about mishandling of a corpse. *Id*[.]" *Klinger* is an unpublished case, has no precedential value, involves statutory law regulating the disposition of human remains that is no

longer in effect, and the issue of "duty" was decided pursuant to the relevant statutes. *Id*.

Plaintiffs' additional cite in support of its position, *Peal ex rel. Peal v. Smith*, 115 N.C. App. 225, 444 S.E.2d 673 (1994), *aff'd by equally divided court*, 340 N.C. 352, 457 S.E.2d 599 (1995) (underlining added), is also an opinion without precedential value. *Peal By Peal v. Smith*, 340 N.C. 352, 457 S.E.2d 599 (1995) (when the votes in an opinion by our Supreme Court are equally divided, "the decision of the Court of Appeals is left undisturbed and stands without precedential value"). Plaintiffs contend: "Similarly, in *Peal*, this Court used an ordinary negligence analysis in what the parties had concluded was a dram shop case. This case is no different." (citations omitted). We disagree. In *Peal*: "The plaintiff . . . instituted a claim based in [ordinary] negligence against Defendant Smith and against his employer, Cianbro." *Peal*, 115 N.C. App. at 229, 444 S.E.2d at 676–77. This Court in *Peal* relied in part on Restatement (Second) of Torts § 317, which states:

> [An employer] is under a duty to exercise reasonable care so to control his [employee] while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the [employee]
>
> (i) is upon the premises in possession of the [employer] or upon which the [employee] is privileged to enter only as his [employee], or
>
> (ii) is using a chattel of the [employer], and
>
> (b) the [employer]
>
> (i) knows or has reason to know that he has the ability to control his [employee], and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 317 (1965). Concerning section 317(a)(ii), our Supreme Court has noted in a negligent hiring case: "A review of our pertinent case law reveals no support for the application of this particular section of the Restatement. We find no case in which liability has been imputed to an employer solely on the basis of an employee 'using a chattel of the [employer].' We decline to recognize this theory of liability in the situation presented in this case." *Braswell*

v. Braswell, 330 N.C. 363, 375, 410 S.E.2d 897, 904 (1991). Our review uncovers five North Carolina opinions citing Restatement (Second) of Torts § 317, including *Peal* and *Braswell*. In none of these opinions has "liability [ ] been imputed to an employer solely on the basis of" section 317. *Id*. In *Peal*, this Court held: "the common law duty of [an employer] to control his [employee] under certain circumstances as outlined in Restatement § 317, taken together with the [employer's] own written policies established a standard of conduct that if breached could result in actionable negligence." *Peal*, 115 N.C. App. at 233, 444 S.E.2d at 679. In light of the equally divided decision of our Supreme Court in *Peal*, rendering it without precedential value, we decline to adopt the analysis in *Peal*. We need not decide whether Restatement § 317 states a separate common law theory of negligence recognized in North Carolina, as Ms. Clark, on 29 September 2016, was neither on Defendant's premises or in a place she was "privileged to enter" at that time, nor did Defendant have any ability or opportunity to control Ms. Clark on 29 September 2016, or know of any necessity to do so and, therefore, the facts in this case do not meet the requirements as set forth in section 317. Restatement (Second) of Torts § 317.

We hold that, on the facts before us, the only action pled in Plaintiffs' complaint was one for negligent hiring. As made clear by the allegations in the complaint itself, as well as the testimony and other evidence presented at trial, Plaintiffs' allegations break down as follows: (1) Defendant's investigation into Ms. Clark's background was insufficient; (2) facts from Ms. Clark's background and application for employment that Defendant either knew, or should have known, made Ms. Clark unfit to be an in-home aide in Plaintiffs' home; (3) once Defendant learned about the two incidents when money was taken from Plaintiffs' home, and identified Ms. Clark as one of two aides who were working in Plaintiffs' home during the relevant time periods, which initially led to both aides being removed from Plaintiff's home, Defendant should not have returned Ms. Clark to service in Plaintiffs' home; (4) additionally, Defendant's investigation of Ms. Clark following the money incidents was insufficient; and (5) Defendant should have considered the two child support notices as a motive indicating Ms. Clark's responsibility for the thefts from Plaintiffs' home.

All of Plaintiffs' relevant allegations and evidence directly challenge whether Defendant should have hired Ms. Clark as an in-home aide; whether Defendant acted appropriately in response to hearing from Plaintiffs that money had been taken from their home on two occasions—which would have involved either greater supervision of—such as moving Ms. Clark to a no-client-contact position, as suggested by

Plaintiffs—or a decision regarding whether to retain her in Defendant's employ at all. Plaintiffs have cited no binding authority for the proposition that an action brought on allegations, and tried on facts, that clearly fall within the scope of a negligent hiring claim may avoid the heightened burden of proving all the elements of negligent hiring by simply designating the action as one in ordinary negligence, and we find none. Were we to accept Plaintiffs' arguments, it is unclear what relevance the firmly-established doctrine of negligent hiring would retain in North Carolina—it is difficult to foresee a circumstance where a plaintiff would choose to bring a negligent hiring action instead of an action in ordinary negligence. The evolution of employer liability jurisprudence, which includes the common law development of the negligent hiring doctrine for the purpose of *expanding* the limits of employer liability to third parties injured by the acts or omissions of employees, strongly suggests the doctrine of negligent hiring was intended as the *sole* means of imposing liability on employers who, as in this case, are alleged to have created circumstances by which their own negligent acts or omissions—their failure to exercise due care in protecting third parties from dangerous employees—were the proximate cause of injury to a third party. Noting that resolution of all negligence claims, including negligent hiring claims, is always a highly fact specific undertaking, we hold, on the facts of this case, that the sole claim alleged in Plaintiffs' complaint was one for negligent hiring, retention, or supervision. In this case, it was error for this action to proceed as a claim in ordinary negligence, and the trial court erred in denying Defendant's request for the jury to be instructed accordingly. This error was clearly prejudicial and would normally require a new trial. However, Defendant's motions for a directed verdict and a JNOV were argued pursuant to negligent hiring, as Defendant correctly contended that the facts as alleged and presented at trial only supported a negligent hiring claim.

In addition, in light of Plaintiffs' intention to proceed under an ordinary negligence theory, Defendant also moved for a directed verdict based on insufficiency of the evidence to support that alleged claim, beginning its argument as follows:

> In order to succeed on [negligent hiring]—and even in an ordinary negligence case [ ] Plaintiffs have to show that the events of September 29th, 2016, and [Ms.] Clark's unfitness and participation in those events were foreseeable to my clients. Those are the events that have caused [ ] Plaintiffs the only injury they complain of. And there is nothing in the record that suggests that it was foreseeable.

Defendant's motion for a directed verdict at the close of all the evidence, as well as its motion for a JNOV after the verdict, were renewals of these arguments.

We hold that the trial court erred in denying Defendant's motions with respect to ordinary negligence, as that claim was not properly before the trial court, and no evidence could support it. We therefore reverse and remand with instruction to the trial court to enter an order granting Defendant a JNOV on Plaintiffs' claim in ordinary negligence. Plaintiffs argued to the trial court that their claim was solely based in ordinary negligence, and that it did not include any claim pursuant to negligent hiring. They maintain that argument on appeal. Therefore, our holding would normally end the matter.

However, because there is a possibility that Plaintiffs will try and file an action against Defendant for negligent hiring, we believe it is appropriate to consider Defendant's motion for a JNOV based upon negligent hiring. As Plaintiffs implicitly acknowledge by several statements such as "the jury could have—and would have—reached the same conclusion, regardless of the instruction it was given[,]" the facts Plaintiffs presented to the jury would not have been different had they proceeded under a negligent hiring theory. We therefore consider Defendant's argument that Plaintiffs' evidence was insufficient to survive Defendant's motion for a JNOV based upon the theory of negligent hiring. We note that neither party has suggested Plaintiffs' evidence could support an action based upon *respondeat superior*, and we hold that, even if such a claim had been made, Plaintiffs' evidence could not support it.

4. **Negligent Hiring, Retention, and Supervision**

We therefore continue our analysis by conducting a review based upon a claim for negligent hiring, which Defendant contends is the only basis upon which Plaintiffs' negligence claim should have been submitted to the jury. After review of Plaintiffs' complaint and the facts developed at trial, we have determined that a claim for negligent hiring was properly pled, and evidence tending to support at least certain elements of such a claim was introduced at trial. Therefore, we review the evidence to determine whether the evidence was sufficient to survive Defendant's motion for a JNOV.

a. Standard of Review

In an action based upon negligent hiring, "there must be a duty owed by the employer to the plaintiff in order to support an action for negligent hiring." *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587,

615 S.E.2d 45, 48 (2005), *aff'd per curiam*, 360 N.C. 164, 622 S.E.2d 494 (2005). "It is only after a plaintiff has established that the defendant owed a duty of care that the trial court considers the other elements necessary to establish a claim for negligent hiring or retention[.]" *Id.* at 588, 615 S.E.2d at 49 (citation omitted).

> Once that duty is established then the plaintiff must prove four additional elements to prevail in a negligent hiring and retention case: "(1) the independent contractor acted negligently; (2) he was incompetent at the time of the hiring, as manifested either by inherent unfitness or previous specific acts of negligence; (3) the employer had notice, either actual or constructive, of this incompetence; and (4) the plaintiff's injury was the proximate result of this incompetence."

Id. at 587, 615 S.E.2d at 48 (2005).

Along with the general requirements a plaintiff must prove in order to establish an employer's duty of care, this Court has identified three specific elements that must be proven in order to show that an employer had a duty to protect a third party from its employee's negligent or intentional acts committed outside of the scope of the employment:

> One commentator, in analyzing the requisite connection between plaintiffs and employment situations in negligent hiring cases, noted three common factors underlying most case law upholding a duty to third parties: (1) the employee and the plaintiff must have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff must have met the employee[, "when the wrongful act occurred,"] as a direct result of the employment; and (3) the employer must have received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff [that resulted in the plaintiff's injury].

Id. at 587-88, 615 S.E.2d at 49. This Court "decline[s] to hold employers liable for the acts of their . . . employees under the doctrine of negligent hiring or retention when *any one* of these three factors was not proven." *Id.* at 588, 615 S.E.2d at 49 (citations omitted).

b. Defendant's Duty of Care Under *Little*

[2] Plaintiff argues that the requirements as set forth in *Little* do not control in this case. We disagree. In *Little*, this Court held:

> In the instant case [the employee] was not in a place where he had a legal right to be since he broke in to plaintiffs' home; [the employee] and plaintiffs did not meet as a direct result of [the employee's] relationship with defendants, since [the employee] did not enter plaintiffs' home as a salesman; finally, defendant[-employers] received no benefit, direct, indirect or potential, from the tragic "meeting" between [the employee] and plaintiffs. We have found no authority in North Carolina suggesting that defendant [-employers] owed plaintiffs a duty of care on these facts, and we hold that in fact none existed.

Id.[4]

We find the facts in this case analogous; Ms. Clark had no legal right to be at Plaintiffs' home, as a co-conspirator in the breaking and entering of Plaintiffs' home, that resulted in the robbery and kidnapping; Ms. Clark's presence at Plaintiffs' home on 29 September 2016 was not "as a direct result of [her] relationship with [Defendant], since [Ms. Clark] did not [constructively] enter plaintiffs' home as a[n in-home aide]"; and "[D]efendant[ ] received no benefit, direct, indirect or potential, from the tragic 'meeting' between [Ms. Clark] and [P]laintiffs." *Id.* Although, unlike the employee in *Little* who did not know his victim, Ms. Clark had worked for Plaintiffs for nearly a year, we hold, *on the facts of this case*, that these elements are necessary to establish Defendant's duty to protect Plaintiffs, and there is no evidence that supports any of these three elements. We examine the facts of this case in detail below. For these reasons, we hold that Plaintiffs' evidence was insufficient to survive Defendant's motion for a JNOV, and reverse and remand for entry of a JNOV in favor of Defendant on any negligent hiring, supervision, or retention claim based on the events of 29 September 2016. We recognize that the jury was not instructed on negligent hiring, but Defendant's motion for a JNOV was a renewal of his motions for directed verdicts, the denial of which also constituted prejudicial error to Defendant demanding this result.

We note that the *Little* requirements are associated with proving an employer's *duty of care*, not proximate cause. These elements go to the foreseeability that an employee will commit a wrongful act against a specific plaintiff, as well as differentiating between acts committed under color of the employee's employment with the employer—for

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4. *Little* involved an independent contractor of the employer, not an employee, but this distinction does not affect our analysis.

which the employer may have had a duty to act to prevent, and acts committed by the employee acting wholly independent of her status as the employer's employee—for which the employer normally would not have had a duty to act to prevent. Nonetheless: "It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct." Restatement (Second) of Torts § 302B(f.) (1965). Therefore, we do not dismiss the possibility that under an extraordinary set of facts an employer may have a duty to protect a third party from a negligently hired employee even though one or more of the factors set forth in *Little* are not met. "What is meant by legal duty . . . varies according to *subject matter and relationships*." *O'Connor v. Corbett Lumber Corp.*, 84 N.C. App. 178, 181, 352 S.E.2d 267, 270 (1987) (emphasis added) (citation omitted).

c. Defendant's Liability Notwithstanding the *Little* Requirements

Assuming, *arguendo*, the requirements set forth in *Little*, 171 N.C. App. at 587-88, 615 S.E.2d at 49, are not applicable in this case, we still find that the trial court erred in denying Defendant's motion for a JNOV based on a theory of negligent hiring.

"[T]he concept of negligence is composed of two elements: legal duty and a failure to exercise due care in the performance of that legal duty[.]" *O'Connor*, 84 N.C. App. at 181, 352 S.E.2d at 270 (citation omitted). Therefore, absent the *Little* requirements, Plaintiffs still had the burden of proving Defendant owed them a duty to protect them from Ms. Clark's criminal acts of 29 September 2016. "Negligence ' "presupposes the existence of a legal relationship between the parties by which the injured party is owed a duty which either arises out of a contract or by operation of law." ' 'If there is no duty, there can be no liability.' " *Prince v. Wright*, 141 N.C. App. 262, 266, 541 S.E.2d 191, 195 (2000). Further,

> the *presumption is that the [employer] has properly performed his duty in selecting his [employees]*, and before responsibility for negligence of [an employee] proximately causing injury to plaintiff . . . can be fixed on the [employer], it must be established by the greater weight of the evidence, the *burden being on the plaintiff*, that [the plaintiff] has been injured by reason of carelessness or negligence . . . *and that the [employer] has been negligent in employing or retaining such incompetent [employee], after knowledge of the fact [of the employee's unfitness]*, either actual or constructive.

Pleasants v. Barnes, 221 N.C. at 177, 19 S.E.2d at 629 (emphasis added) (citations omitted). As stated in the Second Restatement:

> It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases of negligence (see §§ 291- 293), it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct. Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the risk is relatively slight in comparison with the utility of the actor's conduct, he may be under no obligation to protect the other against it.

Restatement (Second) of Torts § 302B(f.) (1965). Further,

> Normally the actor has much less reason to anticipate *intentional* misconduct than he has to anticipate negligence. In the ordinary case he may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. This is true *particularly where the intentional conduct is a crime*, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law. Even where there is a recognizable possibility of the intentional interference, the possibility may be so slight, or there may be so slight a risk of *foreseeable* harm to another as a result of the interference, that a reasonable man in the position of the actor would disregard it.

Restatement (Second) of Torts § 302B(d.) (1965). This Court has recognized the rule that normally an employer will not be expected to anticipate criminal acts of its employee:

> As a general rule "[n]o person owes a duty to anyone to anticipate that a crime will be committed by another, and to act upon that belief." 57 Am. Jur. 2d Negligence Section 63 (1971). However, a duty to afford protection of another from a criminal assault or willful act of violence of a third person may arise, at least under some circumstances, if that duty is voluntarily assumed. *Id*.

O'Connor, 84 N.C. App. at 182, 352 S.E.2d at 270. This Court has recognized that when " 'the particular assault was not committed within the scope of the employment' ":

> [E]mployers of certain establishments can [only] be held liable to an invitee therein assaulted by an employee of the place of business whom the employer "knew, or in the exercise of reasonable care in the selection and supervision of his employees should have known, to be likely, by reason of past conduct, bad temper or otherwise, to commit an assault, even though the particular assault was not committed within the scope of the employment."

Stanley v. Brooks, 112 N.C. App. 609, 611, 436 S.E.2d 272, 273 (1993) (citation omitted). Actions for negligent hiring require two distinct "foreseeability" requirements. First, was the injury allegedly sustained by the third party due to the acts of the employee of a kind reasonably foreseeable by the employer, thereby creating a duty to protect the third party. Second, if the employer's duty to protect is proven, there is a foreseeability requirement for proving the employer's negligence was the proximate cause of the third party's injury and damages. *Stein v. Asheville City Bd. Of Educ.*, 360 N.C. 321, 328 n.5, 626 S.E.2d 263, 268 n.5 (2006) (citation omitted) (just as with the element of duty, "[f]oreseeability is also an element of proximate cause[,]" but when the reviewing court "hold[s] no duty existed, [it is] not [required to] reach the question of proximate cause"). These foreseeability analyses may overlap considerably since both require application of the same set of facts to the law. Employers in certain kinds of businesses—and we find Defendant's business to fall into this category—have an enhanced general duty to insure their employees are fit to undertake the employment for which they are hired—these are generally businesses that involve dangerous equipment or activities, and businesses where the employee will come in frequent contact with the general public or particular individuals. More care is required when hiring someone for jobs involving the use of explosives, flying aircraft, or providing medical care, for example, than for working at a typical desk job. However, even when there is a general duty of care, the plaintiff must still demonstrate that the employer had a specific duty to protect the plaintiff from injury of a kind similar to the actual injury resulting from the employee's acts.

The initial question in a negligent hiring action is did the employer use reasonable care before hiring an employee, taking into account the particular skills or character traits required to safely perform in the position. If the employer used reasonable care before hiring an employee

in light of the particularities of the job, and the employer continued to use reasonable care in supervising and retaining the employee, then the employer cannot be held liable for acts of the employee, not occurring in the course the employment, that cause injury to a third party. Importantly, even when the employer fails to act with due care in the hiring, supervision, or retention of an employee, the employer is *only* liable to third parties for the employee's acts outside of employment if the employee's acts *are of a kind* that were reasonably foreseeable *based solely on the characteristics of the employee that made the employee unfit for the position*, and only those disqualifying characteristics of which the employer *actually knew*, or would have discovered *had the employer acted with due care*. *Stanley v. Brooks*, 112 N.C. App. 609, 611, 436 S.E.2d 272, 273 (1993) (the plaintiff must prove "that the injury complained of resulted from the incompetency" rendering the employee unfit, and the employer's actual or constructive knowledge of the employee's particular unfitness).

In this case, in order to prove that Defendant had a duty to protect Plaintiffs from Ms. Clark's criminal acts, Plaintiffs had to prove that, based upon all the information Defendant knew, or, exercising due care should have known, a reasonable person would have foreseen that Ms. Clark was likely to conspire with dangerous individuals to perpetrate a home invasion robbery against Plaintiffs, by breaking into the house, controlling Plaintiffs by the use of firearms, and forcing Mr. Keith to drive to an ATM to obtain more cash—*or* some other criminal act against Plaintiffs of a similar nature and severity. *Murphey v. Georgia Pac. Corp.*, 331 N.C. 702, 706, 417 S.E.2d 460, 463 (1992) (the plaintiff must prove that "a person of ordinary prudence could have reasonably foreseen that such a result or some similar injurious result was probable") (citation omitted).

We first review the evidence to decide whether it was sufficient, pursuant to the doctrine of negligent hiring, to demonstrate Defendant had a duty to protect Plaintiffs from Ms. Clark's criminal acts on 29 September 2016. Adapting the standard as set forth by our Supreme Court to align with the facts of this case:

> With regard to the first element, [Defendant] ha[d] a duty to exercise due care in [hiring and supervising Ms. Clark]. The standard of due care is always the conduct of a reasonably prudent person under the circumstances. Although the standard remains constant, the proper degree of care varies with the circumstances.

Bolkhir v. N. Carolina State Univ., 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988) (citations omitted). Further, "the presumption is that the [employer] has properly performed his duty in selecting his [employees.]" *Pleasants*, 221 N.C. at 177, 19 S.E.2d at 629 (citation omitted). Plaintiffs were required to rebut this presumption with evidence from which the jury could have reasonably found in favor of Plaintiffs on every element of negligent hiring. *Id*. The first issue is whether Defendant used due or reasonable care in hiring Ms. Clark, and in supervising her during her employment, with the presumption being that it did.

Defendant began providing in-home aide services in 2010, and began providing these services to Plaintiffs on 13 February 2012. The uncontested evidence shows that none of Defendant's clients had reported any thefts or violent crimes—nor any other crimes, and that none of Defendant's clients had complained about any serious issues involving Defendant's in-home aides.[5] Ms. Clark began working for Defendant in September of 2015, and began working in Plaintiffs' home in late 2015, after having worked with another of Defendant's clients. There is no evidence that Ms. Clark's work or character was found wanting by the client in Ms. Clark's first in-home care aide position working for Defendant. Plaintiffs' testimonies in the depositions and at trial demonstrated, repeatedly, that they only had positive things to say about Ms. Clark's work, care, personality, and character prior to 29 September 2016. Mr. Keith testified that, "[p]rior to September 29th [he] had never had any concerns or problems with Ms. Clark[.]" Mrs. Keith testified that "prior to the night of September 29th [2016 she] never had any concerns about Ms. Clark being an aide in [her] home," and "didn't have any uneasy feeling or suspicion about Ms. Clark being in [her] home during that time frame[.]" None of the members of the Keith family who testified expressed any concerns, suspicions, or red flags related to Ms. Clark's regular in-home work providing care for Plaintiffs. None of them testified to any suspicions that Ms. Clark was the person responsible for the missing coins, the missing money from Mrs. Keith's dresser, or missing cash from Mr. Keith's wallet—until after 29 September 2016. By all accounts, Ms. Clark was an able, quiet, polite, and professional employee and, other than Margret's testimony that she complained that the aides working in Plaintiffs' home were not performing some of the duties that Defendant's informational materials indicated were to be

5. Mr. Bailey testified that one prior client had reported money in her house had been taken, and Defendant removed the aide who the client suspected from the home. According to Mr. Bailey, the client later called back to inform Defendant that she had found the money she thought had been stolen, and requesting the return of the removed aide. The aide refused.

provided, there were no complaints lodged against Ms. Clark, nor any disciplinary action taken, while she worked for Defendant—until the events of 29 September 2016.

Plaintiffs never contacted Defendant with any negative reports concerning Ms. Clark, nor expressed any fears or suspicions that Ms. Clark might be stealing from them, or otherwise represented any kind of threat to them or anyone else. Both Mr. Keith and Mr. Bailey considered the other to be a "friend," and Mr. Bailey went to Plaintiffs' home at least every two weeks. Mr. Bailey was collecting payment from Plaintiffs on these bi-weekly visits, but he also checked in with Plaintiffs about how they were doing, if the aides were working out, and generally socialized to the degree that Mr. Keith thought of Mr. Bailey as a friend. Mr. Bailey also called Plaintiffs fairly regularly, to discuss any topics relevant to Defendant's provision of care for Plaintiffs, and to generally "check in." Mr. Bailey's testimony was uncontested that Defendant's aides were supervised by "the R.N.s [registered nurses] and . . . the HR director," and that the R.N.s would supervise the aides in the client's homes on a regular schedule. Ms. Bailey testified: "The nurse is the supervisor for the aides. Also, the nurse goes out to the home of each client because they do a ninety-day supervised revisit. They also do an evaluation of how things are going in the home. They talk with the aide that's there in the home." A "validation of skills" form completed by one of Defendant's supervising R.N.s, Wanda Patrick ("Ms. Patrick"), was entered into evidence. This form was one of the in-home evaluations of Ms. Clark conducted in July 2016. Ms. Patrick's evaluation of Ms. Clark did not include any "unsatisfactory" responses to Ms. Clark's performance as an in-home aide.

Frederick testified that Margret "had a unique role in the sense that when she would come to town she would have the opportunity to spend multiple days in the home." "She would actually stay at the home so she would see the whole process for twenty-four, forty-eight, seventy-two hours at a time, which my other sister and I would not have that opportunity because we didn't overnight at the home[.]" Margret testified: "Well, [Ms. Clark] came in at night some, but she was there on the weekends and she was there on some days, too." Although Margret had the most opportunity of Plaintiffs' children to observe Ms. Clark and the other aides at work, and to get to know them personally, in her testimony Margret expressed no concerns about Ms. Clark prior to 29 September 2016.

Evidence shows that Ms. Clark's three references were called, one could not be contacted, one assessed Ms. Clark as having an "excellent"

work ethic, stating she "is a very hard worker she does [and] completes the task at hand[,]" and indicated that she was punctual. He also assessed her "professionalism and attitude" as "excellent," and stated: "I would hire [Ms. Clark] to work for me. Very good worker." A second reference assessed Ms. Clark's work ethic, punctuality, professionalism, and attitude as "Good." After one of Defendant's nurse-employee's interviewed Ms. Clark for approximately two hours, Ms. Bailey interviewed Ms. Clark, and had only positive responses to Ms. Clark's performance and demeanor in the interview, referring to Ms. Clark as "very soft-spoken. She was very mild and easygoing." "She was pleasant[,]" and "[v]ery polite. She always answered with yes, ma'am and no, ma'am. Just easygoing." When asked if her interview with Ms. Clark raised any concerns about the fitness of Ms. Clark, Ms. Bailey stated: "No, I didn't have any concerns." Ms. Bailey testified Ms. Clark regularly came into Defendant's office, and was always "pleasant," and that Ms. Clark's nurse supervisor would accompany Ms. Clark to the home of the client(s) Defendant was servicing to evaluate Ms. Clark's performance and the clients' satisfaction every ninety days. Ms. Bailey stated that Ms. Clark never received an evaluation of "unsatisfactory" for any category on any of her evaluations. Ms. Bailey testified concerning Plaintiffs' regard for Ms. Clark's work: "I received calls of how awesome [Ms. Clark] was and how pleased [Plaintiffs] were with her work and how she was always prompt and pleasant and respectful so I—you know, I didn't have any concerns about her."

When Ms. Clark was hired in 2015, she had three misdemeanor convictions for non-violent crimes: 2008: Conviction for driving while license revoked; 2009: Conviction for possession of drug paraphernalia; and 2010: Conviction for criminal contempt. Plaintiffs also note that Ms. Clark was twice charged "for communicating threats"; however, these charges were dismissed because the complainant refused to cooperate with prosecutors. Ms. Clark had no felony convictions and was therefore hirable pursuant to Defendant's written standards for employment. Mr. Bailey testified that Ms. Clark checked the box on her application indicating that she had never been convicted of a crime, which was not true, but she also filled out a criminal background check authorization form, which permitted Defendant to run a background check at any time during her employment. Defendant testified that it conducted a thorough criminal background check on Ms. Clark, and knew about all convictions and charges listed above, but could only produce two criminal search documents, one undated that simply indicated that Ms. Clark had some criminal charge against her in 2007, and that it was "DISPOSED[,]" and a second that was requested after the events of 29 September 2016.

Ms. Bailey testified that criminal background checks were run for every employee, and it was her understanding that one had been run on Ms. Clark.

Defendant's "CRIMINAL BACKGROUND INVESTIGATION POLICY" states: "The applicant shall be allowed to work if no reported felony convictions exist, pending receipt of the Criminal History Record information." Defendant's policy allowed employment of certain applicants who had been convicted of felonies, depending on the crimes committed and a favorable interview with the applicant concerning the felony convictions. Because Ms. Clark had never been convicted of a felony, Defendant did not break any contractual obligation to Plaintiffs by hiring an employee with misdemeanor convictions.

Defendant's criminal background check authorization form included a space asking for Ms. Clark's "Drivers License Number," and she filled in the space with the number for her N.C. Identification Card, which is the same as the number for her expired driver's license. Ms. Clark gave Defendant her N.C. Identification Card—along with her Social Security Card—to photocopy for its records. Defendant stated in its answers to Plaintiffs' interrogatories: "Driving clients was not a part of [Ms.] Clark's job duties[,]" and Plaintiff produced no evidence that Ms. Clark's duties included driving Plaintiffs nor, if Ms. Clark in fact drove Mrs. Keith on errands, that Defendant was aware of this fact. Defendant testified through Mr. Bailey that it had no knowledge of Ms. Clark driving Plaintiffs. Mrs. Keith testified that she could not recall if Ms. Clark ever drove her anywhere.

Plaintiff also produced two letters from the Pitt County Child Support Agency requesting Ms. Clark's employment information because the agency was "required by law to investigate the possibilities of obtaining child support for child(ren) entitled to parental support. [The law] requires employers to provide certain . . . information so that child support may be collected or enforced." These letters were dated 25 May 2016 and 9 September 2016. Plaintiffs contend this was evidence that Ms. Clark was in dire financial straits. Mr. Bailey testified that many of Defendant's workers have child-support obligations, and it was not unusual to get letters like these, concerning their aides, from county child support agencies.

Plaintiffs argue on appeal that Defendant should have conducted a Facebook investigation of Ms. Clark, and contend that several of Ms. Clark's Facebook posts were evidence of her violent or criminal disposition. Initially, these posts were not originated by Ms. Clark, they were "memes" created by someone else that she "reposted" on her Facebook

page. More importantly, the trial court instructed the jury "that the Facebook posts may not be used by you in the determination of any fact in this case." We presume that the jury followed the trial court's instructions, and that the trial court did not consider these posts as substantive evidence when it denied Defendant's motion for a JNOV.

As Plaintiffs state in their brief: "[Defendant] assigned [Ms.] Clark to [Plaintiffs'] home shortly after it hired her in [late] 2015." Plaintiffs then contend, however: "Soon thereafter, things around the house started to go missing." Plaintiffs' evidence only allows speculation concerning whether Plaintiff was working for them when they noticed some of Mr. Keith's rolls of coins were missing, as Plaintiffs contend the coins were *noticed* to be missing in "the fall of 2015," there is no evidence suggesting the *actual theft* was conducted during that time period, and Ms. Clark only began working at Plaintiff's house at the end of the "fall 2015" time period. Further, even if Ms. Clark was working at Plaintiffs' home when the coins disappeared, the next "thing around the house" did not "go missing" until over a year later. Meaning Ms. Clark worked at Plaintiff's house for over a year with no evidence that anything was taken from Plaintiffs during that time period.

Plaintiffs' daughter Sarah testified that she was the person who noticed the missing coins: "I found some money missing myself." Sarah's memory of when she noticed coins missing was uncertain, stating that it was: "Last year, maybe the year before. It was recent – in my head it was recent." "Last year" would have been 2017, which was after the events of 29 September 2016 and the termination of Ms. Clark's employment. "The year before" would have been 2016.[6] However, Plaintiffs allege: "In the fall of 2015, [Plaintiffs] discovered that approximately $90.00 in rolled coins had been stolen from a box inside their home." Sarah testified that she immediately alerted Plaintiffs: "I immediately . . . took the box to my father and said, Daddy, someone has taken money from here. Someone has taken some rolls of quarters." Sarah stated that Mr. Keith "said, let's put it underneath the cabinet . . . so I'll know where it's at. And that was the last I saw of it." Mr. Keith testified: "My granddaughter found it missing to begin with and as I recall it was somewhere around – I think it was around $90.00 in the first group of coins that were taken in the rolls – coin wrappers."

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6. If Sarah meant her statement to mean "a year ago, maybe two years ago," then she would be placing the event approximately between late March of 2016 and late March of 2017, as her testimony occurred on 20 March 2018. While Ms. Clark was working for Plaintiffs in March of 2018—and until the events of 29 September 2016, less the several weeks she was removed in August 2016—these time periods and her recollection that the theft was "recent" differ significantly from the alleged time period of "the fall of 2015."

Mr. Bailey testified that he had not been contacted about any money missing from Plaintiffs' house until August of 2016, when he was informed by Mr. Keith that $90.00 had been removed from his wallet. Mr. Bailey also testified that Mrs. Keith came to him at that point and informed him of the $1,200.00 missing from her dresser drawer:

> [Mrs. Keith said] I'm missing some money as well. And I says, well, how much are you missing and when did you realize that you was missing money? And she says, well, I'm missing a little over $1,200.00 and me and Mr. Keith was both flabbergasted about that and says, you are missing how much? . . . . She told me it was in her drawer. And I says, in your bedroom? . . . . I asked her, could we go and look at that, inspect the drawers? And so we went to the bedroom together and inspected the drawers. . . . . I says, can you remember the last time it was here? She says, it was about two or three weeks ago is the last time I remember actually seeing it. And so I says, you're sure? She says, yes. I says, have you recognized any aides that was here at the time that the money was missing? Do you suspect anyone? . . . . She says, I don't know. And then she says, well, there was one particular day when I felt like somebody was near me, but I didn't know who that was. And I asked her if she could really try to think hard about that. And she said that she would, but she came back and said I just cannot remember. I don't know, you know, who that was or, you know, if that even happened.

This testimony is corroborated in large part by the testimonies of Plaintiffs' witnesses. Mr. Bailey testified that they talked more in the living room about the missing money:

> And so that's when Mr. Keith came out and said to me, Sylvester, I didn't really want to tell you this. . . . . And he says, well, about six or seven months ago, he says, I was missing some coins. . . . . And he says, I believe it was – had to be at least $500.00. And so I says, Mr. Keith, I says, you are missing coins about six or seven or eight months ago, I says, can you pinpoint exactly when that was? And he says, I know, I cannot pinpoint when or what happened there. And I says, why didn't you report this to me? I says, you know, we can't do anything about it if you don't report this to me. And he says, I did not want to get any of the aides in any trouble. I did not want to make this out of a big deal or anything like that. And I told him, but you

> have to report things like this. So everything in the same day was reported to [Defendant] Health-Pro, the very same day.

The jury was played the video deposition testimony of Defendant, through Mr. Bailey, and in it Defendant gave the same testimony concerning when it was first informed about the missing money. Plaintiffs' evidence either corroborates Mr. Bailey's testimony, or fails to contradict it. Plaintiffs acknowledge in their appellate brief that they "told [Defendant] Health-Pro about the missing money—from both 2015 and 2016—on the same day, in August 2016." None of Plaintiffs' witnesses could give more than extremely general and broad estimates concerning when the coins were discovered missing, and Mrs. Keith could only state that she believed she had last seen the $1,200.00 two to three weeks prior to discovering it was missing. It is not clear from the evidence when Mrs. Keith actually discovered the money was missing. Plaintiffs' complaint alleges the $1,200.00 "was stolen" in "July or August 2016[.]" Mrs. Keith testified that she believed she saw an aide just outside her room one day as she was removing some cash from her dresser drawer, but she did not know who it was, stating: "all I saw was an arm and at that time, as I said previously, we were having a changeover of personnel. Frankly, I don't remember who was on what nights." Mrs. Keith testified that Mr. Bailey "seemed very concerned that money went missing from [Plaintiffs'] home[.]"

The only evidence that created a relatively short time period for a possible theft was for the money missing from Mr. Keith's wallet, and that came from Mr. Bailey. According to Mr. Bailey's testimony, Mr. Keith told him he had last seen the money in his wallet on Thursday or Friday, and discovered it missing on Sunday when he was trying to pay for food he had ordered. Defendant wrote "Unknown 2016" in the "Incident Date:" section of its "Incident Report" concerning Plaintiffs' allegations of missing money. The report indicates that Defendant was informed of the missing money on 15 August 2016, which was a Monday. Therefore, if Mr. Bailey was correct about Mr. Keith's statements, and if Mr. Keith was correct in his recollection, the $90.00 would have to have been taken between Thursday, 11 August 2016 and sometime on Sunday, 14 August 2016. Plaintiffs testified they had no reason to suspect Ms. Clark had taken the money from the wallet or from the dresser drawer, and did not produce evidence establishing that Ms. Clark was working on any of these days.

Plaintiffs testified that they had no idea when any of the money was taken, who might have been working when it was taken, and did not

identify any of Defendant's aides as suspects. Mr. Bailey testified that Plaintiffs did not want the current aides replaced, but that they were going to cut down on the hours of care provided, so Defendant removed Ms. Clark and Ms. Little, apparently based on the fact that they had been working for Plaintiffs for a long time, the other two aides working for Plaintiffs were relatively new, so only Ms. Clark and Ms. Little would have been working for Plaintiffs "about six or seven or eight months" prior to 15 August 2016.

Plaintiffs also contend that Defendant's decision to return Ms. Clark to work at their house two to three weeks after she and Ms. Little had been removed from the house is evidence of Defendant's negligence. Mr. Keith testified that the decision to return Ms. Clark to work at Plaintiffs' home was made by Defendant, but he "never felt forced to have Ms. Clark [come] back into [the] home." Mr. Keith testified that he "didn't know that there was any need for" an investigation by Defendant before returning Ms. Clark to work at Plaintiffs' home. Mr. Keith testified concerning the time period that money was taken: "[Ms. Clark] was working there, yes. I don't know if she was in the house when it went missing or not." He was asked: "Is it fair to say that you don't know which aide, if any, took money from the home?" Mr. Keith's answer was: "No, I didn't." He further testified that he was satisfied with the manner in which Defendant handled the issue of the missing money. Plaintiffs both testified that they never had any concerns about Ms. Clark working in their home prior to the events of 29 September 2016, including the period after money disappeared in "July or August." The evidence concerning the missing money at most raised a *possibility* that Ms. Clark, as well as other people, could have had the opportunity to take it. It is not at all clear that she was working for Plaintiffs at the time of the alleged 2015 coins incident, which meant any of the four aides working at Plaintiffs' home in the July to August time period could be equally suspect, as could anyone else who may have spent time in Plaintiffs' home during that time period. The evidence available to Defendant prior to 29 September 2016 implicating Ms. Clark in the alleged disappearance of coins or cash was at best speculative.

This Court has stated that there is no general duty to conduct criminal background checks prior to hiring an employee. *Stanley*, 112 N.C. App. at 612, 436 S.E.2d at 274 ("Although [the employer] admits that it did not do a criminal record check on [the employee], we believe that it did not have a duty to do so. *See*, *e.g.*, *Evans v. Morsell*, 284 Md. 160, 395 A.2d 480 (1978) (stating that the majority of courts do not recognize a duty to inquire about an employee's criminal record)."). Therefore, our

analysis is limited to—considering the context and known facts—did Defendant have a duty to conduct an inquiry before hiring Ms. Clark and, if so, did Defendant exercise due care in conducting the inquiry. *Stanley*, 112 N.C. App. at 612–13, 436 S.E.2d at 274. Further, even if Defendant was "negligent" in its duty to properly vet Ms. Clark for a position that required her to work in clients' homes, no duty would attach to Defendant to protect the injured client unless Ms. Clark's injurious acts were of a kind reasonably foreseeable in light of her particular unfitness for the employment, and the facts demonstrating her unfitness would have been uncovered had Defendant conducted an investigation with reasonable care. This is because an employer's "negligence" in hiring an employee does not create a blanket "duty to protect" that covers all third parties, irrespective of the surrounding circumstances.[7] That is, Plaintiffs had to prove the necessary duty element of Plaintiff's negligent hiring claim by demonstrating with substantial evidence that *either* Defendant failed to use reasonable care before hiring Ms. Clark, and thereby failed to uncover reasonably knowable facts that made Ms. Clark unfit for that position, *or* Defendant hired Ms. Clark in spite of knowledge of Ms. Clark's unfitness. Further, it was Plaintiffs' duty to prove that, *as a result of the particular unfitness* of Ms. Clark that *Defendant* "*knew*," either in fact or constructively, Ms. Clark injured Plaintiffs, and the nature or type of that injury was, in the view of a reasonably prudent person in Defendant's position, *the probable result* of Defendant's lack of due care in hiring and supervising Ms. Clark, in light of *Defendant's knowledg*e of her *particular* unfitness.

In this case, Ms. Clark's criminal record included convictions for a few misdemeanors that involved neither theft nor violence. Ms. Clark's application was satisfactory, including two good references. The fact that she checked the box indicating no convictions, even taken as intentionally deceptive, does not seem particularly noteworthy in the context of this case—particularly since Ms. Clark filled out the criminal record check form with her correct information, including social security number and N.C. Identification Card number. Owing child support is not disqualifying, in fact, retaining Ms. Clark in employment, better enabling her to meet her obligations, is acting in accordance with good public

7. "We refuse to make employers insurers to the public at large by imposing a legal duty on employers for victims of their independent contractors' ["Smith's"] intentional torts that bear no relationship to the employment. We note that . . . the result would be the same if Smith had been an employee of defendants[.] Smith could have perpetrated the exact same crimes against these plaintiffs, in the exact same manner, and with identical chances of success, on a day that he was not selling Omega's meats and driving Omega's vehicle." *Little*, 171 N.C. App. at 588–89, 615 S.E.2d at 49.

policy. Further, there does not appear to be any record evidence that Child Social Services ever actually needed to garnish Ms. Clark's wages. The Facebook posts were not evidence the jury could consider to decide any material fact, including Defendant's duty of care—and we find no significant relevance in these posts. Importantly, prior to 29 September 2016 Ms. Clark had worked for Defendant for over a year, had by all accounts done a fine job, was known as quiet and polite—Ms. Clark had established herself as a dependable employee that her clients appeared to like. This record of actual employment with Defendant serves as a substantial counterweight to the relatively minor potential "red flag" evidence Plaintiffs presented at trial.

In light of the events of 29 September 2016, it is easy to assume Ms. Clark did take money from Plaintiffs. However, we are limited to what was or reasonably should have been known to Defendant prior to that date. There was nothing solid from which Defendant would have been able to fairly accuse Ms. Clark of theft. Plaintiffs' testimony shows they did not have any reason to suspect Ms. Clark other than Defendant's attempt to narrow the number of aides that could have been working at Plaintiffs' home during the coin incident alleged to have happened in the fall of 2015 and the events in July or August of 2016. Plaintiffs testify that they assumed Defendant had cleared Ms. Clark prior to returning her to their house. Defendant states that it did clear her, as much as it reasonably could on the evidence it could procure. Plaintiffs did not feel threatened by Ms. Clark's presence, and everybody who testified concerning their reactions to the news that Ms. Clark had been involved in the 29 September 2016 crime testified that they were completely surprised.

We hold, on these facts, that a reasonably prudent person in Defendant's position, knowing *all* the facts that Plaintiffs introduced about Ms. Clark at trial, available to Defendant prior to 29 September 2016, would not have recognized the "possibility of the intentional" criminal acts of Ms. Clark—that the "risk of foreseeable harm" to Plaintiffs was of the kind that occurred on 29 September 2016, and the risk of [this kind of] harm was so "slight," "that a reasonable [person] in the position of [Defendant] would disregard it." Restatement (Second) of Torts § 302B(d.). Therefore, Defendant had no duty to protect Plaintiffs from Ms. Clark's criminal acts of 29 September 2016.

For the same reasons outlined above, we also agree with Defendant that there was insufficient evidence to take to the jury on the issue of proximate cause because the crime of 29 September 2016 was not a reasonably foreseeable result of any presumed negligence on the part of Defendant. Further, there are specific elements a plaintiff must prove to prevail in a negligent hiring case:

> (1) the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) *either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in 'oversight and supervision*,' . . . and (4) that the injury complained of resulted from the incompetency proved.

Stanley, 112 N.C. App. at 611, 436 S.E.2d at 273 (underlining added) (citation omitted). Based on the facts of this case, Defendant could only

> be held liable [for Plaintiffs'] assault[ ] by . . . [Ms. Clark if Defendant] "knew, or in the exercise of reasonable care in the selection . . . of [Ms. Clark] should have known, [Ms. Clark was] likely, by reason of past conduct, bad temper or otherwise, to commit [the] assault, even though the particular assault was not committed within the scope of [Ms. Clark's] employment."

Id. (citation omitted). Plaintiffs' evidence was insufficient to demonstrate proximate cause; that, based upon Ms. Clark's past conduct, the events of 29 September 2016, or some similarly serious and violent crime, were likely to occur.

III. Conclusion

We hold that Plaintiffs' complaint did not include a claim against Defendant based upon the doctrine of *respondeat superior*, and the facts could not support such a claim. We further hold that Plaintiffs' claim was one pursuant to the doctrine of negligent hiring, retention, or supervision, not, as argued by Plaintiffs, one in ordinary negligence. Therefore, the trial court should have granted Defendant's motion for a directed verdict, failing that, should have granted Defendant's request that the jury be instructed in accordance with negligent hiring and, finally, should have granted Defendant's motion for a JNOV on Plaintiffs' claim for ordinary negligence, because it was not the proper action to prosecute on these facts. Assuming, *arguendo*, Plaintiffs' claim pursuant to ordinary negligence was proper, we hold that Defendant's motion for a JNOV should have been granted based upon insufficient evidence of Defendant's duty to protect Plaintiffs from Ms. Clark's criminal acts and, as the crime was not reasonably foreseeable, Plaintiffs failed to produce sufficient evidence of proximate cause as well. We further hold that there was insufficient evidence of the elements of duty and

proximate cause pursuant to a claim for negligent hiring, supervision, or retention, and Defendant's motion for a JNOV should have been granted for that claim as well. As a result, judgment notwithstanding the verdict should have been granted in favor of Defendant on Plaintiffs' negligence claim, under any theory, and we reverse the judgment of the trial court and remand for entry of such an order. Finally, Plaintiffs' cross-appeal was conditioned on this Court remanding for a new trial. Because we have directed the trial court to enter judgment in favor of Defendant, Plaintiffs' cross-appeal concerning the issue of punitive damages is moot and, therefore, dismissed.

REVERSED AND REMANDED; CROSS-APPEAL DISMISSED.

Judge ZACHARY concurs.

Judge DILLON dissents with separate opinion.

DILLON, Judge, dissenting.

The majority concludes that the verdicts/judgments in favor of Plaintiffs must be reversed and that Defendant was entitled to judgment as a matter of law. I disagree.

It was *not* reversible error for the trial court to allow the case to be presented as one in "ordinary negligence," where Defendant argues that the case should have been characterized more specifically as one in "negligent retention." Though Plaintiffs allege that Defendant was negligent in retaining Ms. Clark, evidence of negligent retention is merely a means by which a plaintiff proves ordinary negligence. As such, negligent retention (like any other ordinary negligence claim) requires a plaintiff to show that the defendant owed a duty, that the defendant breached that duty, and that the plaintiff suffered an injury proximately caused by the breach.

And the evidence, *when viewed in the light most favorable to Plaintiffs*, was sufficient to make out an ordinary negligence claim based on their evidence of Defendant's negligent retention of a dishonest employee. The crux of the majority's analysis is based on its conclusion that Plaintiffs were *required* to show that the robbery occurred while the dishonest employee was on duty. I do not believe this to be a hard and fast rule. Rather, I conclude that an employer may still be held liable for negligent retention when its dishonest employee uses "intel" learned while on duty to facilitate a theft, though waits until off-duty to

commit the theft. Here, it should not matter here that Defendant's dishonest employee did not rob Plaintiffs while on duty, but rather waited to be off-duty to use her knowledge gained based on her employment of the location of a key to Plaintiffs' home hidden outside, the location of Plaintiffs' valuables within the home, and the times when the vulnerable Plaintiffs would be alone to facilitate the commission of the robbery.

Accordingly, my vote is "no error." The jury's verdict should be sustained.

Discussion

The facts of the case are relatively straight-forward.

Plaintiffs Mr. and Mrs. Keith are an elderly couple living in their own home. In 2012, they contracted with Defendant Health-Pro to employ qualified people to provide care to them in their home.

In 2015, Deitra Clark was employed by Defendant to serve as a caregiver and was assigned to Plaintiffs' home. She performed her caregiving services well. However, shortly after she was assigned to Plaintiffs' home, money belonging to Mr. Keith went missing. Months later, on two other occasions, while she remained assigned to Plaintiffs' home, more of Plaintiffs' money went missing. After working for about a year, Ms. Clark used her knowledge of Plaintiffs and their home to facilitate a break-in of the home and subsequent robbery.

Plaintiffs commenced this action against Defendant seeking damages suffered from the break-in/robbery, alleging that Defendant was negligent in continuing to assign Ms. Clark to their home and that this negligence was a proximate cause of their damages.

I. Ordinary Negligence vs. Negligent Retention

The majority concludes that it was error to allow Plaintiffs to characterize their claim as an ordinary/common law negligence claim, rather than as a negligent retention claim. *See Adams v. Mills*, 312 N.C. 181, 187, 322 S.E.2d 164, 169 (1984) (describing the tort as "ordinary common law negligence").) I disagree.

To make out a claim for ordinary negligence, "a plaintiff must [show]: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006).

Our Supreme Court has long characterized a claim alleging negligent retention as an ordinary negligence claim. For instance, nearly a

century ago, our Supreme Court held that a claim based on evidence of negligent retention of an incompetent employee "was sufficient to [reach] the jury as to [the] right of plaintiff to recover at common law for negligence." *Johnson v. R.R.*, 191 N.C. 75, 80, 131 S.E. 390, 393 (1926). The Court characterized "[t]he action brought by [the] plaintiff [in that case] was a common-law action for negligence[,]" *id.* at 79, 131 S.E. at 392, recognizing that the employer had a duty "to see that those admitted to and retained in his service are fitted for the duties imposed upon them, the measure of responsibility being the exercise of ordinary or reasonable care." *Id.* at 80, 131 S.E. at 393.

More recently, our Supreme Court again characterized a claim for negligent retention as a "common law negligence" claim. *See Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 335-36, 678 S.E.2d 351, 353 (2009).

Common law negligence differs from other distinct forms of negligence by the proof that may be required. For example, gross negligence requires additional proof of an "intentional wrongdoing or deliberate misconduct[,]" by the defendant. *Ray v. N.C. DOT*, 366 N.C. 1, 13, 727 S.E.2d 675, 684 (2012). But as a type of ordinary negligence, a plaintiff alleging negligent retention must merely show that the defendant owed plaintiff a duty, that the defendant breached this duty, and that this breach was a proximate cause of some injury suffered by the plaintiff. And as explained in the next section, I conclude that Plaintiffs met their evidentiary burden.

II. Sufficiency of Plaintiffs' Evidence for Actionable Negligence

The majority concludes that Plaintiffs failed to offer sufficient evidence on either ordinary negligence or negligent hiring. I disagree. As stated above, negligent hiring is merely a theory by which a plaintiff proves ordinary negligence.

A. Duty

Defendant clearly owed Plaintiffs, an elderly couple in poor health, a **duty** to exercise reasonable care in providing caregivers who were *not only* competent in providing for their physical needs, *but also* who were honest and not likely to take advantage of their position of trust to steal from Plaintiffs. Defendant knew that its caregivers would have wide access to its clients' homes and that its clients were vulnerable to being taken advantage of by dishonest caregivers.

The majority relies, in large part, on its conclusion that Defendant owed no legal duty to Plaintiffs for any harm Ms. Clark caused them

when she was not on the clock. The majority relies on *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 615 S.E.2d 45 (2005), to support this conclusion. I conclude that the majority misreads *Little* as *requiring* that the employee to be on-duty as an essential element of every negligent retention claim.

In *Little*, an employer hired a dishonest person to deliver meat from a truck to the employer's clients. The dishonest employee drove into a neighborhood, parked the truck in a customer's driveway; but then proceeded to break into the house of a neighbor *who was not a customer or prospect of the employe*r. *Id*. at 584, 615 S.E.2d at 47. We held that even assuming the employer knew its employee was dishonest, the employer could not be held liable for the break-in of the neighbor's home. We reasoned that the employer owed no duty *to the neighbor* because its employment relationship with its dishonest employee had nothing to do with the break-in. *Id*. at 589, 615 S.E.2d at 49. Specifically, we so held based on the facts of that case because:

> (1) the employee "was not in a place where he had a legal right to be [when] he broke [into the] plaintiffs' home";
>
> (2) the employee "and plaintiffs did not meet as a direct result of [the employee's] relationship with defendants" and "did not enter plaintiffs' home as a salesman";
>
> (3) the defendant-employers "received no benefit, direct, indirect or potential, from the tragic 'meeting' between [the employee] and plaintiffs."

Id. at 588, 615 S.E.2d at 49.

The present case is distinguishable from *Little*. Here, the harm to Plaintiffs (the break-in) had everything to do with Ms. Clark's employment relationship with Defendant, though it happened when she was off-duty. Plaintiffs and Ms. Clark *met* as a direct result of her employment with Defendant. And though Ms. Clark was off-duty and had no right to be in Plaintiffs' home when the break-in occurred, Ms. Clark used "intel" she learned while she was *on the clock* to target Plaintiffs and to facilitate the break-in. (This "intel" is explained more fully in subsection C. below concerning the "proximate cause" element). And Defendant otherwise received a benefit – being paid large sums of money by Plaintiffs – from Ms. Clark working in Plaintiffs' home, when she gained the "intel."

The majority's rigid interpretation of *Little*, that the harm in every negligent retention case *must* occur when the employee is "in a place

where he had the right to be," would lead to illogical results. For example, based on the majority's logic, Defendant would have been subject to liability *only if* Ms. Clark had let her accomplices in and showed them where valuables were hidden *while on duty*. But, Defendant escapes liability simply because Ms. Clark and her accomplices waited for her to be off duty to use her intel to gain entry and to locate Plaintiffs' valuables. Or consider the following example:

> Assume a restaurant retained a parking valet it knew was a car thief, and assume the valet stole the car of a patron. Based on the majority's reasoning, the restaurant would be subject to liability for negligent retention *only if* the valet stole the car while on duty. The restaurant, would not be liable, though, if the valet merely made a copy of the patron's car key while on duty, as the patron dined, and then waited until he was off-duty to use that key to steal the car.

Little would be applicable if Ms. Clark and her accomplices had broken into the house of the Plaintiffs' next-door neighbor, to whom Defendant owed no duty and about whom Ms. Clark would not have gained intel simply based on her employment. In the same way, if the valet in my example did not make a key but had hot-wired the patron's car when off duty, perhaps the restaurant would not be liable, as there would be no connection between the valet's employment and the theft.

B. Breach

Defendant had a duty to Plaintiffs to exercise reasonable care to see that its caregivers were not the type who would likely to take advantage of their access to the lives and homes of Defendant's clients. There was sufficient evidence, when viewed in the light most favorable to Plaintiffs, that Defendant **breached this duty** it owed to Plaintiffs by allowing Ms. Clark to continue working in Plaintiffs' home: There was evidence which suggested that Defendant should have known that Ms. Clark was dishonest *and* capable of the robbery, perhaps not in September 2015 when she was initially hired by Defendant, but certainly a year later by mid-September 2016, weeks before the break-in. By that time, Defendant knew that Ms. Clark had lied on her job application about her criminal past; that she was having on-going money troubles; that money had gone missing in Plaintiffs' homes on three separate occasions, all after Ms. Clark was assigned there; and that Ms. Clark was one of only two caregivers likely to have been the culprit. Specifically, it could be inferred from the evidence, viewed in the light most favorable to Plaintiffs, that:

In 2012, Defendant contracted with Plaintiffs to provide caregivers.

Three years later, in September 2015, Ms. Clark was hired by Defendant as a caregiver and was assigned to Plaintiffs' home. Up to that time, nothing had been reported stolen by Plaintiffs. Defendant learned at some point before the break-in that Ms. Clark had lied on her job application about having no criminal history.

In October 2015, only a month after Ms. Clark began working in the Plaintiffs' home, several hundred dollars in rolled coins belonging to Plaintiffs' went missing, though Defendant was not immediately notified.

In May 2016, Defendant learned that Ms. Clark was having money problems: Defendant, as Ms. Clark's employer, was notified by Pitt County that Ms. Clark was in arrears in child support payments.

Three months later, in August 2016, Plaintiffs met with Ms. Clark's supervisor and first reported the October 2015 theft. Plaintiffs also reported that $90.00 had *recently* been taken from Plaintiff, Mr. Keith's wallet and $1,200.00 had *recently* been taken from Plaintiff, Mrs. Keith's dresser. Ms. Clark's supervisor concluded that if a caregiver had stolen the money, it was likely either Ms. Clark or one other certain caregiver. Each, though, when questioned, denied stealing from Plaintiffs.

After learning of the three thefts, Defendant removed Ms. Clark from Plaintiffs' home. But weeks later, Defendant again placed Ms. Clark in Plaintiffs' home, signaling to them that Defendant had used reasonable diligence to determine that Ms. Clark was not the thief.

By letter dated 9 September 2016, shortly after Ms. Clark was re-assigned to Plaintiffs' home, Defendant was again notified that Ms. Clark was again delinquent on paying child support. Defendant, though, continued assigning Ms. Clark to work in Plaintiffs' home without raising any concern to Plaintiffs.

Three weeks later, Ms. Clark participated in the break-in of Plaintiffs' home, in which well over $1,000.00 was stolen from Plaintiffs.

There are cases suggesting that an employer breaches its duty to exercise reasonable care to provide honest caregivers by failing to conduct a criminal background check or by knowledge of minor crimes in the remote past. However, the issue here is not Ms. Clark's criminal record itself, but rather that Defendant knew Ms. Clark *had lied* on her job application about it. This lie put Defendant on notice that Ms. Clark was not an honest person. And while knowledge of the lie, by itself, might not have constituted a breach, it along with Defendant's knowledge of the three thefts and that Ms. Clark, a woman who had lied on her job application and who was having money troubles, was one of two suspects were enough to reach the jury on this issue. Reasonable minds can differ as to whether continuing to place Ms. Clark in Plaintiffs' home with all this knowledge was sufficient to constitute a breach. The jury made its call.

C. Proximate Cause

The evidence was sufficient for the jury to infer that Defendant's breach of duty was a **proximate cause** of the break-in. Plaintiff's evidence showed that Ms. Clark used information learned *while on the job* to target Plaintiff's home and facilitate the break in/robbery:

> That Plaintiffs were advanced in age and not in good health and, therefore, easy targets for a robbery.
>
> The location of a key to Plaintiffs' home hidden outside in an obscure location, allowing the perpetrators to gain entry quietly, without any warning or causing any neighborhood disturbance.
>
> The location of Mr. Keith's gun, allowing the perpetrators to grab the gun before Plaintiffs could get to it to defend themselves.
>
> That no one would be with Plaintiffs after 11:00 p.m., after the last caregiver left for the day.
>
> The location of hundreds of dollars in rolled coins belonging to Mr. Keith hidden in an obscure location within the home, allowing the perpetrators to steal quickly.
>
> That Mr. Keith had a car, could still drive, and had a bank card from which he could access money from his account, allowing the perpetrators, who did not have a car during the robbery to force Mr. Keith to drive one of them to his bank and withdraw $1,000.00.

There may have been other proximate causes. But as our Supreme Court has instructed, "[w]hen two or more proximate causes join and concur in producing a result complained of, the author of each cause may be held for the injuries inflicted." *Hairston v. Alexander*, 310 N.C. 227, 234, 311 S.E.2d 559, 566 (1984).

Defendant argues that there was no proximate cause since it was not "foreseeable" that Ms. Clark would participate in an aggressive robbery. Indeed, our Supreme Court has held that "[f]oreseeability is [ ] a requisite of proximate cause." *Id.* at 233, 311 S.E.2d at 565.

But our Supreme Court also instructs that (1) "the test of foreseeability [ ] does not require that defendant should have been able to foresee the injury *in the precise form* in which it actually occurred" and (2) "the law of proximate cause does not always support the generalization that the misconduct of others is unforeseeable. The intervention of wrongful conduct of others may be the very risk that defendant's conduct creates." *Id.* at 233-34, 311 S.E.2d at 565 (emphasis added). And whether a defendant's negligence was a "proximate cause of an injury is ordinarily a question for the jury." *Short v. Chapman*, 261 N.C. 674, 680, 136 S.E.2d 40, 45 (1964).

There was enough evidence here from which the jury could infer that it was foreseeable that: (1) a dishonest caregiver might take advantage of the access and information she would gain due to the nature of the job; (2) Ms. Clark, if she was the culprit of the earlier thefts, might steal again, given that she was having money troubles; and (3) Ms. Clark might wait to be off duty to steal again, which would require a break-in, since she was recently under suspicion for the earlier thefts.[1]

III. Jury Instructions

I disagree with the majority's contention that the trial court committed reversible error by giving certain jury instructions.

Defendant argues in its brief that the trial court erred in instructing the jury on the "duty" element.

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1. Defendant cites *Williamson v. Liptzin*, 141 N.C. App. 1, 539 S.E.2d 313 (2000), to support its contention that Plaintiffs' injuries were not foreseeable. However, the facts in *Williamson*, where we concluded that there was no proximate cause as a matter of law, are easily distinguishable. In *Williamson*, the plaintiff, who had killed two people during a psychotic episode, sued a psychiatrist who had treated him *several months earlier* at a time when his psychosis was under control due to medication. We held that the shooting was unforeseeable because it was too remote in time from the defendant's treatment and there was no evidence that a professional could have predicted the plaintiff's violent acts.

The trial court gave North Carolina Pattern Jury Instruction 102.11, which describes "duty" generally, as follows: "Every person is under a duty to use ordinary care to protect himself and others from injury. Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect himself or others from injury." N.C.P.I. Civil 102.11.

Defendant argues in its brief that the trial court should have given the following, more detailed instruction on "duty," which it requested and which closely tracks language in *Little*:

> The plaintiff must prove that the defendant owed plaintiff a legal duty of care. This means that the plaintiff must prove that [the employee] and the plaintiff were in places where each had a right to be when the wrongful act occurred, that the plaintiff encountered [the employee] as a direct result of his employment by the defendant, and that the defendant must reasonably have expected to receive some benefit, even if only potential or indirect, from the encounter between (the employee) and the plaintiff.

Defendant contends that the jury should have been instructed that "[w]hether the relevant individuals were in places where they had a right to be . . . is relevant to this matter" as this matter is a negligent retention case.

The trial court's actual instruction was a correct statement of the law in this case, as Plaintiffs claim was one in ordinary negligence. But it would not have necessarily been inappropriate for the trial court to expound on some of the elements, provided the requested instructions were a correct statement of the law as supported by the evidence. I disagree, though, that the instruction on duty requested by Defendant, though maybe appropriate in certain negligent retention cases, would have been appropriate in this case. No one disputes that the "wrongful act" occurred when Ms. Clark had no right to be in Plaintiffs' home. However, as explained above, it was enough for Plaintiffs to show that Ms. Clark used intel learned while she was on the job to facilitate the robbery which occurred after she had left work for the day. Accordingly, the instructions requested by Defendant would have confused the jury. If followed by the jury, the instructions would have necessarily resulted in a verdict for Defendant. In fact, if the instructions were an accurate statement of the law, as applied to the evidence in this case, then Defendant would have been entitled to judgment as a matter of law. Based on the requested instructions, Defendant owed no duty to

Plaintiffs *solely* because the robbery occurred when Ms. Clark was off the clock, and therefore could not be held liable, notwithstanding that Defendant had been negligent in continuing to place Ms. Clark in Plaintiffs' home, that Ms. Clark provided the intel learned while placed in Plaintiffs' home to the perpetrators to facilitate the break-in, that it was foreseeable that Ms. Clark would try and steal from Plaintiffs again, and that the break-in would not have otherwise occurred.

Also, I conclude that Defendant failed to meet its burden to show that the jury was "likely misled" by the instructions which were actually given. *Coppick v. Hobbs*, 240 N.C. App. 324, 334, 772 S.E.2d 1, 9 (2015). It is unlikely that the jury did not understand the case before it — that it did not find for Plaintiffs based on anything other than its determination that Defendant owed Plaintiffs a duty to provide honest caregivers, that Defendant breached this duty by continuing to place Ms. Clark in Plaintiffs' home, despite their knowledge about her, and that it was the information that Ms. Clark learned through her employment about Plaintiffs that caused Plaintiffs to be targeted and facilitation of the break-in.

Reasonable minds can differ regarding Defendant's liability for the criminal conduct of its employee Ms. Clark towards its client. But the jury has spoken in this case, and my vote is to honor their verdict.

JERRY MACE, SR. & MACE GRADING CO., INC., PLAINTIFFS
v.
SCOTT T. UTLEY, II, JODY BELL, ENERGY PARTNERS, LLC & ENERGY PARTNERS OF NC, LLC, UTLEY ENTERPRISES, LLC D/B/A ENERGY PARTNERS OF MEBANE, DEFENDANTS

No. COA19-726

Filed 15 December 2020

1. Discovery—depositions—refusal to appear—defective notice —no sanctions

The trial court did not abuse its discretion in denying plaintiffs' motion to compel defendants to appear for depositions, where plaintiffs gave defective notice of the depositions under Civil Procedure Rule 30 by requiring defendants to be deposed in a different county from the one where they resided. Consequently, it was unnecessary for defendants to file a motion for a protective order to avoid

sanctions under Rule 37 because their refusal to appear for depositions did not warrant sanctions.

2. Corporations—summary judgment—genuine issue of material fact—alleged promise to convey ownership interest in company

In a dispute involving two business owners and their companies, where plaintiff alleged that defendant fraudulently induced him to invest in defendant's businesses (also named defendants in the action) by promising him an ownership interest in one of those businesses, which he never received, the trial court's order granting summary judgment in favor of defendants was reversed because a genuine issue of material fact existed regarding whether plaintiff took out a $300,000 loan to pay off an unrelated, preexisting debt or to buy the ownership interest that defendant allegedly promised him.

Judge BRYANT concurring in part and dissenting in part.

Appeal by plaintiffs from orders entered 22 March 2019 by Judge Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 3 March 2020.

K.E. Krispen Culbertson for plaintiffs-appellants.

Steffan & Associates, P.C., by Kim K. Steffan, for defendants-appellees.

MURPHY, Judge.

When Plaintiffs fail to comply with discovery rules, we affirm the trial court's order denying the motion to compel depositions. Where there are genuine issues of material fact, we hold the trial court errs in entering summary judgment in favor of Defendants and dismissing Plaintiffs' action.

BACKGROUND

In 2005, Defendant Scott T. Utley, II ("Utley"), a member/manager of Defendant Energy Partners, LLC ("Energy Partners"),[1] paid $150,000.00 for a 25% ownership interest in Energy Partners. To finance the 25% interest, Utley borrowed $150,000.00 from BB&T and secured the loan by executing deeds of trust on real property.

1. Energy Partners, LLC, a South Carolina corporation, was registered to do business in North Carolina under the trade name "Energy Partners of N.C., LLC," a named Defendant in this action.

In April 2007, Utley executed an agreement to purchase all of the assets of Energy Partners.[2] Pursuant to the asset purchase agreement, Utley assumed a lease agreement between Energy Partners and Foust Oil Company, Inc. ("Foust Oil"). Utley assigned that lease agreement to Utley Investments, LLC ("Utley Investments"). Utley Investments arranged financing with BB&T for the purchase of Energy Partners' assets. The financing was secured by a $300,000.00 deed of trust on real property purchased from Foust Oil, located on Highway 70 in Mebane ("Mebane property").

A few months later, Defendant Jody Bell ("Bell")[3] met with Plaintiff Jerry Mace, Sr. ("Mace"), the owner of Plaintiff Mace Grading Co., Inc. ("Mace Grading"). Mace owned 8.81 acres of land located in Caswell County which he sold to Utley Investments to use as a site for propane storage. Mace subsequently borrowed $300,000.00 from MidCarolina Bank, with his personal residence as collateral.

Meanwhile, Utley Investments filed an *Assumed Name Certificate* in the Orange County Register of Deeds to do business under the trade name "Energy Partners of Mebane." Utley Investments d/b/a Energy Partners of Mebane borrowed $100,000.00 on 23 April 2008 and $200,000.00 on 2 June 2008 from BB&T to fund cleanup costs for the Mebane property—used by Foust Oil for its distribution bulk plant—after Foust Oil failed to remove contaminated soil from the property. Mace granted Utley permission to use one of his properties as collateral for the loans. In turn, Utley agreed to pay all the property taxes and insurance.[4] Mace provided start-up materials, such as a storage tank, asphalt millings, concrete saddles, and vehicles. Utley was allowed to purchase fuel on credit from Gateco Fuels, using Mace's account. Utley allowed Mace to receive fuel at no charge to offset the balance of the loan.

Energy Partners of Mebane subsequently contracted with Mace Grading to remove the contaminated soil from the Mebane property. Mace provided trucks and drivers to remove the contaminated soil. After the work was completed, Mace Grading invoiced Energy Partners of Mebane. Energy Partners of Mebane sued Foust Oil to recoup the cleanup costs for the soil. The matter was settled out of court, but

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2. After Energy Partners sold its assets, it stopped filing annual reports with the Secretary of State, and the corporation was administratively dissolved in September 2010.

3. Bell is Utley's mother, who assisted Utley with administrative matters in his business.

4. Utley made payments until 2017 when the lawsuit commenced.

none of the settlement money was applied to the balance of Mace Grading's invoice.

Plaintiffs Mace, in his individual capacity, and Mace Grading filed a complaint seeking to pierce the corporate veil for punitive damages and alleging claims for breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices against Defendants. Defendants subsequently moved for summary judgment on Plaintiffs' claims and Plaintiffs filed a motion to compel Utley and Bell to appear for depositions. The trial court granted Defendants' summary judgment motion and denied Plaintiffs' motion to compel. Plaintiffs timely appealed.

ANALYSIS

A. Plaintiffs' Motion to Compel

[1] Plaintiffs argue the trial court abused its discretion in denying their motion to compel the depositions of Utley and Bell on the basis of its finding that Plaintiffs failed to comply with discovery rules. We disagree.

When we "review[] a trial court's ruling on a discovery issue, [we] review[] the order of the trial court for an abuse of discretion." *Midkiff v. Compton*, 204 N.C. App. 21, 24, 693 S.E.2d 172, 175 (2010). An abuse of discretion occurs "where the [trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Both parties were on notice that all discovery must be completed by 28 February 2019. The timeline of events during discovery reveal on 14 January 2019 Plaintiffs contacted Defendants to discuss taking depositions for Utley and Bell. In response, Defendants indicated a desire to depose Mace. Counsel for both parties agreed to depose Utley, Bell, and Mace on the same day and exchanged proposed dates for scheduling the depositions.

On 15 January 2019, Defendants' counsel emailed two proposed dates in February to conduct the depositions. Seven days later, Plaintiffs' counsel responded suggesting a new date. Defendants' counsel inquired again about the two February dates and Plaintiffs' counsel did not respond for another two weeks. By that time, the two February dates were no longer available. On 4 February 2019, Plaintiffs' counsel inquired about dates for the last week of February. Defendants' counsel responded the following day proposing two alternate dates. Plaintiffs' counsel did not respond to that email until 12 February 2019, and again, the proposed dates were unavailable. When Plaintiffs'

counsel asked about March dates, Defendants' counsel declined to accommodate the request because it was after the discovery deadline.

On 14 February 2019, Plaintiffs' counsel served a written notice of deposition for Utley and Bell, to be held on 28 February 2019. However, Defendants' counsel informed Plaintiffs' counsel Utley and Bell would not attend the depositions and Plaintiffs filed a motion to compel, which was subsequently denied.

Rule 30 of the North Carolina Rules of Civil Procedure states:

> A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. . . . The notice shall be served on all parties at least 15 days prior to the taking of the deposition when any party required to be served resides without the State and shall be served on all parties at least 10 days prior to the taking of the deposition when all of the parties required to be served reside within the State. Depositions of parties, officers, directors or managing agents of parties or of other persons designated pursuant to subsection (b)(6) hereof to testify on behalf of a party may be taken only at the following places:
>
> *A resident of the State may be required to attend for examination by deposition only in the county wherein he resides or is employed or transacts his business in person. . . .*

N.C.G.S. § 1A-1, Rule 30(b)(1) (2019) (emphasis added). While Plaintiffs contend it was improper for Utley and Bell to refuse to appear for depositions, we note the notice of deposition was defective under Rule 30 as it required Utley and Bell to attend a deposition in Guilford County, even though they were residents of Orange County.

Plaintiffs contend Defendants should have filed a motion for protective order and state the reasons for not appearing for depositions. We reject that contention. Rule 37 of the North Carolina Rules of Civil Procedure allows for sanctions of a party who fails to appear for a deposition, *after receiving proper notice*, unless the party has filed for a

protective order. *See* N.C.G.S. § 1A-1, Rule 37(d)(i) (2019) ("If a party . . . fails [] to appear before the person who is to take the deposition, after being served with a proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just[.] . . . The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order[.]").

Here, as stated above, Plaintiffs failed to properly notify Defendants of the depositions, a predicate to the imposition of sanctions. As a result, Defendants' failure to appear neither warranted the issuance of sanctions nor the filing of a motion for protective order. Accordingly, we hold the trial court did not abuse its discretion in denying Plaintiffs' motion to compel, as it correctly determined Plaintiffs failed to comply with discovery rules.

B. Defendants' Motion for Summary Judgment

[2] We review a trial court's order granting or denying summary judgment de novo. *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019). A genuine issue of material fact is one in which

> the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. . . . [A] genuine issue is one which can be maintained by substantial evidence.

Smith v. Smith, 65 N.C. App. 139, 142, 308 S.E.2d 504, 506 (1983) (quoting *Zimmerman v. Hogg & Allen, P.A.*, 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974)).

> For summary judgment, the movant is held to a strict standard in all cases and all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion. Reasonable persons can reach different conclusions on the evidentiary material offered. Summary judgment is inappropriate where reasonable minds might easily differ as to the import of the evidence.

Marcus Bros. Textiles, Inc. v. Price Waterhouse, L.L.P., 350 N.C. 214, 221-22, 513 S.E.2d 320, 325-26 (1999) (internal citations omitted). "Moreover, the party moving for summary judgment bears the burden of establishing the lack of any triable issue." *Id.* All of the facts asserted by Mace in his affidavit must be taken as true and inferences therefrom must be viewed in the light most favorable to the Plaintiffs. *See Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted) (noting when reviewing summary judgment, "[a]ll facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party").

Here, Plaintiffs' allegations against Defendants stem from the contention that Mace was misled by Utley to invest in Utley's businesses because he was promised an ownership interest but never received it. At the summary judgment hearing, Mace submitted an affidavit in which he alleged he entered into a verbal agreement with Utley and Bell to buy a 25% interest in Utley Investments for $300,000.00. To finance this ownership interest, Mace alleged he took out an equity line of credit on his personal residence in the amount of $300,000.00 on 11 September 2007. Mace alleged he subsequently delivered a check for $300,000.00 to Utley.

Conversely, Defendants provided two documents, the *Satisfaction of Security Instrument* and the *Deed of Trust*, in support of their motion for summary judgment. The *Deed of Trust* shows Mace and his wife obtained an equity line of credit on their personal residence in the amount of $235,000.00 through Suntrust Bank in November of 2006. The *Satisfaction of Security Instrument* shows Mace and his wife paid off the $235,000.00 owed to Suntrust Bank on 20 September 2007. Defendants argue Mace obtained the $300,000.00 loan for the purpose of satisfying his existing debt with Suntrust Bank as opposed to buying an ownership interest in Utley Investments since Mace paid off his preexisting debt to Suntrust Bank nine days after receiving the $300,000.00 loan.

Defendants' argument is only one possible interpretation. *See Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 524, 723 S.E.2d 744, 748 (2012) (noting when the use of a term in a contract can have more than one possible meaning depending on the resolution of certain disputed facts, there is a genuine issue of material fact and summary judgment is not justified). As the nonmoving party, Mace's alleged facts must be taken as true and viewed in the light most favorable to him. Mace alleges he delivered the check for the ownership interest in Utley Investments directly to Utley. While there is no evidence of this check in the Record, there is also no documentation in

the Record linking the $300,000.00 loan to the *Satisfaction of Security Instrument*. Whether Mace took out the $300,000.00 loan in order to pay off his preexisting debt or to acquire an ownership interest in Utley Investments is the classic he-said-she-said where credibility must be determined by twelve jurors and not one (or two) judges. This issue is a genuine issue of material fact that must be left to the jury to determine and Plaintiffs are entitled to move forward beyond the summary judgment stage.

CONCLUSION

Plaintiffs failed to comply with discovery rules and we therefore affirm the trial court's order denying the motion to compel depositions. As there exist genuine issues of material fact, we reverse the trial court's order granting summary judgment in favor of Defendants and dismissing Plaintiffs' action.

AFFIRMED IN PART, REVERSED IN PART.

Judge STROUD concurs.

Judge BRYANT concurs in part, dissents in part, with separate opinion.

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

I concur in the portion of the majority opinion that properly concludes plaintiffs failed to comply with discovery rules, which, in turn, affirmed the trial court's order to deny the motion to compel. However, I respectfully dissent from the portion of the majority opinion reversing the trial court's ruling on summary judgment as plaintiffs' forecast of evidence was *not* sufficient to create a genuine issue of material fact.

The trial court, upon considering all the evidence provided by the parties, found there was no genuine issue of material fact and determined defendants were entitled to judgment as a matter of law. In my view, the majority's opinion reversing the trial court is directly contrary to the evidentiary framework used to analyze claims subject to summary judgment.

Rule 56 of the North Carolina Rules of Civil Procedure provides that any party is entitled to judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact[.]" N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019). When considering a motion for summary judgment, "[a]ll facts asserted by the [nonmoving] party are taken as true, and their inferences must be viewed in the light most favorable to that party." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012).

> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim . . . . *If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.*

Hart v. Brienza, 246 N.C. App. 426, 430, 784 S.E.2d 211, 215 (2016) (citation omitted) (emphasis added). "The purpose of the summary judgment rule is to provide an expeditious method of determining whether a genuine issue as to any material fact actually exists and, if not, whether the moving party is entitled to judgment as a matter of law." *Gudger v. Transitional Furniture, Inc.*, 30 N.C. App. 387, 389, 226 S.E.2d 835, 837 (1976). "Unsupported allegations in the pleadings are insufficient to create a genuine issue as to a material fact where the moving adverse party supports his motion by competent evidentiary matter showing the facts to be contrary to that alleged in the pleadings." *Id.*

In the instant case, it is undisputed that plaintiffs and defendants had prior business dealings which led to the commencement of this action. On the record, the parties do not dispute the following facts: that Mace conveyed an 8-acre parcel in Caswell County to Utley Investments by general warranty deed, that Utley Investments was allowed to use one of Mace's properties as collateral for a loan with BB&T, that Utley was granted access to use Mace's account to purchase fuel on credit, and that Mace Grading performed soil removal for Utley on the Mebane property.

All of plaintiffs' allegations against defendants stem from the contention that Mace was misled by Utley to invest in Utley's businesses because he was promised an ownership interest but never received it.

At the summary judgment hearing, plaintiffs submitted an affidavit by Mace, which stated that he entered into a verbal agreement with Bell and Utley to buy a twenty-five percent interest in Utley Investments in

exchange for $300,000. According to Mace, he used his property as collateral to obtain a loan on 11 September 2007 from MidCarolina Bank and delivered a check for $300,000 to Utley. Plaintiffs presented documentation reflecting that Mace obtained a home equity loan not to exceed $300,000. However, there was no documentation—as the majority acknowledges—to show the existence of a check or a delivery of those proceeds to defendants as Mace averred in his affidavit to support his claim of ownership.

Defendants, on the other hand, in support of their motion for summary judgment, provided evidence that in 2006, prior to Mace receiving the $300,000 loan from MidCarolina Bank, Mace had an existing debt with SunTrust Bank in the amount of $235,000. Defendants' exhibit showed that Mace paid off the Suntrust loan on 20 September 2007, nine days after receiving the funds from MidCarolina Bank. As such, contrary to plaintiffs' allegations, defendants demonstrated that Mace had taken out the $300,000 loan for purposes of satisfying his existing debt with Suntrust as opposed to buying an ownership interest in Utley's businesses.[1] On this record, there is no support for the majority's assertion that this "is the classic he-said-she-said" where defendants have presented factual evidence to rebut the allegations in the complaint. *See Variety*, 365 N.C. at 523, 723 S.E.2d at 747 ("The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense." (citation omitted)).

Plaintiffs could not establish ownership or offer of ownership in any business entity owned or operated by Utley to maintain their claims, and therefore, the appropriate action by the trial court was, as it did, to grant summary judgment.[2] *See Gudger*, 30 N.C. App. at 389, 226 S.E.2d at 837 ("[Allegations, s]tanding alone, [] are insufficient to overcome the competent evidence offered by the movant showing the facts to be contrary to those alleged."). Additionally, Mace claims that he was defrauded by defendants to use his property to secure a loan from BB&T. However,

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1. Notably, plaintiffs filed a similar action in 2017 against defendants—excluding Utley Enterprises—where Mace submitted a sworn statement in response to defendants' request for admissions. Plaintiffs had voluntarily dismissed the action before the summary judgment hearing and refiled the current action a year later.

2. Mace signed a statement acknowledging no ownership interest in Utley entities—admitting that "neither Mace Grading Co., Inc. nor Carl Jerry Mace, Sr., individually, has any ownership interest of business entity owned or operated by Scott Utley, including without limitation the business operated at [the Mebane property] as Energy Partners of Mebane, Utley Investments LLC or any business interest of Scott Utley owned and operated under any other trade name, corporate entity, limited liability company or otherwise."

Mace was not personally obligated on the note, but his property was used to secure the loan. Nevertheless, Mace still owns the property he pledged. Mace admitted in his affidavit that defendants submitted payments to cover the taxes and insurance on the property; this served to further undermine his claims of fraud against defendants.

Consequently, I would affirm the trial court's decision to grant summary judgment in favor of defendants because plaintiffs failed to demonstrate that the evidence, even when viewed in the light most favorable to plaintiffs, was sufficient to create a genuine issue of material fact.

Accordingly, I respectfully concur in part and dissent in part.

JOSEPH A. MALDJIAN AND MARIANA MALDJIAN, PLAINTIFFS
v.
CHARLES R. BLOOMQUIST AND CAROLINE BLOOMQUIST,
DEFENDANTS-APPELLANTS/THIRD-PARTY PLAINTIFFS
v.
PATTI D. DOBBINS, KATHY SMITH, AND ALLEN TATE CO., INC.,
THIRD-PARTY DEFENDANTS

No. COA19-975

Filed 15 December 2020

1. Deeds—reformation claim—appellate standard of review—directed verdict and judgment notwithstanding the verdict—denied

In an appeal from defendants' denied motions for directed verdict and judgment notwithstanding the verdict on plaintiffs' claim to reform a deed to real property, the Court of Appeals held that the correct standard of review was whether "more than a scintilla of evidence" supported each element of plaintiffs' claim and therefore justified submitting the case to the jury. The applicable standard of proof at trial for reformation claims—whether plaintiffs produced "clear, cogent, and convincing evidence" of each element—does not become the standard of review on appeal.

2. Deeds—reformation claim—mutual mistake—draftsman's error—statute of frauds—latent ambiguity

In an action to reform a deed conveying a sixty-two-acre property, plaintiffs presented sufficient evidence that the deed resulted from a mutual mistake and did not correctly reflect the parties'

intent, which was for plaintiffs to sell defendants twenty-two acres of the property. The evidence included testimony from the closing attorney explaining that the parties negotiated for the sale and purchase of twenty-two acres but that she erroneously inserted a description of the entire sixty-two-acre tract when drafting the deed. Further, the parties' agreement to the sale of twenty-two acres did not violate the applicable statute of frauds where the written contract referenced a recorded survey describing the twenty-two acres and was, therefore, only latently ambiguous.

3. Attorneys—legal malpractice—preparation of a deed—deed reformation lawsuit—party's contributory negligence

In plaintiffs' action to reform a deed, where the closing attorney (third-party defendant) stipulated that she negligently drafted a deed conveying a sixty-two-acre tract to defendants even though the parties negotiated for the sale of only twenty-two acres, the trial court properly denied defendants' motions for directed verdict and judgment notwithstanding the verdict as to their legal malpractice claim against the attorney, in which defendants alleged the attorney's negligence forced them to incur substantial legal expenses in defending plaintiffs' lawsuit. There was more than a scintilla of evidence from which a jury could find that any damage to defendants was at least partially caused by defendants' contributory negligence or intentional wrongdoing (by claiming ownership of land they knew they had not purchased).

4. Negligence—third-party defendant—realtor—sale and purchase of land—deed reformation lawsuit

In an action to reform a deed, where the evidence showed that defendants agreed to purchase twenty-two out of sixty-two acres of land from plaintiffs, but the closing attorney inadvertently drafted the deed to convey the entire sixty-two-acre tract, the trial court properly denied defendants' motion for judgment notwithstanding the verdict with respect to its negligence claim against plaintiffs' realtor (third-party defendant). The realtor did not stipulate to negligence at trial, and there was no evidence that the realtor's involvement in the parties' transaction proximately caused any damage to defendants.

5. Evidence—Rule 403 analysis—attorney's offer to cover costs through liability insurance—deed reformation lawsuit

In an action to reform a deed, where the parties negotiated for the sale and purchase of twenty-two out of sixty-two acres of land, but the closing attorney (third-party defendant) inadvertently

drafted the deed to convey the entire sixty-two-acre tract, the trial court did not abuse its discretion by excluding evidence of the attorney's offer to pay plaintiffs' legal costs through her liability insurance carrier. Even if the evidence were relevant for a collateral purpose under Evidence Rule 411 (to show bias), any probative value was substantially outweighed by the danger of unfair prejudice or confusion under Rule 403 where it was unclear whether the attorney's offer was to fund plaintiffs' litigation (which she never did) or to cover the cost of correcting the deed (which she offered to both plaintiffs and defendants).

6. Evidence—Rule 403 analysis—tolling agreement between plaintiffs and third-party defendant—deed reformation lawsuit

In an action to reform a deed, where the parties negotiated for the sale and purchase of twenty-two out of sixty-two acres of land, but the closing attorney (third-party defendant) inadvertently drafted the deed to convey the entire sixty-two-acre tract, the trial court did not abuse its discretion by excluding evidence of the attorney's agreement with plaintiffs tolling the statute of limitations on any claims plaintiffs might have against her. Any probative value of the evidence in showing the attorney's bias was substantially outweighed by the danger of unfair prejudice or confusion, where the attorney offered to enter into a similar tolling agreement with defendants and where her credibility was already attacked throughout trial because of her admitted malpractice in drafting the deed.

7. Appeal and Error—preservation of issues—exclusion of evidence—granted motion in limine—deed reformation lawsuit

In an action to reform a deed, where the parties negotiated for the sale and purchase of twenty-two out of sixty-two acres of land, but the closing attorney (third-party defendant) inadvertently drafted the deed to convey the entire sixty-two-acre tract, defendants failed to preserve for appellate review their challenge to the exclusion of evidence regarding the attorney's alleged violations of the Rules of Professional Conduct because, after the trial court granted the attorney's motion in limine, defendants did not subsequently attempt to introduce the evidence or submit an offer of proof at trial.

8. Evidence—cumulative error—exclusion of evidence—challenged on appeal—deed reformation lawsuit

In a deed reformation action, where defendants challenged the trial court's exclusion of myriad evidence concerning the attorney (third-party defendant) who mistakenly drafted the deed, but where

the Court of Appeals rejected each challenge on appeal, there was no cumulative, prejudicial error in the trial court's exclusion of the evidence taken as a whole.

Appeal by defendants from judgment entered 6 November 2018 and order entered 14 March 2019 by Judge Tanya T. Wallace in Davie County Superior Court. Heard in the Court of Appeals 29 April 2020.

Fitzgerald Litigation, by Andrew L. Fitzgerald, and The Bomar Law Firm, PLLC, by J. Chad Bomar, for plaintiffs-appellees.

Blanco Tackabery & Matamoros, P.A., by Peter J. Juran and Chad A. Archer, and Nelson Mullins Riley & Scarborough, LLP, by Stuart H. Russell and Lorin J. Lapidus, for defendants-appellants/third-party plaintiffs-appellants.

Poyner Spruill LLP, by John Michael (J.M.) Durnovich and Karen H. Chapman, for third-party defendants-appellees Kathy Smith and Allen Tate Co., Inc.

Cranfill Sumner & Hartzog LLP, by Richard T. Boyette, for third-party defendant-appellee Patti D. Dobbins.

ZACHARY, Judge.

On their third appeal to this Court, the parties continue their protracted litigation concerning, *inter alia*, reformation of a deed conveying over 62 acres of real property in Mocksville, North Carolina. The background and procedural facts of this case are provided, in part, in the parties' two related appeals: *Maldjian v. Bloomquist*, 245 N.C. App. 222, 782 S.E.2d 80 (2016), and *Maldjian v. Bloomquist*, 245 N.C. App. 328, 782 S.E.2d 121, 2016 WL 409797 (2016) (unpublished).

On 19 March 2018, this matter came on for trial by jury in Davie County Superior Court. After an eight-day trial, the jury found that Plaintiffs Joseph A. Maldjian and Mariana Maldjian executed a deed for 62.816 acres, more or less, to Defendants Charles R. Bloomquist and Caroline Bloomquist under a mutual mistake of fact. In addition, the jury found against the Bloomquists on the counterclaims they lodged against the Maldjians, as well as the Bloomquists' claims against third-party Defendants Patti D. Dobbins, Kathy Smith, and Allen Tate Co., Inc. ("Allen Tate Co."). The trial court drew the description for a deed of correction, conveying 22.015 acres, more or less, to the Bloomquists, and

ordered the Bloomquists to execute the correction deed within 10 days of entry of judgment.

The Bloomquists contend on appeal that the trial court erred (1) by denying certain of the Bloomquists' motions for directed verdict and judgment notwithstanding the verdict; and (2) by excluding certain evidence following pretrial motions *in limine*. After careful review, we affirm.

Background

The Maldjians owned 62.816 acres on Cana Road in Mocksville, North Carolina ("the Cana Road property"). They were contacted by the Bloomquists' realtor, Kathy Smith of Allen Tate Co., regarding the sale of a portion of the Cana Road property. Because the Bloomquists lived in Pennsylvania, the Maldjians dealt primarily with Kathy Smith and the Bloomquists' daughter and son-in-law, Kate and Sidney Hawes. Mrs. Maldjian testified that she met with the Haweses and discussed "different configurations" of the property for sale, shading various acreages on the Davie County Geographic Information System map. Kathy Smith and LeAnne Brugh, the Maldjians' realtor, were also present. After negotiating a price and agreeing to have the 22 acres surveyed, the parties entered into a contract, which Smith prepared at the Bloomquists' direction. The Maldjians hired a surveyor who prepared a survey of the 22 acres, which was shared with the Bloomquists and Smith, and recorded prior to closing. The Bloomquists retained Patti D. Dobbins to serve as the closing attorney and to prepare the deed. She later agreed to represent the Maldjians as well. On 20 May 2013, the Maldjians executed a deed, recorded at Deed Book 551, Page 69, Davie County Registry, conveying the entire Cana Road property to the Bloomquists. The Bloomquists then leased the Cana Road property to the Haweses.

Approximately ten months after the closing on the Cana Road property deal, the Maldjians filed suit against the Bloomquists and the Haweses, seeking, *inter alia*, reformation of the deed conveying all of the Cana Road property to the Bloomquists.

The Maldjians contended that the deed was incorrect, the result of mutual mistake and a draftsman's error, and did not correctly reflect the intention of the parties. According to the evidence propounded by the Maldjians at trial, the parties negotiated for the sale and purchase of 22 acres. In support of their contention, the Maldjians offered, among other evidence, the parties' correspondence, the survey, and the testimony of various witnesses. Smith, the Bloomquists' realtor, testified that the parties negotiated the sale of 22 acres to the Bloomquists. The

closing attorney, Dobbins, testified that the Bloomquists agreed to purchase 22 acres, but that she inadvertently failed to draw a new description from the survey of the 22 acres, and instead inserted the description of the entire 62-acre tract into the deed, which the Maldjians signed and Dobbins recorded. Furthermore, the local Carolina Farm Credit agent testified that Dr. Bloomquist complained to him that he was overcharged on his property tax bill because it included 41 acres that he did not purchase—he only purchased 22 acres, and thus did not owe property taxes on the entire 62-acre tract. Dobbins, the closing attorney, also testified that she and Dr. Bloomquist had several conversations about the incorrect description in the deed, which she offered to correct at no charge. Mrs. Maldjian testified that she and her husband were not alerted to the problem with the deed until neighbors complained to them nine to ten months later that the Haweses were limiting their access to a portion of the property that the Maldjians did not think that they had sold. This report prompted the Maldjians to review the deed on the website for the Davie County Register of Deeds, at which time they discovered the error. The Maldjians maintained that they then attempted to work with the Bloomquists to resolve this error.

The Bloomquists maintained at trial that they intended to purchase the entire 62-acre Cana Road property from the Maldjians, and that they interpreted the contract's reference to a 22-acre survey to mean that the Maldjians would provide them with a survey of 22 acres for their future use. They did not think that it referred to the number of acres that they were purchasing. Dr. Bloomquist testified that the contract also stated "Lot/Unit 62," which the Bloomquists believed was the number of acres that they were purchasing. According to the Bloomquists, the parties had a meeting of the minds, and the deed conveying the entire Cana Road property to them accurately reflected the intention of the parties.

Procedural Posture

On 11 March 2014, the Maldjians filed a verified complaint against the Bloomquists and the Haweses in Davie County Superior Court, seeking, *inter alia*, reformation of the deed. On 1 May 2014, the Maldjians filed their amended verified complaint, and on 10 July 2014, the Maldjians filed their second amended verified complaint.

On 22 July 2014, the Bloomquists and the Haweses filed their answer generally denying the Maldjians' claims, asserting various defenses, and moving to dismiss the complaint. The Bloomquists further asserted several counterclaims relating to the condition of the house against the Maldjians: (1) breach of the implied covenant of good faith and fair

dealing; (2) negligent misrepresentation; (3) fraud; (4) unfair and deceptive trade practices; and (5) breach of contract. On 21 August 2014, the Maldjians responded to the Bloomquists' counterclaims, generally denying the Bloomquists' allegations and asserting various defenses.

On 22 April 2016, the Bloomquists moved to add Dobbins, Smith, and Allen Tate Co. as third-party defendants. After the trial court granted the motion, the Bloomquists filed their third-party complaint, alleging (1) legal malpractice on the part of Dobbins, (2) negligence on the part of Smith and Allen Tate Co., and (3) breach of contract on the part of Smith and Allen Tate Co.

Dobbins filed an answer and crossclaim on 6 July 2016 against Smith and Allen Tate Co., seeking joint tortfeasor contribution if her alleged negligence was determined to be a proximate cause of any damages sustained by the Bloomquists. In response, Smith and Allen Tate Co. filed their answer and crossclaim, in which they moved to dismiss the third-party complaint, generally denied the allegations therein, and crossclaimed against Dobbins for indemnity.

On 17 March 2017, both the Bloomquists and the Haweses moved for summary judgment. On 3 April 2017, the trial court granted the Haweses' motion for summary judgment as defendants, but denied the motion with regard to the Bloomquists.

On 19 March 2018, the case came on for jury trial in Davie County Superior Court, the Honorable Tanya T. Wallace presiding. The jury heard evidence on (1) the Maldjians' claim for reformation of the deed; (2) the Maldjians' claim for unjust enrichment; (3) the Bloomquists' counterclaim for breach of contract, with regard to the condition of the house; (4) the Bloomquists' third-party claim for legal malpractice against Dobbins; and (5) the Bloomquists' third-party claims for negligence and breach of contract against Smith and Allen Tate Co.

The Bloomquists moved for directed verdict on the Maldjians' claim for unjust enrichment, which the trial court granted. The trial court denied all other motions for directed verdict, including the Bloomquists' motion for directed verdict on the Maldjians' claim for reformation of the deed. At the close of all evidence, the Bloomquists again moved for directed verdict on the remaining claims, which the trial court denied.

After a short deliberation, the jury found, *inter alia*, that: (1) the Maldjians executed the deed under a mutual mistake of fact; (2) the Maldjians did not breach their contract with the Bloomquists; (3) the Bloomquists were damaged by the negligence of Dobbins, but

that the Bloomquists contributed to their damages by their own negligence or intentional wrongdoing; and (4) the Bloomquists were not damaged by the negligence of Smith and Allen Tate Co. On 6 November 2018, the trial court entered judgment in accordance with the jury's verdicts. The trial court further ordered that the Bloomquists execute the trial court's deed of correction within 10 days of entry of judgment, conveying 22.015 acres, more or less, to the Bloomquists, and with the description drawn in accordance with the survey.

The Bloomquists filed a motion for judgment notwithstanding the verdict, which the trial court denied. The Bloomquists gave timely notice of appeal to this Court.

Discussion

On appeal, the Bloomquists assert numerous arguments that can be segmented into two broad categories: that the trial court erred (1) by denying several of the Bloomquists' motions for directed verdict and their motion for judgment notwithstanding the verdict; and (2) by excluding certain evidence following pretrial motions *in limine*.

I. Motions for Directed Verdict and JNOV

A. Reformation Claim

The Bloomquists first contend that the trial court erred by denying their motion for judgment notwithstanding the verdict ("JNOV") as to the Maldjians' claim for reformation of the deed.

1. Standard of Review

[1] As a general matter, "[w]hen considering the denial of a directed verdict or JNOV, the standard of review is the same." *Green v. Freeman*, 367 N.C. 136, 140, 749 S.E.2d 262, 267 (2013). That is, this Court must determine "whether the evidence, taken in the light most favorable to the non-moving party, [wa]s sufficient as a matter of law to be submitted to the jury." *Id.* (citation omitted). The trial court must deny a JNOV motion "if there is more than a scintilla of evidence to support the plaintiff's *prima facie* case." *Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God*, 136 N.C. App. 493, 499, 524 S.E.2d 591, 595 (2000). "A scintilla of evidence is defined as very slight evidence. The party moving for judgment notwithstanding the verdict, like the party seeking a directed verdict, bears a heavy burden under North Carolina law." *S. Shores Realty Servs., Inc. v. Miller*, 251 N.C. App. 571, 578, 796 S.E.2d 340, 347-48 (citations and internal quotation marks omitted), *disc. review denied*, 369 N.C. 563, 798 S.E.2d 753 (2017). On appeal,

whether the movant was entitled to JNOV is a question of law, which this Court reviews de novo. *Green*, 367 N.C. at 141, 749 S.E.2d at 267.

The Bloomquists propound, however, that "the evidentiary standard . . . is greater" upon appellate review of a reformation claim. They assert that "this Court is charged to review the underlying judgment—and the JNOV order—to determine whether the Maldjians produced *clear, strong, and convincing* evidence from which the jury could have reasonably found all essential elements of the Maldjians' reformation claim in their favor," rather than whether the Maldjians produced *more than a scintilla of evidence* to support their claim. (Emphasis added). Indeed, it is easy to conflate the appellate standard of review with the clear and convincing standard of proof applied at trial.

The determination as to "[w]hether the evidence is clear, cogent and convincing is *for the jury*," not the appellate court. *Durham v. Creech*, 32 N.C. App. 55, 59, 231 S.E.2d 163, 166 (1977) (emphasis added). As our Supreme Court stated over a century ago,

> although the evidence must be "clear, cogent and convincing" to entitle a party to correct or reform a written instrument, the [trial] court had no right to withhold the case from the jury. If there was more than a scintilla of evidence, we cannot hold, as a matter of law, that the evidence is not "clear, cogent and convincing," that being for the jury.

Cuthbertson v. Morgan, 149 N.C. 72, 76, 62 S.E. 744, 746 (1908).

More recently, then-Judge Beasley made clear in *Willis v. Willis*, 216 N.C. App. 1, 3-4, 714 S.E.2d 857, 859 (2011), *modified and aff'd*, 365 N.C. 454, 722 S.E.2d 505 (2012), that at trial of a deed reformation claim, the plaintiff must establish by clear and convincing evidence that the terms of the written document do not represent the original understanding of the parties. However, the trial court should deny a motion for directed verdict "if more than a scintilla of evidence supports each element of the non-moving party's claim." *Willis*, 216 N.C. App. at 3, 714 S.E.2d at 859 (citation omitted). The standard of review on appeal is "whether the evidence, considered in the light most favorable to the non-moving party, [wa]s sufficient to be submitted to the jury"—i.e., whether there was more than a scintilla of evidence to support each element of the nonmovant's claim. *Id.* (citation omitted).

In sum, the "clear, cogent, and convincing" standard of proof applies at the trial level, and is for the jury to determine. On appeal of the denial

of a motion for directed verdict or JNOV, this Court reviews whether there was "more than a scintilla of evidence" to support each element of the reformation claim, therefore justifying submission of the case to the jury.

2. Mutual Mistake

[2] The Bloomquists first argue that the trial court erred in denying their motion for JNOV because the Maldjians failed to produce clear, cogent, and convincing evidence that they "executed the Original Deed while mistakenly believing that it would transfer only the twenty-two acres identified by the Reformation Survey," and that the Bloomquists shared the same mistaken belief. (Emphasis omitted). We disagree.

"A written instrument, though it may describe one property, may be reformed to reflect the true intent of the parties where a movant can show (1) the existence of a mutual mistake of fact, and (2) a resultant failure of the document as executed to reflect the parties' intent." *Bank of Am., N.A. v. Schmitt*, 263 N.C. App. 19, 24, 823 S.E.2d 396, 399 (2018) (citation and internal quotation marks omitted), *disc. review denied*, 372 N.C. 96, 824 S.E.2d 424 (2019). "A mutual mistake is one that is shared by both parties to the contract, wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement." *Wells Fargo Bank, N.A. v. Coleman*, 239 N.C. App. 239, 248-49, 768 S.E.2d 604, 611 (citation and internal quotation marks omitted), *disc. review denied*, 368 N.C. 280, 775 S.E.2d 871 (2015).

"In an action for reformation of a written instrument, the plaintif[f] has the burden of showing that the terms of the instrument do not represent the original understanding of the parties[.]" *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 651, 273 S.E.2d 268, 270 (1981).

Accordingly, on appeal, this Court must determine whether the Maldjians produced more than a scintilla of evidence that there was a mutual mistake of fact as to the acreage that the Maldjians would convey to the Bloomquists; that is, whether it was the intent of all parties that the Maldjians convey to the Bloomquists approximately 22 acres of the Cana Road property as described in the survey, rather than the entire Cana Road property. *See id.* at 651, 273 S.E.2d at 270-71.

We are satisfied that the Maldjians produced sufficient evidence that the deed did not reflect the actual agreement and intent of the Maldjians and the Bloomquists because of mutual mistake, the true intent being that the deed convey the 22 acres described in the survey

to the Bloomquists. First, there were several witnesses at trial—including Dobbins, the Bloomquists' realtor, and Mrs. Maldjian—who testified that the agreement was for the Bloomquists to purchase 22 acres from the Maldjians.

In addition, the Maldjians produced evidence at trial that Dr. Bloomquist told others that the deed incorrectly conveyed 62 acres to him, rather than 22 acres as intended. The Carolina Farm Credit loan officer, Mark Robertson, testified that Dr. Bloomquist repeatedly called him after he received the property tax bill, stating that the bill was wrong because he had been deeded too much land in the conveyance. Dr. Bloomquist discussed the mistake with Dobbins several times.

There was also substantial evidence of the negotiations for the sale of the property, which indicated that the parties' agreement was for a sale of 22 acres as described in the survey. The emails exchanged between the parties reflect a 22-acre deal. The Bloomquists' realtor, Smith, prepared the Offer to Purchase Contract and included the provision "22 ACRES TO BE SURVEYED," and the Maldjians paid to have the survey done. Smith testified that she emailed the completed survey of the 22 acres to Mrs. Bloomquist four days prior to closing, and Mrs. Bloomquist admitted reviewing the email with the attached survey.

Moreover, "[e]vidence which tends to show the draftsman's error *also tends to show that the parties were mistaken in their beliefs*. The evidence would support a finding of mutual mistake by the parties." *Durham*, 32 N.C. App. at 60, 231 S.E.2d at 167 (emphasis added). Here, there was clear evidence at trial that the failure to provide a description in the deed for the 22 acres shown in the survey, as intended by the parties, resulted from a mistake of the individual who drafted the deed, Dobbins. Dobbins testified that after Dr. Bloomquist alerted her staff to the error in the deed, Dobbins determined that her employee failed to conduct a "follow-up title check just before closing to make sure nothing ha[d] happened between when you first check and the closing," and thus, the employee did not discover the recorded survey of the 22.015 acres. Dobbins testified that because of this error, she failed to prepare a deed that reflected the true intention of the parties and mistakenly prepared a deed conveying the entire Cana Road property to the Bloomquists.

The Bloomquists' argument that the parties cannot have agreed to the conveyance of the 22 acres that was surveyed because it "cut[s] off acreage required for access to the property that was supposed to be included" is inapposite. Considering the evidence in the light most

favorable to the nonmovants, the Maldjians, the electric-gate mechanism is not needed for access to the property. In addition, the "gate equipment" can be relocated, or replaced for approximately $2,000.

Finally, the Bloomquists insist that "any argument that the parties agreed upon the . . . [s]urvey violates the statute of frauds," because the survey was not attached to the contract or signed by both parties. We reject this argument.

"A contract to convey an interest in land must satisfy the requirements of the statute of frauds. The contract must be in writing and signed by the party to be charged." *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 123, 388 S.E.2d 538, 551 (1990). A contract for the conveyance of land "violates the statute of frauds as a matter of law if it is patently ambiguous, that is, if it leaves the subject of the contract, the land, in a state of absolute uncertainty and refers to nothing extrinsic by which the land might be identified with certainty." *Wolfe v. Villines*, 169 N.C. App. 483, 486, 610 S.E.2d 754, 757 (2005) (citation and internal quotation marks omitted). However, there is no violation of the statute of frauds if the description is latently ambiguous, that is, if the description "is insufficient, by itself, to identify the land, but refers to something external by which identification might be made." *Id.* at 486, 610 S.E.2d at 758 (citation omitted).

A contract to convey land from a larger described tract is saved from patent ambiguity by the parties' agreement to determine the description from a survey to be obtained by the sellers. As our Supreme Court has stated, "[i]t is not a ground for objection that the survey was prepared subsequently to the execution of the option . . . . [The parties] recognized the necessity for one and obviously contemplated that it would be made sometime in the future." *Kidd v. Early*, 289 N.C. 343, 356, 222 S.E.2d 392, 402 (1976); *see also Wolfe*, 169 N.C. App. at 486-87, 610 S.E.2d at 757-58 (concluding that where the parties agreed that the description would be determined by a survey yet to be obtained, the description was not patently ambiguous, and did not violate the statute of frauds).

Here, "the contract provided an extrinsic means for identification of the precise property to be sold," *Wolfe*, 169 N.C. App. at 487, 610 S.E.2d at 758, namely, the survey requested by the Bloomquists in the contract they submitted to the Maldjians. Thus, "we find the description was latently, rather than patently, ambiguous and therefore did not violate the statute of frauds as a matter of law." *Id.*

In conclusion, there was ample evidence adduced at trial "of a mutual mistake by the parties and their draftsman. The record reflects

nothing which bars reformation as a matter of law." *Durham*, 32 N.C. App. at 61, 231 S.E.2d at 167. Accordingly, the trial court did not err in denying the Bloomquists' motion for JNOV on the Maldjians' reformation claim.

B. Negligence Claims Against the Third-Party Defendants

We next consider whether the trial court erred by denying the Bloomquists' motions for directed verdict and JNOV as to their legal malpractice claim against Dobbins, as well as their motion for JNOV as to their negligence claim against Smith and Allen Tate Co.

1. Standard of Review

"In determining the sufficiency of the evidence to justify the submission of an issue of contributory negligence to the jury, the court must consider the evidence in the light most favorable to the defendant and disregard that which is favorable to the plaintiff." *Kummer v. Lowry*, 165 N.C. App. 261, 263, 598 S.E.2d 223, 225, *disc. review denied*, 359 N.C. 189, 605 S.E.2d 153 (2004); *see also Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 479, 562 S.E.2d 887, 896 (2002) ("The existence of contributory negligence is ordinarily a question for the jury . . . ."). To that end, "[i]f there is more than a scintilla of evidence that [the] plaintiff is contributorily negligent, the issue is a matter for the jury, not for the trial court." *Cobo v. Raba*, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998).

"A directed verdict is seldom appropriate in a negligence case." *Alva v. Cloninger*, 51 N.C. App. 602, 609, 277 S.E.2d 535, 540 (1981). As a matter of policy, "[g]reater judicial caution is . . . called for in actions alleging negligence as a basis for [the] plaintiff's recovery or, in the alternative, asserting contributory negligence as a bar to that recovery." *Taylor v. Walker*, 320 N.C. 729, 734, 360 S.E.2d 796, 799 (1987).

2. Legal Malpractice Claim

[3] The Bloomquists contend that Dobbins stipulated that she was negligent, and that as a result of Dobbins' negligence, the Bloomquists were forced to incur legal fees defending the lawsuit instituted by the Maldjians. They further argue that the trial court erred in denying their motions for directed verdict and JNOV because Dobbins "failed to present even a scintilla of evidence as to the Bloomquists' purported contributory negligence or alleged intentional wrongdoing," and that instead, "the entirety of the evidence suggested that the Bloomquists always believed . . . that they got exactly what they were supposed to receive" in the deal. We disagree.

It is well settled that "[c]ontributory negligence is a defense to a claim of professional negligence by attorneys, just as it is to any other negligence action." *Piraino Bros., LLC v. Atl. Fin. Grp., Inc.*, 211 N.C. App. 343, 351, 712 S.E.2d 328, 334, *disc. review denied*, 365 N.C. 357, 718 S.E.2d 391 (2011); *see also Swain v. Preston Falls E., L.L.C.*, 156 N.C. App. 357, 361, 576 S.E.2d 699, 702 (explaining that contributory negligence acts as "a complete bar" to negligence claims), *disc. review denied*, 357 N.C. 255, 583 S.E.2d 290 (2003). "Contributory negligence is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Piraino Bros.*, 211 N.C. App. at 351-52, 712 S.E.2d at 334 (citation and internal quotation marks omitted). "[T]he standard of ordinary care is an objective one[.]" *Williams v. Odell*, 90 N.C. App. 699, 702, 370 S.E.2d 62, 64, *disc. review denied*, 323 N.C. 370, 373 S.E.2d 557 (1988).

In the instant case, Dobbins stipulated to her negligence in the preparation of the deed, leaving the issue of the Bloomquists' damages for the jury. The Bloomquists maintained that, as a result of Dobbins' negligence, they have incurred hundreds of thousands of dollars in legal expenses defending the Maldjians' suit against them. As Dobbins explains in her brief, the Bloomquists were contributorily negligent, in that they "viewed [her] mistake as an opportunity; a chance to claim ownership of land they did not purchase. That decision resulted in litigation, which caused them to incur attorneys' fees."

Over the course of an eight-day trial, the jury reviewed exhibits and heard testimony from numerous witnesses in support of the Maldjians' claim that the parties intended to convey 22 acres of land, rather than 62 acres. Dobbins testified that she made numerous errors in handling this transaction, including her error in preparation of the deed mistakenly conveying the entire 62 acres of the Cana Road property to the Bloomquists. More importantly, in that it directly relates to the Bloomquists' damages, Dobbins also testified that she offered to correct the error in the deed at no charge.

Taken together, there was more than a scintilla of evidence from which the jury could find that any damage to the Bloomquists was caused, at least in part, by the Bloomquists' negligence or intentional wrongdoing. Where there was conflicting evidence as to whether the Bloomquists were contributorily negligent or engaged in intentional wrongdoing, then the trial court was required to submit this issue to the jury. *See Cobo*, 347 N.C. at 545, 495 S.E.2d at 365. The trial court, therefore, properly denied the Bloomquists' motions for directed verdict and JNOV as to their legal malpractice claim against Dobbins.

3. Negligence Claim Against Third-Party Realtor Defendants

[4] The Bloomquists also argue that the trial court erred in denying their motion for JNOV against Smith and Allen Tate Co. The Bloomquists posit that because their damages were "completely uncontested" by Smith and Allen Tate Co. who "stipulated to their negligence," the jury's verdict on this claim was inexplicable and JNOV was appropriate. This argument is without merit.

The verdict sheet to which the parties agreed provided the following question for the jury: "Were the Bloomquists damaged by the negligence of the Third-Party Defendants Kathy Smith and Allen Tate Co., Inc.?" Contrary to the Bloomquists' position, Smith and Allen Tate Co. did not stipulate to negligence by agreeing to the verdict sheet.

Indeed, it was evident at trial that Smith and Allen Tate Co. did not stipulate to negligence, as counsel's discussions regarding the proposed jury instructions clearly demonstrate:

> [Counsel for the Bloomquists]: *As to Kathy Smith, they are denying negligenc*e so –
>
> THE COURT: That's all one issue. It is negligence and proximate cause, so even though the instructions will be different –
>
> [Counsel for the Bloomquists]: Have you submitted a single issue[?]
>
> THE COURT: We have the attorneys' fees instruction yet with [counsel for Dobbins], but when you are talking about the negligence issue, that's – what are you saying is different?
>
> [Counsel for Smith and Allen Tate Co.]: We need an issue as to whether Kathy was negligent. *We didn't stipulate to negligence.*

(Emphases added).

Moreover, the trial court repeatedly made it clear in the jury instructions, to which the Bloomquists did not object, that Smith and Allen Tate Co. contested the Bloomquists' negligence claim. The trial court instructed the jury that

> [i]n this case the Bloomquists contend, and Kathy Smith and Allen Tate deny, that Kathy Smith and Allen Tate were negligent in one or more ways. The Bloomquists further

> contend, and Kathy Smith and Allen Tate deny, that the negligence of Kathy Smith and Allen Tate's [sic] was a proximate cause of the Bloomquists' damage.

In short, the premise that Smith and Allen Tate Co. stipulated to their negligence is specious.

Similarly incorrect is the Bloomquists' assertion that evidence of the third-party realtor defendants' negligence, or the Bloomquists' damages, was uncontested because Smith and Allen Tate Co. did not offer any evidence. The Bloomquists bore the burden of proving the negligence, if any, of Smith and Allen Tate Co., as well as their own damages, and it was within the jury's prerogative to reject the Bloomquists' evidence. *See Patterson v. Worley*, 265 N.C. App. 626, 628-29, 828 S.E.2d 744, 747 (2019); *Dobson v. Honeycutt*, 78 N.C. App. 709, 712, 338 S.E.2d 605, 607 (1986). It is beyond cavil that the jury considers all of the evidence properly before it, and the jury is not limited to considering evidence offered by certain parties regarding certain claims, as the Bloomquists suggest. *See Hancock v. Telegraph Company*, 142 N.C. 163, 165, 55 S.E. 82, 83 (1906) ("The jury has the right, and it is [its] duty, to consider all the evidence admitted by the Court."). Simply put, there was abundant evidence offered at trial to support the jury's verdict on this issue.

Finally, as with the Bloomquists' legal malpractice claim against Dobbins, even if the jury found that Smith and Allen Tate Co. were negligent, the evidence at trial nevertheless fails to support a reasonable conclusion that their actions proximately caused any damage to the Bloomquists. There was plentiful evidence at trial that the Bloomquists agreed to purchase 22 acres of the Cana Road property from the Maldjians, that Dobbins failed to properly prepare the deed, and that Dobbins subsequently offered to correct the error in the deed free of charge.

Considered in the light most favorable to Smith and Allen Tate Co., there was more than a scintilla of evidence from which the jury could find that Smith and Allen Tate Co. were not negligent, or that the actions of Smith and Allen Tate Co. were not the proximate cause of any damage to the Bloomquists. The trial court, therefore, properly denied the Bloomquists' motion for JNOV.

II. Exclusion of Evidence

Next, the Bloomquists raise several evidentiary issues. Specifically, they argue that the trial court erred by granting Dobbins' motions *in limine* excluding evidence of (1) Dobbins' offer to pay the Maldjians' legal costs through her liability insurance carrier; (2) the tolling agreement

between Dobbins and the Maldjians; and (3) Dobbins' alleged violations of the Rules of Professional Conduct. According to the Bloomquists, the excluded evidence shows Dobbins' bias against the Bloomquists, and would have revealed to the jury that Dobbins had joined a conspiracy with the Maldjians and the Bloomquists' realtor to defeat the Bloomquists' claims. We address each issue in turn.

A. Standard of Review

"When this Court reviews a decision to grant or deny a motion *in limine*, the determination will not be reversed absent a showing that the trial court abused its discretion." *Smith v. Polsky*, 251 N.C. App. 589, 594, 796 S.E.2d 354, 358 (2017). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Cameron v. Merisel Props., Inc.*, 187 N.C. App. 40, 52, 652 S.E.2d 660, 668-69 (2007) (citation omitted).

An objection to the trial court's ruling on "a motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence." *Xiong v. Marks*, 193 N.C. App. 644, 647, 668 S.E.2d 594, 597 (2008) (citation omitted). Rather, "a party objecting to an order granting . . . a motion *in limine*, in order to preserve the evidentiary issue for appeal, is required to . . . attempt to introduce the evidence at the trial (where the motion was granted)." *Id.* (citation omitted).

B. Legal Costs and Liability Insurance

[5] Before the parties began jury selection, the trial court granted Dobbins' motion *in limine* seeking to exclude any evidence that Dobbins offered to pay the Maldjians' legal costs through coverage provided by her professional malpractice carrier. During trial, the Bloomquists' counsel asked Mrs. Maldjian whether Dobbins told her that she would pay the Maldjian's legal costs, drawing Mrs. Maldjian's unsolicited reference to Dobbins' statement "that she had insurance." Counsel immediately objected and moved to strike Mrs. Maldjian's statement. The trial court sustained the objection, ordered that Mrs. Maldjian's reference to Dobbins' statement "that she had insurance" be stricken, and instructed the jury to disregard the reference to insurance. On appeal, the Bloomquists contend that this evidence should have been admitted to show that Dobbins "was biased against her clients, the Bloomquists, and favored their adversaries, the Maldjians." We disagree.

Pursuant to Rule 411 of the North Carolina Rules of Evidence, "[e]vidence that a person was or was not insured against liability is not

admissible upon the issue whether he acted negligently or otherwise wrongfully." N.C. Gen. Stat. § 8C-1, Rule 411. However, evidence of liability insurance may be admissible "when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." *Id.* Nonetheless, "[a] trial court must be diligent about determining if the asserted purpose for offering evidence of insurance is merely pretextual or too attenuated, for then the general rule would be exclusion." *Williams v. Bell*, 167 N.C. App. 674, 684-85 n.2, 606 S.E.2d 436, 443 n.2 (Elmore, J., concurring), *disc. review denied*, 359 N.C. 414, 613 S.E.2d 26 (2005).

To establish that evidence of liability insurance is admissible under Rule 411's collateral purpose exception, the trial court must determine that (1) the evidence is offered for a permissible purpose; (2) the evidence is relevant to establish such purpose; and (3) "the probative value of the relevant evidence [is] substantially outweighed by the factors set forth in Rule 403." *Id.* at 678, 606 S.E.2d at 439 (majority op.); *see also* N.C. Gen. Stat. § 8C-1, Rule 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). "The application of the Rule 403 balancing test remains entirely within the inherent authority of the trial court. Hence, the trial court's determination as a result of this balancing test will not be disturbed on appeal absent a clear showing that the court abused its discretion." *Schmidt v. Petty*, 231 N.C. App. 406, 410, 752 S.E.2d 690, 693 (2013) (citations and internal quotation marks omitted).

In the present case, the Bloomquists maintain that Rule 411 does not categorically prohibit the admission of evidence of Dobbins' malpractice liability insurance, in that Dobbins stipulated to her negligence and the evidence was offered for a collateral purpose. Assuming for the sake of argument that this contention is correct, the trial court properly considered the relevancy of this evidence to a showing of Dobbins' bias against the Bloomquists, as well as whether the probative value of the relevant evidence was substantially outweighed by the factors provided in Rule 403.

If this evidence were relevant to the issue of bias—which is far from clear—any probative value is substantially outweighed by the danger of unfair prejudice or confusion. To begin, it is unclear what Dobbins meant by the phrase "legal fees." Dobbins could have meant that she would assume responsibility for the minimal cost of correcting her error in the preparation of the initial deed, rather than that she would fund the

Maldjians' litigation. And if Dobbins' offer was to cover the cost of preparing and recording a new deed to correct her earlier mistake, she made the same offer to Dr. Bloomquist. In addition, it is undisputed that neither Dobbins nor her insurer had, in fact, paid any part of the Maldjians' legal costs or attorneys' fees. Thus, the probative value of this evidence appears slight, while the danger of confusion is more readily apparent.

Moreover, it is unclear that the Bloomquists suffered any prejudice from the trial court's ruling. Although the Bloomquists maintain that the trial court's ruling "deprived [them] of a key means of discrediting the testimony of an important adverse witness," Dobbins, the Bloomquists had no difficulty attacking Dobbins' credibility. By her own admission at trial, Dobbins made numerous mistakes concerning the title search and drafting of the deed, including preparing the deed such that the Maldjians conveyed the entire Cana Road property to the Bloomquists. Dobbins also testified that the deal was for the Maldjians to sell the Bloomquists 22 acres of the Cana Road property, not the entire parcel, and that Dr. Bloomquist admitted that he and Mrs. Bloomquist had mistakenly been deeded too much of the Maldjians' property. In that Dobbins' testimony throughout trial patently "favored [her] adversaries' " claim, the Bloomquists cannot show prejudice from the exclusion of evidence of Dobbins' offer to pay the Maldjians' legal costs through her malpractice insurance.

On these facts, we cannot say that the trial court's ruling was manifestly unsupported by reason. The contention that the jury would have reached a different result upon learning that Dobbins was insured and that she stated that she would pay for the Maldjians' legal costs rings hollow. *See Latta v. Rainey*, 202 N.C. App. 587, 603, 689 S.E.2d 898, 911 (2010) ("The exclusion of evidence constitutes reversible error only if the appellant shows that a different result would have likely ensued had the error not occurred." (citation omitted)). Therefore, the trial court's exclusion of this evidence was not an abuse of discretion.

C. The Tolling Agreement

[6] Prior to trial, the trial court heard Dobbins' motion *in limine*, seeking to exclude any evidence that she entered into a tolling agreement with the Maldjians as irrelevant and unduly prejudicial. The agreement tolled the statute of limitations on any claims that the Maldjians may have against Dobbins. The Bloomquists argued that evidence of the tolling agreement should be admitted, as it showed Dobbins' bias against them. The trial court granted Dobbins' motion *in limine* with regard to the tolling agreement. At trial, the Bloomquists attempted to introduce

this evidence, and the trial court precluded them from offering evidence of the tolling agreement. On appeal, the Bloomquists assert that the trial court erred in this evidentiary ruling, to the Bloomquists' prejudice. We disagree.

By entering into a tolling agreement, a potential "defendant agrees to extend the statutory limitations period on the [potential] plaintiff's claim, usu[ally] so that both parties will have more time to resolve their dispute without litigation." *Tolling Agreement*, *Black's Law Dictionary* (11th ed. 2019). Here, although Dobbins stipulated to her negligence, she offered to enter into a tolling agreement with both the Maldjians and the Bloomquists so that they could resolve the land dispute prior to seeking damages from her. The Maldjians chose to enter into a tolling agreement with Dobbins, and the Bloomquists chose instead to join Dobbins as a third-party defendant in the lawsuit with the Maldjians.

The Bloomquists first argue that the trial court erred in excluding evidence of the tolling agreement under Rule 408 of the North Carolina Rules of Evidence, which provides, in pertinent part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or evidence of statements made in compromise negotiations is likewise not admissible.

N.C. Gen. Stat. § 8C-1, Rule 408. Indeed, it is evident that this Rule is inapplicable to a tolling agreement, which is not an offer to settle a disputed claim or a settlement agreement. *See id.* However, it is not clear that the trial court excluded the evidence pursuant to this Rule.

Rather, it appears that the trial court excluded evidence of the tolling agreement pursuant to Rule 403, which provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* § 8C-1, Rule 403. "The Rule 403 balancing test falls within the exclusive purview of the trial court, and therefore the court's decisions under Rule 403 will not be disturbed on appeal absent an abuse of discretion." *Williams v. McCoy*, 145 N.C. App. 111, 117, 550 S.E.2d 796, 801 (2001).

The trial court properly determined that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice or confusion of the issues. This evidence lends little to the Bloomquists' argument that Dobbins was biased against them. Dobbins offered to enter into a tolling agreement with the Bloomquists as well as the Maldjians. Moreover, Dobbins' testimony clearly supported the Maldjians' contentions. Finally, Dobbins' credibility was on attack throughout trial, which was centered on her negligence in handling the Maldjians and Bloomquists' real estate transaction. The fact that Dobbins entered into a tolling agreement to permit the Maldjians to sue her at a future date for her admitted malpractice would hardly seem to make Dobbins' testimony less credible, and would only serve to confuse the issues for the jurors.[1]

This evidence had little probative value, and that minimal value was abundantly outweighed by the danger of unfair prejudice or confusion of the issues. Accordingly, the trial court did not abuse its discretion by excluding this testimony.

D. Violations of the Rules of Professional Conduct

[7] The trial court also granted Dobbins' motion *in limine* to exclude evidence that Dobbins violated the North Carolina Rules of Professional Conduct. Although Dobbins stipulated to her negligence, the Bloomquists argued that evidence that her actions violated the Rules of Professional Conduct was necessary to show her bias against the Bloomquists, and to "illustrate[ ] the things that the Bloomquists were denied the ability to know because Dobbins was negligent and acted in derogation of the rules." (Internal quotation marks omitted). On appeal, the Bloomquists assert that the trial court erred in excluding evidence of Dobbins' violations of the Rules of Professional Conduct.

As previously explained, "[a] ruling on a motion *in limine* is merely preliminary and not final." *Xiong*, 193 N.C. App. at 647, 668 S.E.2d at 597 (citation and internal quotation marks omitted). "A trial court's ruling on a motion *in limine* is subject to change during the course of trial, depending upon the actual evidence offered at trial." *Id.* (citation and internal quotation marks omitted). "On appeal the issue is not whether the granting or denying of the motion *in limine* was error, as

1. The Bloomquists further assert that the cumulative effect of the trial court's error in excluding evidence of Dobbins' tolling agreement with the Maldjians "[w]hen considered in tandem" with Dobbins' offer to pay the Maldjians' legal costs through her professional malpractice carrier warrants a new trial. Given our determination that the trial court did not err by excluding evidence of Dobbins' liability insurance, this argument lacks merit.

that issue is not appealable, but instead whether the evidentiary rulings of the trial court, made during the trial, are error." *T&T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602-03, 481 S.E.2d 347, 349, *disc. review denied*, 346 N.C. 185, 486 S.E.2d 219 (1997). Thus, as our Supreme Court has explained, "a motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the movant fails to further object to that evidence at the time it is offered at trial." *Martin v. Benson*, 348 N.C. 684, 685, 500 S.E.2d 664, 665 (1998) (per curiam) (citation omitted).

In order to preserve for appeal an evidentiary issue raised in a motion *in limine*, the party objecting to the trial court's order granting the motion *in limine* must attempt to introduce the evidence at trial. *See Morris v. Bailey*, 86 N.C. App. 378, 383, 358 S.E.2d 120, 123 (1987). If the trial court prevents the party from offering such evidence, the party must then submit an offer of proof, setting forth the substance of the excluded evidence. *See Xiong*, 193 N.C. App. at 648-49, 668 S.E.2d at 597-98 (holding that the plaintiff waived appellate review of a grant of a motion *in limine* when he failed to make an offer of proof of the excluded evidence at trial).

In the case at bar, the trial court granted Dobbins' motion *in limine* with regard to the exclusion of any evidence of her violations of the Rules of Professional Conduct, but permitted the Bloomquists to question Dobbins about the acts at issue without mentioning the Rules. Specifically, after the Bloomquists' counsel conceded that "[i]t isn't all that important . . . that I use the word 'ethics,' " the trial court ruled that the attorneys were to "keep out any reference to ethics, ethics rules, et cetera. You are free to ask anything – don't touch on that or specific rules since negligence has already been apparently admitted." At trial, the Bloomquists adhered to the trial court's limitations, and cross-examined Dobbins on her actions (which were in violation of the Rules of Professional Conduct) without attempting to introduce evidence that her actions constituted *violations* of the Rules of Professional Conduct.

"Our review of the trial court's decision is precluded by [the Bloomquists] having failed to make an offer of proof and include that evidence in the record on appeal." *Morris*, 86 N.C. App. at 383, 358 S.E.2d at 123. Indeed, at the conclusion of the Bloomquists' cross-examination of Dobbins, their attorney stated, "subject to the discussion in chambers, we will later have an offer of proof"; however, this offer of proof, made the following day, only concerned the tolling agreement. Accordingly, the evidentiary issue raised by the Bloomquists regarding the exclusion of

evidence that Dobbins' actions violated the Rules of Professional Conduct is not properly before this Court. But even assuming, *arguendo*, that this issue were properly preserved, this alleged error would not warrant reversal. As previously explained in greater detail, Dobbins stipulated to her negligence, testified to her negligent acts, and was thoroughly examined about submitting affidavits on behalf of the Maldjians. This argument is overruled.

E. Cumulative Error

[8] The Bloomquists further contend that the aforementioned excluded evidence, taken as a whole, amounted to cumulative error because if admitted, this evidence would have permitted the Bloomquists to "demonstrate the scope and extent of the cabal that was conspiring against them." Although all of the excluded evidence pertained to Dobbins, the Bloomquists nevertheless claim that the exclusion of this evidence furthered the other parties' "counterfactual narrative" against the Bloomquists, to their prejudice.

In that we discern no error in the trial court's exclusion of the evidence of which the Bloomquists complain on appeal, the trial court's rulings cannot cumulatively be deemed prejudicial error.

Conclusion

For the foregoing reasons, we affirm (1) the trial court's judgment in accordance with the jury's verdicts, and (2) the trial court's order denying the Bloomquists' motion for judgment notwithstanding the verdict.

AFFIRMED.

Judges COLLINS and HAMPSON concur.

McKENZIE v. McKENZIE

[275 N.C. App. 126 (2020)]

ALESSANDRA McKENZIE, Plaintiff
v.
STEVEN McKENZIE, Defendant

No. COA19-1116

Filed 15 December 2020

1. Contempt—civil—purge provision—equitable distribution—refusal to pay distribution to spouse

After a husband refused to pay his wife the full balance of a money market account pursuant to an equitable distribution order, a civil contempt order and its purge provision—allowing the husband to purge himself of contempt by paying his wife the amount required under the equitable distribution order—were affirmed, even though the purge provision in a prior contempt order required the husband to pay the account's "gross balance" as of a later date, and the account had since accumulated passive gains. The wife was not entitled to any passive gains under the equitable distribution order, and the purge provision in the first contempt order did not bind the parties as to how the equitable distribution order should be construed. Moreover, the trial court had authority under N.C.G.S. § 5A-21(b2) to reconsider the purge conditions de novo.

2. Divorce—equitable distribution—motion for sanctions and attorney fees—refusal to pay distribution to spouse

Where a husband was repeatedly held in civil contempt for refusing to distribute an account balance to his wife pursuant to an equitable distribution order, the trial court's order denying the wife's motion for Rule 11 sanctions against the husband (for avoiding compliance with the equitable distribution order by filing frivolous motions, complaints, and appeals) was vacated and remanded for insufficient findings on material factual issues. However, the portion of the order denying the wife's request for attorney fees was affirmed because she failed to show the amount of fees incurred as a result of her husband's allegedly sanctionable behavior.

Appeal by Plaintiff from orders entered 6 March 2019 and 28 June 2019 by Judge A. Elizabeth Keever in Rowan County District Court. Heard in the Court of Appeals 21 October 2020.

Mark L. Hayes for the Plaintiff-Appellant.

Matthew J. Barton for the Defendant-Appellee.

DILLON, Judge.

Alessandra McKenzie appeals from the Order on Motions entered 6 March 2019, from the Order on Rule 52 Motion entered 28 June 2019, and from the Order on Contempt entered 28 June 2019.

I. Background

This is a domestic matter involving Steven McKenzie ("Husband") and Alessandra McKenzie ("Wife"), who were married in 1998 and separated in 2011. The present dispute involves Husband's refusal to pay money to Wife as ordered in the equitable distribution order and two subsequent orders finding Husband in civil contempt for his refusal. The more recent contempt order is before us in this appeal, where the main issue is whether the purge provision is appropriate.

In 2016, Husband was ordered, as part of an equitable distribution order (the "2016 ED Order"), to pay $236,014.00 by certified check to Wife. Specifically, the trial court ordered that:

> The balance of $236,014.00 in [a certain money market account (hereinafter the "Account")] shall be distributed to [Wife]. [Husband] shall immediately upon the filing of this judgment transfer this balance to [Wife] *by delivering a certified check* to [her attorney].

(Emphasis added.) Husband has never complied with this provision.

In 2017, on Wife's motion, Husband was found in civil contempt (the "2017 Contempt Order") for his refusal to comply with the above provision in the 2016 ED Order. The trial court ordered that Husband could purge himself of this continuing civil contempt – not by turning over the sum certain of $236,014.00 – but rather by "transferring the [then] gross balance [in the Account to Wife]". We note that the record does not reflect what that balance in the Account was when the 2017 Contempt Order was entered. In any event, the 2017 Contempt Order had no teeth: the trial court did not order Husband to be imprisoned to coerce his compliance.

In 2019, on Wife's motion, Husband again was found to be in civil contempt (the "2019 Contempt Order") for his continued refusal to comply with the 2016 ED Order. But unlike the prior contempt order, the 2019 Contempt Order had teeth: the trial court ordered Husband imprisoned until he purged himself. The trial court ordered that Husband could purge himself by paying $236,014.00 (representing the balance in the

Account as of the date the 2016 ED Order was entered), notwithstanding that the Account had grown in value to over $280,000.00.[1]

Wife moved for reconsideration of the purge provision contained in the 2019 Contempt Order to require Husband to pay the increase in the Account, for attorneys' fees, and for Rule 11 sanctions against Husband. The trial court denied Wife's motions. Wife appeals from those orders.[2]

II. Analysis

On appeal, Wife argues that the trial court erred by (1) entering a contempt order that allowed Husband to retain *the growth* in the Account and (2) concluding that Wife presented no evidence of Husband's sanctionable conduct.

A. Trial Court's Calculation of Husband's Payment

[1] Wife challenges the purge provision in the 2019 Contempt Order. Specifically, Wife argues that the trial court should have directed husband to transfer the entire balance contained in the Account – including the $53,888.00 passive gain which occurred since the 2016 ED Order was entered – to her. She argues that a proper reading of the 2016 ED Order mandates the interpretation that she is entitled to the passive increase. Alternatively, she argues that the trial judge entering the 2017 Contempt Order interpreted the 2016 ED Order as requiring her to receive the passive increase by requiring Husband to "transfer the [then] balance" in the Account to purge himself of that contempt. And, since the 2017 Contempt Order has not been reversed or vacated, Husband and the trial judge who entered the 2019 Contempt Order were bound by that interpretation of the 2016 ED Order as made by the trial judge entering the 2017 Contempt Order.

For the reasons explained below, we hold that the purge provision in the 2019 Contempt Order is appropriate and, therefore, the trial court did not err in denying Wife's motion to consider the purge provision.

Our civil contempt law is outlined in Chapter 5A of our General Statutes. N.C. Gen. Stat. §§ 5A-21 to 34 (2017). Under our statutes, a

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1. Husband was also found to be in civil contempt for failing to pay the distributive award as ordered in the 2016 ED Order. The purge provision in the 2019 Contempt Order also required Husband to pay this distributive award to purge himself of civil contempt. The distributive award portion of the purge provision is not being challenged in this appeal.

2. Wife petitioned our Court for *certiorari*. To the extent that Wife does not have an appeal as of right, we grant Wife's petition to aid in our jurisdiction.

party may be found to be in "continuing civil contempt" if (1) he is in violation of a prior order, (2) his violation of that prior order is willful, (3) he is able to comply or is able to take reasonable steps to comply with the order, (4) the order remains in force, and (5) the purpose of the order may still be served by compliance. N.C. Gen. Stat. § 5A-21(a).

When the trial court finds a party to be in continuing civil contempt, the court must instruct that party what he must do to "purge" himself of civil contempt. A party found to be in continuing civil contempt remains so until he *either* purges himself as specified in the contempt order *or* the court determines that one of the factors in subsection (a) of Chapter 5A-21 no longer applies; *e.g.*, he has complied with the order, his non-compliance is no longer willful, or the order is no longer in force, etc.

A party found in continuing civil contempt "*may* be imprisoned as long as the civil contempt continues, subject to [certain] limitations[.]" N.C. Gen. Stat. § 5A-21(b) (emphasis added). One limitation provides that if a party is in civil contempt for failing to pay a money judgment, other than a child support award, the party may only be imprisoned for 90 days. N.C. Gen. Stat. § 5A-21(b2). Of course, if it is found that the party is no longer in continuing civil contempt during this 90-day imprisonment – for example, it is found that the party's disobedience is no longer willful – he should be released before the 90 days are up, as his failure to comply with an order no longer meets the definition of "continuing civil contempt." *Id.*

In any event, a party who has been imprisoned for 90 days under Section 5A-21(b2) may be subject to 3 successive 90-day imprisonments, provided that he is first afforded a new hearing on each occasion to determine if he is still in continuing civil contempt. *Id.* Specifically, our General Assembly directs that "[b]efore the court may recommit a person to any additional period of imprisonment under this subsection, the court shall conduct a hearing **de novo**." *Id.* (emphasis added).

We must address a number of legal issues to resolve the ultimate issue regarding the validity of the purge provision contained in the 2019 Contempt Order.

First, we must determine what exactly Husband's obligation is under the 2016 ED Order. We hold by the plain language of that Order that Husband was obligated to pay a sum certain of $236,014.00; he was not ordered to turn over the Account itself, but rather to tender a certified check. Accordingly, under the terms of the 2016 ED Order, Wife is not entitled to any passive increase (or subject to risk for any

passive decrease in the Account itself) as she was not awarded the Account specifically.[3]

Second, we hold that the purge provision contained in the 2017 Contempt Order directing Husband to pay "the gross balance" in the Account, at that time a condition of purge, did not bind the parties as to how the 2016 ED Order should be construed. It is true that a purge provision *should* track the obligation contained in the judgment when the court is trying to coerce compliance. However, the purge provision does not always track the obligation. For instance, it may be that a party owes a judgment of $100,000, but that party only has the present ability to pay $30,000. It would be appropriate for the judge to order the party to pay only $30,000 to purge himself of the contempt. And if he pays the $30,000, he is no longer in contempt, but he still owes $70,000 on the judgment.

And third, because Husband was subject to being imprisoned when called before the trial court in 2019, we hold that the trial court had the authority to consider the purge condition anew when entering the 2019 Contempt Order. Section 5A-21(b2) provides that a person who has already been imprisoned for a period of 90 days is entitled to a *de novo* hearing to determine whether he will need to spend another 90 days in prison. N.C. Gen. Stat. § 5A-21(b2). This case, though, presents an odd situation because the 2017 Contempt Order did not subject Husband to any imprisonment. We conclude, though, that whenever a party appears before a judge and is subject to initial or additional imprisonment for a continuing civil contempt, the judge considering the show cause motion hears the matter *de novo*, irrespective of any prior civil contempt orders.

In conclusion, we affirm the 2019 Contempt Order.[4]

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3. Had Husband been directed to turn over the Account itself, Wife might have been entitled to any passive increase (or decrease) in that asset as part of the judgment, and therefore the payment of said increase could have been included in a purge condition. In *Conrad v. Conrad*, 82 N.C. App. 758, 348 S.E.2d 349 (1986), the wife was awarded an asset, namely a specific number of shares of stock, in an equitable distribution award. We held that the trial court, who found the husband in contempt for failing to turn over the shares of stock, acted appropriately by ordering the husband to pay the value of the *passive increases* from that stock, including stock splits and dividends, earned from the date of the original ED order as a condition of purge. *Id.* at 760, 348 S.E.2d at 350. If the value of the Account had decreased, the purge provision could *not* have awarded Wife damages as a condition of purge. It may be that Husband would have owed Wife damages for the decrease, but North Carolina follows the minority view that damages for failing to comply with an order cannot be awarded through a contempt proceeding. *See Hartsell v. Hartsell*, 99 N.C. App 380, 391, 393 S.E.2d 570, 577 (1990), *aff'd*, 328 N.C. 729, 403 S.E.2d 307 (1991).

4. We note that the 2019 Contempt Order provides for Husband to be imprisoned until he purges his contempt. However, this imprisonment is subject to the provisions of Section 5A-21(b2), limiting "the period of imprisonment [not to] exceed 90 days[.]"

B. Evidence of Sanctionable Conduct

[2] Wife sought Rule 11 Sanctions "based on [Husband's] abusive use of frivolous motions, complaints, and appeals to avoid compliance with the [2016 ED Order]." The trial court denied the motion, finding that she "failed to present any evidence upon which to base sanctions on [Husband's] actions in filing a Rule 60 Motion or appealing [the 2017 Contempt Order]." On appeal, Wife argues that the trial court's findings with respect to her motion for sanctions were insufficient.

We agree with Wife that the trial court's findings fail to address factual issues material to her request for sanctions, as her request was based on a number of actions taken by Husband, not just the filing of a Rule 60 Motion or a prior appeal. We vacate the Order on Motions to the extent that it denies Wife's request for sanctions and remand, directing the trial court to make further findings concerning Wife's motion for sanctions.

The trial court denied Wife's request for attorneys' fees because she failed to show the amount of fees incurred as the result of Husband's alleged sanctionable behavior. Wife contends on appeal that sanctions under Rule 11 can be imposed as a fine for bad behavior independent of attorneys' fees. Accordingly, we affirm that portion of the Order on Motions that denies Wife's request for attorneys' fees.

III. Conclusion

We affirm the 2019 Contempt Order.

Regarding the Order on Motions, we vacate and remand the trial court's order denying Wife's request for sanctions. We remand so that the trial court can make additional findings regarding factual issues raised by Wife's motion. However, we affirm the trial court's order denying Wife's request for attorneys' fees as part of any sanctions as the trial court did not err in finding that Wife had failed to meet her burden of showing the fees she paid as a result of Husband's sanctionable conduct.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges INMAN and YOUNG concur.

THE NEW HANOVER COUNTY BOARD OF EDUCATION, PLAINTIFFS
v.
JOSH STEIN, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, DEFENDANT, AND NORTH CAROLINA COASTAL FEDERATION AND SOUND RIVERS, INC., INTERVENORS

No. COA17-1374-2

Filed 15 December 2020

1. Appeal and Error—law in effect at time of appellate decision—enacted during pendency of appeal—case on remand from Supreme Court—considered by Court of Appeals

In an action concerning the payments specified in an agreement between the attorney general and meat-processing companies following the contamination of water supplies by swine waste lagoons, a new law passed during the pendency of the appeal (N.C.G.S. § 147-76.1) applied to the funds paid by the companies, since it applied to "all funds received by the State" and appellate courts generally apply the law in effect at the time their decision is rendered. The applicability of the new law was properly before the Court of Appeals on remand from the Supreme Court ("for any additional proceedings not inconsistent with this opinion") because it was a question of law on undisputed facts.

2. Appeal and Error—law in effect at time of appellate decision—enacted during pendency of appeal—different relief than sought in complaint

In an action concerning the payments specified in an agreement between the attorney general and meat-processing companies following the contamination of water supplies by swine waste lagoons, a new law passed during the pendency of the appeal (N.C.G.S. § 147-76.1) applied to the funds paid by the companies, and the Court of Appeals rejected the attorney general's argument that plaintiff was seeking an entirely new claim for relief before the appellate court. Plaintiff's amended complaint, which sought to enjoin the attorney general from distributing the funds to anyone other than the Civil Penalty and Forfeiture Fund, provided sufficient notice for relief under the new law—that all funds be deposited in the State treasury.

3. Attorney General—receipt of funds—swine waste lagoons—application of statute—state treasury

In an action concerning the payments specified in an agreement between the attorney general and meat-processing companies

following the contamination of water supplies by swine waste lagoons, a new law passed during the pendency of the appeal (N.C.G.S. § 147-76.1) applied to the funds paid by the companies, and the Court of Appeals concluded that the law required the attorney general and the companies to transfer and deposit all funds paid under the agreement to the state treasury rather than into a private bank account controlled by the attorney general.

Judge BRYANT dissenting.

Appeal by plaintiff from order entered 12 October 2017 by Judge Paul C. Ridgeway in Wake County Superior Court. Originally heard in the Court of Appeals 20 June 2018. *De Luca v. Stein*, 261 N.C. App. 118, 820 S.E.2d 89 (2018). Upon remand from the Supreme Court of North Carolina by opinion issued 3 April 2020. *New Hanover Cty. Bd. of Educ. v. Stein*, 374 N.C. 102, 840 S.E.2d 194 (2020).

Stam Law Firm, PLLC, by Paul Stam and R. Daniel Gibson, for plaintiff-appellants.

Attorney General Joshua H. Stein, by Deputy Solicitor General James W. Doggett and Special Deputy Attorney General Marc Bernstein, for defendant-appellee.

No supplemental briefing by intervenors.

TYSON, Judge.

I. Background

Smithfield Foods, Inc. and its subsidiaries: Brown's of Carolina, Inc., Carroll's Foods, Inc., Murphy Farms, Inc., Carroll's Foods of Virginia, Inc., and Quarter M Farms, Inc. (collectively, the "Companies"), own and operate swine farms throughout eastern North Carolina. In the mid-to-late 1990s, millions of gallons of swine waste overflowed the containment lagoons after storms and spilled into North Carolina waterways. The waste contaminated the waterways and impacted groundwater supplies.

The North Carolina Department of Justice Environmental Division (the "DOJ") filed a number of lawsuits against swine farms from which the waste had overflowed. *See, e.g.*, *Murphy Family Farms v. N.C. Dep't of Env't & Natural Res.*, 359 N.C. 180, 605 S.E.2d 636 (2004).

After months of negotiations, then Attorney General, Michael F. Easley, and the Companies entered into an agreement (the "Agreement") under which the Companies "agreed to lead the development and implementation of environmentally superior swine waste management technologies in North Carolina" and to pay for those costs.

The Companies additionally agreed to "pay each year for 25 years an amount equal to one dollar for each hog in which the Companies . . . have had any financial interest in North Carolina during the previous year, provided, however, that such amount shall not exceed $2 million in any year."

The Attorney General retained sole authority under the Agreement to award and distribute funds held in a private bank account to organizations of his choosing, if the funds are "used to enhance the environment of the State." The Attorney General developed the Environmental Enhancement Grant Program (the "EEG Program") to receive requests and facilitate the administration of these funds.

The Attorney General, after receiving EEG Program recommendations, retains sole discretion to select recipients of the funds and to allocate the amount awarded to each recipient, up to $500,000 per award. Once the grant recipients are selected, the recipient requests reimbursement, and the Attorney General orders the bank to disburse the funds. Since the Agreement was signed, the Attorney General has selected and distributed more than $24 million dollars in payments. The recipients and programs are not limited to the geographical areas of swine production, water quality improvement, or elimination of pollution, but include conservation projects and storm sediment.

Former Plaintiff, Francis X. De Luca ("De Luca"), filed his complaint on 18 October 2016. De Luca sought to preliminary and permanently enjoin the Attorney General from distributing payments made pursuant to the Agreement to anyone other than the Civil Penalty and Forfeiture Fund. *See* N.C. CONST. art. IX, § 7(a) ("the clear proceeds of all penalties and forfeitures and of all fines collected . . . shall be faithfully appropriated and used exclusively for maintaining free public schools").

The Attorney General filed a motion to dismiss De Luca's complaint on 19 December 2016. Plaintiff amended his complaint to add the New Hanover County Board of Education ("the Board") as a Plaintiff and to substitute Josh Stein, the current Attorney General of North Carolina, as Defendant on 25 January 2017.

The superior court entered an order granting the Attorney General's motion for summary judgment on 12 October 2017. That same day, the

superior court denied Plaintiffs' motion for summary judgment, dismissed Plaintiffs' complaint with prejudice, and dissolved the preliminary injunction. Plaintiffs filed their notice of appeal to this Court and a motion for temporary stay at the trial court on 25 October 2017.

This Court reversed the superior court. *See De Luca v. Stein*, 261 N.C. App. 118, 136, 820 S.E.2d 89, 100 (2018). Further, we held De Luca lacked standing to assert the civil penalty claim, but we determined the Board had standing as an "intended beneficiary of a portion of those monies." *Id.* at 126-28, 820 S.E.2d at 94-95. The Attorney General appealed to the Supreme Court based upon a dissent in this Court. De Luca did not seek review of his dismissal for lack of standing and subsequently filed a motion to be removed from the case. *New Hanover Cty. Bd. of Educ.*, 374 N.C. at 113, n.3, 840 S.E.2d at 202 n.3.

The day before oral arguments were heard at the Supreme Court, the Governor of North Carolina signed 2019 N.C. Sess. Laws 250 into law. The Board argued § 5.7 of 2019 N.C. Sess. Laws 250 ("§ 5.7") controlled the disposition of "the bulk of the money in controversy."

Our Supreme Court, over a dissent, reversed and remanded, holding these funds are not "the clear proceeds of all penalties and forfeitures and of all fines collected . . . shall be faithfully appropriated and used exclusively for maintaining free public schools." N.C. CONST. art. IX, § 7(a). The Supreme Court "remand[ed] this case to the Court of Appeals for any additional proceedings not inconsistent with this opinion." *New Hanover Cty. Bd. of Educ.*, 374 N.C. at 123-24, 840 S.E.2d at 209.

In a subsequent Order, the Supreme Court deleted a portion of footnote 8 in its opinion and substituted in part:

> [T]he parties agreed that the provisions of newly-enacted N.C.G.S. § 147-76.1 *would not have the effect of mooting this appeal* . . . we will refrain from attempting to construe N.C.G.S. § 147-76.1 or to apply its provisions to the facts of this case. We express no opinion as to what effect, if any, N.C.G.S. § 147-76.1 has on the agreement or on any past or future payments made thereunder.

New Hanover Cty. Bd. of Educ., 374 N.C. 260, n.8, 840 S.E.2d at 209 n.8 (emphasis supplied).

II. Jurisdiction

This case returns to this Court upon remand from the Supreme Court of North Carolina "to the Court of Appeals for any additional

proceedings not inconsistent with this opinion." *New Hanover Cty. Bd. of Educ.*, 374 N.C. at 123-24, 840 S.E.2d at 209. No issue of Plaintiff's lack of standing was raised before or ruled against the Board in the Supreme Court nor does the Attorney General assert the Board's lack of standing in supplemental briefing before this Court.

III. Summary Judgment Against the Board

[1] Section 5.7 became effective 1 July 2019 and provides:

> SECTION 5.7.(a) Article 6 of Chapter 147 of the General Statutes is amended by adding a new section to read:
> § 147-76.1. Require deposit into the State treasury of funds received by the State. (a) Definition. –For purposes of this section, the term "cash gift or donation" means *any funds provided*, without valuable consideration, *to the State*, for use by the State, *or for the benefit of the State*. (b) Requirement. –Except as otherwise specifically provided by law, all funds received by the State, including cash gifts and donation, shall be deposited into the State treasury. *Nothing in this subsection shall be construed as exempting from the requirement set forth in this subsection funds received by a State officer* or employee acting on behalf of the State. (c) Terms Binding. –Except as otherwise provided by subsection (b) of this section, the terms of an instrument evidencing a cash gift or donation are a binding obligation of the State. *Nothing in this section shall be construed to supersede*, or authorize a deviation from the terms of an instrument evidencing a gift or donation setting forth *the purpose for which the funds may be used*.

2019 N.C. ALS 250, 2019 N.C. Sess. Laws 250, 2019 N.C. Ch. 250, 2019 N.C. HB 200 (emphasis supplied). *See also* N.C. Gen. Stat. § 147-76 (2019).

The Board argues "no genuine issue of material fact exists that, the Attorney General received funds for the benefit of the State for a specific purpose and they are entitled to relief under § 5.7. As noted by the Supreme Court, both parties concede § 5.7 did not moot the case. 374 N.C. 260, n.8, 840 S.E.2d at 209 n.8. The Attorney General's supplemental brief "[did] not want to take a position on behalf of the Attorney General's office on specifically how § 5.7 would be enforced."

Neither party asserts there are any disputed facts to require further remand to the superior court. Our Supreme Court remanded to this

Court to determine "any additional proceedings not inconsistent with this opinion," and that remand includes determination of the applicability of the statute in question. *New Hanover Cty. Bd. of Educ.*, 374 N.C. at 124, 840 S.E.2d at 209.

The Attorney General is an agent in the executive branch of the State. Pursuant to the Agreement, he retains sole authority to determine recipients and order disbursement of the public funds held in a private bank account. Section 5.7 mandates "all funds received by the State, including cash gifts and donations, shall be deposited into the State treasury." N.C. Gen. Stat. § 147-76.1.

The Attorney General agrees he "accepts the funds [from the Companies] on behalf of the State." Section 5.7 controls the disposition of "all funds received by the State," whether cash gifts or donations. The statute clearly mandates these are public funds, they belong to the taxpayers of this State, and are required to "be deposited into the State treasury." N.C. Gen. Stat. § 147-76.1.

We disagree with our dissenting colleague that § 5.7 cannot apply to the case before us because of the date of its enactment. The Attorney General did not raise that issue on appeal, and he further agrees "courts may sometimes apply new law to the facts of a case even if the new law postdates the complaint." Our courts have held, "[t]he general rule is an appellate court *must* apply the law in effect at the time it renders its decision." *State v. Currie*, 19 N.C. App. 241, 243, 198 S.E.2d 491, 493 (1973) (citations omitted) (emphasis supplied).

An exception to the general rule exists if applying the statute "would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711, 40 L. Ed. 2d 476, 488 (1974). The Attorney General does not argue applying § 5.7 to this case would result in "manifest injustice." Nor does the Attorney General argue there is statutory direction not to apply § 5.7 to pending litigation, nor is there any legislative history to indicate that § 5.7 does not to apply to these admittedly public funds.

Section 5.7 applies to "all funds received by the State" and appellate courts must apply the law in effect at this time. *Currie*, 19 N.C. App. at 243, 198 S.E.2d at 493. Section 5.7 applies to all present and future funds paid under the Agreement and mandates their deposit into the State treasury.

> The legislative branch of government is without question the policy-making agency of our government. The General

> Assembly is well equipped to weigh all the factors surrounding a particular problem, balance the competing interests, provide an appropriate forum for a full and open debate, and address all of the issues at one time.

Cooper v. Berger, 268 N.C. App. 468, 489, 837 S.E.2d 7, 21 (2019) (citations and alterations omitted), *disc. review allowed*, 373 N.C. 584, 837 S.E.2d 886 (2020). Both chambers of the legislature enacted, and the Governor signed § 5.7 into law the day before the Supreme Court heard other issues on appeal in this case. The applicability of § 5.7 to these facts is properly before us. As purely a question of law on undisputed facts, there is no need for remand to the trial court.

IV. Amended Complaint Claim § 5.7

[2] Rather than arguing the application of § 5.7 would result in manifest injustice or provide a statutory direction to the contrary, the Attorney General argues the Board is seeking an entirely new claim for relief. The dissenting opinion overly generalizes precedent and states the Board's arguments concerning § 5.7 are novel. The Board's allegations are sufficient to provide the Attorney General with notice of the transactions and occurrences showing entitlement to relief and is well within the scope of this Court's jurisdiction.

Rule 8 of the Rules of Civil Procedure only requires a "short and plain statement" of "the transactions, occurrences, or series of transactions or occurrences." The only question is whether the complaint "gives notice of the events and transactions" that allows "the adverse party to understand the nature of the claim." *Haynie v. Cobb*, 207 N.C. App. 143, 149, 698 S.E.2d 194, 199 (2010).

Similarly, "[t]he prayer for relief does not determine what relief ultimately will be awarded. Instead, the court should grant the relief to which a party is entitled, whether or not demanded in his pleading." *Holloway v. Wachovia Bank & Trust Co.*, 339 N.C. 338, 346, 452 S.E.2d 233, 237-38 (1994).

North Carolina Rules of Civil Procedure Rule 54(c) specifically provides "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." N.C. Gen. Stat. § 1A-1, Rule 54(c) (2019). Rule 54(c)'s purpose is to provide "whatever relief is supported by the complaint's factual allegations and proof at trial." *Holloway*, 339 N.C. at 346, 452 S.E.2d at 237. If the party makes a demand for relief, it is "not crucial that the wrong relief had been demanded." *Id.* at 346, 452 S.E.2d at 238 (citations omitted).

The Board's original prayer for relief seeks deposit of these funds into the State treasury in the Civil Penalty and Forfeiture Fund, and the pleadings cite Article IX of the North Carolina Constitution. The complaint alleges the Attorney General, while representing and as an agent of the State "entered into an agreement with [the Companies]" and attaches a copy of that Agreement.

The amended complaint also alleges the Companies are depositing $2 million dollars of admittedly public funds per year into a private bank account for public environmental purposes and under the Agreement, the Attorney General purports to exercise sole authority to allocate and distribute these sums to his chosen recipients. The Board requested a preliminary and permanent injunction against the Attorney General to prevent distribution of these funds. The prayer for relief alleges a current and ongoing course of future payments of public funds under the Agreement.

These allegations provide sufficient notice to the Attorney General and states a claim under § 5.7. Whether the funds should be deposited into the State treasury for further appropriation and distribution or be earmarked for the Civil Penalty and Forfeiture Fund is immaterial as juxtaposed with deposits of public funds into a private bank account with distributions therefrom and recipients thereof within the Attorney General's sole discretion and control. The Board's complaint states a claim for relief. *See id.* at 345-46, 452 S.E.2d at 237-38.

Our Supreme Court remanded to this Court the task of determining additional proceedings regarding § 5.7. *New Hanover Cty. Bd. of Educ.*, 374 N.C. at 124, 840 S.E.2d at 209. This Court "must apply the law in place at the time it renders its decision." *Currie*, 19 N.C. App. at 243, 198 S.E.2d at 493. The Board's amended complaint "gives notice of the events and transactions" and allows "the adverse party to understand the nature of the claim." *Haynie*, 207 N.C. App. at 149, 698 S.E.2d at 199. This Court may issue an opinion and judgment and grant relief to which the party is entitled, even if the party has not demanded such relief in his pleadings." N.C. Gen. Stat. § 1A-1, Rule 54(c).

V. North Carolina Constitution

[3] "Legislative—rather than executive—authority over the State's expenditure of funds was intrinsic to the State's founding." *Cooper v. Berger*, 268 N.C. App. at 480, 837 S.E.2d at 16 (citations and internal quotations omitted). In *Cooper v. Berger*, the Governor claimed the right to allocate certain federal grants designated to the State.

The General Assembly disagreed and passed their budget to prevent the Governor from access to the federal grants. *Id.* at ___, 837 S.E.2d at 12. This Court relied upon the North Carolina Constitution and the General Assembly's authority and purpose to appropriate federal funds and grants, and held the General Assembly rightfully reallocated the funds. *Id.* at ___, 837 S.E.2d at 9-16. "Nothing shows that the founders of this State, in drafting our Constitution, intended for the Executive Branch to wield such authority over a category of funds . . . and that it could do so free from legislative control, appropriation, and substantial oversight." *Id.* at 489, 837 S.E.2d at 21-22.

North Carolina's courts have not permitted members of the executive branch to exercise unbridled appropriation or expenditure of unbudgeted public funds. "The Attorney General is not only the State's chief law enforcement officer but a steward of our liberties." *In re Investigation by Attorney General*, 30 N.C. App. 585, 589, 227 S.E.2d 645, 648 (1976).

The stated purpose of the public funds being used for environmental purposes was not changed by the statute. The statute mandates the location and depository where the public money is to be deposited and held. All funds due or held under the Agreement must be paid and deposited into the State treasury, rather than into a private bank account under the exclusive control and discretion of the Attorney General.

Further, "[p]ursuant to Section 7(2) of Article III of the North Carolina Constitution, it shall be the duty of the Attorney General: (6) To pay all moneys received for debts due or penalties to the State immediately after the receipt thereof into the treasury." N.C. Gen. Stat. § 114-2(6) (2019). Our Supreme Court held "the payments contemplated by the agreement did not constitute penalties[.]" *New Hanover Cty. Bd. of Educ.*, 374 N.C. at 123, 840 S.E.2d at 209. Where the "debts due" and amounts currently held, and where future annual payments are to be paid to the State pursuant to the Agreement, are not in dispute. *See* N.C. Gen. Stat. § 147-76.1(b).

The State Treasurer must receive, hold, and account for the disbursement of these funds in accordance with the stated environmental purposes in the Agreement. "No money shall be drawn from the State treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published annually." N.C. Const. art. V, § 7(1). Section 5.7 requires all public funds held and due under the Agreement from the Companies to be deposited into the State treasury. N.C. Gen. Stat. § 147-76.1.

VI. Conclusion

> (a) Definition. –For purposes of this section, the term "cash gift or donation" means any funds provided, without valuable consideration, to the State, for use by the State, or for the benefit of the State. (b) Requirement. –Except as otherwise specifically provided by law, all funds received by the State, including cash gifts and donation, shall be deposited into the State treasury. *Nothing in this subsection shall be construed as exempting from the requirement set forth in this subsection funds received by a State officer or employee acting on behalf of the State.*

N.C. Gen. Stat. § 147-76.1(a)-(b) (emphasis supplied).

"[A]n appellate court must apply the law in effect at the time it renders its decision." *Currie*, 19 N.C. App. at 243, 198 S.E.2d at 493 (citations omitted). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d. 1, 3 (2006) (citations omitted).

No party challenged the Board's standing to seek funds from that public source for the benefit of New Hanover County public schools and their programs, consistent with the environmental purposes for which the funds may be used. "[T]he legal theory set forth in the complaint does not determine the validity of the claim[.]" *Enoch v. Inman*, 164 N.C. App. 415, 417, 596 S.E.2d 361, 363 (2004) (citation omitted). "Rule 54(c) provides that every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." *Holloway*, 339 N.C. at 345, 452 S.E.2d at 237 (internal quotation marks omitted).

In the absence of any disputed issues of fact and the applicability of the statute purely a question of law, we reverse and remand to the trial court for entry of an order to compel the Companies and the Attorney General to transfer and deposit all funds presently held and those to be paid and received from the Companies under the Agreement in the future into the State treasury in compliance with § 5.7. N.C. Gen. Stat. § 147-76.1. *It is so ordered.*

REVERSED AND REMANDED.

Judge BERGER concurs.

Judge BRYANT dissents with separate opinion.

BRYANT, Judge, dissenting.

I. Introduction

The majority has held that the trial court erred in granting summary judgment in favor of the State based on 2019 N.C. Sess. Laws 250, sec. 5.7(a), (c) (codifying N.C. Gen. Stat. § 147-76.1, effective 1 July 2019). Because I do not believe the New Hanover County Board of Education ("the Board") has standing to argue this issue, I respectfully dissent from the majority's opinion reversing and remanding this case.

II. Standing

In its original appeal to this Court, the Board did not raise the issue of sec. 5.7. It could not, as that law was only passed during the pendency of the appeal. This Court did not address that issue. Nor, as the majority concedes, did our Supreme Court address the issue, save in a footnote, noting that "we will refrain from attempting to construe N.C.G.S. § 147-76.1 or to apply its provisions to the facts of this case. We express no opinion as to what effect, if any, N.C.G.S. § 147-76.1 has on the agreement or on any past or future payments made thereunder." *New Hanover Cty. Bd. of Educ. v. Stein*, 374 N.C. 102, 124 n.8, 840 S.E.2d 194, 209 n.8 (2020) *as modified*, 374 N.C. 260 (N.C. May 18, 2020).

In short, neither the trial court, this Court, nor our Supreme Court initially addressed this issue. Rather, in consideration of the issue before it, our Supreme Court held that

> the Court of Appeals erred by determining that the record disclosed the existence of genuine issues of material fact that precluded the entry of summary judgment in favor of either party and remanding this case to the Superior Court, Wake County, for a trial on the merits, . . . [and that] the trial court correctly decided to enter summary judgment in favor of the Attorney General on the grounds that the payments contemplated by the agreement did not constitute penalties for purposes of article IX, section 7.

Id. at 123, 840 S.E.2d at 209. The Supreme Court remanded the matter to this Court "for any additional proceedings not inconsistent with this opinion." *Id.* at 124, 840 S.E.2d at 209.

The issue raised by the Board concerning sec. 5.7 is novel. It was not addressed by the trial court, nor by our Supreme Court. It is not,

therefore, an "additional proceeding" as contemplated by the Supreme Court's mandate, but an entirely new proceeding which a trial court of competent jurisdiction must rule on before this Court may consider arguments. The majority's statement that the Supreme Court's "remand includes determination of the applicability of the statute in question," is simply not the case.

"Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Shelly*, 181 N.C. App. 196, 206–07, 638 S.E.2d 516, 524 (2007) (citation omitted). Given that the Board has not yet raised this issue before the trial court, it is clear that the issue of sec. 5.7 was not a suitable "additional proceeding" as expressed by the Supreme Court's mandate. "On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court." *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962) (citation omitted). Our review on remand is properly limited to those issues the Board previously raised—sec. 5.7 is not among them.

Nor do I believe that the Supreme Court's mandate enables us to consider issues not properly raised before the trial court. Our jurisdiction as an appellate court is well-defined. *See* N.C. Const. art. IV, § 12(1) ("The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe."); N.C. Gen. Stat. § 7A-26 ("[T]he Court of Appeals . . . ha[s] jurisdiction to review upon appeal decisions of the several courts of the General Court of Justice and of administrative agencies, upon matters of law or legal inference, in accordance with the system of appeals provided in this Article."). I am unaware of any precedent which would permit us to overstep our jurisdictional authority and consider this issue for the first time on appeal. The majority's references to Rule 8 and Rule 54(c) of the Rules of Civil Procedure as allowing relief to a party even if the party has not demanded such relief in its pleadings is inapposite. The Rules of Civil Procedure apply to our trial courts. *See* N.C. Gen. Stat. § 1A-1, Rule 1 ("Scope of Rules") ("These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when differing procedure is prescribed by statute."); *cf.* N.C.R. App. P. Rule 1(b) ("Scope of Rules") ("These rules govern procedure in all appeals from the courts of the trial division to the courts of the appellate division. . . ."). The majority points to no authority which authorizes this appellate court to act with the statutory authority conferred upon our trial courts to enter civil judgments pursuant to Rule 54(c). Our

appellate courts are authorized to determine whether the trial courts properly applied the Rules of Civil Procedure. We are not authorized to substitute those rules for the rules which govern our review on appeal.

III. Conclusion

I believe the appropriate venue for the Board's claim under sec. 5.7 is in the trial court. It is premature for this Court to rule on such a claim before a trial court has done so. I would therefore dismiss any arguments concerning sec. 5.7 as unripe and hold that the Board lacks the standing to raise them until they have been addressed by a trial court of competent jurisdiction. In accordance with the Supreme Court's mandate, and as stated in my previous dissent in this matter, I would find no error in the trial court's ruling to grant summary judgment in favor of the State.

For the foregoing reasons, I respectfully dissent.

BROWN OSBORNE AND WIFE, JENNIFER OSBORNE, PLAINTIFFS
v.
REDWOOD MOUNTAIN, LLC, DEFENDANT

No. COA20-186

Filed 15 December 2020

1. Appeal and Error—denial of motion to change venue—interlocutory—direct appeal

In an action by plaintiffs to establish their right to use a roadway that crossed defendant's property, defendant's interlocutory appeal from the trial court's denial of its motion to change venue as a matter of right under N.C.G.S. § 1-76 was directly appealable and properly before the Court of Appeals.

2. Venue—motion to change—property located in multiple counties

In an action by plaintiffs to establish their right to use a roadway that crossed defendant's property where all or some of the roadway was within Wilkes County and both parties' properties were within Wilkes and Alexander Counties, the trial court did not err by denying defendant's motion to change venue from Wilkes County to Alexander County. Wilkes County was an appropriate venue since the subject of the action was located, at least in part, in that county.

3. Appeal and Error—res judicata—collateral estoppel—not raised at trial—dismissal

In an interlocutory appeal involving an action brought by plaintiffs to establish their right to use a roadway that crossed defendant's property, defendant's arguments on appeal that plaintiffs' action was barred based on res judicata and collateral estoppel were dismissed because these arguments had not yet been raised in the trial court and could not be raised for the first time on appeal.

Appeal by defendant from order entered 18 October 2019 by Judge Michael D. Duncan in Wilkes County Superior Court. Heard in the Court of Appeals 20 October 2020.

Joines & James, P.L.L.C., by Timothy B. Joines and Carmen James, for plaintiffs-appellees.

THB Law Group, by Brian W. Tyson, for defendant-appellant.

ZACHARY, Judge.

Defendant Redwood Mountain, LLC, appeals from an order denying its motion for change of venue. After careful review, we affirm in part and dismiss in part.

I. Background

Plaintiffs Brown and Jennifer Osborne ("the Osbornes") brought this action to establish their right to use a roadway that crosses the property of Defendant Redwood Mountain, LLC ("Redwood") in order to access their property, and to enjoin Redwood from further interfering with their use of the roadway. The Osbornes own land in Wilkes and Alexander Counties; Redwood also owns land in Wilkes and Alexander Counties, adjacent to the Osbornes'. There is some dispute between the parties as to whether the roadway at issue lies entirely in Wilkes County, or runs through Wilkes and Alexander Counties.

A.

In 2002, the Osbornes filed suit against Almedia Myers and Darryl and Sharon Little, seeking a declaratory judgment that the Osbornes had "an appurtenant easement and right of way for ingress, egress, and regress over the existing roadway" to the real property that they purchased in 1977 and 1978. The Osbornes then amended their complaint to reflect that (1) the Littles had conveyed their interest in the property to Charles and Blair Craven, who were the current record owners of the

portion of the land previously owned by the Littles; and (2) in 2003, the Cravens granted the Osbornes an easement across their property over the existing roadway. On 9 April 2003, the Osbornes filed a voluntary dismissal of the action against the Littles and Cravens, leaving Myers as the sole defendant.

Myers failed to file any responsive pleadings, and on 10 April 2003, the Wilkes County Clerk of Superior Court entered default against her. On 2 September 2003, this matter came on for trial before the Honorable Andy Cromer. The trial court entered judgment (the "2003 Judgment") in favor of the Osbornes, setting forth the metes and bounds description of the easement, and finding in part that the "roadway [wa]s located entirely in Wilkes County, North Carolina."

B.

In June 2018, Redwood purchased real property adjacent to the Osbornes', and erected a gate across the roadway. After that gate was removed, Redwood erected a second gate across the roadway. On 15 February 2019, the Osbornes filed a complaint in Wilkes County Superior Court alleging that Redwood had obstructed their access to the easement provided in the 2003 Judgment. The Osbornes asked that the court enjoin Redwood from interfering with their use of the roadway, and enter "a declaratory judgment that the [Osbornes] have . . . a valid prescriptive easement across the" roadway, or, in the alternative, order that the Osbornes have the right to use the roadway by virtue of a prescriptive easement, and enjoin Redwood from interfering with their use of the roadway.

On 7 May 2019, Redwood filed a motion to change venue pursuant to Rule 12(b)(3) of the North Carolina Rules of Civil Procedure. Specifically, Redwood sought to transfer the case from Wilkes County to Alexander County, where it alleges some portion of the roadway is located, as well as much of Redwood's 81-acre tract. On 7 October 2019, Redwood's motion came on for hearing in Yadkin County Superior Court before the Honorable Michael D. Duncan. By order entered 18 October 2019, the trial court denied Defendant's motion.

Redwood timely filed notice of appeal.

II. Interlocutory Jurisdiction

[1] Both parties recognize that the instant appeal is interlocutory, as it "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). The "[d]enial of

a motion for change of venue as a matter of right under N.C. Gen. Stat. § 1-76, although interlocutory, is directly appealable." *Fox Holdings, Inc. v. Wheatly Oil Co.*, 161 N.C. App. 47, 51, 587 S.E.2d 429, 432 (2003); *accord First S. Sav. Bank v. Tuton*, 114 N.C. App. 805, 807, 443 S.E.2d 345, 346, *disc. review denied*, 338 N.C. 309, 452 S.E.2d 309 (1994); *Pierce v. Associated Rest & Nursing Care, Inc.*, 90 N.C. App. 210, 211, 368 S.E.2d 41, 42 (1988). Accordingly, this appeal is properly before us.

III. Standard of Review

This Court has articulated a two-step analysis for review of issues of venue. "The first step is determining the proper venue for a case, which is based upon the substantive statute for the particular type of claim. This determination of proper venue under the substantive statute presents a question of law which is reviewed de novo." *Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218, 225, 791 S.E.2d 100, 105 (2016) (italics omitted). The next step is "determining whether a change of venue is appropriate under the procedural statute regarding changes of venue, which in this instance appears to be N.C. Gen. Stat. § 1-83." *Id.*

IV. Motion to Change Venue

[2] The sole issue on appeal is whether the trial court erred in denying Defendant's motion to change venue pursuant to Rule 12(b)(3) of our Rules of Civil Procedure. Rule 12(b)(3) provides that "[e]very defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . [i]mproper venue or division[.]" N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) (2019).

"Venue" is defined as "the proper or a possible place for a lawsuit to proceed, usually because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant." *Stokes v. Stokes*, 371 N.C. 770, 773, 821 S.E.2d 161, 163 (2018) (quoting *Venue*, *Black's Law Dictionary* (10th ed. 2014)). It follows that "[t]he authority . . . to remove a cause instituted in a county which is not the proper one . . . is the power to change the place of trial." *Lovegrove v. Lovegrove*, 237 N.C. 307, 309, 74 S.E.2d 723, 725 (1953) (internal quotation marks omitted).

It has long been understood that venue is regulated by statute. *See Interstate Cooperage Co. v. Eureka Lumber Co.*, 151 N.C. 455, 456, 66 S.E. 434, 435 (1909) ("The venue of civil actions is a matter for legislative regulation, and is not governed by the rules of the common law."). Indeed, for certain causes of action the appropriate venue is designated

by statute. *See*, *e.g.*, N.C. Gen. Stat. § 1-78 ("All actions against executors and administrators in their official capacity, except where otherwise provided by statute, and all actions upon official bonds must be instituted in the county where the bonds were given, if the principal or any surety on the bond is in the county; if not, then in the plaintiff's county."); *Id.* § 1-81 ("In all actions against railroads the action must be tried either in the county where the cause of action arose or where the plaintiff resided at that time or in some county adjoining that in which the cause of action arose, subject to the power of the court to change the place of trial as provided by statute.").

However, there are specific venue statutes for only a limited number of actions; thus, it is well established that "all civil actions are governed by venue statutes of general application, see N.C. Gen. Stat. §§ 1-82 through 1-84, *unless subject to a venue statute of more specific application*." *Dechkovskaia v. Dechkovskaia*, 244 N.C. App. 26, 31, 780 S.E.2d 175, 180 (2015) (emphasis added).

N.C. Gen. Stat. § 1-83, which serves as the procedural basis for Redwood's motion to change venue, addresses the trial court's obligation to transfer an action to the proper venue upon timely motion:

> If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.
>
> The court may change the place of trial in the following cases:
>
> (1) When the county designated for that purpose is not the proper one.

N.C. Gen. Stat. § 1-83(1). If the county where the suit is filed is improper, "the trial court does not have discretion, but *must* upon a timely motion and upon appropriate findings transfer the case to the proper venue." *Cheek v. Higgins*, 76 N.C. App. 151, 153, 331 S.E.2d 712, 714 (1985) (emphasis added).

Here, the issue presented involves the Osbornes' access to a roadway easement. Hence, the applicable specific substantive venue provision is N.C. Gen. Stat. § 1-76, which provides:

> Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by law:
>
> > (1) Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

N.C. Gen. Stat. § 1-76(1).

After careful review, it is evident that Wilkes County is an appropriate venue for this action. As written, the statute requires that particular real property actions "must be tried in the county in which the subject of the action, or some part thereof, is situated." *Id.* The parties agree that either all or some portion of the roadway lies in Wilkes County, and both parties' properties lie in Wilkes and Alexander Counties. Moreover, the 2003 Judgment, which was attached as Exhibit A to the Osbornes' complaint, found that the easement was located entirely in Wilkes County. The "subject of the action" is located in Wilkes County, at least in part.

Redwood cites *Rose's Stores, Inc. v. Tarrytown Center* for the principle that "[w]hen the title to real estate may be affected by an action, this Court has consistently held the action to be local and removable to the county where the land is situate by proper motion made in apt time." 270 N.C. 201, 203, 154 S.E.2d 320, 321 (1967). Redwood acknowledges in its brief that the instant action "directly affects [its] title to the [p]roperty in its entirety."

However, title to the real property *in Wilkes County* will also be affected by the outcome of this case. N.C. Gen. Stat. § 1-76(1) does not provide that proper venue lies in the county containing more of the subject real property, only that the case "be tried in the county in which the [real property which is] the subject of the action, *or some part thereof*, is situated[.]" (Emphasis added). Wilkes County is a proper county for trial of this action. Accordingly, we affirm the trial court's denial of Redwood's motion.

V. Res Judicata and Collateral Estoppel

[3] Redwood next posits that "[i]n addition to the other arguments as outlined within this brief, . . . the [Osbornes'] action and Complaint are barred in Wilkes County based on the doctrines of res judicata and collateral estoppel by judgment."

However, "[a] contention not raised in the trial court may not be raised for the first time on appeal." *Creasman v. Creasman*, 152 N.C. App. 119, 123, 566 S.E.2d 725, 728 (2002); *see also Rheinberg-Kellerei GMBH v. Vineyard Wine Co.*, 53 N.C. App. 560, 566, 281 S.E.2d 425, 429 ("This issue was not presented in the pleadings nor does the record reveal that the issue was raised at trial. [The p]laintiff cannot now present this theory on appeal."), *disc. review denied*, 304 N.C. 588, 289 S.E.2d 564 (1981).

Here, Redwood did not raise its contentions regarding res judicata and collateral estoppel at the trial level, and they cannot be presented for the first time on appeal. Because the trial court has not had an opportunity to rule on these arguments, they are not properly before us, and we dismiss this portion of Redwood's appeal.

VI. Conclusion

"While a party has a right to a legally proper venue, a party does not have a right to a preferred venue." *Stokes*, 371 N.C. at 774, 821 S.E.2d at 164. Pursuant to N.C. Gen. Stat. § 1-76(1), the Osbornes filed the instant action in a proper county. Accordingly, we affirm the trial court's order denying Redwood's motion for change of venue.

Redwood raises its arguments regarding res judicata and collateral estoppel for the first time on appeal, and thus we dismiss that portion of its appeal.

AFFIRMED IN PART; DISMISSED IN PART.

Judges MURPHY and COLLINS concur.

SHERRILL v. SHERRILL

[275 N.C. App. 151 (2020)]

JAY FRANKLIN SHERRILL, PLAINTIFF
v.
LINDA ANN SHERRILL, DEFENDANT

No. COA19-429

Filed 15 December 2020

Child Custody and Support—permanent custody order—conclusions of law—not supported by findings of fact

A permanent custody order denying defendant-mother both custody and visitation was reversed and remanded where the trial court's findings of fact that defendant admitted to intentionally touching the child's penis and made inappropriate comments about the child's genitals were not supported by the evidence; the other findings challenged on appeal did not resolve the crucial factual dispute regarding whether the touching was accidental or intentional and sexually inappropriate; and the court failed to make a clear ultimate finding characterizing the touching as intentional and inappropriate. Further, the remaining findings of fact were mostly positive toward defendant, showed she was the primary caretaker, and did not support a conclusion that defendant was not a fit and proper person for custody or visitation.

Appeal by defendant from order entered 20 December 2018 by Judge Charlie Brown in District Court, Rowan County. Heard in the Court of Appeals 13 November 2019.

Hick McDonald Noecker LLP, by David W. McDonald, for plaintiff-appellee.

Fox Rothschild LLP, by Michelle D. Connell, for defendant-appellant.

STROUD, Judge.

Mother appeals from a permanent custody order granting sole legal and physical custody to Father, with no visitation for Mother. Because the trial court's findings of fact do not support its conclusion that Mother is not a fit and proper person to have custody or visitation of her minor child, we must reverse and remand for further proceedings and entry of a new order.

I. Background

Mother and Father married in November 2003 and in June 2004, Henry,[1] the parties' only child, was born. After he was injured in an automobile accident in 2004, Father began sleeping separately from Mother in a different bedroom. Because of health issues earlier in life, Henry slept in the bed with Mother, and this continued until 2016. Both parties acknowledged the sleeping arrangements were a source of conflict in their marriage.

The parties separated in March 2017, when Mother left the parties' marital home. Father and Henry continued to live in the marital home. After separation, Mother continued to take Henry to school each day. On 6 April 2017, Father filed a complaint for custody and child support. Father also filed an ex parte motion for temporary custody, based upon his allegation that Mother had told him "she will take the minor child from him and that he will never see the minor child again." The trial court granted the ex parte temporary custody order and set a hearing to determine whether to continue the temporary order. During the return hearing on the ex parte motion, Henry talked to the judge in his chambers, and for the first time, he disclosed Mother had improperly touched him on or about 26 November 2016. Based upon this disclosure, the incident was reported to DSS and law enforcement. The allegations were investigated twice by DSS and were unsubstantiated, and the District Attorney's Office declined to prosecute. On 17 May 2017, the trial court entered a temporary custody order which granted Father full legal and physical custody of Henry. Mother consented to pay child support.

The permanent custody trial was held on 20 March, 22 March, and 4 April 2018. At the beginning of the trial, the parties agreed to allow Henry to testify in chambers with only their counsel present. The permanent custody order was entered on 20 December 2018 and found relevant to the issue on appeal:

> 19. That the reported touching by [Mother] of the minor child occurred around Thanksgiving of 2016. The first report by the minor child of any alleged touching occurred at the hearing on April 18, 2017.
>
> 20. That [Mother] was the primary parent involved with the minor child and his medical, school, and extracurricular activities prior to [Father's] injury in 2014. [Father] admits he worked "long hours" with NASCAR

1. We use a pseudonym to protect the privacy of the minor child.

until his injury when the minor child was ten years of age. [Mother] often took the minor child to educational and recreational events, including the North Carolina Transportation Museum, Carowinds, Discovery Place, Whitewater Park, Tiger World wildlife preserve, Harlem Globetrotters basketball games, Ringling Brothers Circus events, Carolina Panthers football games, Catawba College football games, Kannapolis Intimidators minor league baseball games, NASCAR Hall of Fame and races, monster truck shows, zoo, air shows, train excursions, museums, library, church, ball practice, go-kart race tracks, swimming pools and lakes, and more. [Mother's] Exhibits 11, 12, and 13 are incorporated by reference.

21. That [Mother] took the minor child to the large majority of his doctor and dental appointments.

22. That [Mother] attended the large ·majority of the minor child's basketball and baseball games for years. The maternal grandmother and uncle also attended many of the minor child's basketball and baseball games.

23. That [Mother] has maintained health insurance for years on the minor child.

24. That [Mother] pays Four Hundred Fourteen Dollars and Fifty Cents ($414.50) per month in child support for the minor child and is current in her child support obligation.

25. That [Mother] took the minor child to school every day prior to entry of the Temporary Custody Order signed on April 6, 2017 (filed April 7, 2017).

26. That since the entry of the Temporary Order on April 18, 2017, [Mother] has sent four or five letters to the minor child as well as a cell phone, clothes, gift cards, money, a wallet, and miscellaneous items. These letters and gifts have been sent over time, including the minor child's birthday and Christmas. [Mother]'s Exhibits 3 and 4 are incorporated by reference.

27. That on October 29, 2017, [Mother], after sharing her inability to talk to the minor child, sent an email to

the minor child's teacher seeking help from a tutor for the minor child. [Mother's] Exhibit 5 is incorporated herein by reference.

28. That during the marriage [Mother] established a college fund for the minor child.

29. That prior to the parties' separation, the minor child had a good relationship with the maternal grandparents and uncle, spending quality time with them on many occasions.

30. That [Mother] attended counseling post-separation with Jabez Family Outreach to address issues between her and the minor child.

31. That [Mother] has a suitable and appropriate three bedroom, two-bath home.

32. That on April 6, 2017, [Father] filed a Complaint for Custody and Child Support and an Ex Parte Motion for Temporary Custody to Maintain Status Quo.

33. That on April 6, 2018, an Ex Parte Custody Order was signed by The Honorable Kevin Eddinger (filed on April 7, 2018), which placed the immediate temporary ex parte legal and physical care, custody, and control of the minor child with [Father] and set the matter on for hearing on April 18, 2017.

34. That on April 18, 2017, [Mother] filed an Answer and Counterclaim for custody and child support.

35. That upon the call of the matter on April 18, 2017, for hearing on the Ex Parte Custody Order, the parties and their attorneys stipulated that the minor child could testify in chambers before the presiding judge, The Honorable Marshall Bickett.

36. That while testifying in chambers, with both attorneys present, the minor child disclosed that his mother, the [Mother] in this action, had touched him inappropriately.

37. That following the minor child's testimony, the parties and their attorneys signed a Temporary Memorandum of Judgment/Order which slated that [Father] shall

have full legal and physical care, custody, and control of the minor child [Henry] and that given the circumstances of this case referral to custody mediation is not appropriate. That the Temporary Memorandum of Judgment/Order was filed on April 18, 2017 (formal Order filed May 17, 2017).

38. That the issues raised by the minor child's testimony were reported to law enforcement and to the Rowan County Department of Social Services.

39. That law enforcement conducted an investigation, and the Rowan County Department of Social Services conducted an investigation.

40. That in conjunction with the Rowan County Department of Social Services' investigation, the minor child was referred to the Terrie Hess House Child Advocacy Center where he gave an interview and it was recommended that the minor child talk to a therapist to assist him in dealing with the [Mother] inappropriately touching him. That the basis for the referral to the therapist was that the minor child's mother had touched his penis.

. . . .

43. That the Rowan County Department of Social Services conducted an investigation on the reported touching of the minor child. The case was not substantiated. A later complaint was lodged against [Mother] which was also not substantiated. [Mother's] Exhibits 1 and 2 are incorporated by reference.[2]

44. That no juvenile neglect or abuse proceeding was initiated by the Rowan County Department of Social Services against the [Mother] on behalf of the minor child.

45. That following a complaint, the Rockwell Police Department conducted an investigation on the reported touching of the minor child. [Mother] made a voluntary statement to the police. The Rowan

2. These exhibits are letters from DSS stating, "the case was unsubstantiated."

County District Attorney's Office was contacted and declined prosecution.

46. That no 50B was filed by [Father] on behalf of the minor child against [Mother].

47. That the parties were experiencing marital disharmony during the relevant time periods related to the reported touching of the minor child, including from Thanksgiving of 2016 until the hearing on April 18, 2017.

48. That the minor child was a "very sick baby" requiring the use of a nebulizer "50% to 60% of the time." The minor child began sleeping with [Mother] as an infant.

49. That prior to the parties' separation [Father] and [Mother] slept in separate bedrooms, and [Mother] had the minor child sleep in the same bed with her regularly and frequently. [Mother] referred to this time as their "cuddle time," "snuggles," and "snuggle time."

50. That [Father] and [Mother] argued over the minor child sleeping in the same bed with [Mother] as [Father] objected to that arrangement.

51. That [Mother] admitted in her testimony that she touched the minor child's penis when he was in the bed with her.

52. That on the night of the touching, the minor child was wearing sweatpants.

53. That the [Mother] explained in her testimony that while touching the minor child's penis she thought she was petting a cat or a dog.

54. That the [Mother] told a neighbor, Mona Bisnette, that She had been accused of improperly touching the minor child; that she was mortified; and that she thought she was touching a dog.

55. That following the incident of [Mother] touching the minor child's penis, the minor child refused to sleep in the same bed with [Mother]. [Mother] started yelling at the minor child and punishing the minor child by taking away his play station and other items. That [Mother] acknowledged that she was yelling at

> the minor child "a lot the last week before the date of separation."
>
> 56. That prior to the parties' separation [Mother] made inappropriate comments to [Father] about the minor child's genital size.

The order concluded Mother "is not a fit and proper person to have custody of the minor child" and granted "permanent full legal and physical care, custody, and control" to Father. The order directs that Mother "shall not have visitation with the minor child at this time." The order also does not recommend or direct Mother to engage in counseling or order any other method by which she may be able to resume some form of visitation or communication with Henry. Mother timely appealed.[3]

II. Required Findings

Mother argues the "trial court's conclusion of law that Ms. Sherrill is not a fit and proper person to have custody or any visitation with the minor child is not supported by competent evidence or findings of fact."

A. Standard of Review

> The standard of review "when the trial court sits without a jury is 'whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.' " "In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings . . . . Unchallenged findings of fact are binding on appeal." "Whether [the trial court's] findings of fact support [its] conclusions of law is reviewable de novo." " 'If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order.' "
>
> In addition, "[i]t is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody."

Burger v. Smith, 243 N.C. App. 233, 236, 776 S.E.2d 886, 888-89 (2015) (alterations in original) (citations omitted).

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3. Initially, Father did not have appellate counsel and was referred to the North Carolina Appellate Pro Bono Program.

B. Findings of Fact

Most of the trial court's findings of fact are not challenged on appeal and thus are binding on this Court. *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011) ("Unchallenged findings of fact are binding on appeal." (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991))). Mother challenges portions of Findings of Fact 51, 53, 55, and 56:

> 51. That [Mother] admitted in her testimony that she touched the minor child's penis when he was in the bed with her.
>
> . . . .
>
> 53. That the [Mother] explained in her testimony that while touching the minor child's penis she thought she was petting a cat or a dog.
>
> . . . .
>
> 55. That following the incident of [Mother] touching the minor child's penis, the minor child refused to sleep in the same bed with [Mother]. [Mother] started yelling at the minor child and punishing the minor child by taking away his play station and other items. That [Mother] acknowledged that she was yelling at the minor child "a lot the last week before the date of separation."
>
> 56. That prior to the parties' separation [Mother] made inappropriate comments to [Father] about the minor child's genital size.

C. Sufficiency of the Evidence to Support Finding No. 51

Mother argues the trial court's conclusions are not supported by the findings of fact. She also challenges the trial court's findings of fact to the extent that they find she touched Henry's penis. Her argument is based primarily upon Finding No. 51, "That [*Mother*] *admitted in her testimony* that she touched the minor child's penis when he was in the bed with her." (Emphasis added.) Her argument also encompasses portions of Finding No. 53 ("[Mother] explained in her testimony that while touching the minor child's penis") and Finding No. 55 ("following the incident of the [Mother] touching the minor child's penis"). We will first address the findings of fact.

Mother argues the only evidence of any inappropriate touching was her own testimony. To the extent Finding No. 51 could be interpreted as a finding of a direct, unclothed touching, or even an intentional touching, Mother is correct that *her testimony* does not support such a finding, although we will address Father's argument regarding Henry's testimony below. In her testimony, Mother described the incident as an accidental touching on top of a blanket and outside of the child's pants. Finding No. 52 seems to accept Mother's claim that any touching was outside the clothing: "That on the night of the· touching; the minor child was wearing sweatpants."

Despite Finding No. 52, Mother argues the trial court's Finding No. 51 could be interpreted as a finding she had *directly* and intentionally touched the child's penis. She argues this difference is "incredibly significant," and she is correct. The first, an unintentional touching outside of the clothing not motivated by sexual intent, is neither child abuse nor a crime. The second—an intentional touching underneath the clothing or an intentional touching with sexual intent—could easily be child abuse and potentially a felony. And if the incident was accidental, one accidental touch would not justify granting Father sole legal and physical custody and entirely cutting off all visitation between Mother and Henry.

The other evidence in our record is either consistent with Mother's testimony or does not address how the touching incident occurred. Kim Lance, a licensed marriage and family therapist, testified regarding her therapy with Henry, which started on 11 May 2017, upon referral from Terrie Hess House. She testified the "basis of that referral" was "[t]hat his mother had touched his penis," and her therapy was focused upon that particular issue. Ms. Lance did not testify regarding what Henry had disclosed to her in their fourteen therapy sessions, based upon Mother's objection to this testimony. Father's counsel asked Ms. Lance about what Henry had said, resulting in these objections and rulings:

> Q. Ms. Lance, in the 14 times that you've met with [Henry], has he discussed with you what he has said occurred to him–
>
> MR. DAVIS: Objection.
>
> Q. -- or happened to him?
>
> THE COURT: She's not an expert. Can't use it as the basis of her foundation. Okay.
>
> MS. SMITH: Be corroborative of his testimony, Your Honor.

> . . .
>
> MR. DAVIS: We don't know that.
>
> THE COURT: -- his -- his testimony by the stipulation of the parties was confidential and not reduced as findings.
>
> MS. SMITH: Thank you.
>
> THE COURT: Objection sustained. . . . I -- I've considered it as testimony. I know it's testimony. *Y'all were there when I heard it and -- and whether you know from the record and your prep of this witness about whether that testimony that we heard, that confidential testimony that we heard, is consistent with her experience may be grounds for you to question, but you're not going -- it would be improper for you to have her tell us what -- what [Henry] said at this point as corroboration at least.*[4]

(Emphasis added.)

Ms. Lance testified about her therapy with Henry and that he had been "specific in his conversations . . . related to his mom[.]" Ms. Lance provided her therapy records to DSS on 8 August 2017. The therapy records were not presented as evidence at trial, even for *in camera* review.

Mona Bisnette, a neighbor who lived next door to the parties since 2002, also testified. Her grandson played with Henry so she saw him frequently and she was "on a friendly basis" with Mother. Mother talked to her "several times" regarding the parties' marital difficulties and their separation. She testified that Mother contacted her about the allegations against her around April of 2017. Mother told Ms. Bisnette

> [t]hat she had been accused of inappropriate touching with [Henry] and that they were -- [Henry] and her were in her room in her bed and that she said she had accidentally touched him and that she was mortified and he laughed.
>
> Q. That's what she told you?
>
> A. Yes, ma'am.

---

4. Since trial counsel for both parties were in chambers during the child's testimony, they would have been aware if the child testified to a direct touching or some other action which may constitute sexual abuse. But the trial court forbade trial counsel from telling anyone what the child said, and both parties have different attorneys on appeal, so we assume that they also do not know what the child said.

> Q. What did you ask her about that or say in response to that?
>
> A. I just -- we just briefly just discussed it. . . . She didn't go into great detail and I didn't ask to be told the details of it.
>
> Q. Did she say to you anything about what she thought she was doing or touching?
>
> A. That she was touching one of their cats.
>
> Q. Okay. Did she say specifically she thought she was petting a cat?
>
> A. I believe it was a dog.
>
> Q. You thought dog? Okay. Did she -- I don't want to put words in your mouth. Did she say that, did she say petting a dog? Or what did she say?
>
> A. She thought she was touching the dog.

Thus, Mother's argument that the only evidence of any inappropriate touching was her own testimony is essentially correct, although again, this argument does not take the child's testimony in chambers into account. But in Finding No. 51, to the extent the trial court found Mother "admitted in her testimony" any sort of inappropriate intentional touching, the finding is not supported by the evidence. Mother did not "admit" to any inappropriate, intentional, or sexually motivated touching. Ms. Lance did not testify regarding any details of the incident, and Ms. Bisnette's testimony about Mother's prior statements to her was consistent with Mother's trial testimony that the touching was accidental and outside of the child's clothing. Ms. Lance had provided her therapy records to DSS during its investigations, and neither DSS nor law enforcement found sufficient evidence to pursue legal action regarding child abuse or a criminal prosecution. Although we recognize the legal standards and burden of proof are different for an adjudication of abuse and a criminal prosecution than a custody determination, in this case, we are dealing with one discrete incident in November 2016. The incident was either an accidental touch or sexual abuse, and Mother "admitted" an accidental touching outside of the clothing but not an intentional or improper touching. Thus, Finding No. 51, as well as the portions of Findings No. 53 and 55 which seem to be based upon No. 51, are not supported by the evidence.

D. Sufficiency of Evidence to Support Finding 56

Mother also challenges Finding No. 56, that "[Mother] made inappropriate comments to [Father] about the minor child's genital size" for similar reasons. This finding addresses a discussion between Mother and Father, not the child's testimony of the touching incident. Neither party contends the child's testimony is relevant to this finding. The evidence supports a finding that Mother commented regarding the child's development, although it is not apparent why the comment was "inappropriate." Father testified:

> We were standing in the hallway of the house and she came out and told me that [Henry] had hair down there on his private parts and how big his penis was.
>
> Q. She said that specifically?
>
> A. Yes, ma'am.
>
> Q. Can you tell me approximately when that was before you separated?
>
> A. That was right in January [of 2017].
>
> . . . .
>
> Q. Okay. What, if anything, prompted that statement? I mean, were y'all talking about anything like that?
>
> A. No, ma'am.
>
> Q. What did you say back to her?
>
> A. I asked her what she was doing looking at [Henry's] private parts and that I thought that was uncalled for. And–
>
> Q. What did she –
>
> A. – I was in shock. I mean, I just – it just sort of blew my mind and I was like – I couldn't believe it that she just came out and said that.

Mother also testified about this comment. She testified at length regarding interviews she gave to both DSS and law enforcement.

> Q: Did you acknowledge to the detective in your investigation that you did comment to your husband about your son's, specifically, his genital area?
>
> A. I did. I was in shock. I did not know that he had become a man and that he had reached puberty.

> Q. What did you say to [Father] and when was that?
>
> A. I -- I don't really recall what time frame it was. I just know that he was coming out of my bathroom. They must've been getting ready for baseball, because they were both taking showers at the same time. He dropped his towel by accident. He got embarrassed. He left. I looked away. And I made a comment holy cow, I didn't know that my son is a little man now. I had no idea. And that he had reached puberty.

Based on the trial court's Finding No. 56 and the evidence from both parties, it is not clear what the trial court meant by characterizing Mother's comments as "inappropriate." Parents sometimes discuss the physical development of their children, with no sexual intent or connotation. Based upon the findings and all of the evidence, Mother made these comments only to Father and not to the child or in the child's presence. And although these comments occurred before the parties' separation and Father knew this comment when he filed the complaint, Father made no allegations of sexual misconduct in his complaint for child custody or in his motion for emergency ex parte temporary custody. The only basis for his emergency motion was his concern that Mother may take Henry and Father "will never see the minor child again." The trial court's Finding No. 56 is supported by the evidence to the extent that Mother commented regarding the child's development. Since the trial court determines the weight and credibility of the evidence, *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994), the trial court has the discretion to characterize the comment as "inappropriate," but this finding also fails to resolve the crucial factual issue as to Mother's alleged sexual misconduct.

E. Waiver of Findings Regarding Child's Testimony

Father's primary response to Mother's arguments regarding the findings of fact is that the parties waived findings of fact and agreed for the trial court to speak to Henry in chambers and off the record. Father is correct that Mother waived the right to have the child testify in open court and to have a record of the child's statements to the trial court. Father is also correct that the parties agreed the trial court would not tell the parties what Henry said and would not make detailed evidentiary findings regarding his in-chambers testimony. But regardless of Henry's testimony, Finding No. 51 specifically addresses *Mother's testimony*, not other evidence presented in or out of the courtroom. No matter what the child disclosed in chambers, the only finding of fact regarding the

touching is specifically based upon *Mother's testimony*, and this finding is not supported by her testimony.

Had the trial court made a clear ultimate finding characterizing the touching as an intentional inappropriate touching, Father is correct that Mother would be unable to argue the finding was not supported by the evidence, since she agreed for Henry to testify in chambers with no record of his testimony. *Kleoudis v. Kleoudis*, 271 N.C. App. 35, 43, 843 S.E.2d 277, 283 (2020) ("An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts." (quoting *Quick v. Quick*, 305 N.C. 446, 451-52, 290 S.E.2d 653, 657-58 (1982))). This sort of ultimate finding need not identify the particular evidence supporting it. *Id*. But the trial court did not make any ultimate finding which resolves the issue, and we must consider whether the findings support the trial court's conclusions of law. Mother did not waive findings of fact entirely and she did not waive having conclusions of law based upon the trial court's findings.

Father argues Mother waived not just the right to have Henry's testimony on the record, but also that she waived findings of fact. The trial court's order notes the agreement as follows:

> AND IT APPEARING to the Court that at the call of this matter for trial the parties and their attorneys stipulated that the minor child at issue could testify in chambers and that his testimony would be considered by the Court and his credibility weighed by the Court as part of the Court's final decision and Order with the parties' stipulation that specific findings of fact were waived and confidential[.]

At the beginning of the trial, after some discussion of how to proceed with Henry's testimony, the trial court summarized the parties' agreement to the satisfaction of both parties:

> All right. So the features, as I understand them, of your agreement are I'll be back there. The attorneys will be back there. Your son will answer questions asked by your attorneys. He'll have a chance to volunteer anything they don't ask. Anything he tells me, I'll consider, I'll weigh it along with all the other evidence that will be received after that. He doesn't need to decide what's going to happen. That's my job.
>
> But I have to assess what weight to give his testimony, but here's the key: what he says to me is not going

> to be in any final order. It's just to be considered by me, because it's -- what he says is going to be confidential. And so what he says can't be relayed to you by the attorneys, by your attorneys. So you can ask them. They can't tell you. And they're officers of the Court and they're going to follow that rule.
>
> Now, your son, if he wants to tell you, that's -- that's up to him. I -- I - I can't put a gag order on him. But it would be inappropriate for you to ask him. All right?
>
> So the confidentiality, waiving specific written findings of fact, featuring that I will consider his comments and what weight to give his testimony, along with other relevant testimony yet to be offered. Is that your agreement?
>
> MS. SHERRILL: Yes.
>
> MR. SHERRILL: Yes.

Father argues that because Mother agreed for Henry's testimony to be unrecorded and to waive findings of fact regarding his testimony, Mother has waived appellate review of the trial court's findings or their sufficiency to support the trial court's conclusions of law, or that Mother invited any error by the trial court. He contends that Mother's

> argument that "at trial, the only first-hand testimony given about the events of Saturday morning 26 November 2016 came from Defendant Mother, Linda Ann Sherrill", Appellant's Brief, p. 16, is not an accurate representation of the details of the trial. While the court followed the stipulation of the parties and did not include a description or evaluation of the unrecorded testimony of the minor in chambers, this Court must presume that the child gave testimony about this incident, including the likelihood that the child gave testimony that conflicted sharply with the self-serving testimony of Mrs. Sherrill. Findings of fact by the trial court are presumed to be supported by sufficient evidence, unless the appellant can show the absence of supporting evidence. *See Clark v. Clark*, 23 N.C. App. 589, 209 S.E.2d 545 (1974) (courts will bind the parties to their agreements).

We first note that the trial court's description of the parties' agreement, which both parties indicated was correct, did not entirely waive findings of fact to support the custody determination, as did the parties

in *Clark v. Clark*, 23 N.C. App. 589, 209 S.E.2d 545 (1974). They also did not agree for the trial court to make conclusions of law unsupported by any findings of fact. They agreed to confidentiality for what Henry actually said in chambers. Specifically, the trial court summarized the agreement: "but here's the key: *what he says to me is not going to be in any final order*." (Emphasis added.)

Findings of fact are not supposed to be recitations of testimony, nor must orders include detailed evidentiary findings. *See Schmeltzle v. Schmeltzle*, 147 N.C. App. 127, 130, 555 S.E.2d 326, 328 (2001) ("There are two kinds of facts, evidentiary facts and ultimate facts. Evidentiary facts are 'those subsidiary facts required to prove the ultimate facts.' Ultimate facts are "the final facts required to establish the plaintiff's cause of action or the defendant's defense . . . ." (alteration in original) (citations omitted)). The trial court is required only to make findings of ultimate fact sufficient to support its conclusions of law and sufficient to allow appellate review. N.C. Gen. Stat. § 1A-1, Rule 52(a)(1). In *In re Anderson*, this Court reversed and remanded the trial court's order because its findings were recitations of evidence which did not resolve the issues of fact:

> The trial court's findings of fact, in large part, amount to mere recitations of allegations and provide little support for the conclusions of law.
>
> > In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.
>
> N.C. Gen. Stat. § 1A–1, Rule 52(a)(1) (2001). Rule 52(a) requires three separate and distinct acts by the trial court: (1) find the facts specially; (2) state separately the conclusions of law resulting from the facts so found; and (3) direct the entry of the appropriate judgment. Thus, the trial court's factual findings must be more than a recitation of allegations. They must be the "specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." "Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts."
>
> > In summary, while Rule 52(a) does not require a recitation of the evidentiary and subsidiary

> facts required to prove the ultimate facts, it does require specific findings of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

151 N.C. App. 94, 96-97, 564 S.E.2d 599, 601-02 (2002) (alteration in original) (citations omitted).

The parties' agreement that the trial court need not make specific findings of fact regarding what the child said does not eliminate the need for ultimate findings, as findings of fact should not be recitations of testimony. *See Appalachian Poster Advert. Co. v. Harrington*, 89 N.C. App. 476, 479, 366 S.E.2d 705, 707 (1988) (Mere recitations "do not reflect the 'processes of logical reasoning' required by G.S. 1A–1, Rule 52(a)(1)."). "The findings should resolve the material disputed issues, or if the trial court does not find that there was sufficient credible evidence to resolve an issue, should so state." *Carpenter v. Carpenter*, 225 N.C. App. 269, 279, 737 S.E.2d 783, 790 (2013) (citing *Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986)).

Most of the trial court's other findings, particularly No. 53 and 54, also seem consistent with Mother's testimony, although we also note that No. 53 is a recitation of testimony. *In re M.R.D.C.*, 166 N.C. App. 693, 699, 603 S.E.2d 890, 894 (2004) ("Recitations of the testimony of each witness do not constitute findings of fact . . . ." (quoting *Moore v. Moore*, 160 N.C. App. 569, 571-72, 587 S.E.2d 74, 75 (2003))). As a recitation, it does not resolve the factual issue presented to the trial court. *Id*. In particular, Finding 53 is quite important:

> 53. That the [Mother] explained in her testimony that while touching the minor child's penis she thought she was petting a cat or a dog.

This finding is supported by the evidence, since Mother did explain the incident this way. But we cannot tell if the trial court accepted Mother's explanation as credible, or if the trial court determined this was an excuse for Mother's inappropriate actions and was not credible. If Mother thought she was petting a cat or dog—and this finding seems to indicate she did—Mother's touching was an unfortunate accident.[5]

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5. Mother testified that the family had cats and dogs, and both sometimes slept with her and Henry.

If the trial court believed Mother was lying about how the touching occurred and her intent, this would support a finding of inappropriate sexual conduct.

III. Conclusions of Law

Mother argues that the findings of fact do not support the trial court's conclusions of law. The trial court made these conclusions of law:

> 4. That [Mother] is not a fit and proper person to have custody of the minor child, and it is not in the best interests of the minor child for his custody to be placed with [Mother].
>
> 5. That [Mother] is not a fit and proper person to have visitation with the minor child, and it is not in the best interests of the minor child to have visitation with [Mother].

We have already determined that Finding No. 51 and portions of Findings 53 and 55 were not supported by the evidence, so we will disregard those findings. As noted above, the remaining findings do not resolve the crucial factual dispute regarding the nature of the touching-accidental or intentional and sexually inappropriate.

The other unchallenged findings of fact regarding Mother are mostly positive. The uncontested findings show that Mother was Henry's primary caretaker for most of his life and was active in supporting his education and sports activities. She had provided for him financially both before and after the separation. She attended counseling as recommended to address the issues arising from the alleged touching. She has a suitable home. There are no other findings of fact which would support a conclusion of law that Mother is not a fit and proper person to have custody or at least some form of visitation with the child.

The trial court made findings of fact regarding both parties' homes, health, and employment as well as the child's education, health, and extracurricular activities. Although some of the trial court's findings regarding Father were positive, many of the trial court's findings regarding father are negative or, at least, raise concerns. For example, he had serious anger issues which resulted in him yelling at Henry's middle school basketball coach and subsequently getting barred from all the home and away basketball games for the rest of the season. Father also suffers from chronic nerve pain and "takes a number of narcotic, muscle relaxer, analgesic, pain, and mental health medications." But considering all of the findings, there is no apparent reason Mother would be

denied any sort of visitation with Henry based upon the single alleged touching in November 2016. This is not a case with evidence of a pattern of sexual abuse or misconduct by Mother. Since the trial court's findings did not clearly identify why it found Mother unfit even to have supervised visitation or limited contact with the child, the order left her with no way to correct whatever error caused her to lose custody.

Since the trial court's findings cannot support its conclusion that Mother is unfit to have custody or visitation with Henry, the findings also cannot support the trial court's conclusion that visitation with Henry is not in his best interest. In addition, the trial court did not include any provisions requiring Mother to attend therapy or note any actions Mother may take to be able to resume visitation. Since the order does not determine exactly what Mother did wrong, it gives her no direction on what she may need to do resume visitation with Henry. Because we have concluded the trial court's findings do not support its conclusions that Mother is not a fit and proper person to have custody or visitation with Henry and that it is not in his best interest for mother to have custody or visitation, we must reverse the trial court's order and remand for further proceedings.

IV. Conclusion

Because the trial court failed to make adequate findings of fact to support its conclusions of law that Mother is not a fit and proper person to have custody or visitation of Henry and that custody and visitation with Mother are not in his best interest, we reverse and remand for a new order with additional findings resolving the crucial disputes of fact. On remand, the trial court may, but is not required to, rely upon the existing record, including its recollection of Henry's testimony in chambers and, in accord with the parties' agreement, should not make detailed evidentiary findings regarding his testimony, but the trial court must clearly make ultimate findings of fact to support the conclusions of law. In its discretion, the trial court may also receive additional evidence on remand.

REVERSED AND REMANDED.

Judges MURPHY and BROOK concur.

STATE OF N.C. EX REL. N.C. DEP'T OF COM., DIV. OF EMP. SEC. v. ACES UP EXPO SOLS., LLC

[275 N.C. App. 170 (2020)]

STATE OF NORTH CAROLINA EX REL. NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT SECURITY, APPELLEE
v.
ACES UP EXPO SOLUTIONS, LLC, APPELLANT

No. COA20-185

Filed 15 December 2020

1. Employer and Employee—unemployment taxes—assessment—findings of fact

In its decision affirming a tax assessment issued to appellant-business for unemployment taxes owed on its employee payroll, the N.C. Department of Commerce Board of Review's findings of fact were supported by competent evidence where appellant challenged the findings regarding appellant's control of the manner of work and ability to discharge workers; workers' use of independent knowledge, skill, or licenses; workers being in appellant's regular employ; appellant's provision of tools and equipment; and workers' pay. Although appellant may have established that there was conflicting evidence on the findings, it was the Board's duty to resolve those conflicts.

2. Employer and Employee—unemployment taxes—assessment—conclusions of law—Hayes factors

In its decision affirming a tax assessment issued to appellant-business for unemployment taxes owed on its employee payroll, the N.C. Department of Commerce Board of Review's conclusions of law were supported by the findings of fact and a proper application of *Hayes v. Bd. of Trustees of Elon College*, 224 N.C. 11 (1944), and the Board did not err in affirming the assessment. The Board properly applied *Hayes* in determining that the workers were not licensed and had no specialized skills; they worked part-time; appellant instructed the time, place, and person to which they would report; and they received training as to how to perform the work.

Appeal by Appellant from an Order entered 9 October 2019 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 October 2020.

Timothy M. Melton, for appellee North Carolina Department of Commerce, Division of Employment Security.

The Law Office of Mark N. Kerkhoff, PLLC, by Mark N. Kerkhoff, for appellant.

HAMPSON, Judge.

Factual and Procedural Background

Aces Up Expo Solutions, LLC (Appellant) appeals from an Order affirming the North Carolina Department of Commerce Board of Review's decision concluding the Department's Employment Security Division (the Division) correctly issued a Tax Assessment and Demand for Payment to Appellant for unemployment taxes owed on Appellant's employee payroll. The Record before us reflects the following:

Appellant is a business, owned by Dennis Scott Foshie (Foshie), that provides labor crews to construct and take down trade show booths and displays in North Carolina and other states. The Division is responsible for administering North Carolina's Employment Security Act, codified in Chapter 96 of the North Carolina General Statutes, pursuant to state and federal law. In 2014, the Division received a complaint that Appellant had misclassified its workers as independent contractors and not as employees. As such, Appellant was allegedly not paying unemployment security taxes that fund the state's unemployment benefits programs. Based on this complaint, the Division began investigating Appellant's account. The Division's investigation concluded Appellant was an employer liable for unemployment insurance taxes. Accordingly, the Division sent Appellant invoices for each quarter of the years 2010 through 2014.

On 29 November 2016, the Division issued an Unemployment Tax Assessment and Demand for Payment (Tax Assessment) to Appellant for employer contributions, interest, and penalties for all of 2015 and the first three quarters of 2016. On 28 December 2016, Appellant filed a protest of the Tax Assessment asserting its workers were independent contractors and not employees covered under the Employment Security Act. In response to the protest, the Division conducted a review to determine if it had correctly issued the Tax Assessment. That review concluded the Division had correctly issued the Tax Assessment to Appellant because Appellant's workers were employees and not independent contractors.

Appellant appealed the Division's determination to the North Carolina Department of Commerce Board of Review (the Board). The Board held a telephonic hearing pursuant to N.C. Gen. Stat. § 96-4(q). Present at this hearing were: Sheena Cobrand, the Board's hearing

officer; Appellant's attorney; Foshie; the Division attorney; Division investigator Lisa Ramsey; Division witness Bruce Milazzo, owner of a business in competition with Appellant; and Division witness Brandon Page, an insurance agent. Both sides presented evidence including witness testimony, affidavits, and other exhibits.

On 28 May 2019, the Board issued a Tax Opinion affirming the Division's Tax Assessment issued to Appellant. Included in the Board's Tax Opinion were the following relevant Findings of Fact:

> 2. During the course of the underground economy investigation, Lyles provided Foshie with an Employer's Statement Questionnaire ("ESQ") to be completed on behalf of the employer.
>
> 3. In the ESQ, Foshie acknowledged: (1) that the nature of the services rendered by his business include laying carpet, setting up tables, preparing booths for trade shows, general tools, and stages; (2) that workers do not advertise their services; (3) that workers do not have federal employer identification numbers; (4) that licenses or permits for this type of work is not applicable; (5) that he provided on-the-job training for some workers, including teaching them the tools of the trade; (6) that payment is set based on a 10-hour workday; (7) that workers are reimbursed for hotel expenses; (8) that he tells the workers what is to be done; (9) that he tells the workers how to do the work; (10) that he can discharge workers for doing the work another way; (11) that workers don't specifically report to anyone while work is being done, but talks to him if problems arise; (12) that there are no contracts with workers; and (13) that he carries workers' compensation insurance on the workers, and that the workers do not carry insurance. Foshie signed the ESQ on October 16, 2014, acknowledging that his responses were true, accurate, and complete.
>
> . . . .
>
> 9. RTM Lisa Ramsey was assigned to review and determine whether the Tax Assessment was properly issued. Ramsey provided another ESQ to Foshie to be completed on behalf of the employer. On May 4, 2017, Attorney Kerkhoff submitted responses to the ESQ that Ramsey

provided to Foshie. Foshie acknowledged that his typed name on the document signifies his signature, and that the responses provided in this ESQ were also true, accurate, and complete.

10. Upon completing her protest assignment, Ramsey submitted written findings. In her findings, Ramsey concluded that the workers listed in the employer's 2015 and 2016 quarterly tax and wage reports were employees of the employer, and not independent contractors. Ramsey specifically noted discrepancies in the two ESQ responses given by Foshie.

. . . .

12. The employer does not maintain a brick and mortar building or office specifically for its business. Some crew members are residents of North Carolina, while others reside in other states. Crew members travel directly from their homes to the project trade show job sites. Job sites include fairgrounds, convention centers, and racetracks.

13. The process of providing a crew for a specific project is as follows: The decorators/contractors contact the employer with requests for specific individuals and/or a specific number of workers to provide trade show labor. The employer contacts the requested individuals and other workers to provide the labor needed for specific trade shows.

14. Crew members perform work in four main categories, including professional riggers/commercial signage crews operating aerial platform lifts and scissor lifts; forklift operators; construction/deconstruction crews; and tradeshow design/decorator outfit crews.

15. Foshie contacts workers to meet a decorator's stated needs and directs the workers to the specific location of the work to be completed for the trade show. He also instructs them on when to report for work, as well as to whom they should report. Workers are instructed to report to the on-site crew leader, and to follow instructions provided by the crew leader or decorator. If problems arise, workers are directed to contact Foshie for solutions.

16. Foshie travels to trade shows after dispatching his workers to ensure that displays are set up correctly and that the work performed by his workers is satisfactory to the customer decorator. Foshie also had the right to discharge workers. The employer's business operation and procedures have remained the same since employer's inception.

17. The employer's business relies on its workers to continue operating, and would have to shut down if the workers were treated as employees. Most of the employer's workers perform work as part of a constructing and deconstructing crew, or design/decorator outfit crew, and did not require licenses, certificates, or specialized training.

18. Workers cannot enter facilities to perform their job duties without insurance coverage provided by the employer.

19. The employer signed and submitted applications for insurance coverage for its business and workers. The employer's insurance policies cover the employer's workers for on-the-job injuries.

20. The employer carries general liability and workers' compensation insurance on all its workers. The employer carried general liability insurance policies during calendar years 2015, 2016, and 2017. The employer also carried workers' compensation insurance for its workers during calendar years 2015, 2016, and 2017.

21. The insurance policy issued to the employer from State Auto Insurance Companies under policy number BOP 2664234 02 for the period January 8, 2014 to January 8, 2015 provides insurance coverage for some of the employer's equipment and tools.

22. The insurance policy issued to the employer from Erie Insurance under policy number Q25 0820945 CH for the period January 8, 2014 to January 8, 2015 provided insurance coverage for four full-time employees. Coverage was based on information provided by Foshie to his agent.

. . . .

24. The employer's commercial general liability application with Erie Insurance for the policy effective date of June 15, 2015 specifically states that the employer had no subcontractors, and does not act as a general contractor.

25. The Employment Practices Liability coverage issued to the employer from Liberty Mutual Insurance under policy number BKS (17) 57 37 95 97 for the period July 7, 2016 to July 7, 2017 sets a premium and provides coverage for eight employees.

26. Prior to issuing the workers' compensation policy, Page explained to the employer that workers' compensation insurance was not required on two or less employees.

. . . .

28. Foshie determines the hourly rate of compensation for the workers. Workers are paid for overtime hours. The employer also maintains payroll for all its workers. The employer also pays for the workers' travel and lodging expenses when overnight stays are necessary.

29. With the exception of one company, Wide Ark Services, Inc. ("Wide Ark") , the employer's workers are individuals, and do not have their own businesses. One of the employer's workers was homeless and sleeping in her car while when she performed work for the employer. One worker was paid $12.00 per hour. Another worker performed additional services for the employer.

. . . .

31. The employer's other workers, who are all individuals, do not have any written contracts with the employer. Some of those workers perform the same type of work for other companies in the same line of work as the employer. The workers do not submit bids for jobs to the employer. The workers do not submit written invoices for their services to the employer. The workers are paid directly by the employer, and payment is made in the individuals' names. Requests for raises in the amount of hourly pay for a worker must be made to Foshie. Foshie can fire workers.

> 32. The employers' workers do not carry liability insurance or workers' compensation insurance. Foshie has never asked the workers if they had their own businesses. He has also never requested certificates of insurance from the workers. The individual workers do not advertise for their services, or have federal employer identification numbers.

The Board annotated its Findings with sixty-seven footnotes referencing the hearing transcripts, affidavits, exhibits, and other evidence adduced at the hearing.

The Board's Opinion also included a section setting out the applicable law. This section explained that N.C. Gen. Stat. § 96-1(b)(10) defers to federal law which defines "employee" as: "any individual who, under the common law rules applicable in determining the employer-employee relationship, has the status of an employee . . . ."[1] Further, the Board noted Sections 96-1(11)-(12) defer to the federal definition of employer as: "any person who during a calendar year . . . paid wages of $1,500 or more, or . . . employed at least one individual . . . ."[2] Because Appellant's appeal centered around the Division's conclusion Appellant's workers were "employees," the Board saw it necessary to examine North Carolina's common law rules used to determine if a worker is an independent contractor.

The Board's Tax Opinion relied on *Hayes v. Bd. of Trustees of Elon College*, which sets out the common law factors for determining whether a worker is an independent contractor. 224 N.C. 11, 29 S.E.2d 137 (1944). Citing *Hayes*, the Board identified those factors including that an independent contractor:

> (a) Is engaged in an independent business, calling or occupation;
> (b) Is to have the independent use of his special skill, knowledge or training in the execution of the work;
> (c) Is doing a specified piece of work at a fixed price or a lump sum upon a quantitative basis;
> (d) Is not subject to discharge because he adopts one method of work rather than another;
> (e) Is not in the regular employ of the other contracting party;

1. 26 U.S.C. § 3121(d).

2. 26 U.S.C. § 3306(a).

(f) Is free to use such assistants as he may think proper;

(g) Has full control over such assistants;

(h) Selects his own time.

Also citing *Hayes*, the Board noted, "the employer's retention of the right to control and direct the manner in which the details of the work are to be executed and what the laborers will do as the work progresses is decisive."

Applying the *Hayes* factors, the Board observed from the evidence: Appellant's "workers were not engaged in independent businesses, callings or occupations . . . performed part-time work for the employer[,]" and that no profit or loss could be realized by the workers; the workers could complete their tasks after general direction and without "specialized skills" requiring "formal training[;]" workers did not "do a specified piece of work at a fixed price . . . [Appellant] set the pay rate and signed the relevant pay checks"—workers were paid on an hourly basis and did not bill Appellant; workers were subject to discharge for adopting one method of work over another, but it was not necessary for Foshie to be present because of the nature of the work; Foshie established and communicated expectations to the workers and required them to report to specific places, at specific times, to specific people; workers did not use assistants and had no supervisory authority over any other worker; and, workers could not "select [their own] work hours"—Appellant required certain "commitment minimums" and workers were paid overtime. Accordingly, the Board affirmed the Division's Tax Assessment and found Appellant was liable for unemployment insurance contributions.

On 12 June 2019, Appellant filed exceptions to the Tax Opinion. The Board overruled Appellant's exceptions on 19 June 2019. Appellant petitioned for judicial review in Mecklenburg County Superior Court on 27 June 2019. The Mecklenburg County Superior Court heard Appellant's case on 7 October 2019. After hearing "the arguments presented, review[ing] the applicable case and statutory law, examin[ing] the record on appeal, and review[ing] the evidence[,]" the Superior Court filed its Order Affirming Administrative Decision (Order) on 9 October 2019. In its Order, the Superior Court concluded the Board was responsible for "determining the weight and sufficiency of the evidence . . . and resolving conflicting and circumstantial evidence." The Superior Court found there was "competent evidence in the record to support the Board of Review's findings of fact[.]". Moreover, the Superior Court concluded: "It appears from the record that the Board of Review considered and applied the common law factors set forth in *Hayes v. Bd. of Trustees of*

Elon College, . . . in determining that Appellant's workers were employees . . . ." As such, the Superior Court concluded "the Board of Review correctly applied the common law factors to its findings of fact in concluding that Appellant's workers were employees of Appellant." Finally, the Superior Court determined the Board considered, interpreted, and correctly applied North Carolina's Employment Security Law in this case. Accordingly, the Superior Court affirmed the Board's Tax Opinion. The Superior Court's 9 October 2019 Order was not served on Appellant until 18 November 2019. Thus, Appellant timely filed its written Notice of Appeal to this Court on 16 December 2019.

Issues

The dispositive issues in this case are whether the Superior Court properly concluded: (I) the Board's Findings of Fact were supported by competent evidence; and (II) the Board properly applied the law in determining Appellant was an employer liable for unemployment taxes under North Carolina's Employment Security Law.

Standard of Review

Generally, final agency decisions are subject to judicial review pursuant to North Carolina's Administrative Procedure Act found in Chapter 150B of the General Statutes. N.C. Gen. Stat. § 150B-1 (2019). However, "Department of Commerce hearings and appeals authorized under Chapter 96" are exempt from Chapter 150B's contested case provisions. *Id.* § 150B-1(e)(20).

N.C. Gen. Stat. § 96-4(q) provides, "[t]he Board of Review . . . shall have the right and power to hold and conduct hearings for the purpose of determining the rights, status and liabilities of an employer" and "the power and authority to determine any and all questions and issues of fact or questions of law that may arise under the Employment Security Law" affecting the rights, liabilities, and status of an employer including the right to determine the amount of contributions an employer owes to the Division. N.C. Gen. Stat. § 96-4(q) (2019). A "decision or determination of the Board of Review upon such review in the Superior Court shall be conclusive and binding as to all questions of fact supported by any competent evidence." *Id.* Our standard of review is the same as the Superior Court's review of the Board's decision: "whether the facts found by the [Board] are supported by competent evidence and, if so, whether the findings support the conclusions of law." *Reeves v. Yellow Transp., Inc.*, 170 N.C. App. 610, 614, 613 S.E.2d 350, 354 (2005) (citations and quotation marks omitted). "Competent evidence is evidence

that a reasonable mind might accept as adequate to support the finding." *In re Adams*, 204 N.C. App. 318, 321, 693 S.E.2d 705, 708 (2010) (citation and quotation marks omitted). Moreover, the Board's findings are conclusive "even though the evidence might sustain findings to the contrary." *Brackett v. Thomas*, 371 N.C. 121, 126, 814 S.E.2d 86, 89 (2018) (citation and quotation marks omitted).

Analysis

I. Findings of Fact

[1] Appellant argues the Superior Court erred in concluding the Board's Findings of Fact were supported by competent evidence. The Superior Court concluded the Board did not err in "determining the weight and sufficiency of the evidence" and that there was competent evidence to support the Board's Findings. Therefore, we review the Board's Findings to determine whether the Record contained *any* competent evidence to support those Findings. N.C. Gen. Stat. § 96-4(q) (2019); *see also Reeves*, 170 N.C. App. at 614, 613 S.E.2d at 354.

Specifically, Appellant argues the following Findings were not supported by competent evidence: (A) Appellant controls the manner in which its workers complete the work and can discharge workers for adopting a different method; (B) workers did not have independent use of special skills, knowledge, or licenses; (C) workers were in Appellant's regular employ; (D) Appellant must have provided tools and equipment to its workers because Appellant maintained insurance for tools; and (E) workers did not perform a specified piece of work, make a profit or loss, or negotiate and set their own pay.

A. Control of the manner of work and ability to discharge workers

Appellant contends testimony at the hearing contradicts the Board's conclusion Appellant controlled the method of work and retained the authority to discharge workers. It is true there is some evidence in the Record to support Appellant's position. For example, Foshie testified he would not go to tradeshows to direct or manage the work crews. Foshie testified he "might come in after" to ensure the clients were satisfied with the product. Further, when asked whether a worker could be discharged for adopting one method of work or another, Foshie responded: "No. That is not my concern. . . . the only thing I'm concerned about is the outcome of it." Sworn affidavits from some workers also tend to corroborate Foshie's assertion workers could not be fired in the middle of a job.

However, there is also evidence in the Record to support the Board's Findings. *See Brackett*, 371 N.C. at 126, 814 S.E.2d at 89. As part of the Division's investigation, Foshie responded to and signed an Employment Security Questionnaire stating he tells workers what to do, how to do it, and could discharge workers as he sees fit. Moreover, the Record contains other questionnaires from workers who stated they felt as if they were employees and could not complete jobs in any way they saw fit. Thus, there is evidence in the Record to support the Board's Findings.

B. Workers' use of independent knowledge, skill, or licenses

Appellant further contends Foshie's testimony at trial contradicts the Board's Finding workers did not have use of independent knowledge, skill, or licenses in completing the work. Foshie testified workers could not "come in off the street" and complete the tasks required. Moreover, certain tasks and trades—rigging and forklift operation—required licensure and certification. Foshie testified even the "construct and deconstruct" crews, without any special licenses or certifications, required "talent" to complete the jobs assigned them.

However, the Record also contains evidence some workers did not use independent or special knowledge, skill, or licenses to complete their work. In Foshie's first signed ESQ, he answered "N/A" to the question asking if workers had licenses or permits and "must be able to work" to the question as to whether workers had independent use of special skills, knowledge, or training. Moreover, at least three workers answered the same questions in the negative. These workers also stated Foshie and other "bosses" showed them how to complete their tasks. Thus, again, there is evidence in the Record supporting the Board's Finding.

C. Workers were in Appellant's regular employ

Appellant argues the Board "grasped" to find Appellant's workers were in Appellant's regular employ. Appellant highlights the Board's citation to evidence one worker "performed additional services [outside of the tradeshow setting] for the employer." Moreover, Appellant argues work is performed on a temporary and sporadic basis and workers do not work for Appellant outside of the tradeshow setting.

However, the Board's Finding is supported with substantial other evidence Appellant does not mention. The Board acknowledged workers did not have written contracts with Appellant, but Appellant "communicated its expectations to workers and required workers to report to jobs at a specific time, place, and person." The Board stated, although the work was

done on a part-time basis, workers were regularly employed by Appellant when available. Moreover, the Board pointed to evidence Appellant's clients did not seek out any of these workers individually and always contacted Appellant to provide crews. The Board also cited Appellant's general liability and workers' compensation policies for four to eight "employees." Thus, we conclude the Board's Finding is supported by evidence in the Record.

D. Providing tools and equipment for workers

Appellant further submits the Board's Finding Appellant provided tools for workers was not supported by competent evidence. Again, Appellant posits the Board "grasped" at evidence of Appellant's tool insurance policy to infer Appellant provided tools to its workers. Appellant points to "overwhelming" evidence—in workers' statements and affidavits—workers provided their own tools. According to Appellant, the Board made an impermissible inference based solely on the insurance policy.

The specific Finding challenged by Appellant was actually part of the Board's broader Finding the workers were not engaged in their own independent business and that workers did not independently use their own special knowledge or skill on jobs. However, the Board in its Finding, acknowledged Appellant's workers supplied their own tools, while also inferring Appellant provided at least some tools based on Appellant's purchase of insurance coverage for tools. Even if this particular inference was improper, the mere fact workers, as found by the Board, provided their own hand tools, would not in and of itself be determinative under *Hayes*. *See Hayes*, 224 N.C. at 16, 29 S.E.2d at 140 ("The presence of no particular one of these indicia is controlling.").

Moreover, the broader Finding that workers were not engaged in their own businesses was supported by competent evidence. When asked whether he could name any of the individual workers' businesses, Foshie responded: "They don't have, most of these guys don't have names of businesses." Moreover, some of the workers—through questionnaires and affidavits—stated they did not have federal employee identification numbers, and one stated, "I felt like an employee. I wasn't my own boss . . . ."

E. Performing a specified piece of work; Profit or Loss; Setting Pay

Finally, Appellant contends the Board's Findings workers were not paid for performing a specified piece of work, did not realize a profit or loss, and did not set their own pay were not supported by competent evidence. Appellant notes the citations the Tax Opinion used to support

these Findings merely point to evidence workers preferred "flat bid" jobs and that Appellant would negotiate pay rates on the workers' behalf.

However, Foshie testified he paid the workers overtime for periods of work over eight hours in a twenty-four-hour period, and travel expenses including hotel rooms. Moreover, multiple worker affidavits—even those stating the workers considered themselves contractors—stated most jobs were paid on an hourly basis. In fact, Foshie testified workers merely preferred the flat bid jobs because the workers could get jobs done quickly regardless of the money paid. The Record also indicates Appellant paid workers for extraneous travel expenses and overtime. Moreover, even where workers objected to pay rates on particular jobs, Appellant negotiated the pay rate with its clients. Thus, the Record supports the Board's Findings Appellant's workers did not perform a specified piece of work, realize profit or loss, and were not able to set their own pay.

At best, Appellant establishes there was conflicting evidence on all these Findings. However, it was the Board's duty to resolve these conflicts in the evidence. *See Brackett*, 371 N.C. at 126, 814 S.E.2d at 89. As discussed, the Record does contain competent evidence to support the Board's Findings. Thus, the Superior Court did not err in determining the Board's Findings were supported by competent evidence.

II. Application of the *Hayes* Factors

[2] Appellant further contends the Superior Court erred in concluding the Board correctly applied the law in applying the *Hayes* factors and in concluding Appellant's workers were employees; and, therefore, Appellant was liable for employment security contributions.

As noted above, our Supreme Court laid out the determinative common law factors in *Hayes*. According to the *Hayes* Court, an independent contractor is one who:

> (a) is engaged in an independent business, calling, or occupation;
>
> (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work;
>
> (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis;
>
> (d) is not subject to discharge because he adopts one method of doing work rather than another;

(e) is not in the regular employ of the other contracting party;
(f) is free to use such assistants as he may think proper;
(g) has full control over such assistants; and
(h) selects his own time.

See Hayes, 224 N.C. at 16, 29 S.E.2d at 140. "[N]o particular one of these indicia is controlling. Nor is the presence of all required. They are considered along with all other circumstances to determine whether in fact there exists in the one employed that degree of independence necessary to require his classification as independent contractor rather than employee." *Id*. The parties in this case agree the *Hayes* factors and analysis applies to these proceedings before the Board.

Here, the Board made Findings of Fact supporting conclusions Appellant's workers were not independent contractors based on each of the *Hayes* factors.[3] Accordingly, the Board concluded, as a matter of law, the Division correctly issued the Tax Assessment to Appellant, and Appellant was an employer liable for unemployment insurance contributions.

However, Appellant specifically argues the Superior Court erred in determining the Board correctly applied the law when it concluded: (A) workers were not engaged in an independent calling; (B) workers were in Appellant's regular employ; (C) workers did not select their own time under *Hayes*; and (D) Appellant exercised the right to control the manner and details of the work performed.

A. Independent Calling

Appellant argues the Division misapplied the law by concluding workers were not engaged in an independent calling or business because the Division ignored the fact that workers were sole proprietors.

The Board supported its conclusion by finding workers did not have their own businesses, did not advertise their services, did not carry their own insurance, and did not have federal employer identification numbers. Appellant cites *McCown v. Hines* to support its contention the law does not require such formalities in order to be a sole proprietor; and, thus, an independent contractor. 353 N.C. 683, 549 S.E.2d 175 (2001).

3. Appellant contends the Division erroneously requires that each of the *Hayes* factors be established before an entity may be deemed an independent contractor. However, our review of the Record indicates the Board itself did not apply such a requirement, and instead merely weighed the evidence presented on each factor.

Although the *McCown* Court held a roofer, hired by an individual to repair a roof, did not need all these formalities to be a sole proprietor and independent contractor, the Court explained this was because the roofer was hired for his *expertise* as a roofer. *Id.* at 687, 549 S.E.2d at 178. In fact, the cases Appellant cites holding workers were engaged in independent callings each involved workers who had expertise in, or licenses or certifications for, particular professions. *See, e.g.*, *Hayes*, 224 N.C. 11, 29 S.E.2d 137 (skilled electricians); *McCown*, 353 N.C. 683, 549 S.E.2d 175 (a person hired specifically for his expertise in roofing); *Rhoney v. Fele*, 134 N.C. App. 614, 518 S.E.2d 536 (1999) (a registered nurse); *Gordon v. Garner*, 127 N.C. App. 649, 493 S.E.2d 58 (1997) (a truck driver with a commercial driver's license).

Here, however, as the Board noted, Appellant's workers were not licensed and had no particular expertise. Further, the Board found, "workers were not engaged in independent businesses, callings or occupations . . . performed part-time work for the employer[,]" and that no profit or loss could be realized by the workers. Moreover, the workers could complete their tasks after general direction and without "specialized skills" requiring "formal training." Indeed, in one affidavit a worker described himself as a "jack of many trades." Accordingly, the Board's Findings supported its conclusion workers were not engaged in an independent calling or business.

B. Regular Employ

Appellant further contends the Record reflects the work done by its workers was "sporadic" and, thus, the Division misapplied the law by concluding workers were in Appellant's regular employ.

In *Hayes*, electricians were hired to do an "extra" job outside of their regular employment with Duke Power. 224 N.C. at 18, 29 S.E.2d at 141. The electricians were free to decide when to do the work when they had time, but this sporadic work was a part of the one project on which they agreed to work. *Id.* Appellant cites our decision in *Rhoney v. Fele* for the proposition "sporadic" work done by a nurse—*engaged in an independent calling*—coordinated by a nurse-finding agency did not satisfy the regular employment *Hayes* factor. 134 N.C. App. 614, 518 S.E.2d 536.

However, here, the Board did not characterize the work as "sporadic." The Board characterized the work as "part-time" and workers were employed when Appellant had work and the workers were available. Further, the Board found Appellant instructed the specific

time, place, and person to which the workers were to report for work. Moreover, the nature of the work—unlike the specialized, licensed nursing or electrical work—was itself part-time and relatively unskilled, rather than sporadic work done by someone with an independent calling. *See, e.g.*, *Hayes*, 224 N.C. at 18, 29 S.E.2d at 141 ("[workers] were skilled electricians[.]"; *Rhoney*, 134 N.C. App. at 618, 518 S.E.2d at 540 ("as a registered nurse, [the worker] was engaged in an independent profession[.]"). As the Board found: Appellant was not merely a "middleman" for an entity needing a specialized worker; Appellant hired workers to complete jobs it contracted with clients to complete. *See Rhoney*, 134 N.C. App. at 619, 518 S.E.2d at 540 ("Thus, Nursefinders' role was similar to that of a broker or other middleman."). Thus, the Board's Findings supported its conclusion workers were in Appellant's regular employ.

C. Workers selecting their own time

Next, Appellant argues the Division misapplied the law by concluding the workers could not set their own time for working because they were able to accept or reject jobs as they saw fit.

Again, the *Hayes* Court concluded the electricians were free to determine when to complete the contracted work—outside of their regular employment duties with Duke Power—when they had extra time to work. 224 N.C. at 18, 29 S.E.2d at 141. In this case, workers could accept or reject entire projects; however, if they accepted a project they had to report at a specific time and place and to specific people for work. Within that particular job, the workers could not set their own hours.

Appellant cites *Rhoney* for the proposition the ability to accept or reject a job tends to support an independent contractor status. *Rhoney*, 134 N.C. App. at 619, 518 S.E.2d at 540. However, the *Rhoney* court also stated the nurse's inability to set his or her time once the nurse accepted a particular job cut against an independent contractor status. *Id.* Here, the Board found Appellant's workers were free to reject or accept specific projects; however, once on a project, workers could not choose the hours they worked. Therefore, as in *Rhoney*, the facts in this case cut both ways.

Appellant also cites *Gordon v. Garner* where we held a commercial truck driver was an independent contractor where he was free to accept or reject any delivery but had no discretion as to what he did with the load once he accepted a delivery. 127 N.C. App. 649, 659, 493 S.E.2d 58, 64. However, again, the commercial truck driver engaged in an independent calling and contracted for discrete deliveries with other

businesses. Appellant's workers, unlike the truck driver in *Gordon*, agreed to work on multi-day projects, made up of numerous individual tasks. Accordingly, the Board's Findings supported its conclusion the workers could not set their own working times.

D. Controlling the manner and details of work

Finally, Appellant argues the Division misapplied the law by concluding Appellant controlled the manner and details of the work when Appellant was not generally on site directing the work. Again, we disagree.

The *Hayes* Court held discussing specific details "before the work was begun . . . related to the general nature of the work" failed to show "the right to control the details of the work" sufficient to establish an employer-employee relationship. *Hayes*, 224 N.C. at 18, 29 S.E.2d at 142. Indeed, the *McCown* Court held the customer's direction that the roofer use certain mismatched shingles and where to place the shingles did not show the customer retained the right to control the manner and details of the work—the customer did not tell the roofer how many nails to put in each shingle or how far to overlap the shingles. *McCown*, 353 N.C. at 688, 549 S.E.2d at 178. Appellant contends, like these cases, it was only concerned with the end product and whether its clients were satisfied by the work.

However, the Board found—supported by affidavits and questionnaires, including one signed by Foshie—workers received on-the-job training as to how to do the work. Indeed, Foshie stated no person could "come in off the street" and do these jobs. Foshie, or someone employed by Appellant, gave at least some of the workers on-the-job training on how to do some of the work required. Unlike in *Hayes* and *McCown*, Appellant did exercise some control over how the work was done and not merely the end result. Therefore, the Board's Conclusion Appellant controlled the manner and details of the work was supported by its Findings.

Thus, we conclude the Board's Conclusions as challenged by Appellant are supported by the Board's Findings of Fact. Moreover, when considered along with the Board's additional Conclusions as to the remaining *Hayes* factors, the Board did not err in concluding Appellant's workers were employees and Appellant was liable for employment security contributions. Consequently, the Superior Court did not err in concluding the Board correctly applied the *Hayes* factors to the facts of this case.

Conclusion

For the foregoing reasons, the Superior Court properly affirmed the Board's Tax Opinion. Accordingly, we, in turn, affirm the Superior Court's Order.

AFFIRMED.

Judges BRYANT and DIETZ concur.

STATE OF NORTH CAROLINA
v.
JONATHAN CONLANGES BOYKIN

No. COA19-686

Filed 15 December 2020

1. Motor Vehicles—speeding to elude arrest—operating a motor vehicle—motion to dismiss—sufficient evidence

In a prosecution for felony speeding to elude arrest where "operating a motor vehicle" was an essential element of the crime and mopeds were specifically excluded from the statutory definition of "motor vehicle", the State presented sufficient evidence of that element to survive defendant's motion to dismiss where the arresting officer, despite repeatedly referring to defendant's vehicle as a moped during his testimony, stated that the vehicle operated by defendant was traveling at 50 mph, and also testified that the definition of "moped" excludes vehicles capable of going over 30 mph.

2. Motor Vehicles—speeding to elude arrest—jury instructions—failure to instruct on definitions of "motor vehicle" and "moped"

In a prosecution for felony speeding to elude arrest where "operating a motor vehicle" was an essential element of the crime and mopeds were specifically excluded from the statutory definition of "motor vehicle," the trial court committed plain error by failing to instruct the jury on the definitions of "motor vehicle" and "moped." Because the arresting officer repeatedly referred to defendant's vehicle as a "moped" and—where "moped" was statutorily defined as a vehicle incapable of going over 30 mph on level ground—he did not lock in a speed on radar or state whether the vehicle was being operated on level ground, failure to instruct on the definitions

of "motor vehicle" and "moped" likely misled or misinformed the jury and had a probable impact on the jury's finding that defendant was guilty.

3. Sentencing—habitual felon status—underlying felony conviction vacated—new trial

Where defendant's conviction for felony speeding to elude arrest was vacated for a new trial, his conviction for attaining the status of habitual felon based on that felony was also vacated for a new trial.

Appeal by defendant from judgments entered 12 June 2018 by Judge Ebern T. Watson III in Superior Court, Sampson County. Heard in the Court of Appeals 18 February 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil Dalton, for the State.

Gilda C. Rodriguez, for defendant-appellant.

STROUD, Judge.

Defendant was found guilty by a jury of felony speeding to elude arrest, felony habitual driving while impaired and two counts of attaining the status of habitual felon, one based on the speeding to elude arrest conviction and one based upon the habitual driving while impaired conviction. Defendant's appeal focuses on the judgment convicting him of felony speeding to elude arrest and because the jury was not instructed on the definition of an essential element of the crime of speeding to elude arrest and the evidence on this issue was in conflict, defendant must receive a new trial for speeding to elude arrest. Accordingly, defendant must also receive a new trial on the count of attaining the status of habitual felon which was based upon the felony speeding to elude arrest conviction. Further, we remand defendant's judgment for habitual impaired driving and the attaining of habitual felon status conviction, based upon habitual impaired driving, for resentencing and clarification.

I. Background

The State's evidence showed that in mid-May 2015, Patrol Officer Christopher Hardison of the Sampson County Sheriff's Office heard a radio communication about "a moped[.]" Officer Hardison then saw a man later identified as defendant riding a moped and followed him. The speed limit was 55 mph, and Officer Hardison testified that he

"clocked [the moped] at 50 miles per hour" but failed to "lock this speed in[.]" The speed limit then changed to 35 mph, and Officer Hardison testified the moped was still going 50 miles per hour. Officer Hardison turned on his blue lights to stop the moped for speeding, but it did not stop. The driver of the moped made several turns and ran three stop signs. Much of the chase was recorded. Later that day, the moped was spotted next to a "residence." Officers found defendant nearby and arrested him.

When defendant was arrested, he smelled of alcohol and had red glassy eyes and slurred speech. Defendant refused to submit any field sobriety tests and to provide a breath sample. Officer Hardison obtained a search warrant for a blood sample from defendant. Defendant was combative during the blood draw and had to be restrained. The results of the blood test showed a blood alcohol level of 0.19. During defendant's trial, the jury was informed of defendant's prior convictions, including impaired driving. Defendant was found guilty of felony speeding to elude arrest, habitual driving while impaired, and two counts of attaining the status of habitual felon -- one count based upon the conviction for eluding arrest and one based on the conviction for habitual impaired driving. Ultimately, the trial court entered judgment on the convictions for eluding arrest and habitual impaired driving, but entered only the count of attaining the status of habitual felon as related to the eluding arrest felony. Defendant appeals.

II. Felony Speeding to Elude Arrest

Defendant makes two arguments on appeal arising from the definition of a "motor vehicle" for a speeding to elude arrest conviction.

> The essential elements of misdemeanor speeding to elude arrest under section 20–141.5(a) are: (1) operating a motor vehicle (2) on a street, highway, or public vehicular area (3) while fleeing or attempting to elude a law enforcement officer (4) who is in the lawful performance of his duties. N.C. Gen. Stat. § 20–141.5(a).

State v. Mulder, 233 N.C. App. 82, 89, 755 S.E.2d 98, 103 (2014). Additionally, two aggravating factors raise the misdemeanor of speeding to elude arrest to a felony. *See id.* For purposes of this appeal, we note that the essential four elements are the same for both misdemeanor and felony speeding to elude arrest. *See generally id.*

A. Motion to Dismiss

[1] We begin with defendant's last issue in his brief. At the close of the State's evidence, defendant moved to dismiss the charges against him

because "the State has [not] carried its burden in this particular matter[.]" The trial court denied the motion. Thus, we turn first to defendant's last argument on appeal. Defendant contends "the trial court erred when it denied . . . [his] motion to dismiss the charge of felony speeding to elude arrest because the evidence was insufficient to support the necessary element that . . . [he] was operating a 'motor vehicle.' " (Original in all caps.)

> The proper standard of review on a motion to dismiss based on insufficiency of the evidence is the substantial evidence test. The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If there is substantial evidence of each element of the charged offense, the motion should be denied.

State v. Key, 182 N.C. App. 624, 628-29, 643 S.E.2d 444, 448 (2007) (citations and quotation marks omitted). "When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

The State agrees with defendant that operating a "motor vehicle" is an essential element of the crime of felony speeding to elude arrest. Again,

> [t]he essential elements of . . . speeding to elude arrest under section 20–141.5(a) are: (1) operating a motor vehicle (2) on a street, highway, or public vehicular area (3) while fleeing or attempting to elude a law enforcement officer (4) who is in the lawful performance of his duties. N.C. Gen. Stat. § 20–141.5(a).

Mulder, 233 N.C. App. at 89, 755 S.E.2d at 103. Defendant correctly notes a "moped" is specifically excluded from the statutory definition of a "motor vehicle[.]" *See* N.C. Gen. Stat. § 20-4.01(23) (2015).[1] Defendant's offenses occurred in May of 2015, when North Carolina General Statute § 20-4.01(23) defined a "motor vehicle" as "[e]very vehicle which is

1. The statutes regarding the definitions of "motor vehicle" and "moped" have since been amended several times. *See generally* N.C. Gen. Stat. Ch. 20 (2019).

self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. *This shall not include mopeds as defined in G.S. 20-4.01(27)d1*." *Id.* (emphasis added). At the time of defendant's offenses North Carolina General Statute § 20-4.01(27)d1 defined a "moped" as "[d]efined in G.S. 105-164.3." N.C. Gen. Stat. § 20-4.01(27)d1 (2015).

North Carolina General Statute § 105-164.3(22) defined a "moped" in May of 2015 as "[a] vehicle that has two or three wheels, no external shifting device, and a motor that does not exceed 50 cubic centimeters piston displacement and cannot propel the vehicle at a speed greater than 30 miles per hour on a level surface." N.C. Gen. Stat. § 105-164.3(22) (Supp. 2014). Thus, the statutory definition of a "moped" requires evidence of a vehicle with all the following characteristics:

> (1) two or three wheels,
>
> (2) no external shifting device, and
>
> (3) a motor which
>
> > (a) does not exceed 50 cubic centimeters piston displacement, and
> >
> > (b) cannot propel the vehicle at a speed greater than 30 miles per hour on a level surface.

See id.

As a general rule, "[t]he state is not called on to prove the negative." *State v. Glenn*, 118 N.C. 1194, 1195, 23 S.E. 1004, 1005 (1896). But in this particular case, the statutory definition of "motor vehicle" has a negative embedded within it since it excludes "mopeds." *See* N.C. Gen. Stat. § 20-4.01(23). Defendant argues the State was required to prove a negative and the motion to dismiss should have been granted because the State did not prove defendant's vehicle was *not* a moped. The State contends it was required to prove only that defendant was operating a "motor vehicle" and defendant would have the burden of proving the exclusion; in other words, defendant would have to argue sufficient evidence that his vehicle was actually a moped as defined by statute as a defense. Indeed, despite the wording of the statute, the State is required to prove an affirmative: that defendant was operating a "motor vehicle." *See Mulder*, 233 N.C. App. at 89, 755 S.E.2d at 103. Thus, to survive a motion to dismiss, the State was required to present evidence that the vehicle defendant was operating was a "motor vehicle," defined as "[e]very vehicle which is self-propelled[,]" but excluding mopeds. N.C.

Gen. Stat. § 20-4.01(23). There is no dispute that the vehicle defendant was operating was self-propelled, and thus we turn to the evidence of "mopeds[.]" *Id.*

Defendant contends that his vehicle was excluded from the statutory definition of "motor vehicle" because it was a "moped," which is specifically excluded by North Carolina General Statute § 20-4.01(23). *See id.* But the State's burden of proof was not to present evidence that defendant's vehicle was a "moped;" its burden was to present evidence defendant was operating a "motor vehicle" and the State's evidence met this burden, so the trial court correctly denied defendant's motion to dismiss. *See generally id.*

Defendant's argument is based primarily on the State's use of the word "moped" to describe his vehicle. At trial, the State consistently referred to defendant's vehicle as a "moped." The State's primary witness, Officer Hardison, used the word "moped" over 50 times in his testimony, referring to defendant's vehicle.[2] But the word "moped" as used in the vernacular is not as technical as the statutory definition. *See generally* N.C. Gen. Stat. § 105-164.3(22). Since the statute defines the term "moped," that definition controls, despite the vernacular understanding of what a "moped" is. *See generally id.*

> In the construction of any statute, including a tax statute, words must be given their common and ordinary meaning, nothing else appearing. *Where, however, the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be.* The courts must construe the statute as if that definition had been used in lieu of the word in question. If the words of the definition, itself, are ambiguous, they must be construed pursuant to the general rules of statutory construction, including those above stated.

Appeal of Clayton-Marcus Co., Inc., 286 N.C. 215, 219–20, 210 S.E.2d 199, 202–03 (1974) (emphasis added) (citations omitted).

The "ordinary meaning" of "moped" generally does not take into account the nature of the "shifting device" or "piston displacement," and Officer Hardison was using the word in the ordinary sense in his

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2. At one point in Officer Hardison's testimony, he stated the speed of 50 miles per hour would make the vehicle a "motorcycle," but unfortunately, Officer Hardison and the State's counsel persisted in using the term "moped."

testimony. N.C. Gen. Stat. § 105-164.3(22). Despite Officer Hardison's use of the word "moped," where a statute defines a word, the court is required to use the statutory definition. *See Clayton-Marcus Co., Inc.*, 286 N.C. at 219–20, 210 S.E.2d at 202–03. Although it is odd that the State identified the vehicle defendant was operating as a "moped" before the jury over 50 times and now argues before this Court that defendant's conveyance was a "motor vehicle, not [a] moped," the use of the word "moped" in evidence is not conclusive. *See generally id.* The better practice would certainly be for the State and its witnesses to use the statutory term applicable to the crime, here "motor vehicle." *See Mulder*, 233 N.C. App. at 89, 755 S.E.2d at 103.

Officer Hardison acknowledged that a "moped" could not be a "motor vehicle" during direct examination, but despite the use of the word "moped" the State's evidence did not clearly establish that defendant's vehicle was a "moped" which would be excluded under the statutory definition. Officer Hardison testified: "I activated my blue lights due to the fact that this vehicle was running 50 in a 35, as well as I could obviously tell this was a moped, which is a vehicle that should not have been traveling more than 30 miles per hour because a vehicle traveling at 30 miles per hour as a motor vehicle is anything above 30 miles per hours" and

> [i]n reference to a moped, a moped by the state statute cannot exceed 30 miles per hour. So if it was manufactured as a moped and any -- for any reason or any kind of alterations that could have been done to increase that speed from 31 to whatever it may be, which in this case was 50, that changes the classification of that moped from a vehicle, which is the same thing as a bicycle, a lawnmower, et cetera, it changes that classification to a motor vehicle which requires a valid driver's license, insurance to be on that vehicle, as well as registration to be on that vehicle. Which a vehicle, a moped in itself, at this time did not require any of that.

The testimony continued,

> Q. But for a legal classification, you're saying it goes from a vehicle to a motor vehicle?
>
> A. That's correct.
>
> Q. And in this case, specifically, when it's not a car, it doesn't make it a car, does it?

> A. No. It makes it a motorcycle. Once it goes from the -- beyond the 30 miles per hour, once it hits 31 miles per hour and above, it changes the classification to a motor vehicle which is -- in turn, makes this, with two wheels, a motorcycle.

On cross-examination, Officer Hardison again stated that a moped, as defined by North Carolina General Statute § 105-164.3(22) would not be able to go over 30 miles per hour unless it had been altered. The maximum speed of the vehicle is one element of the definition of a moped, *see* N.C. Gen. Stat. § 105-164.3(22), and thus a moped should not be able to go as fast as 50 miles per hour on a level surface. Officer Hardison did not testify if the road was level where he clocked defendant at 50 miles per hour. Viewed in the light most favorable to the State, as we must for purposes of a motion to dismiss, *see Miller*, 363 N.C. at 98, 678 S.E.2d at 594, the State's evidence showed defendant was operating a vehicle which outwardly appeared to be a moped but could go faster than a "moped" as defined by statute.

On appeal, the State contends it presented evidence defendant's vehicle was going faster than 30 miles per hour, so it met the definition of "motor vehicle" in as would be necessary for a conviction of felony speeding to elude arrest. *See Mulder*, 233 N.C. App. at 89, 755 S.E.2d at 103. All the State needed to show to survive the motion to dismiss on the element of "motor vehicle" was to present evidence that defendant was operating a "self-propelled" vehicle. *See* N.C. Gen. Stat. § 20-4.01(23). The State's evidence that the vehicle was going over 30 miles per hour could potentially exclude one of the elements of the definition of "moped," although the evidence was silent as to the gradient of the road when the speed was clocked. *See* N.C. Gen. Stat. § 105-164.3(22). Further, no evidence was presented regarding the "shifting device" or "piston displacement" in order to establish that the vehicle was a "moped." *Id.* Ultimately, the State's evidence met the elements of the statutory definition of a "motor vehicle," despite its repeated use of the term "moped," *see* N.C. Gen. Stat. § 20-4.01(27), and defendant's motion to dismiss the charge of felony speeding to elude arrest was properly denied. *See generally Mulder*, 233 N.C. App. at 89, 755 S.E.2d at 103.

B. Jury Instructions

[2] Defendant also contends "the trial court committed plain error when it failed to instruct the jury on the definition of 'motor vehicle,' which is an essential element of speeding to elude arrest." (Original in all caps.) Defendant notes he did not object to the jury instructions and thus argues for plain error review.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted).

Defendant contends,

> Had the trial court explained the legal definition of "motor vehicle" to the jury, there is a reasonable probability that the jury would not have convicted Mr. Boykin of felony speeding to elude arrest. The State's evidence that was presented to the jury was that Mr. Boykin was driving a moped when Officer Hardison chased him on May 15, 2015. Although Officer Hardison stated that he believed Mr. Boykin was driving at a speed in excess of 30 miles per hour, he also stated that he failed to lock Mr. Boykin's speed with the RADAR device he had that night. Moreover, there was no evidence of modifications made to Mr. Boykin's moped that would have enabled it to travel the speed Officer Hardison alleged and possibly have disqualified it as a moped. Lastly, the only source of information the jury had on what constituted a motor vehicle was from Officer Hardison, the State's witness, who may not have been completely accurate or thorough in his explanation. In other words, the impartial law on what could be characterized as a motor vehicle was absent from the jury's deliberation. In light of the evidence, it was reasonably probable that the jury would have reached a different verdict on the speeding to elude arrest offense. The trial court, therefore, committed plain error when it failed to define a motor vehicle for the jury and Mr. Boykin should receive a new trial.

Thus, using much of the same law as in his argument regarding the motion to dismiss, defendant contends had the jury been properly instructed as to the full definition of a "motor vehicle" and the excluded vehicle, a

"moped," the jury would have reached a different result because it would have determined he was operating a "moped" and not a "motor vehicle." *See generally* N.C. Gen. Stat. §§ 20-4.01(27); 105-164.3(22). Defendant cites to *State v. Rhome*, wherein this Court found plain error when the trial court failed to instruct on an essential element of a crime. *See State v. Rhome*, 120 N.C. App. 278, 294, 462 S.E.2d 656, 667–68 (1995) ("It is well established that the defendant in a criminal action has a right to a full statement of the law from the court. Failure to specifically charge the jury on every element of each crime with which the defendant is charged is not error per se, requiring reversal, but reversal is mandated in such a case if the jury consequently falls into error. Thus, in instructing the jury, the trial court must correctly declare and explain the law as it relates to the evidence. Moreover, the rule that instructions are to be confined to the issues applies in criminal cases. Instructions must be tailored to the charge and the indictment, and adjusted to the evidence. Accordingly, the jury charge must relate each and every essential element as alleged in the indictment." ((citations, quotation marks, and brackets omitted)).

Further,

> [t]he question of whether a trial court erred in instructing the jury is a question of law reviewed *de novo*. The standard of review set forth by this Court for reviewing jury instructions is as follows:
>
> > This Court reviews jury instructions contextually and in its entirety. The charge will be held sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. McGee, 234 N.C. App. 285, 287, 758 S.E.2d 661, 663 (2014) (citations, ellipses, and brackets omitted). Defendant notes that Officer Hardison testified the moped was going in excess of 30 miles per hour, but he also admitted he had failed to lock in the speed on the RADAR device. In addition, Office Hardison did not describe the gradient of the roadway; even the statute recognizes that a moped may be able to go over 30 miles per hour downhill. *See generally* N.C. Gen. Stat. § 105-164.3(22).

The State's primary argument on appeal is that it is extraordinarily difficult for defendant to prevail under the plain error standard of review because defendant must demonstrate the jury would probably have reached a different result. We note this issue would likely have been avoided if the State had simply referred to the defendant's vehicle as anything but a "moped," the type of vehicle specifically excluded under the definition of "motor vehicle." *See* N.C. Gen. Stat. § 20-4.01(27). The State now contends,

> Given the unequivocal and [uncontradicted] testimony by Officer Hardison that he clocked the defendant at 50 miles per hour on radar, there can be no doubt that the defendant's vehicle met the definition of motor vehicle, not moped, since the officer's reading on radar was 50 miles per hour, which is not close to 30 miles per hour.

But there is some doubt. Even the fact noted as dispositive here by the State – speed – is not conclusive as there was no testimony that the surface was level. *See* N.C. Gen. Stat. § 105-164.3(22). In addition, the definition of "moped" includes elements other than speed. *See id.*

Properly instructed, a jury could have determined based on the evidence that defendant was not operating a "motor vehicle" but instead was operating a "moped." *See* N.C. Gen. Stat. §§ 20-4.01(27); 105-164.3(22). Often, due to the substantial evidence in trial, it is obvious that any errors in instructions had little or no probable impact on the jury's verdict, but that is not the case here. The State consistently and repeatedly used the term "moped" to describe defendant's vehicle, but the trial court did not instruct the jury on the definition of "motor vehicle" and the specific exclusion of a "moped" from that definition.

We conclude that without any instructions regarding the definition of "motor vehicle," including the statutory exclusion of a "moped," it "was likely that, in light of the entire charge," the jury was "misled or misinformed[,]" *McGee*, 234 N.C. App. at 287, 758 S.E.2d at 663, particularly since the State's evidence used the word "moped" to describe defendant's vehicle. We further conclude that "the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Defendant must receive a new trial on the speeding to elude arrest charge.

[3] Without the speeding to elude arrest conviction, defendant's conviction for attaining the status of a habitual felon based on that felony must be vacated for a new trial. *See generally State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977) ("Being an habitual felon is not a crime but

is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence. The habitual criminal act does not create a new and separate criminal offense for which a person may be separately sentenced but provides merely that the repetition of criminal conduct aggravates the guilt and justifies greater punishment than ordinarily would be considered." (citation, quotation marks, and ellipses omitted)).

Defendant makes two other arguments on appeal. The first argument is a double jeopardy issue regarding the felony speeding to elude arrest that he requests we invoke Rule 2 to consider. We decline to do so at this time as double jeopardy is a protection against twice being convicted or punished for the same offense, *see generally* U.S. Const. amend. V; N.C. Const. art. I, § 19, and defendant is now receiving a new trial for one of the convictions he contends is at issue. The remaining argument is as to a clerical error regarding the punishment class for the judgment for habitual impaired driving, and the State concedes this judgment may contain an error. We remand the habitual impaired driving judgment and remand for the trial court to address the clerical error on appeal and also the attaining the status of habitual felon conviction based upon the underlying felony of habitual impaired driving upon which defendant was convicted but, per our record, judgment was never entered upon nor arrested.

III. Conclusion

Defendant must receive a new trial on the charge of felony speeding to elude arrest and attaining the status of habitual felon conviction based on that charge. This result leaves intact the habitual impaired driving conviction and the habitual felon status based upon that conviction but due to the clerical error and the lack of any judgment regarding the habitual felon status conviction based upon the habitual impaired driving, we remand for the trial court to address the punishment class and both charges. In summary, we vacate the judgment in 15CRS50192 (speeding to elude arrest and habitual felon) for a new trial, and we remand for resentencing in file number 15CRS051148 (habitual impaired driving and habitual felon).

NEW TRIAL in part and REMANDED.

Judges INMAN and YOUNG concur.

STATE v. COFFEY

[275 N.C. App. 199 (2020)]

STATE OF NORTH CAROLINA
v.
WILLIAM BRANDON COFFEY

No. COA19-445

Filed 15 December 2020

1. Indecent Liberties—six-year-old victim—touching of chest—sufficiency of evidence—videotaped interview

On one of the charges of taking indecent liberties with a child in a prosecution for rape, sexual offenses, and kidnapping, a video recording of the six-year-old victim's forensic interview constituted sufficient evidence that defendant inappropriately touched the victim's chest after he made her remove her clothes, as detailed in the victim's statement. The interview was properly admitted for substantive purposes since it fell within the medical diagnosis exception to the hearsay rule and was not merely corroborative.

2. Kidnapping—first-degree—child victim—forcibly removed to church bathroom—sufficiency of evidence

In a prosecution for rape, sexual offenses, and kidnapping, the State presented sufficient evidence on the first-degree kidnapping charge that defendant forcibly removed the six-year-old victim from a hallway in a church to a bathroom, where the victim testified at trial that defendant began his assault on her in the hallway before taking her into the bathroom, a more secluded location, to complete his sexual acts.

3. Kidnapping—first-degree—jury instructions—variance from indictment—no prejudicial error

In a prosecution for rape, sexual offenses, and kidnapping, the trial court did not plainly err by instructing the jury on a theory of first-degree kidnapping that was not alleged in the indictment. Although the trial court failed to instruct on the element of whether the six-year-old victim had been sexually assaulted, as alleged in the indictment, but included the element that defendant did not release the victim in a safe place, which was not alleged, defendant was not prejudiced where it was unlikely a different result would have been reached since the evidence supported both theories, and it was clear from the record as a whole that the jury found that defendant had sexually assaulted the victim.

4. Sexual Offenses—sexual offense with a child by an adult—jury instructions—jury also instructed on first-degree sex offense—conviction vacated

In a prosecution for rape, sexual offenses, and kidnapping, the trial court committed prejudicial error by entering judgment on sexual offense with a child by an adult after instructing the jury on the lesser-included offense of first-degree sex offense, where the jury was not instructed on the only element distinguishing the two offenses—that defendant was at least eighteen years old when he committed the crime. Although there was evidence to show that defendant was thirty-three, and his conviction for rape of a child did include an element that he be at least eighteen, defendant's sentence on the greater offense was improper, and the matter was remanded for resentencing on first-degree sexual offense.

5. Evidence—expert witness testimony—Rule 702—foundation—DNA extraction and analysis

In a prosecution for rape and related charges, the trial court did not plainly err by allowing the admission of expert testimony regarding the DNA profile of a biological sample taken from the six-year-old victim's underwear that matched to defendant, where the expert laid a proper foundation pursuant to Evidence Rule 702(a)(3) regarding the procedures used to extract, analyze, and compare DNA samples.

6. Evidence—prior bad acts—Rule 404(b)—prior victim—similar acts

In a prosecution for rape, sexual offenses, and kidnapping involving the assault of a six-year-old victim in a church bathroom, the trial court did not plainly err by admitting evidence of a prior incident involving defendant and a nine-year-old girl where there were multiple similarities between that incident and the events for which defendant was charged, and where the trial court gave a limiting instruction restricting the jury's use of the prior bad act to prove defendant's identity, plan, or scheme in accordance with Evidence Rule 404(b).

7. Evidence—witness testimony—cross-examination of defendant's father—relevance

In a prosecution for rape, sexual offenses, and kidnapping involving the assault of a six-year-old victim in a church bathroom, there was no error in the State's cross-examination of defendant's father regarding his supervision of defendant on the day the offenses

occurred and whether churchgoers were warned about defendant, where the information elicited was relevant to the charges at issue and well within the scope of the father's testimony on direct examination that defendant needed frequent supervision.

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

Appeal by defendant from judgment entered 17 August 2018 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 3 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney Kathryn L. Pomeroy-Carter, for the State

Joseph P. Lattimore for defendant-appellant.

BRYANT, Judge.

On 28 September 2015, defendant William Brandon Coffey was indicted on two counts of sexual offense with a child by an adult, rape of a child, first-degree kidnapping, and two counts taking indecent liberties with a child. At the time of the incident, the victim, Maya[1], was six years old, and defendant was thirty-three years old. The matter was tried before the Honorable A. Graham Shirley, Judge presiding.

At trial, the State's evidence tended to show that on 1 September 2015, Maya went with her father to choir practice at their church. Upon arrival, Maya went to the kitchen area to play with the other children. At the same time, the church was also hosting a men's fellowship meeting, which was attended by defendant and his father. The church's video surveillance showed defendant left the men's fellowship meeting two times—the first time for about two minutes, and the next time for about eight minutes. Defendant saw Maya walking to the bathroom and extended his arms to hug and pick her up. Maya thought defendant was a friend of her father's. Another member of the church testified he saw defendant extend his arms toward Maya, pick her up, and hug her. The member testified that he was concerned, stating he "just [] had a feeling something didn't look right." He sought out the assistant pastor to tell him what he saw and asked him if defendant was related to Maya. The

1. Throughout the opinion, a pseudonym "Maya" and the word "child" are used interchangeably to protect the identity of the child-victim and for ease of reading.

assistant pastor didn't know but promised to look into it. Meanwhile, defendant had returned to the meeting but left a second time for much longer.

During that time, defendant saw Maya at the water fountain and told her to take her pants down. After "kissing [her] butt," defendant took Maya into the men's bathroom and told her to take off her pants, underwear, and shirt. Maya testified that defendant "used the part he pees with to [penetrate] the part [she] pee[s] with" and then defendant told her to roll over on her stomach and defendant "put the part that [he] pees with on [Maya's] butt." Maya said she felt poop coming out, and she also peed on the floor. Maya tried to yell for help, but defendant covered her mouth and nose and told her to "hold on just a little bit longer." Afterwards, defendant "wiped the part he pees with" and left the bathroom. Maya told her father that she had peed on herself. After leaving the church, Maya told her father that defendant had taken her to the bathroom and tried to explain what defendant had done to her. Maya's father immediately returned to the church and talked to the pastor about what had happened. The pastor then called the police.

Maya was taken to the hospital, where a standard rape examination was conducted. A nurse collected vaginal, rectal, and oral smears as well as Maya's clothes and underwear. Maya was also taken to SafeChild, a specialized child advocacy center for abused children. While there, she had a forensic interview, which was videotaped and later introduced into evidence at trial without objection. The church member, who had seen defendant pick up and hug Maya, was asked to identify the man he saw in a photo lineup. The church member identified defendant with 100 percent certainty. Defendant was then arrested and advised of his rights. A search warrant was served to obtain a buccal swab of the inside of defendant's mouth. The swab was sent to the North Carolina State Crime Laboratory and tested, using YSTR DNA ("DNA"), against a semen sample found on Maya's underwear.[2] The DNA profile from the semen on Maya's underwear matched the DNA profile from defendant's buccal swab. At the close of the State's case, the only evidence presented by defendant was the testimony of his father.

A jury convicted defendant on all counts. Defendant was sentenced as follows: 300 to 420 months imprisonment for each count of first-degree sex offense with a child; 300 to 420 months imprisonment for rape of a child; 83 to 112 months imprisonment for first-degree kidnapping; and 19 to 32 months imprisonment for each count of indecent liberties with

2. YSTR DNA testing is a type of autosomal testing for male DNA (Y chromosome).

a child. The sentences were ordered to run consecutive to each other. The trial court ordered defendant to register as a sex offender and that a satellite-based monitoring hearing be conducted upon defendant's release from prison. Defendant entered timely notice of appeal.

On appeal, defendant argues the trial court erred by I) denying his motion to dismiss a charge of taking indecent liberties with a child and kidnapping, II) entering judgment on two counts of sexual offense with a child by an adult after instructing the jury on the lesser charge of first-degree sex offense, and instructing the jury on first-degree kidnapping, III) admitting expert witness testimony about DNA profiles and allowing 404(b) evidence of defendant's prior misconduct with another child, and IV) allowing improper cross-examination of defendant's father.

I

Defendant first argues the trial court erred by denying his motion to dismiss for indecent liberties with a child and first-degree kidnapping. We disagree.

We review a "trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). In deciding whether to grant a defendant's motion to dismiss, the trial court must consider "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980) (citations omitted).

Indecent Liberties with a Child

[1] Defendant does not challenge the evidence that resulted in a verdict of taking indecent liberties based on kissing the child. As to the other charge of taking indecent liberties with a child, defendant argues the State did not provide sufficient evidence that defendant acted inappropriately by touching Maya's chest. Specifically, defendant argues that the evidence of defendant placing his hand on Maya's chest was offered for corroborative purposes only. We disagree.

Under N.C. Gen. Stat. § 14-202.1, a defendant can be convicted of taking indecent liberties with a child if: 1) the defendant is at least

sixteen years old, 2) the child-victim is under the age of sixteen, and 3) the defendant is at least five years older than the child in question. Additionally, a defendant is guilty of taking indecent liberties with a child under subsection (a)(1) if he "[w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]" N.C. Gen. Stat. § 14-202.1(a)(1) (2019).

In the instant case, Maya testified that defendant removed her clothes and got on top of her in the men's bathroom. She stated defendant touched her and kissed her. The forensic interviewer from SafeChild testified about Maya's videotaped interview at SafeChild. The videotaped interview was introduced into evidence and played for the jury without objection from defendant. During the interview, Maya specifically stated that defendant touched her chest during the assault.

Nevertheless, defendant contends the evidence from Maya's videotaped interview was offered for corroborative purposes only because Maya's testimony at trial never specifically stated that defendant touched her on the chest. As such, according to defendant, the trial court erred by instructing the jury as to indecent liberties based on the videotaped interview. We disagree.

This Court has previously held that statements made by a victim during an interview with a licensed clinical social worker can be used as substantive evidence at trial when the statements were made with the understanding that they would lead to medical diagnosis or treatment and that the statements were reasonably pertinent to diagnosis or treatment. *State v. Thornton*, 158 N.C. App. 645, 649–51, 582 S.E.2d 308, 310–11 (2003) (holding that the videotaped interview of a child-victim's statements to a social worker was properly admitted for substantive purposes under the medical diagnosis or treatment exception to the hearsay rule).

"Rule 803(4) [Statements for Medical Diagnosis or Treatment] requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *Id.* at 649–50, 582 S.E.2d at 311 (citing *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000)).

Here, the videotaped interview was conducted at SafeChild following Maya's sexual assault. The forensic interviewer testified about the standard procedure at SafeChild, which includes conducting a forensic interview and a medical exam for a child-victim's diagnosis. The

interviewer testified that prior to an interview with a child-victim, the child-victim is given a tour, so the child knows "[it] is really important for their health, that we are going to talk about today, we need to kind of know what happened, make sure we are telling the truth, and you are going to see the doctor today for anything that you are worried about with your body." The interviewer further testified that Maya was given a medical exam and was interviewed. During the interview, she specifically described the acts done to her by defendant, including defendant touching her on the chest. According to the witness, "[Maya] offered a number of those kinds of details, where, you know, it just was remarkable."

Given the evidence presented, Maya's videotaped interview was properly admitted under Rule 803(4) as her statements were made for the purposes of medical diagnosis or treatment, and the statements were reasonably pertinent to diagnosis or treatment. Further, while not distinguishing specific videos, the trial court instructed the jury without objection that the videos, including the forensic video at issue here, could be considered as substantive evidence. The evidence was sufficient to support denial of the motion to dismiss the challenged charge of taking indecent liberties with a child. Defendant's argument is overruled.

First-degree Kidnapping

[2] As to the first-degree kidnapping charge, defendant contends there was insufficient evidence to support that defendant forcibly removed Maya to the bathroom. We disagree.

Under N.C. Gen. Stat. § 14-39, any person who unlawfully confines, restrains, retains or removes a person under the age of sixteen from one place to another without the consent of a parent or legal guardian, will be guilty of kidnapping if the confinement, restraint or removal is "for the purpose of . . . [f]acilitating the commission of any felony" or "[d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed[.]" Further, "[i]f the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first[-] degree[.]" N.C. Gen. Stat. § 14-39(b) (2019).

"Kidnapping can be accomplished either by actual force or by fraud or trickery which induce[s] the victim to be removed to a place other than where the victim intended to be." *State v. Williams*, 201 N.C. App. 161, 171–72, 689 S.E.2d 412, 419 (2009) (alterations in original) (citation and quotation marks omitted)). "Asportation of a rape victim is

sufficient to support a charge of kidnapping if the defendant could have perpetrated the offense when he first threatened the victim, and instead, took the victim to a more secluded area to prevent others from witnessing or hindering the rape." *State v. Walker*, 84 N.C. App. 540, 543, 353 S.E.2d 245, 247 (1987) (citations omitted).

In the instant case, Maya testified that when she left the kitchen area to get some water, she saw defendant standing near the water fountain. At the water foundation, Maya testified that defendant asked her to take her pants down and kissed her bottom. Defendant then "took [her] to the men's bathroom," where he completed the sexual assault previously described. Thus, defendant's contention, that the evidence neither shows that he used actual force nor fraud or trickery to remove Maya, is without merit. Prior to the sexual assault, Maya had interacted with defendant, whom she thought was a friend of her father when he hugged her. Defendant began his sexual assault of Maya at the water fountain, where he had her pull down her pants and kissed her butt, and where he could have continued his assault, but instead *took* her to a secluded place, the men's bathroom, to further enable his ability to complete his sexual acts out of the presence of potential witnesses. The asportation of Maya from the water fountain to the men's bathroom in order to further sexually assault her was sufficient to support that element of the kidnapping charge. *See id.*

II

Defendant also raises arguments regarding his convictions of first-degree kidnapping and sexual offense with a child, arguing that the trial court erred by instructing on first-degree kidnapping and by failing to instruct on sexual offense with a child by an adult. Having not objected at trial to the issues raised on appeal regarding the jury instructions, we review each of defendant's arguments for plain error only.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "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.* (citation and quotation marks omitted).

First-Degree Kidnapping Jury Instructions

[3] Defendant argues the trial court committed plain error by instructing the jury on first-degree kidnapping. After careful consideration, we find no prejudicial error.

The first-degree kidnapping indictment returned against defendant by the Wake County grand jury charged as follows:

> [That] defendant named above unlawfully, willfully, and feloniously did confine, restrain or remove from one place to another [Maya], a child under the age of 16, without consent of a parent or legal custodian. The kidnapping was done in furtherance of a felony or for the purpose of committing a sexual assault. [] *[D]efendant also sexually assaulted [Maya]* []. This act was done in violation of NCGS § 14-39.

(emphasis added). The evidence at trial was consistent with the allegations in the indictment. The evidence showed that the act elevating the offense to first-degree kidnapping was that Maya was sexually assaulted. However, the trial court instructed the jury in pertinent part as follows:

> [T]he defendant has been charged with first[-]degree kidnapping. For you to find the defendant guilty of this offense, the state must prove five things beyond a reasonable doubt.
>
> First, that the defendant unlawfully removed a person from one place to another;
>
> Second, that the person had not reached her 16th birthday and her parent did not consent to this removal;
>
> Third, that the defendant removed that person for the purpose of facilitating the defendant's commission of rape or a sex offense. . . .
>
> Fourth, that this removal was a separate and complete act, independent and apart from the rape or sex offense;
>
> *And fifth, that the person was not released by the defendant in a safe place.*

(emphasis added).

By instructing the jury (as to the fifth element) that Maya was not released in a safe place and failing to instruct the jury on the element of whether Maya had been sexually assaulted, there was a variance between the language in the indictment and the language in the jury instruction. Such a variance is usually considered prejudicial error. However, upon plain error review of the entire case, it is not probable that the jury would have reached a different result if given the correct

instruction. *See id.* ("[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." (emphasis added)).

Defendant argues that *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984), is factually indistinguishable, and thus, defendant is entitled to a new trial on the kidnapping charge. However, to the contrary, *Brown* is distinguishable. In *Brown*, our Supreme Court found there was a variance between the first-degree kidnapping indictment and the jury instructions. The indictment alleged that the victim was restrained for the purpose of facilitating "attempted rape" and that defendant did not release the victim in a safe place. *Id.* at 247, 321 S.E.2d at 862. The jury instructions stated that the victim was restrained for the purpose of "terrorizing her" and "was sexually assaulted." *Id.* In addition to the trial judge erroneously "instruct[ing] on different theories for both the crime of kidnapping and the basis for first[-]degree kidnapping than were alleged in the indictment[,]" the erroneous instruction was repeated more than once. *Id.* Further, the evidence at trial did not support the trial court's instructions. *Id.* at 248, 321 S.E.2d at 862–63.

Notwithstanding the holding in *Brown*, the instant case is more analogous to *State v. Tirado*, 358 N.C. 551, 599 S.E.2d 515 (2004), where our Supreme Court held the jury instructions setting out a theory of a kidnapping charge not included in the indictment was erroneous. In *Tirado*, the evidence supported both the theory set out in the indictment and the additional theory set out in the trial court's instructions. *Id.* at 574–76, 599 S.E.2d at 532–33. Accordingly, the Supreme Court concluded that "a different result would not have been reached had the trial court instructed only on the purpose charged in the indictment, and that the error in the instructions was not prejudicial." *Id.* at 576, 599 S.E.2d at 533.

Here, as in *Tirado*, the evidence at trial supported both the theory in the indictment and the additional theory set out in the trial court's instructions. While it was error for the trial court to instruct on the fifth element—that the victim was not released in a safe place—as opposed to the language of the indictment—that the victim was also sexually assaulted—the record, as a whole, makes it clear the jury found that defendant had sexually assaulted Maya. The evidence also supported that Maya was not left in a safe place—specifically, she was left by defendant on the floor of the men's bathroom having urinated and defecated on herself following the sexual assault by defendant. It is unlikely a different result would have been reached had the trial court properly instructed the jury on the charged theory in the indictment. Thus, no prejudicial error existed in the jury instructions.

Sexual Offense Jury Instructions

[4] Defendant argues the trial court erred by entering judgment on sexual offense with a child by an adult after instructing the jury on first-degree sex offense, a lesser offense. We agree and find this to be prejudicial error.

To convict for sexual offense with a child in violation of N.C. Gen. Stat. § 14-27.28, formerly codified under N.C. Gen. Stat. § 14-27.4A, "[a] person is guilty . . . if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." In contrast, a conviction for first-degree sexual offense under N.C. Gen. Stat. § 14-27.29, formerly codified as N.C. Gen. Stat. § 14-27.4(a)(1), can be obtained "if the person engages in a sexual act with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim."

> While both offenses require the State to prove that the defendant engaged in a sexual act with a victim who was a child under the age of 13 years, sexual offense with a child . . . has a greater requirement with respect to the age of a defendant at the time of the act. For first[-]degree sexual offense, . . . the State must prove only that the defendant was at least 12 years old and at least four years older than the victim, whereas for [sexual offense with a child], the State must prove that the defendant was at least 18 years old.

State v. Hicks, 239 N.C. App. 396, 406–07, 768 S.E.2d 373, 379 (2015). "It is well settled in North Carolina that when a defendant is indicted for a criminal offense[,] he may be convicted of the offense charged or of a lesser included offense when the greater offense in the bill includes all the essential elements of the lesser offense." *State v. Snead*, 295 N.C. 615, 622, 247 S.E.2d 893, 897 (1978).

Here, defendant was indicted for sexual offense with a child. However, rather than instruct the jury on the indicted offense—sexual offense with a child by an adult—the trial court instructed the jury on the lesser offense—first-degree sexual offense. The trial court failed to submit to the jury the additional element necessary for sexual offense with a child by an adult: that defendant was at least eighteen years old, at the time he committed the offense.

We note the only distinction between sexual offense with a child and first-degree sexual offense is the element of establishing defendant's

age. There was evidence in the record to show that defendant was thirty-three years old when he committed a sexual act on six-year-old Maya. Additionally, defendant's conviction of rape of a child (requiring that the defendant be at least 18 years of age) following the same trial session presumably suggest that the jury found the State's evidence sufficient to prove he was at least eighteen years of age.

Nevertheless, in other circumstances, the failure to instruct on the additional element, standing alone, would not have a prejudicial impact on a defendant's verdict had that defendant been sentenced to first-degree sexual offense and the evidence was sufficient to support a conviction for this lesser offense. Defendant was sentenced as a Level II offender for sexual offense with a child by an adult, a Class B1 felony, punishable by an active sentence no less than 300 months. *See* N.C.G.S. § 14-27.28(b). The lesser included offense of first-degree sexual offense, also a Class B1 felony, is punishable by 221 to 276 months in the presumptive range.[3]

Here, as with the kidnapping instructions, we consider the entire record and find that defendant has demonstrated prejudicial error. The judgment in defendant's case, although consistent with the verdict, impermissibly sentenced defendant to a greater offense than set forth in the instructions. The jury instruction clearly outlined the lesser included offense of first-degree sexual offense, and thus, it was improper for the trial court to enter judgment for two counts of sexual offense with a child. Accordingly, on this record, we must vacate defendant's conviction for sexual offense with a child by an adult and remand for resentencing on the first-degree sexual offense.

III

Defendant raises issues on appeal involving the admission of evidence—particularly contesting the expert witness testimony regarding DNA testing on Maya's underwear and evidence of defendant's prior bad acts. Because defendant did not properly preserve his challenges to the admission of this evidence, we review for plain error only. N.C. R. App. P. 10(a)(4); *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Admission of expert witness testimony

[5] Defendant argues the trial court committed plain error by admitting expert witness testimony regarding the DNA profile from Maya's

3. For sentencing purposes, the length of the sentence in North Carolina is based on a defendant's prior criminal history. Defendant was Level II prior record level offender with 4 prior record points. *See* N.C.G.S. § 15A-1340.17(c) (2019).

underwear, which matched defendant, contending the trial court lacked a sufficient foundation to satisfy the requirements of Rule 702(a)(3). We disagree.

Under the North Carolina Rules of Evidence, an expert witness may testify in the form of an opinion if: (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. N.C. Gen. Stat. § 8C-1, Rule 702. The expert must "[have] knowledge of facts which would be helpful to a jury in reaching a decision[.]" *State v. Fletcher*, 322 N.C. 415, 422, 368 S.E.2d 633, 637 (1988).

> Subsections (1)-(3) [of Rule 702] compose the three-pronged reliability test[.] The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony[.] [While] the trial court has discretion in determining how to address the three prongs . . . [,] [t]he primary focus should be the reliability of the witness's principles and methodology, not . . . the conclusions that they generate[.]

State v. McPhaul, 256 N.C. App. 303, 313, 808 S.E.2d 294, 303 (2017) (alterations in original) (citations omitted and quotation marks omitted).

"[A]n expert witness must be able to explain not only the abstract methodology underlying the witness's opinion, but also that the witness reliably applied that methodology to the facts of the case." *Id.* at 316, 808 S.E.2d at 305; *see also State v. Gray*, 259 N.C. App. 351, 356–57, 815 S.E.2d 736, 740–41 (2018) (holding that a proper foundation was established at the time the challenged expert provided her opinion because her testimony demonstrated that she was a qualified expert, with over 20 years of experience in the field, and that her opinion was the product of reliable principles and methods which she reliably applied to the facts of the case).

In the instant case, Agent Meyer, a qualified expert in the field of forensics and an employee at the North Carolina State Crime Lab, testified to her qualifications in the area of DNA analysis as well as her training and experience in gathering evidence for DNA profiles. In particular, Agent Meyer testified to the process of extracting DNA from defendant's buccal swab by performing autosomal testing, which is a form of testing "exclusively for male DNA." Agent Meyer then described the four-step process to extract DNA from defendant:

[MEYER]: YSTRs are sort of another class of the autosomal testing[.]. . . YSTRs are typically used in cases of alleged sexual assault since they don't amplify the female DNA component on items such as body swabs, vaginal, rectal or oral swab and the female component will usually be an overwhelming abundance compared to the male component. And YSTRs can kind of – they will ignore the female component and just focus strictly on the male aspects of what may be present in that sample. And that is primarily what YSTR is used for, is to screen out the female portion of the sample.

. . . .

So compared to regular autosomal DNA, the first couple of steps where you extract DNA from an item where we use a series of chemicals to remove the DNA from the item you are testing, the quantitation step which is where you get an estimate of how much DNA you are able to obtain, those two steps are exactly the same no matter which type of testing is being performed. The difference comes in the third step which is what we refer to as amplification, and that is where we make millions of copies of specific areas on the DNA that we want to look at because those areas will differ from person to person. Therefore, they are the most informative.

. . . .

So after those areas have been amplified, we move them on to an instrument where it can separate out the different areas that we test and it produces a graph that we can look at and make visual comparisons between the patterns observed on the evidence and those that are observed from the standards.

. . . .

[THE STATE]: These procedures that you are talking about for YSTR, have they been widely accepted as valid in the scientific community?

[MEYER]: Yes.

[THE STATE]: Did you use those widely accepted procedures in analyzing the evidence from this case?

> [MEYER]: Yes.
>
> [THE STATE]: Were you qualified to do YSTR testing?
>
> [MEYER]: Yes. I was proficiency tested, and in addition to that, I performed the in-house validation for the system that we are currently using for YSTR.
>
> . . . .
>
> [THE STATE]: Did you receive evidence in the case involving [ ] defendant . . . and the victim, [Maya]?
>
> [MEYER]: Yes.
>
> . . . .
>
> [MEYER]: I performed YSTR analysis on both the buccal sample from [defendant] as well as the extract that [was] generated from [Maya's] underwear previously.
>
> . . . .
>
> [THE STATE]: Agent Meyer, when you did these procedures for this case, what were your results?
>
> . . . .
>
> [MEYERS]: The YSTR DNA profile obtained from the cutting from the underpants matche[d] the YSTR DNA profile obtained from [defendant].

Based on the testimony above, a proper foundation was laid to admit Agent Meyer's expert testimony regarding the DNA testing of Maya's underwear. Agent Meyer thoroughly explained the methods and procedures of performing autosomal testing and analyzed defendant's DNA sample following those procedures. That particular method of testing has been accepted as valid within the scientific community and is a standard practice within the state crime lab. Thus, her testimony was sufficient to satisfy Rule 702(a)(3). Defendant's argument is overruled.

Admission of Defendant's Prior Bad Acts

[6] Defendant next argues it was error to allow 404(b) evidence that defendant engaged in misconduct with a prior victim, Dana.[4] Specifically, defendant argues that because the incident with Dana was unrelated to the incident with Maya, the trial court should not have allowed the

4. A pseudonym is used to protect the identity of the victim witness.

prior bad acts evidence. Although defendant filed a motion in limine to exclude the 404(b) evidence, which motion was denied, he did not renew his objection to the admission of evidence, and now asks that we review this argument for plain error. N.C. R. App. P. 10(a)(4); *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Under N.C. Gen. Stat. § 8C-1, Rule 404, evidence of other crimes may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." This rule is "guided by two constraints: similarity and temporal proximity." *State v. Johnson*, 145 N.C. App. 51, 58, 549 S.E.2d 574, 579 (2001) (citation and quotation marks omitted).

> [F]or evidence of defendant's prior crimes or bad acts to be admissible to show the identity of the defendant as the perpetrator of the crime for which he is being tried, there must be some . . . particularly similar acts that would indicate that the same person committed both crimes, . . . [and while t]he similarities need not be unique and bizarre, they must tend to support a reasonable inference that the same person committed both the earlier and later acts.

State v. Gary, 348 N.C. 510, 521, 501 S.E.2d 57, 65 (1998) (internal citation and quotation marks omitted); *see also State v. Bagley*, 321 N.C. 201, 207–08, 362 S.E.2d 244, 248 (1987) (holding that in a first-degree sexual offense case, evidence that defendant attempted a remarkably, odd and strikingly similar *modus operandi* some ten weeks after his attack on victim was relevant and admissible as tending to prove defendant's modus operandi, motive, intent, preparation, and plan).

In the instant case, the trial court conducted a *voir dire* hearing on defendant's 404(b) motion in limine. Dana testified at the hearing that on 30 May 2019, after leaving a pool at her apartment complex, defendant approached her. Dana was *nine years old* at that time. Defendant pulled down Dana's pants and touched her bottom. Defendant then grabbed Dana's wrist and started pulling her. Defendant pulled Dana to the other side of her building and put her on the stairs. Defendant took off her shoe and kissed her foot. As Dana began to scream, defendant slapped her and told her to be quiet. At the hearing, Dana identified defendant as her assailant.

The trial court's findings at the *voir dire* hearing reflect that Maya and Dana were young females, similar in age. The findings also established the following: both females were strangers to defendant; they were separated from a group and taken to a more secluded location;

they were touched improperly beginning with the buttocks; and they were told to be quiet during the assault. The trial court found the facts similar enough in both cases to be admissible under Rule 404(b), and Dana was allowed to testify before the jury. Dana's testimony before the jury was substantially the same as at the hearing on the motion to suppress.

We note the trial court gave a limiting instruction to the jury that Dana's testimony was received "solely for the purpose of showing the identity of who committed the crime . . . or that there existed in the mind of [ ] defendant a plan, scheme, system or design and involving the crime charged in this case."

Defendant argues there were significant differences between the two incidents such that Dana's testimony should have been excluded. We disagree. In the instant case, Maya, a six-year-old child, was approached by defendant at the water fountain after leaving the kitchen where she was playing with other children. Similarly, Dana, a nine-year-old child, was approached by defendant after she separated from her group of friends at a pool. In both cases, defendant first pulled down the victims' pants and touched their bottoms. Defendant also moved both victims to secluded locations in an attempt to continue his sexual assault. Further, defendant's use of force was similar in both incidents: in one instance, he used his hand to slap the victim's face, and in the other, he put his hand over the victim's mouth to quiet her.

In sum, defendant's actions toward these young children were similar enough that the trial court did not err in admitting evidence of prior bad acts under Rule 404(b). Defendant's argument is overruled.

IV

[7] Defendant argues the trial court erred by allowing the cross-examination of defendant's father. Specifically, defendant contends the State improperly elicited testimony from defendant's father that was not relevant to defendant's trial. We disagree.

"The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000) (internal citation and quotation marks omitted). "Whether [the] evidence is relevant is a question of law, thus we review the trial court's admission of the evidence *de novo*. Defendant bears the burden of showing that the evidence was erroneously admitted and that he was

prejudiced by the error." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010) (internal citation omitted).

Under N.C. Gen. Stat. § 8C-1, Rule 611, "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." However, "[t]he scope of cross-examination is limited to those matters that are relevant issues before the jury." *State v. Hosey*, 79 N.C. App. 196, 202, 339 S.E.2d 414, 417 (1986). Evidence that is not relevant is inadmissible. N.C. Gen. Stat. § 8C-1, Rule 402.

Here, on direct examination, defendant's father generally testified regarding his relationship with defendant, defendant's mental capacity, and defendant's current living arrangement. He testified about how defendant needed help with day-to-day activities because "he was lacking" the ability to do things for himself without specific instructions. Defendant's father stated that he was "like a chaperone" to the extent that defendant needed to be watched, so "nobody [took] advantage of him."

Thereafter, on cross-examination, the State asked defendant's father questions about his supervision of defendant at the church on the day that the events took place. The following exchange occurred:

> Q. You said that you kind of have to watch him, is that right?
>
> A. Yes.
>
> . . . .
>
> Q. Were you not told by the church that you were supposed to be watching him and not let him alone near children?
>
> A. I know we had an agreement that we had to take to saying that he could come to that church.
>
> . . . .
>
> A. *We had to get a permission slip signed and take to . . . the parole officer in Raleigh[,] saying that he could go to that church unless someone had a problem with it, and then we would be asked to leave, not continue to come to that church. As long as it was all right with the church, he could go to church.*
>
> Q. Did you notify all these parents who were bringing their children into this church?
>
> A. No. Only I had the secretary . . . . I think she set it up. She was the go between. We had to get permission slip

from the pastor or from the board to take back to the parole officer to make sure we had permission to go to the church. And out of the hundreds of -- a couple hundred people that go to that church, we didn't go around to each and every last one saying, Watch my son around your kid, watch my son around your kid.

Q. Did you watch your son walk out of the room?

A. Yes.

Q. You knew he was out of the room by himself?

A. Yes.

Q. You knew that there were children in the kitchen?

A. I didn't pay any attention to that.

. . . .

Q. You didn't hear the children running up and down the hallway?

A. Yes, running up and down the hallway making a ruckus, yes, but in the kitchen, I don't know.

Q. So you knew your son had walked out of the room by himself and that there were children in there and you didn't do anything?

A. We have been going to that church. There are children in the service. We had been going to that church to the fellowship meetings. Okay. There are, I guess, children that come with their parents. We have been to functions at the Dream Center where there have been parents and children. I can't go up to every last one and say, Watch out for my son. And you better watch him. He is dangerous. Which I don't think he is dangerous, but is that what you want me to do? I don't know. You know. It's unreasonable.

(emphasis added). Defendant argues that whether or not defendant's father warned the children at the church about defendant had no bearing on whether defendant committed the offenses defendant was charged with. However, the questions on cross-examination elicited relevant testimony and were well within the scope of defendant's father's direct testimony that defendant needed frequent supervision for basic activities. Clearly, defendant was on parole for some type of concerning

misconduct, which required permission for defendant to attend the church. Because the cross-examination was relevant and related to the issues at trial, defendant was not prejudiced by the admission of his father's testimony.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judge STROUD concurs.

Judge MURPHY concurs in part, concurs in result only in part, and dissents in part with separate opinion.

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

While I concur in parts of the Majority, I respectfully disagree with some of the results reached by the Majority and portions of its analysis as more thoroughly discussed, below.

A. Indecent Liberties with a Child[1]

Defendant argues there was insufficient evidence to support his conviction for indecent liberties with a child since the video evidence provided by the State on this issue was admitted for corroborative purposes only. The Majority disagrees and concludes video evidence of Maya's out-of-court statements to a forensic examiner was submitted as substantive evidence and supported Defendant's conviction for indecent liberties with a child. I concur in result, but write separately to fully evaluate Defendant's argument as clarified in his reply brief.

Defendant argues the trial court provided a more specific jury instruction regarding prior statements, and as a result the video evidence of Maya's out-of-court statements were admitted solely for corroborative purposes. We have previously observed, "[o]ur system of justice is based upon the assumption that trial jurors are women and men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so." *State v. Hauser*, 844 S.E.2d 319, 322 (N.C. Ct. App. 2020) (quoting *State v. Hines*, 131 N.C. App. 457, 462, 508 S.E.2d 310, 314 (1998)). When jurors are instructed on the general purpose of evidence which is followed by

1. This section corresponds with the Majority Part I: Indecent Liberties with a Child. *Supra* at 203-05.

more specific instructions, they are presumed to understand and apply the more specific instructions provided by the trial court.

While Defendant's argument is generally correct, it does not apply to this case. Here, the trial court provided the following jury instructions in part:

> Videos were introduced as evidence in this case. These videos may be considered by you as evidence of facts they illustrate or show.
>
> . . .
>
> Evidence has been received tending to show that at an earlier time a witness made a statement which may conflict or be consistent with the testimony of the witness at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial.

In addition to Maya's forensic interview, there were two other instances where prior statements were introduced into evidence. After these other prior statements were introduced, the trial court gave limiting instructions that substantially tracked the North Carolina pattern jury instruction, which reads:

> Evidence has been received tending to show that at an earlier time a witness made a statement which may conflict or be consistent with the testimony of the witness at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe the earlier statement was made, and that it conflicts or is consistent with the testimony of the witness at this trial, you may consider this, and all other facts and circumstances bearing upon the witness's truthfulness, in deciding whether you will believe or disbelieve the witness's testimony.

N.C.P.I.—CRIM. 105.20. Conversely, there was no limiting instruction requested or provided by the trial court regarding the introduction of Maya's forensic interview.

Given these other instances of prior statements and the limiting instructions which followed them, it is clear the trial court was referring to these other prior statements in its jury instruction on corroborative

evidence. Moreover, in addition to the jury instruction regarding the substantive use of video evidence, the absence of a limiting instruction regarding the forensic interview shows the trial court did not limit its substantive use. While Defendant's argument has merit, the specifics of this case do not entitle him to the outcome for which he advocates.

B. Sexual Offense Jury Instructions[2]

The Majority properly finds the trial court erred by entering judgment on sexual offense with a child by an adult after instructing the jury on first-degree sex offense, a lesser offense. However, the Majority concludes this instructional error amounts to plain error. I disagree with this conclusion.

"[P]lain error is to be applied cautiously and only in the exceptional case, [and] the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]" *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citation, alteration, and quotation marks omitted). Under the plain error standard of review, Defendant must first "demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, [Defendant] must establish prejudice—that, after examination of the *entire record*, the error had a probable impact on the jury's finding that [Defendant] was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal citation and quotation marks omitted) (emphasis added). Following *Lawrence*, plain error review requires us to look at the entire record on appeal.

As observed by the Majority, a person can be convicted of sexual offense with a child in violation of N.C.G.S. § 14-27.28[3] "if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." *Supra* at 209. Looking at the entire Record, Defendant's conviction of rape of a child required the jury to find beyond a reasonable doubt "that at the time of the acts alleged, [D]efendant was at least 18 years of age." The rape of a child element satisfies our inquiry on plain error review and we must conclude the instructional error did not have any impact on the verdict much less a "probable impact."

I agree the trial court erred in instructing the jury, however, since the jury found beyond a reasonable doubt Defendant was at least 18

2. This section corresponds with the Majority Part II: Sexual Offense Jury Instructions. *Supra* at 209-10.

3. Formerly codified under N.C.G.S. § 14-27.4A.

years old in another portion of its verdict and all the charges against Defendant occurred on the same date, there was no plain error.

C. First-Degree Kidnapping Jury Instructions[4]

The Majority finds the trial court did not commit plain error when it instructed the jury on a theory not alleged in the indictment because the evidence at trial supported both the theory in the indictment and the additional theory set out in the trial court's instructions. While I agree with the Majority that Defendant did not suffer plain error, I dissent from the Majority's analysis of this issue. Further, I dissent from the Majority's outcome of this issue as we must remand for the trial court to arrest judgment on first-degree kidnapping and enter a sentence on second-degree kidnapping.

1. Erroneous Instruction

In finding the variance did not amount to plain error, the Majority distinguishes the current case from *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984) and relies on *State v. Tirado*, 358 N.C. 551, 599 S.E.2d 515 (2004). I find the Majority's reliance on *Tirado* is misplaced.

Tirado involved the kidnapping of three victims, Tracy Lambert, Susan Moore, and Debra Cheeseborough by two defendants. *Tirado*, 358 N.C. at 559, 599 S.E.2d at 523. The first indictment alleged the defendants "confined, restrained, and removed [Lambert and Moore] for the purpose of 'facilitating the commission of a felony.'" *Id.* at 575, 599 S.E.2d at 532. The trial court instructed the jury it could find the defendants guilty if it found each defendant "'removed' Lambert or Moore for the purpose of 'facilitating the defendant's or another person's commission of robbery with a firearm or doing serious bodily injury to the person so removed.'" *Id.* The second indictment alleged "each defendant confined, restrained, and removed [Cheeseborough] for the 'purpose of doing serious bodily injury to her.'" *Id.* The trial court instructed the jury that it could find the defendants guilty if it found each defendant "removed the victim for the purpose of 'facilitating . . . commission of robbery with a firearm or for the purpose of doing serious bodily injury.'" *Id.*

The kidnapping instruction regarding Lambert and Moore was more specific than the indictment language, and the kidnapping instruction regarding Cheeseborough included an additional purpose to the one alleged in the indictment. Both jury instructions involved *additional*

4. This section corresponds with the Majority Part II: First-Degree Kidnapping Jury Instructions. *Supra* at 206-08.

language beyond the indictment. The issue in *Tirado* was one of mere surplusage and it is not applicable to the facts of this case.

Our kidnapping statute provides:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; []
>
> . . .
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C.G.S. § 14-39 (2019). The first-degree kidnapping indictment here charged the following:

> [D]efendant named above unlawfully, willfully, and feloniously did confine, restrain or remove from one place to another [Maya], a child under the age of 16, without the consent of a parent or legal custodian. The kidnapping was done in furtherance of a felony or for the purpose of committing a sexual assault. [] *[D]efendant also sexually assaulted [Maya]* []. This act was done in violation of [N.C.G.S.] § 14-39.

(Emphasis added). However, the jury was instructed:

> [D]efendant has been charged with first degree kidnapping. For you to find the [D]efendant guilty of this offense,

> the state most prove five things beyond a reasonable doubt. First, that the [D]efendant unlawfully removed a person from one place to another; Second, that the person had not reached her 16th birthday and her parent did not consent to this removal; Third, that the [D]efendant removed that person for the purpose of facilitating the [D]efendant's commission of rape or a sex offense. A sex offense includes anal intercourse, which I have previously defined for you, and anilingus, which is the touching by the lips or tongue of one person and the anus of another; Fourth, that this removal was a separate and complete act, independent and apart from the rape or sex offense; And fifth, *that the person was not released by the [D]efendant in a safe place.*

(Emphasis added). Here, the first-degree kidnapping indictment alleged "Defendant also sexually assaulted [Maya] []." This language was not included in the jury instruction, and the jury was charged with finding Defendant's guilt on a completely separate element not alleged by the Grand Jury in its indictment, "that the person was not released by the [D]efendant in a safe place." Unlike *Tirado*, where there was an instruction on the indicted charge plus surplusage, the trial court here gave an instruction only on a theory not alleged in the indictment. I find *Brown* more analogous to these facts.

Rather than a surplusage issue, *Brown* involved instructions on completely distinct theories from those alleged in the indictment. *Brown*, 312 N.C. at 247, 321 S.E.2d at 862. In *Brown*, the indictment provided the theory of kidnapping was "unlawfully removing [the victim] from one place to another and confining and restraining [the victim] for the purpose of facilitating the commission of . . . attempted rape[,]" and the "defendant did not release the victim in a safe place." *Id.* However, the trial court instructed the jury it could find the defendant guilty of first-degree kidnapping if he "removed, restrained and confined the victim for the purpose of terrorizing her" and if he sexually assaulted the victim. *Id.* (internal quotation marks omitted). In finding plain error, our Supreme Court noted it "has consistently held that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon a theory not supported by the bill of indictment." *Id.* at 248, 321 S.E.2d at 863 (citing *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980); *State v. Dammons*, 293 N.C. 263, 272, 237 S.E.2d 834, 840-41 (1977)).

Here, the trial court permitted the jury to convict Defendant upon a theory not alleged in the indictment. Under *Brown*, the variance here constitutes error by the trial court.

2. Plain Error

The Majority concludes this erroneous instruction does not amount to plain error because the evidence at trial supported both the theory in the indictment and the theory instructed to the jury. I agree with its conclusion of no plain error, but dissent from the Majority's reasoning and the eventual result as discussed in section 3. Double Jeopardy, below. While I find the trial court erroneously instructed the jury on a theory not alleged in the indictment, under the Record here the error did not amount to plain error as the jury found the elements elsewhere in the verdict.

In *State v. Harding*, the trial court gave a jury instruction that included the indicted language and additional language. *State v. Harding*, 258 N.C. App. 306, 313, 813 S.E.2d 254, 260, *writ denied*, *review denied*, 371 N.C. 450, 817 S.E.2d 205 (2018). The first-degree kidnapping indictment provided the element of "sexual assault," while the jury instruction provided "it could find [the] defendant guilty if it found 'the [victim] was not released by the defendant in a safe place and/or had been sexually assaulted and/or had been seriously injured.'" *Id.* at 313, 813 S.E.2d at 260. In addition to this instruction, the jury was provided a special verdict sheet with all three elements listed. On the verdict sheet "the jury indicated it found [the] defendant guilty of first-degree kidnapping based on each individual . . . element." *Id.* We found the erroneous instruction did not amount to plain error because "[t]he State presented compelling evidence to support the . . . element of not released in a safe place, and the jury separately found [the] defendant guilty of first-degree kidnapping based on *all* three . . . elements." *Id.* (emphasis added).

Here, the issue before us now becomes whether the jury found the indicted language not provided in the jury instruction elsewhere in its verdict. All the elements of the first-degree kidnapping indictment and the first-degree kidnapping jury instruction were the same apart from the fifth element which elevates the kidnapping charge from second-degree kidnapping to first-degree kidnapping.

Under the kidnapping indictment the final element alleged for the purposes of N.C.G.S. § 14-39(b) is, "[D]efendant also sexually assaulted [Maya] []." However, the jury was instructed it could find Defendant guilty of first-degree kidnapping if it found "that the person was not released by [D]efendant in a safe place." The element alleged in the indictment did not substantially follow the element instructed to the jury. However, this does not amount to plain error if the entirety of the Record discloses the jury found beyond a reasonable doubt Maya was sexually assaulted.

In North Carolina, sexual assault includes sexual offenses and rape. *See State v. Mason*, 317 N.C. 283, 292, 345 S.E.2d 195, 200 (1986) (finding "rape [was] the sexual assault used to elevate kidnapping to first degree."); *see also State v. Freeland*, 316 N.C. 13, 21, 340 S.E.2d 35, 39 (1986) ("[I]n finding [the] defendant guilty of first degree kidnapping the jury must have relied on the rape or sexual offense to satisfy the sexual assault element."). We have also held that it includes taking indecent liberties with a child. *See State v. Stinson*, 127 N.C. App. 252, 257, 489 S.E.2d 182, 186 (1997). The jury found Defendant guilty on two counts of first-degree sexual offense, rape of a child, and two counts of indecent liberties with a child. As the jury found Defendant guilty beyond a reasonable doubt of offenses constituting sexual assault for first-degree kidnapping, there is evidence from the jury's verdict it found beyond a reasonable doubt Maya was sexually assaulted.

In reviewing the entire Record, the jury found Defendant guilty beyond a reasonable doubt of each indicted element of first-degree kidnapping as alleged by the Grand Jury. Defendant has failed to show this instructional error "had a probable impact on the jury's finding that [he] was guilty" of first-degree kidnapping. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quotation marks omitted).

3. Double Jeopardy

While I find this instructional error did not have a probable impact on the jury's verdict, it did impact Defendant's sentencing. Had Defendant been charged and subsequently sentenced based on the language provided in the first-degree kidnapping indictment, he would have been placed in double jeopardy by sentencing him for both first-degree kidnapping and the underlying sexual assault that was an element of the first-degree kidnapping charge.

Under N.C.G.S. § 14-39, the offense of first-degree kidnapping requires "the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted[.]" N.C.G.S. § 14-39(b) (2019). Our Supreme Court has held in first-degree kidnapping cases based on the element of sexual assault "the legislature did not intend that defendants be punished for both the first degree kidnapping and the underlying sexual assault." *Freeland*, 316 N.C. at 23, 340 S.E.2d at 40-41. In *Freeland*, the defendant was convicted and sentenced on a first-degree rape charge, first-degree sexual offense, and first-degree kidnapping. *Id.* 316 N.C. at 14, 340 S.E.2d at 36. Our Supreme Court held "in finding [the] defendant guilty of first degree kidnapping the jury must have relied on the rape or sexual offense to satisfy the sexual assault

element. As a result [the] defendant was unconstitutionally subjected to double punishment under statutes proscribing the same conduct." *Id.* at 21, 340 S.E.2d at 39; *see also State v. Barksdale*, 237 N.C. App. 464, 474, 768 S.E.2d 126, 132 (2014) (finding violation of double jeopardy where "one of the two sex offense charges must be the basis for th[e] count of first degree kidnapping[]").

Had the jury been correctly instructed on the first-degree kidnapping indictment language and found Defendant guilty of first-degree kidnapping based on sexual assault the trial court could not have sentenced Defendant for all the sexual offenses and the first-degree kidnapping offense without violating double jeopardy. As a result, the instructional error by the trial court affected Defendant's sentencing and we must remand for resentencing. Given the similarity between the convictions here and those in *Stinson*, we are bound to adopt its directions on remand:

> Because it is impossible to determine from the record whether the same sexual acts used for the rape and indecent liberties convictions were the basis of the jury's first degree kidnapping conviction, we cannot ascertain whether either or both of these convictions in combination with the kidnapping conviction is unconstitutional. Rather than arresting judgment on both the rape and indecent liberties convictions, the remedy most consistent with the jury's verdict and the one we order is to arrest judgment on the first degree kidnapping conviction and remand the case to the trial court to resentence [the] defendant for second degree kidnapping. The remaining judgments are not affected.

Stinson, 127 N.C. App. at 258, 489 S.E.2d at 186.

D. Father's Testimony[5]

The Majority finds the cross-examination of Defendant's father to be relevant and concludes Defendant was not prejudiced by the admission of his father's testimony. I dissent as this issue was not preserved for appellate review.

Defendant argues the trial court erred in allowing irrelevant cross-examination of his father. Assuming, *arguendo*, this testimony was irrelevant, this issue was not preserved for review on appeal.

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5. This section corresponds with the Majority Part IV. *Supra* at 215-18.

N.C. R. App. P. 10(a)(1) provides

> to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the *specific grounds* for the ruling the party desired the court to make if the *specific grounds* were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1) (2020) (emphasis added). "A general objection, when overruled, is ordinarily not adequate unless the evidence, considered as a whole, makes it clear that there is no purpose to be served from admitting the evidence." *State v. Patterson*, 249 N.C. App. 659, 664, 791 S.E.2d 517, 521 (2016) (quoting *State v. Jones*, 342 N.C. 523, 535, 467 S.E.2d 12, 20 (1996)).

Here, Defendant only generally objected to the testimony at issue. Defendant's reason for objecting, and the trial court's reason for overruling are not provided in the Record. Additionally, the "specific grounds were not apparent from the context" as the objection could have been related to various issues of admissibility, not just relevancy. N.C. R. App. P. 10(a)(1) (2020). The Record here is unclear as to the grounds for the objection and the trial court's basis for overruling, therefore this issue is not preserved for review and should be dismissed.

Additionally, even assuming, *arguendo*, this issue was preserved for review, if the trial court erroneously admitted this evidence, its admission did not prejudice Defendant. "A new trial will not be ordered automatically each time a court rules erroneously on the admissibility of evidence." *State v. Mebane*, 106 N.C. App. 516, 529, 418 S.E.2d 245, 253 (1992) (citing *State v. Galloway*, 304 N.C. 485, 496, 284 S.E.2d 509, 516 (1981)). "Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001); *see also* N.C.G.S. § 15A-1443(a) (2019).

Here, Defendant has not met his burden of demonstrating that had the erroneously admitted evidence been excluded, there was a reasonable probability a different result would have been reached. A review of the Record and transcripts reveals the testimony of Defendant's father had little impact on the trial. Given the strength of the evidence against Defendant from Maya and Dana's testimony, even assuming, *arguendo*, the father's testimony was irrelevant, Defendant has not demonstrated prejudice.

CONCLUSION

For the reasons stated above, I concur in part, concur in result only in part, and respectfully dissent in part.

STATE OF NORTH CAROLINA
v.
BRENT ALLEN DINGESS, DEFENDANT

No. COA20-188

Filed 15 December 2020

1. Sentencing—aggravating factor—requirement of notice or waiver

The trial court erred by accepting defendant's admission to the existence of an aggravating factor (as part of a plea agreement involving the charge of assault inflicting serious bodily injury) in violation of N.C.G.S. § 15A-1022.1 where the State failed to give defendant the required 30-day written notice of its intent to prove the aggravating factor pursuant to N.C.G.S. § 15A-1340.16(a6), defendant never directly responded when the trial court asked if he waived notice, and defendant never waived his right to a jury trial regarding the aggravating factor.

2. Criminal Law—plea agreement—error in part of plea agreement—entire plea agreement vacated

Where defendant entered into a plea agreement that included an admission of the existence of an aggravating factor, but successfully argued on appeal that he did not receive proper notice of the aggravating factor, the Court of Appeals rejected defendant's argument that the case should be remanded for a new sentencing hearing. Defendant could not repudiate part of the plea agreement without repudiating the whole agreement, and therefore the plea agreement in its entirety was vacated and the matter remanded for disposition.

Judge TYSON concurring in the result only with separate opinion.

Appeal by Defendant from judgment entered 9 October 2019 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 22 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Ann Stone, for the State.

Mary McCullers Reece for defendant-appellant.

MURPHY, Judge.

Where a defendant admits to the existence of an aggravating factor, the State must have provided the statutory 30-day notice of its intent to prove the aggravating factor. The trial court shall determine whether notice was provided or whether the defendant waived their right to such notice. Here, the State neither provided notice, nor did Defendant waive his right to notice. Accordingly, we set aside Defendant's aggravated range sentence. However, we hold the entirety of his plea agreement must also be vacated and remanded to the trial court for disposition.

BACKGROUND

Defendant Brent Allen Dingess ("Defendant") was indicted for assault inflicting serious bodily injury resulting from an altercation with Ernest Mudd ("Mudd"). During the altercation, Defendant struck Mudd, causing him to fall and hit his head on an object on the ground. Responding officers found Mudd unconscious, convulsing, and bleeding from the ear. It was later determined Mudd suffered a fractured skull, mandibular condyle fracture, and subdural hematoma as a result of the altercation, leaving him with paralysis in his lower extremities and suffering from dementia. Mudd's injuries rendered him unable to perform his duties, and as a result, he lost his job as caretaker of a mobile home park. Mudd and his wife were evicted from the mobile home provided as part of his compensation, resulting in their living out of their car.

At his plea hearing, Defendant pled guilty to a Class F felony. The trial court determined an aggravating factor existed as a result of Defendant's violation of probation, sentencing him to an active term of 23 to 37 months as a Level II offender. Defendant timely filed written notice of appeal.

ANALYSIS

A. Waiver of Notice

[1] Defendant argues the trial court erred in accepting his admission to the aggravating factor without first confirming he intended to waive the required statutory notice by the State. We agree.

"Alleged statutory errors are questions of law, and as such, are reviewed *de novo*." *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (internal citation omitted). Our statutes plainly lay out what is required by the State and trial court when a defendant admits to the existence of an aggravating factor:

> The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury pursuant to the procedures in this subsection. *Admissions of the existence of an aggravating factor must be consistent with the provisions of [N.C.]G.S. 15A-1022.1.* If the defendant does not so admit, only a jury may determine if an aggravating factor is present in an offense.

N.C.G.S. § 15A-1340.16(a1) (2019) (emphasis added). Additionally:

> (a) Before accepting a plea of guilty or no contest to a felony, the court shall determine whether the State intends to seek a sentence in the aggravated range. If the State does intend to seek an aggravated sentence, the court shall determine which factors the State seeks to establish. The court shall determine whether the State seeks a finding that a prior record level point should be found under [N.C.]G.S. 15A-1340.14(b)(7). *The court shall also determine whether the State has provided the notice to the defendant required by [N.C.]G.S. 15A-1340.16(a6) or whether the defendant has waived his or her right to such notice.*
>
> (b) In all cases in which a defendant admits to the existence of an aggravating factor or to a finding that a prior record level point should be found under [N.C.]G.S. 15A-1340.14(b)(7), the court shall comply with the provisions of [N.C.]G.S. 15A-1022(a). In addition, the court shall address the defendant personally and advise the defendant that:
>
> (1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under [N.C.]G.S. 15A-1340.14(b)(7); and
>
> (2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.

> . . .
>
> (e) The procedures specified in this Article for the handling of pleas of guilty are applicable to the handling of admissions to aggravating factors and prior record points under [N.C.]G.S. 15A-1340.14(b)(7), unless the context clearly indicates that they are inappropriate.

N.C.G.S. §§ 15A-1022.1(a)(b)(e) (2019) (emphasis added). N.C.G.S. § 15A-1340.16(a6) provides:

> The State *must* provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior record level point under [N.C.]G.S. 15A–1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

N.C.G.S. § 15A-1340.16(a6) (2019) (emphasis added).

At his hearing, Defendant admitted to the existence of an aggravating factor:

> [DEFENSE COUNSEL]: . . . [H]e agrees that he was in violation of federal probation and finished his time.
>
> THE COURT: And for our purposes, you understand that's an aggravating factor in this case?
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: And you are admitting to that, right?
>
> [DEFENDANT]: Yes, sir.

As such an admission is controlled by N.C.G.S. § 15A-1022.1, and by implication N.C.G.S. § 15A-1340.16(a6), we examine the Record to determine whether the statutory requirements for accepting Defendant's admission to the aggravating factor were met. N.C.G.S. § 15A-1022.1(a) (2019); N.C.G.S. § 15A-1340.16(a1) (2019).

On appeal, neither party contends the State provided Defendant with written notice of its intent to prove the existence of the aggravating factor at least 30 days prior to trial, as required by N.C.G.S. § 15A-1340.16(a6). Additionally, there is no evidence in the Record to show the State provided Defendant with the required notice. We must then determine

whether, in the alternative, the trial court determined Defendant waived his right to receive such notice. N.C.G.S. § 15A-1022.1(a) (2019).

In *State v. Wright*, the defendant was provided notice of the State's intent to prove the aggravating factor only twenty days prior to trial instead of the required thirty. *State v. Wright*, 265 N.C. App. 354, 361, 826 S.E.2d 833, 838 (2019). Nevertheless, we found the "defendant and his counsel had sufficient information to give an 'intentional relinquishment of a known right[,]'" as evidenced by this exchange:

> THE COURT: The jury having returned verdicts of guilty in Case No. 16CRS13374, 16CRS13373, counts one and two, and 16CRS13375. The State having announced to the [c]ourt that it intends to proceed on aggravating factors in this matter, which is a jury matter. The district attorney has indicated to the [c]ourt that in conference with the defense counsel, that the [d]efendant would stipulate to aggravating factors; is that correct? What says the State?
>
> [STATE:] I do intend to proceed with aggravating factors. I did have a discussion with [Defense Counsel] and indicated his intent was to stipulate to the one aggravating factor that I intended to offer, which was from the AOC form is Factor 12A, that the [d]efendant has during the ten-year period prior to the commission of the offense for which the [d]efendant is being sentenced been found by a court of this state to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence.
>
> THE COURT: All right. Would you -- is that correct?
>
> [DEFENSE COUNSEL]: *That is correct, Your Honor. I've been provided the proper notice and seen the appropriate documents, Your Honor.*

Wright, 265 N.C. App. at 358, 826 S.E.2d at 836-37. The defendant in *Wright* unequivocally waived his right to have a jury determine the existence of the aggravating factor:

> THE COURT: Do you now waive your right to a -- to have the jury determine the aggravating factor?
>
> (Discussion held off the record.)
>
> DEFENDANT: Yes, sir. I'm ready to proceed.

> THE COURT: And do you waive the right to have the jury determine the aggravating factor and do you stipulate to the aggravating factor?
>
> DEFENDANT: Yes, sir.

Id. at 359-60, 826 S.E.2d at 837. We concluded (1) the defendant's "knowing and intelligent" waiver of the right to have a jury determine the aggravating factor; (2) his stipulation to said factor; and (3) prior notice given by the State all supported a finding the defendant waived notice of the State's intent to prove the existence of the aggravating factor. *Id.* at 361, 826 S.E.2d at 838.

Here, those factors are not present. As stated previously, (1) the Record gives no indication the State provided Defendant with notice of its intent to prove the existence of the aggravating factor, as required by N.C.G.S. § 15A-1340.16(a6), prior to the 30-day timeframe or otherwise. N.C.G.S. § 15A-1340.16(a6) (2019). As a result, Defendant did not enjoy the same level of "sufficient information to give an 'intentional relinquishment'" of his right to notice, as was true of the defendant in *Wright*. *Wright*, 265 N.C. App. at 361, 826 S.E.2d at 838. Further, (2) while the trial court did inquire as to whether Defendant waived his right to notice, Defendant never directly answered the question:

> THE COURT: Have you admitted to the existence of the following aggravating factors: That being that within 10 years of the date of this offense you were in violation of the terms of your probation, and do you understand that you are waiving any notice the State may have with regard to that aggravating factor?
>
> [DEFENSE COUNSEL]: Your Honor, just did speak with Mr. D.A. He was on federal probation. He was violated and he served time, and I believe that's what Mr. D.A. was referring to.
>
> THE COURT: Is that correct, Mr. D.A.?
>
> [STATE]: Yes, that would be one of them. I think it was something out of state court also.
>
> [DEFENSE COUNSEL]: But he completed the state probation, but he agrees that he was in violation of federal probation and finished his time.
>
> THE COURT: And for our purposes, you understand that's an aggravating factor in this case?

> [DEFENDANT]: Yes, sir.

A thorough examination of the transcript reveals the trial court did not revisit the subject and therefore never obtained a clear answer as to whether Defendant waived his statutory right to notice, under N.C.G.S. § 15A-1022.1(a). N.C.G.S. § 15A-1022.1(a) (2019). And (3), although not required by statute, Defendant also never waived his right to a jury trial on the factor, further distinguishing him from the defendant in *Wright*:

> THE COURT: Understand you have a right to plead not guilty and be tried by a jury?
>
> THE DEFENDANT: Yes, sir.
>
> . . .
>
> THE COURT: Do you understand at a jury trial you have the right to have a jury determine the existence of any aggravating factors that may apply to your case?
>
> THE DEFENDANT: Yes, sir.

While here Defendant reiterated his understanding of his right to a jury trial, he did not explicitly waive it, as opposed to the defendant in *Wright*. *Wright*, 265 N.C. App. at 359-60, 826 S.E.2d at 837. Rather, the circumstances here most resemble *State v. Snelling*, where we determined the trial court committed error as it was

> never determined whether the statutory requirements of N.C.[G.S.] § 15A–1340.16(a6) were met. Additionally, there is no evidence in the record to show that the State provided sufficient notice of its intent to prove the probation point. Moreover, the record does not indicate that [the] defendant waived his right to receive such notice.

State v. Snelling, 231 N.C. App. 676, 682, 752 S.E.2d 739, 744 (2014).

The language of N.C.G.S. §§ 15A-1340.16(a6) and 15A-1022.1(a) is clear: "[t]he State *must* provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors," and "[t]he [trial] court *shall* also determine whether the State has provided the notice to the defendant . . . or whether the defendant has waived his or her right to such notice." N.C.G.S. § 15A-1340.16(a6) (2019) (emphasis added); N.C.G.S. § 15A-1022.1(a) (2019) (emphasis added). As Defendant did not receive prior notice of the State's intent to prove the existence of the aggravating factor, nor did he waive his right to such notice, we find the trial court's conclusion "[t]he State has provided [Defendant]

with appropriate notices to the aggravating factors, and [Defendant] has waived notice to those aggravating factors" to be in error.

B. Remedy

[2] Defendant requests we vacate and remand for a new sentencing hearing. However, a "[d]efendant cannot repudiate [a plea agreement] in part without repudiating the whole." *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting in part), *rev'd for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012). As part of his plea agreement with the State, Defendant agreed to admit to the existence of the aggravating factor, opening up the possibility of receiving a sentence in the aggravated range. Defendant now seeks to have the benefit of the plea agreement without living up to his end of the bargain, which originally included the possibility of an aggravated sentence.

> In the instant case, essential and fundamental terms of the plea agreement were unfulfillable. Defendant has elected to repudiate a portion of his agreement. Defendant cannot repudiate in part without repudiating the whole. . . . The entire plea agreement must be set aside, and this case remanded to the Superior Court of [Iredell] County for disposition on the original charge of [assault inflicting serious bodily injury].

Id. (internal citation omitted).

CONCLUSION

The trial court erred in determining Defendant was provided with and waived his right to notice of the State's intent to prove the existence of the aggravating factor. As we are setting aside part of Defendant's plea agreement, we accordingly vacate the agreement in its entirety and remand for disposition.

VACATED AND REMANDED.

Judge DIETZ concurs.

Judge TYSON concurs in result only, with separate opinion.

TYSON, Judge, concurring in the result.

I concur in the result reached by the majority's opinion. The aggravating factor the State proceeded upon at sentencing, and to which

Defendant's counsel agreed, was neither alleged in an indictment nor an information. The enhanced sentence, entered beyond the presumptive range, constitutes prejudicial error to vacate Defendant's sentence.

I concur with that portion of the majority's analysis that a "Defendant cannot repudiate [a plea agreement] in part without repudiating the whole." *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting in part), *rev'd for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012). I vote to vacate the sentence and remand for trial on the following basis.

I. N.C. Gen. Stat. § 15A-1022.1

The Due Process Clause of the Fifth Amendment and the notice and jury trial protections of the Sixth Amendment, applicable to the states, guarantee that "[a]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476, 147 L. Ed. 2d 435, 446 (2000) (citations omitted). The North Carolina General Assembly codified these protections within N.C. Gen. Stat. § 15A-1340.16 (2019).

The Supreme Court of the United States applied *Apprendi's* requirements to the sentencing phase following a guilty plea in *Blakely v. Washington*. 542 U.S. 296, 305, 159 L. Ed. 2d 403, 414 (2004).

North Carolina's statutes codify and expand *Blakely's* protections in N.C. Gen. Stat. § 15A-1022.1 (a)-(e), which provide:

> (a) Before accepting a plea of guilty or no contest to a felony, the court shall determine whether the State intends to seek a sentence in the aggravated range. If the State does intend to seek an aggravated sentence, the court shall determine which factors the State seeks to establish. The court shall determine whether the State seeks a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7). *The court shall also determine* whether the State has provided the notice to the defendant required by G.S. 15A-1340.16(a6) or *whether the defendant has waived his or her right to such notice.*
>
> (b) *In all cases in which a defendant admits to the existence of an aggravating factor* or to a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7), *the court shall comply* with the provisions of G.S. 15A-1022(a). *In addition, the court*

> *shall address the defendant personally and advise the defendant that*:
>
> (1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and
>
> (2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.
>
> (c) Before accepting an admission to the existence of an aggravating factor or a prior record level point under G.S. 15A-1340.14(b)(7), *the court shall determine* that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant. The court may base its determination on the factors specified in G.S. 15A-1022(c), as well as any other appropriate information.
>
> (d) *A defendant may admit to the existence of an aggravating factor* or to the existence of a prior record level point under G.S. 15A-1340.14(b)(7) *before or after the trial of the underlying felony.*
>
> (e) *The procedures* specified in this Article for the handling of pleas of guilty *are applicable to the handling of admissions to aggravating factors* and prior record points under G.S. 15A-1340.14(b)(7), unless the context clearly indicates that they are inappropriate.

N.C. Gen. Stat. § 15A-1022.1 (a)-(e) (2019) (emphasis supplied).

Our General Assembly extended *Blakely's* protections to the admission of aggravating factors or prior record level points, even in the absence of an underlying guilty plea. *See id.* The transcript shows the trial court failed to address Defendant personally.

This Court has interpreted N.C. Gen. Stat. § 15A-1022.1 to "require[] a trial court to inform a defendant of his or her right to have a jury determine the existence of an aggravating factor, and the right to prove the existence of any mitigating factor." *State v. Wilson-Angeles*, 251 N.C. App. 886, 902, 795 S.E.2d 657, 669 (2017) (citation omitted).

Unlike the requirements of N.C. Gen. Stat. § 15A-1340.16(a1) cited by the majority's opinion, the trial court's failure to inquire personally into a knowing and voluntarily waiver of Defendant's rights prejudiced

Defendant. Under subsections (c) and (d), we must reconcile the express statutory language that: "A defendant may admit to the existence of an aggravating factor . . . *before or after the trial of the underlying felony*" with "Before accepting an admission to the existence of an aggravating factor . . . , the court shall determine that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant." N.C. Gen. Stat. § 15A-1022.1 (c), (d) (emphasis supplied).

A. Canons of 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 [plain meanings of 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) (citations omitted).

"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). "Interpretations that would 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) (citation, internal quotation marks, and ellipses omitted).

"'[S]tatutes *in pari materia* must be read in context with each other.'" *Publishing v. Hospital System, Inc.*, 55 N.C. App. 1, 7, 284 S.E.2d 542, 546 (1981) (quoting *Cedar Creek Enters. Inc. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976)). "'*In pari materia*' is defined as '[u]pon the same matter or subject.'" *Id.* at 7-8, 284 S.E.2d at 546 (quoting Black's Law Dictionary 898 (4th ed. 1968)).

My review of relevant case and statutory authority fails to disclose any authority interpreting N.C. Gen. Stat. § 15A-1022.1(d) as nullifying a defendant's admission under N.C. Gen. Stat. § 15A-1022.1(c). Reconciling both statutory subsections with *Blakely* and *Apprendi*, a defendant can both waive prior notice and admit to the presence and applicability of an aggravating factor or prior record level both before and after the guilt-innocence phase after being provided the applicable protections of N.C. Gen. Stat. § 15A-1022.1(a)-(c), *Blakely*, and *Apprendi*. These protections are: "that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant." N.C. Gen. Stat. § 15A-1022.1(c). Generally, these protections must be personally addressed to and waived by the defendant. *Id.*

II. Conclusion

The indictment failed to allege and the State never proved the aggravating factor, as is required by *Apprendi*, *Blakely*, and N.C. Gen. Stat. § 15A-1340.16(a1). Upon remand, N.C. Gen. Stat. § 15A-1022.1(a)-(e) sets out the procedures for the disposition for resentencing, not N.C. Gen. Stat. § 15A-1340.16(a1).

This waiver allowed the court to exceed the presumptive range and impose the maximum aggravated sentence and constitutes prejudice. The sentence is properly vacated. *See Rico*, 218 N.C. App. at 122, 720 S.E.2d at 809 (Steelman, J., dissenting in part), *rev'd for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571. Upon remand, a "Defendant cannot repudiate [a plea agreement] in part without repudiating the whole." *Id.*

The State is free to pursue any charges and aggravating factors applicable in the case in compliance with the statutes, without regard to the vacated plea agreement. *Id.*

I concur in the result to remand to the trial court for a new trial or for entry of a plea agreement that follows the statutes. N.C. Gen. Stat. § 15A-1022.1(a)-(e).

STATE OF NORTH CAROLINA
v.
MICHAEL SHANE FALLS, DEFENDANT

No. COA20-40

Filed 15 December 2020

Search and Seizure—knock and talk doctrine—scope of implied license to approach—curtilage of home—walk through front yard at night

The trial court erred by denying defendant's motion to suppress drugs, drug paraphernalia, and a firearm seized by law enforcement officers after they approached defendant's house—which had a visible no trespassing sign outside—intending to conduct a knock and talk in response to an anonymous tip about drugs. The officers violated defendant's Fourth Amendment right against unreasonable searches where their conduct exceeded the implied license allowed an ordinary citizen to approach a stranger's house. The officers

parked at an adjacent property at 9:30 at night and, after seeing a man get into a car and start backing out of the driveway, quickly cut through defendant's front yard using trees as cover, and surrounded and shone flashlights at the car.

Judge BERGER dissenting.

Appeal by Defendant from judgments entered 20 May 2019 by Judge Daniel A. Kuehnert in Gaston County Superior Court. Heard in the Court of Appeals 7 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General J. Aldean Webster, III, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for Defendant.

BROOK, Judge.

This case presents the following question: are three law enforcement officers wearing dark clothing impliedly licensed to cut across a person's front yard, swiftly passing a no trespassing sign, and emerge from trees they were using for cover and concealment in order to illuminate, surround, and stop that person's departing car at 9:30 p.m. on a dark, cold mid-December evening? Or does this conduct instead implicate the Fourth Amendment? Common sense tells us no Girl Scouts would attempt such audacious efforts in peddling their cookies. Accordingly, we must suppress the fruits of the officers' unconstitutional search in this case.

I. Factual Background and Procedural History

At the suppression hearing, Gastonia Police Officer Clarence Belton testified that he received an anonymous drug complaint that Michael Shane Falls ("Defendant") was selling and growing marijuana out of his home. Officer Belton also received information that Defendant carried a silver revolver and determined that Defendant was a convicted felon.

The next day, 16 December 2017, law enforcement decided to conduct a knock and talk to "further investigate the complaint based on the details" they had received. Around 9:30 p.m. on that "extremely cold" night, Officer Belton, along with Officers J.C. Padgett and S.D. Hoyle, went to Defendant's house to conduct their investigation despite the fact that "[they] usually do the knock and talks . . . during the daylight hours."

The officers parked in a church parking lot next to Defendant's house. They then walked where "the road meets the [Defendant's] property line[,]" or what they later termed walking on the property's right-of-way. Officer Belton then saw "a white male get inside of a vehicle" and told Officers Padgett and Hoyle that he was "possibly our suspect."

Wanting to make contact with him before he left, the officers made a beeline for Defendant's car. In so doing, they cut into Defendant's front yard and "between the tree[s] to go straight to the vehicle. [ ] [I]t g[a]ve [them] cover and concealment as well, just in case there was an issue." The officers "walked swiftly over to th[e] vehicle," passing a no trespassing sign that none of them appreciated in the moment. The car was running and starting to reverse out of the driveway, and, as the officers approached, they turned on their flashlights and shined them at Defendant's vehicle. Officers Belton and Padgett went to the driver side window while Officer Hoyle went around to the passenger side. Officer Belton immediately noticed a silver revolver lying in the passenger seat and within a few seconds also smelled "a pungent odor of marijuana coming from the vehicle" on the driver side.

Officer Belton asked Defendant if he lived at the house and what his name was before telling him they had received a drug complaint. He then asked Defendant to step out of the vehicle and conducted a *Terry* frisk of Defendant for weapons. According to Officer Belton, Defendant was "very belligerent . . . [and] didn't like the fact that we were there" and called someone on his cell phone; at that point, Officer Belton put Defendant in handcuffs because he was not listening to commands. Officer Padgett then recovered the gun from the vehicle and saw several vials in the driver door, which he identified based on their odor and color as THC oil.

Afterwards, Officers Belton and Padgett went to the front door of the residence and knocked several times. Within a few minutes, Defendant's fiancée, Summer Bolt, came outside to speak with the officers. When she opened the door, Officer Belton testified that he could smell the odor of marijuana coming out of the residence. Ms. Bolt did not consent to a search of the residence, so Officer Padgett applied for and received a search warrant. Once Officer Padgett returned with the warrant, he read it to Defendant and Ms. Bolt, and then the officers executed the warrant. Marijuana, paraphernalia, a pill that field-tested positive for methamphetamine, and counterfeit $100 bills were found in the home.

Defendant was charged with possession of methamphetamine, possession of counterfeit instruments, and possession of a firearm by a felon. Defendant moved to suppress, and, during that hearing,

Officer Padgett testified as follows regarding how people might access Defendant's front door:

> The sidewalk would be what anybody that was going door-to-door selling anything would take, they would go down -- up the little sidewalk that jets off the driveway[.]
>
> . . .
>
> There was not a worn path in the grass [where we walked], or anything like that. I would think anybody, especially if you parked your vehicle on the roadway, you would go down the driveway. We did -- just because of the freedom of movement, and stuff, we're not going [to] block the driveway. We don't like parking our patrol cars on the road. So that's why we took the path we did. If you were in a mail truck you would probably stop at the driveway and go down the sidewalk to the door. But that's not the path that we took.

Officer Belton further testified that "due to the fact [of] it being dark, there's no lights right there, and us wearing dark clothing, we didn't want to be struck by a vehicle just doing a simple knock and talk."

Judge Kuehnert denied the motion to suppress by written order on 6 November 2019. The trial court made the following pertinent findings of fact:

> 7. . . . [O]fficers decided to conduct a "knock and talk" at 2300 Davis Park Road to further investigate the information provided by the anonymous tipster.
>
> 8. At approximately 9:30 p.m. on December 16, Officers Belton, Padgett, Hoyle and Lewis arrived at 2300 Davis Park Road and parked in the adjacent church parking lot.
>
> 9. The officers walked along the highway right-of-way by the house on the grass portion of the highway as they walked up to the driveway.
>
> 10. The house could be approached by walking up the driveway, which was obvious, or through the yard, which was not obvious.
>
> 11. At the end of the driveway was a sidewalk that ran parallel to the house and up to the front door.

12. There was a "no trespassing" sign posted on a tree in front of the property.[1]

13. As [ ] [O]fficers Padgett and Belton approached the driveway along the grass right-of-way they noticed a white male in a Honda Civic start to back up[ ] (this was indicated because the backup lights came on the vehicle).

14. The officers passed the front door of the house but did not go directly to the front door because there was no obvious path.

15. All of the officers involved then walked over towards the vehicle cutting through the yard approximately 10-20 feet.

16. Officer Belton arrived at the vehicle on the driver side and Officer Padgett was right behind. Officer Hoyle went to the passenger side of the vehicle.

17. As [Officer] Belton arrived he noticed the window was rolled down and began speaking to the individual.

18. The individual identified himself as Michael Shane Falls.

19. Almost immediately, Officers Belton and Padgett noticed an odor of marijuana emanating from the vehicle.

20. At the same time, Officer Hoyle, on the passenger side of the vehicle noticed a silver handgun in plain view on the passenger side of the vehicle.

. . .

24. [Defendant] advised that his fiancé[e], Summer Bolt, was in the residence.

25. [ ] [O]fficer Padgett walked up the driveway to the sidewalk that was perpendicular to the house and walked up to the front door.

. . .

27. According to testimony from [O]fficers Padgett and Belton, approximately 2-3 minutes later, Ms. Bolt came to

1. This finding is unchallenged and thus binding on us on appeal; we also note that the record reflects Defendant had an additional no trespassing sign in his front yard.

> the door. Upon the door opening, Officer[s] Padgett and Belton noticed an odor of marijuana.

The trial court then made the following pertinent conclusions of law:

> 39. A knock and talk is valid so long as it is reasonable and does not violate the normal customs of an invitation and is not physically intrusive. (*Jardines*, at 1416).
>
> . . .
>
> 41. In the present case, Officer's [sic] Padgett, Belton and Hoyle testified that [ ] they approached the driveway of 2300 Davis Park Road along the right of way open to the public along the side of the road.
>
> 42. Officer Belton also testified that himself, Padgett and Hoyle passed the front of the front door by the house. However, there was to [sic] sidewalk or direct path to the door, so the officers continued to the driveway adjacent to the front door.
>
> 43. In walking along the right-of-way, the officers followed a path that a person visiting 2300 Davis Park Road would follow if that individual was going to knock on the front door of the house.
>
> 44. That [ ] when Officer Padgett saw a white male getting into a car and the br[ake] lights turn on, they immediately cut across the normal path into the curtilage of the yard at 2300 Davis Park Road. Officer Belton testified that he believed that [the] individual was the owner of the house and wanted to talk to him about the drug complaint.
>
> . . .
>
> 46. Even though the police officers briefly entered the curtilage of the property[,] it was for talking to the potential homeowner leaving in their car.
>
> 47. That the intrusion on the curtilage of the property was brief and minimal. Further, the officers did not use any special equipment or use any special force to enter the property. As a result, it was not an unreasonable intrusion and therefore did not violate the Fourth Amendment to the United States Constitution.

On 20 May 2019, Defendant pleaded guilty to all charges, reserving his right to appeal the denial of the motion to suppress. Judge Kuehnert consolidated the charges and sentenced Defendant to 17 to 30 months' imprisonment, suspended upon 60 months' supervised probation and a 90-day split sentence. Defendant timely noticed appeal.

II. Analysis

On appeal, Defendant argues that the trial court erred in denying his motion to suppress because the officers exceeded the scope of the implied license to conduct a knock and talk and therefore were not lawfully present when they observed contraband in his vehicle. Defendant also argues that the trial court sentenced him incorrectly.

We agree with Defendant that the trial court erred in denying his motion to suppress and therefore do not reach the issue of whether he was sentenced correctly.

A. Standard of Review

Our review of a trial court's denial of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "In addition, the trial court's unchallenged findings of fact are binding on appeal." *State v. Ramseur*, 226 N.C. App. 363, 366, 739 S.E.2d 599, 602 (2013). "This Court reviews conclusions of law stemming from the denial of a motion to suppress *de novo*. . . . 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. Borders*, 236 N.C. App. 149, 157, 762 S.E.2d 490, 498-99 (2014) (citation omitted).

B. Governing and Persuasive Authority

The Fourth Amendment to the United States Constitution and Article 1, Section 20 of the North Carolina Constitution protect against unreasonable searches. U.S. Const. amend. IV; N.C. Const. art. I, § 20. "[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Florida v. Jardines*, 569 U.S. 1, 6, 133 S. Ct. 1409, 1414, 185 L. Ed. 2d 495, 501 (2013) (internal marks and citation omitted). "While law enforcement officers need not shield their eyes when passing by the home on public thoroughfares, an officer's leave to gather information is

sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas." *Id.* at 7, 133 S. Ct. at 1415 (internal citation and marks omitted). This constitutional protection extends to the "curtilage," which is "the area immediately surrounding and associated with the home[.]" *Id.* at 6, 133 S. Ct. at 1414 (internal citation and marks omitted).

"A knock and talk is a procedure by which police officers approach a residence and knock on the door to question the occupant, often in an attempt to gain consent to search when no probable cause exists to obtain a warrant." *State v. Marrero*, 248 N.C. App. 787, 790, 789 S.E.2d 560, 564 (2016). While a knock and talk does not implicate the Fourth Amendment, *see Kentucky v. King*, 563 U.S. 452, 469-70, 131 S. Ct. 1849, 1862, 179 L. Ed. 2d 865, 880-81 (2011), it is, of course, a tactic employed "for the purpose of gathering evidence[,]" *Jardines*, 569 U.S. at 21, 133 S. Ct. at 1423 (Alito, J., dissenting). But "[w]hen the Government obtains information by *physically intruding* on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred." *Id.* at 5, 133 S. Ct. at 1414 (internal marks omitted) (emphasis added) (quoting *United States v. Jones*, 565 U.S. 400, 406-07 n.3, 132 S. Ct. 945, 950-51 n.3, 181 L. Ed. 2d 911, 919 n.3 (2012)); *see also People v. Frederick*, 500 Mich. 228, 235 n.2, 895 N.W.2d 541, 544 n.2 (2017) ("The violation of [the defendant's] property rights, combined with the subsequent information-gathering, constituted a search.").

In *Jardines*, the Supreme Court utilized a property-rights framework to assess whether the use of a drug-sniffing dog on a homeowner's porch to investigate the contents of the defendant's home was a search within the meaning of the Fourth Amendment. Holding first that the porch was "part of the home itself for Fourth Amendment purposes[,]" the Court then turned to whether the officers' investigation "was accomplished through an unlicensed physical intrusion." 569 U.S. at 6-7, 133 S. Ct. at 1414-15. Concluding that it was, the Court held that law enforcement may not act outside the scope of the "implicit license [which] typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 8, 133 S. Ct. at 1415.

Writing for the majority, Justice Scalia noted that "[c]omplying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." *Id.*

> To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor

> exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics. Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.

Id. at 9, 133 S. Ct. at 1416. Justice Scalia emphasized that

> [i]t is not the dog that is the problem, but the behavior that here involved use of the dog. We think a typical person would find it "a cause for great alarm" . . . to find a stranger snooping about his front porch *with or without* a dog.

Id. at 9 n.3, 133 S. Ct. at 1416 n.3 (internal citation omitted). Put simply, bloodhound or not, law enforcement can do no more than the ordinary citizen would be expected to do. *Id.* at 8, 133 S. Ct. at 1416 ("[A] police officer not armed with a warrant may approach a home and knock, precisely because that is '*no more than any private citizen might do*.'") (emphasis added) (citation omitted).

Pursuant to the precedent established by the Supreme Court in *Jardines*, our appellate courts have underlined "the right of police officers to conduct knock and talk investigations, so long as they do not rise to the level of Fourth Amendment searches." *Marrero*, 248 N.C. App. at 790-91, 789 S.E.2d at 564. "This limitation is necessary to prevent the knock and talk doctrine from swallowing the core Fourth Amendment protection of a home's curtilage." *State v. Huddy*, 253 N.C. App. 148, 152, 799 S.E.2d 650, 654 (2017). We have emphasized that the implied license "extends only to the entrance of the home that a 'reasonably respectful citizen' unfamiliar with the home would believe is the appropriate door at which to knock." *Id.* (quoting *Jardines*, 569 U.S. at 8 n.2, 133 S. Ct. at 1415 n.2); *see also id.* at 155, 799 S.E.2d at 656 (Tyson, J., concurring) ("[E]ven a seldom-used front door is the door uninvited members of the public are expected to use when they arrive."). "Without this limitation, law enforcement freely could wander around one's home searching for exterior doors and, in the process, search any area of a home's curtilage without a warrant." *Id.* at 152, 799 S.E.2d at 654.

The scope of the implied license to conduct a knock and talk is governed by societal expectations, and when law enforcement approach a home in a manner that is not "customary, usual, reasonable, respectful, ordinary, typical, nonalarming," they are trespassing, and the Fourth Amendment is implicated. *Jardines*, 569 U.S. at 8 n.2, 133 S. Ct. at 1415 n.2. Relevant to distinguishing between a knock and talk and a search is how law enforcement approach the home, the hour at which they did so, and whether there were any indications that the occupant of the home welcomed uninvited guests on his or her property.

First, law enforcement may not approach a home in a manner that "would not have been reasonable for solicitors, hawkers[,] or peddlers." *State v. Stanley*, 259 N.C. App. 708, 717, 817 S.E.2d 107, 113 (2018) (citation and marks omitted) ("Rather than using the paved walkway that led directly to the unobstructed front door of the apartment, the officers walked along a gravel driveway into the backyard in order to knock on the back door, which was not visible from the street."); *see also Huddy*, 253 N.C. App. at 153, 799 S.E.2d at 655 (impermissible knock and talk where officer walked around the entire residence to "clear" the sides of the home, checked the windows for signs of a break-in, and then approached the home from the back door). Similarly, law enforcement cannot "overstay[ ] their 'knock and talk' welcome on the property." *State v. Ellis*, 266 N.C. App. 115, 121, 829 S.E.2d 912, 916 (2019) (violation of Fourth Amendment where detective received no response after knocking on front door and second detective walked around to rear door and then to sides of the defendant's yard); *see also State v. Gentile*, 237 N.C. App. 304, 309-10, 766 S.E.2d 349, 353 (2014) (detectives engaged in "trespassory invasion of defendant's curtilage" where they knocked on front door, received no response, and then proceeded to back of house where they smelled the odor of marijuana).

Relatedly, the hour at which officers conduct their knock and talk is relevant to whether officers have exceeded the scope of the implied license. While this Court has not held that knock and talks are impermissible during a certain time-window, we have approvingly noted that "a number of courts have found late-night inquiries unreasonable because of the societal expectation that members of the public would not knock on one's front door in the middle of the night." *State v. Hargett*, 251 N.C. App. 926, 795 S.E.2d 828, 2017 N.C. App. LEXIS 70, at *6 (2017) (unpublished). Even the dissent in *Jardines* acknowledged that "as a general matter . . . a visitor [may not] come to the front door in the middle of the night without an express invitation." 569 U.S. at 20, 133 S. Ct. at 1422 (Alito, J., dissenting). Noting agreement on this point between the majority and dissenting opinions in *Jardines*, the Michigan Supreme

Court unanimously concluded "that a nighttime visit would be outside the scope of the implied license (and thus a trespass)." *Frederick*, 500 Mich. at 238, 895 N.W.2d at 546. Accordingly, "as the Supreme Court suggested in *Jardines*, [ ] the scope of the implied license to approach a house and knock is time-sensitive" and assessed by reference to whether Girl Scouts would do so at the hour in question. *Id.*

Finally, we consider whether a resident has signaled that uninvited guests are not welcome to approach his or her home. Even before *Jardines*, we noted that plainly visible no trespassing signs are "evidence of the homeowner's intent that the [area protected by the sign is] not open to the public[,]" regardless of whether officers have seen the sign or not. *State v. Pasour*, 223 N.C. App. 175, 179, 741 S.E.2d 323, 326 (2012). While a sign alone may not be "sufficient to revoke the implied license[,]" it is one factor to be considered among others, such as the presence of a consistently locked gate or fence and the homeowner or occupant's conduct upon the officers' arrival. *State v. Smith*, 246 N.C. App. 170, 178, 783 S.E.2d 504, 510 (2016). In *Smith*, we held that the presence of a sign alone did not expressly revoke the implied license where the defendant "emerged from his home and greeted the detectives and deputy" and "engaged them in what the record reflects was a calm, civil discussion." *Id.* at 179, 783 S.E.2d at 510; *see also Huddy*, 253 N.C. App. at 151, 799 S.E.2d at 654 ("[O]fficers are permitted to approach the front door of a home, knock, and engage in *consensual* conversation with the occupants.") (emphasis added). We also noted that the defendant had inconsistently displayed a no trespassing sign and the gate to his driveway was open on the date the officers arrived, all of which "did not reflect a clear demonstration of an intent to revoke the implied license to approach." *Smith*, 246 N.C. App. at 179, 783 S.E.2d at 510 (internal marks omitted).

This guidance is pertinent here because "an officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant" and thus "[a] plain-view seizure [ ] cannot be justified if it is effectuated by unlawful trespass." *Collins v. Virginia*, ___ U.S. ___, ___, 138 S. Ct. 1663, 1672, 201 L. Ed. 2d 9, 21 (2018) (citation omitted). If law enforcement goes beyond the bounds of a knock and talk and, in so doing, sees or smells contraband, then, absent an applicable exception to the warrant requirement, they do not have the right to seize that evidence. *Id.* Accordingly, evidence seized pursuant to a knock and talk that has strayed into a search must be suppressed as fruit of the poisonous tree. *See Stanley*, 259 N.C. App. at 718, 817 S.E.2d at 114.

C. Application to the Instant Case

Since the scope of the implied license is governed by "background social norms," a knock and talk does not implicate the Fourth Amendment so long as officers behave as a Girl Scout or trick-or-treater would. The officers here decidedly did not.

The trial court found and Defendant challenges on appeal the following findings of fact:

> 10. The house could be approached by walking up the driveway, which was obvious, or through the yard, which was not obvious.
>
> . . .
>
> 14. The officers passed the front door of the house but did not go directly to the front door because there was no obvious path.

Defendant also challenges the following conclusion of law:[2]

> 43. In walking along the right-of-way, the officers followed a path that a person visiting 2300 Davis Park Road would follow if that individual was going to knock on the front door of the house.

Turning to the evidence presented at the suppression hearing, Officer Padgett testified explicitly as to the path that the ordinary person would take and the reasons why he and Officers Belton and Hoyle did not take that path:

> The sidewalk would be what anybody that was going door-to-door selling anything would take, they would go down -- up the little sidewalk that juts off the driveway[.]
>
> . . .
>
> There was not a worn path in the grass [where we walked], or anything like that. *I would think anybody, especially if you parked your vehicle on the roadway, you would go down the driveway.* We did -- just because of the freedom of movement, and stuff, we're not going up block the driveway. We don't like parking our patrol cars on the

2. Though labeled a conclusion of law, this is more properly classified as a finding of fact because it is a determination reached through "logical reasoning from evidentiary facts." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657-58 (1982).

> road. So that's why we took the path we did. *If you were in a mail truck you would probably stop at the driveway and go down the sidewalk to the door. But that's not the path that we took.* (Emphasis added.)

And Officer Belton testified that they took a different path because "of vehicles coming by, and the fact that the night being dark and us wearing dark clothing." He also testified that they "went straight to the driveway" because he saw "a white male getting inside a vehicle, possibly [the] suspect." To get to the driveway, the officers "cut between the tree to go straight to the vehicle. [ ] [I]t g[a]ve us cover and concealment as well, just in case there was an issue." There was no testimony to the contrary on any of these points.

While the above testimony is competent evidence in support of finding of fact 10 as persons *could* approach the house through its yard, it offers no support for finding of fact 14 or conclusion of law 43. The testimony from the suppression hearing conclusively established that the officers did *not* follow the path that "a person visiting 2300 Davis Park Road *would* follow if that individual was going to knock on the front door of the house." (Emphasis added.) Instead of "stop[ping] at the driveway and go[ing] down the sidewalk to the door"—like "anybody" would do—the officers took a path that offered them "cover[,] [ ] concealment[,]" and safety since they were out at night in dark clothing. And Officer Belton specifically testified that they did not go to the front door because they saw Defendant getting into his car—not because there was no "obvious path" to the front door.

The unbidden deviations from the ordinary path that the officers took here for the purposes of obtaining information are of the type that our Court has held time and time again violate the Fourth Amendment. *See*, *e.g.*, *Stanley*, 259 N.C. App. at 717, 817 S.E.2d at 113 (unlawful knock and talk where officers ignored paved walkway to front door and walked along gravel driveway to back door); *see also Huddy*, 253 N.C. App. at 149, 799 S.E.2d at 652 (same where officers walked around the entire residence before proceeding to back of house to knock). But this case presents far more than a 10- to 20-foot intrusion into Defendant's front yard.

First, the manner in which the officers approached the home here, including but not limited to the physical intrusion, was contrary to that of the "reasonably respectful citizen." Instead of parking in Defendant's driveway, they parked in a lot beside Defendant's home. Clad in dark clothing, the three officers walked along Defendant's property line.

Then, when they saw Defendant enter his car, they briskly crossed onto his property, cutting through trees because it gave them "cover and concealment[,]" shining flashlights at and surrounding his *moving* vehicle. While the State granted at oral argument such behavior would mark Girl Scouts as "ambitious," this conduct, as Justice Scalia put it, "would inspire most of us to—well, call the police[,]" *Jardines*, 569 U.S. at 9, 133 S. Ct. at 1416, if not resort to self-defense.

Relatedly, the officers here also conducted their "knock and talk" at 9:30 p.m. on a cold, mid-December night. Ordinary citizens are not generally expected so late at night. In fact, this was out of the ordinary even for these officers, who testified that their usual practice was to conduct knock and talks during the daylight hours. The atypical, potentially alarming time of this investigation is difficult to square with the implied license discussion in *Jardines*. *Id.* at 8 n.2, 133 S. Ct. at 1415 n.2.[3]

Not only was the manner and time contrary to that of the "reasonably respectful citizen," there also was a plainly visible no trespassing sign in Defendant's yard, evincing an intent to signal that the front yard was not open to the public. *Jardines*, 569 U.S. at 8 n.2, 133 S. Ct. at 1415 n.2; *see also Pasour*, 223 N.C. App. at 179, 741 S.E.2d at 326. Whereas in *Smith*, the defendant engaged officers in a "calm, civil discussion" inconsistent with "an intent to revoke the implied license to approach[,]" 246 N.C. App. at 179, 783 S.E.2d at 510, Defendant's conduct here underlined the

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3. When questioned about the late hour at oral argument, the State noted that the survivor of a car accident might knock on a homeowner's front door at any time to seek help. This is undoubtedly so. But, instead of bolstering the State's argument, it underlines its fundamental weakness.

The test here turns on social norms in routine circumstances—again, how a Girl Scout, trick-or-treater, or "reasonably respectful citizen unfamiliar with the house" would behave—not how someone responds to a potentially life-threatening emergency. *Jardines*, 569 U.S. at 8 n.2, 133 S. Ct. at 1415 n.2; *see, e.g.*, *Frederick*, 500 Mich. at 240, 895 N.W.2d at 547 ("[T]he fact that a visitor may approach a home in an emergency does not mean that a visitor who is *not* in an emergency may approach. Emergencies justify conduct that would otherwise be unacceptable; they are exceptions to the rule, not the rule."). Like those individuals, and unlike the survivor of a car accident, law enforcement has control over when it conducts a knock and talk. It stands to reason these officers generally performed knock-and-talks during the day because late-night efforts are more likely to cause alarm—a consideration in whether someone has an implicit license to approach a person's front door. *See Jardines*, 569 U.S. at 8 n.2, 133 S. Ct. at 1415 n.2; *see also id.* at 20, 133 S. Ct. at 1422 (Alito, J., dissenting). Returning to the State's car accident example, one need not look far into North Carolina's past to find such a late-night knock on a front door stemming from those exigent circumstances leading a homeowner to "call the police[,]" *id.* at 9, 133 S. Ct. at 1416, with tragic consequences, *see* Michael Gordon, *Jonathan Ferrell was just starting his life in Charlotte*, The Charlotte Observer (19 July 2015), https://www.charlotteobserver.com/news/local/crime/article27558442.html.

intent demonstrated by his no trespassing sign. Namely, he questioned the officers' presence on his property and was so "belligerent" in so doing that he was handcuffed. Though Defendant did not have a fence surrounding his property, *Smith* emphasized that it is not the presence of a gate or fence that indicates that a person's property is off-limits to the public, it is the *consistent* presence of a sign or the *consistent* locking of a gate that evinces this intent.[4] Here, Defendant's own conduct plus the lack of any findings or evidence that Defendant did not consistently display a no trespassing sign demonstrated, at the very least, that his yard was not open to the public.

While there may be circumstances where cutting across a person's yard does not exceed the scope of the implied license, *see State v. Grice*, 367 N.C. 753, 754, 767 S.E.2d 312, 314 (2015) (entering curtilage to approach defendant's side door appropriate where front door obscured and inaccessible),[5] and while knocking on Defendant's door at 9:30 p.m. is arguably, as the State contends, just "ambitious" as opposed to plainly beyond the pale, *see Hargett*, 2017 N.C. App. LEXIS 70, at *6-7, and while the presence of a no trespassing sign, by itself, might not expressly revoke the implied license, *see Smith*, 246 N.C. App. at 178, 783 S.E.2d at 510, the "reasonably respectful citizen" would have taken each of these facts into account in determining whether "background social norms" licensed him or her to quickly emerge from trees in a stranger's yard at night with two of his or her colleagues in order to illuminate, surround, and stop a moving car, *Jardines*, 569 U.S. at 8-9 n.2, 133 S. Ct. at 1415-16 n.2. Taken together, the officers' conduct went far beyond the "implied license" that "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to

4. At oral argument, the State suggested the outcome might differ if the officers had seen the no trespassing sign, crossed over a moat filled with alligators, and scaled a fence that surrounded Defendant's property. The dissent similarly argues that Defendant did not revoke the implied license to approach his front door because, in part, he "did not have a fence surrounding his property[.]" *Falls*, *infra* at 259 (Berger, J., dissenting). We need only note in response that the protections of the Fourth Amendment extend to us all regardless of our ability to invest in physical barriers and reptiles. *See United States v. Ross*, 456 U.S. 798, 822, 102 S. Ct. 2157, 2171, 72 L. Ed. 2d 572, 592 (1982) ("[T]he most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion[.]").

5. Defendant notes both that "[t]he continuing validity of *Grice*'s ultimate holding is questionable following the United States Supreme Court's later decision in *Collins*[,]" and that it is not necessary for us to weigh in on this issue because of the distinguishing features of the current controversy. We agree on both counts.

be received, and then (absent invitation to linger longer) leave." *Id.* at 8, 133 S. Ct. at 1415.[6]

The officers here strayed beyond the bounds of a knock and talk; therefore, the seizure of evidence based on their trespassory invasion cannot be justified under the plain view doctrine. *Collins*, ___ U.S. at ___, 138 S. Ct. at 1672 ("[A]n officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant[.]"). Officers Padgett, Belton, and Hoyle did not have a right to be where they were when they saw the revolver and when they smelled marijuana in Defendant's car. Thus, the trial court erred in denying Defendant's motion to suppress.

IV. Conclusion

We "are not required to exhibit a naivete from which ordinary citizens are free." *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977). It takes no fine-grained legal knowledge to appreciate that a Girl Scout troop, a trio of teenage pranksters down the block, or perhaps more sinister characters are not impliedly licensed to emerge from trees that they were using for cover and concealment and cut across a person's yard, swiftly passing a no trespassing sign, to illuminate, surround, and stop that person's departing car on a dark, mid-December evening. It only requires common sense.

Because law enforcement can do no more than a private citizen in this context, the conduct in question implicated the Fourth Amendment. And because the officers lacked a warrant supported by probable cause

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6. The dissent primarily relies on pre-*Jardines* and/or pre-*Collins*, non-binding case law in arguing that this was a knock and talk instead of a search, most notably *United States v. Walker*, 799 F.3d 1361 (11th Cir. 2015). Of course, *Walker* is at most persuasive authority to this Court, *State v. Woods*, 136 N.C. App. 386, 390, 524 S.E.2d 363, 365 (2000) ("[W]ith the exception of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State."), and, as with *Grice*, there are serious questions as to whether *Walker*'s holding survives *Collins*, ___ U.S. at ___, 138 S. Ct. at 1672 ("[S]earching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage.").

Regardless of *Walker*'s dubious legal force, it is also factually distinguishable for several material reasons. First, law enforcement in *Walker* approached the defendant's "main door" via a gravel driveway leading to it—starting on the path the Girl Scouts would take. 799 F.3d at 1362. Law enforcement also did not take steps to conceal their appearance or approach from the defendant as they did in the present case. *Id.* Furthermore, there was no evidence that the defendant displayed a visible no trespassing sign on his property. *Id.* Finally, the defendant was sleeping inside of his stationary vehicle, which was turned off—not reversing out of his driveway—when approached by law enforcement. *Id.*

and no other exception to the Fourth Amendment's warrant requirement applied in this case, we conclude that the evidence in question was illegally obtained. Accordingly, we reverse the trial court's denial of the motion to suppress.

REVERSED.

Judge ZACHARY concurs.

Judge BERGER dissents by separate opinion.

BERGER, Judge, dissenting in separate opinion.

Because the officers did not exceed the scope of their implied license, I respectfully dissent.

Our review of a trial court's denial of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Reaves-Smith*, 271 N.C. App. 337, 340, 844 S.E.2d 19, 22 (2020) (citation and quotation marks omitted). "Unchallenged findings of fact, where no exceptions have been taken, are presumed to be supported by competent evidence and binding on appeal." *State v. McLeod*, 197 N.C. App. 707, 711, 682 S.E.2d 396, 398 (2009) (*purgandum*).

On appeal, Defendant contends that the trial court erred when it denied his motion to suppress because the officers (1) exceeded the scope of their implied license to conduct a knock and talk by cutting across "approximately 10-20 feet" of his front yard to approach his vehicle; and (2) were not lawfully present when they observed the contraband in plain view in his vehicle. In support of this argument, Defendant specifically challenges findings of fact 10 and 14, which state:

> 10. The house could be approached by walking up the driveway, which was obvious, or through the yard, which was not obvious.
>
> 14. The officers passed the front door of the house but did not go directly to the front door because there was no obvious path.

In addition, Defendant challenges conclusions of law 42, 43, and 47, which are set forth below:

> 42. Officer Belton also testified that himself, Padgett, and Hoyle passed the front of the front door by the house. However, there was no sidewalk or direct path to the door, so the officers continued to the driveway.
>
> 43. In walking along the right-of-way, the officers followed a path that a person visiting 2300 Davis Park Road would follow if that individual was going to knock on the front door of the house.
>
> 47. That the intrusion on the curtilage of the property was brief and minimal. Further, the officers did not use any special equipment or use any special force to enter the property. As a result, it was not an unreasonable intrusion and therefore did not violate the Fourth Amendment of the United States Constitution.

Although conclusions of law 42 and 43 are mixed findings of fact and conclusions of law, "we do not base our review of findings of fact and conclusions of law on the label in the order, but rather, on the substance of the finding or conclusion." *Reaves-Smith*, 271 N.C. App. at 343, 844 S.E.2d at 24 (citation and quotation marks omitted). We review these conclusions to determine whether they are supported by competent evidence. *Id.* at 340, 844 S.E.2d at 22.

Because Defendant challenges no other findings of fact, all remaining findings are presumed to be supported by competent evidence and are binding on appeal. *See McLeod*, 197 N.C. App. at 711, 682 S.E.2d at 398 ("Unchallenged findings of fact . . . are presumed to be supported by competent evidence and binding on appeal" (citation and quotation marks omitted)).

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "The touchstone of the Fourth Amendment is reasonableness." *State v. Grice*, 367 N.C. 753, 756, 767 S.E.2d 312, 315 (2015) (citation and quotation marks omitted).

"Because an individual ordinarily possesses the highest expectation of privacy within the curtilage of his home, that area typically is afforded the most stringent Fourth Amendment protection." *State v. Smith*, 246 N.C. App. 170, 180, 783 S.E.2d 504, 511 (2016) (citation and quotation marks omitted). "[C]urtilage . . . is the area immediately surrounding and associated with the home. . . [and] law enforcement ordinarily cannot enter the curtilage of one's home without either a warrant or probable cause and the presence of exigent circumstances that justify the warrantless intrusion." *State v. Huddy*, 253 N.C. App. 148, 151, 799 S.E.2d 650, 654 (2017) (citation and quotation marks omitted).

"A knock and talk is a procedure by which police officers approach a residence and knock on the door to question the occupant, often in an attempt to gain consent to search when no probable cause exists to obtain a warrant." *State v. Stanley*, 259 N.C. App. 708, 714, 817 S.E.2d 107, 112 (2018) (citations and quotation marks omitted). Accordingly, "law enforcement [is not] absolutely prohibited from crossing the curtilage and approaching the home, based on our society's recognition that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers, and peddlers[.]" *Grice*, 367 N.C. at 759-60, 767 S.E.2d at 318. "[W]hen officers enter private property for the purpose of a general inquiry or interview, their presence is proper and lawful[.]" *State v. Church*, 110 N.C. App. 569, 573-74, 430 S.E.2d 462, 465 (1993) (citation omitted).

Defendant argues that the officers exceeded their implied license by cutting across "approximately 10-20" feet of his front yard because such conduct would not have been reasonable for an uninvited guest. At the suppression hearing, Officer Belton testified that there was no path directly to the front door from the road and that to approach the front door you would have to "[e]ither come up behind the tree, or beside the tree, and go straight to it, or the path that we took to go down the driveway." Further, Officer Belton testified that the driveway was the only paved path to get to the front door. This testimony supports findings of fact 10, 14, and 43, namely that the officers had to walk past the front door to get to the driveway and that the obvious path to the house was down the driveway and through the sidewalk. Therefore, these findings are supported by competent evidence.

Defendant also challenges conclusion of law 43, which again, is a mixed finding of fact. However, at the hearing, Officer Belton testified that "[w]hen we arrived at the residence we walked pretty much where the road meets the property line . . . [t]here's no sidewalk, so we pretty much had to [walk] on the street but a little off on the road

. . . just because of vehicles coming by, and the fact that the night being dark[.]" This testimony supports that a reasonable person approaching the house would have to walk along the right of way to approach the driveway because there is no sidewalk. Therefore, this finding is supported by competent evidence.

Next, we must determine whether the trial court's findings of fact support conclusion of law 47 that officers cutting across "approximately 10-20 feet" of Defendant's yard was not an "unreasonable intrusion and therefore did not violate the Fourth Amendment of the United States Constitution."

Conduct that would be unreasonable for "solicitors, hawkers or peddlers . . . is also unreasonable for law enforcement officers." *Stanley*, 259 N.C. App. at 717, 817 S.E.2d at 113 (*purgandum*). "Law enforcement may not use a knock and talk as a pretext to search the home's curtilage [because] no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search." *Huddy*, 253 N.C. App. at 152, 799 S.E.2d at 654 (*purgandum*). In fact, our courts have repeatedly held that an officer exceeds the scope of their implied license when they approach a home from the backyard, or snoop around the property to investigate the home. *See id.* at 149, 799 S.E.2d at 655 (finding that the officer exceeded the scope of implied license where officer ran a license plate on a car not visible from the street, checked windows for signs of a break-in, and walked around the entire residence to clear the sides of the home); *see also Stanley*, 259 N.C. App. at 717, 817 S.E.2d at 113 (determining that the officers exceeded the scope of implied license where they walked along a gravel driveway to the back door instead of using a paved walkway to the front door).

Here, after seeing a white male matching Defendant's description get into a vehicle, officers cut through "approximately 10-20 feet" of Defendant's front yard to approach the vehicle and to see if Defendant would speak with them – a valid purpose of a knock and talk. *See Church*, 110 N.C. App. at 573-74, 430 S.E.2d at 465 (finding that "when officers enter private property for the purpose of a general inquiry or interview, their presence is proper and lawful."); *see also United States v. Raines*, 243 F.3d 419, 421 (8th Cir. 2001) ("We have previously recognized that law enforcement officers must sometimes move away from the front door when attempting to contact the occupants of a residence."); *see also United States v. Taylor*, 458 F.3d 1201, 1205 (11th Cir. 2006) ("Such a minor departure from the front door [when officers proceeded to the curtilage of the defendant's property after defendant yelled 'Don't shoot my dog!'] does not remove the initial entry from the "knock and

talk" exception to the warrant requirement."). In fact, a driveway is an access route to the front door where officers are allowed to approach to conduct a "knock and talk." *Smith*, 246 N.C. App. at 181, 783 S.E.2d at 511. Accordingly, the officers did not exceed the scope of their implied license by cutting across "approximately 10-20 feet" of Defendant's front yard to approach the driveway.

Defendant also argues that the "No Trespassing" sign on a tree in his front yard expressly removed the officers' implied license to approach his home. However, a "No Trespassing" sign, alone, is not "sufficient to revoke the implied license to approach." *Id.* at 178, 783 S.E.2d at 510; *see*, *e.g.*, *United States v. Bearden*, 780 F.3d 887, 893-94 (8th Cir. 2015) (upholding "knock and talk" where officers entered property through an open driveway gate marked with "No Trespassing" signs). Rather, the homeowner must clearly demonstrate, through either a physical obstruction or verbal instructions, their intention to revoke the implied license. *See Smith*, 246 N.C. App. at 178, 783 S.E.2d at 510. Here, Defendant had only one "No Trespassing" sign, did not have a fence surrounding his property, and did not express his intention to revoke the implied license to approach until after the officers noticed the contraband in plain view. Therefore, Defendant did not effectively revoke the officers' implied license to approach.

Finally, Defendant contends under *Florida v. Jardines*, 569 U.S. 1 (2013) that the officers conducted an investigatory search when they approached his vehicle and exceeded the scope of their implied license by approaching his vehicle at 9:30 at night. However, *Jardines* is distinguishable. Here, the officers did not approach Defendant's car with the purpose of discovering incriminating evidence, nor did the officers approach with a forensic narcotics dog. *See Jardines*, 569 U.S. at 9-10 (holding that using a police dog to sniff for drugs on the front porch in hopes of discovering incriminating evidence exceeds the scope of the knock and talk exception). Rather, the officers approached Defendant's property with the intent to speak with him after receiving an anonymous tip, which led to a "knock and talk." *Id.* at 8 ("[A] police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.' " (citation omitted)).

This case is similar to *United States v. Walker*, 799 F.3d 1361 (11th Cir. 2015). In *Walker*, officers went to the defendant's residence at 5:04 a.m. to conduct a knock and talk to see if a man with an outstanding warrant was inside his house. *Id.* at 1362. Rather than first going to the front door, officers approached the defendant in his carport. The Eleventh Circuit held that the officers "small departure from the front door [to

go to the carport] when seeking to contact the occupants [was] permissible[,]" and that the officers did not conduct an investigatory search when they approached the vehicle because "the officers' behavior did not objectively reveal a purpose to search[.]" *Id.* at 1363-64. Further, the Eleventh Circuit held that going to someone's house before sunrise was not unreasonable because "although many people might normally be asleep at that early hour, the light on in the car indicated otherwise." *Id.* at 1364.

Here, as in *Walker*, the officers did not approach to conduct a search; rather, their main purpose was to follow up on the anonymous tip. Additionally, it was a small departure when the officers cut across "10-20" feet of Defendant's grass to then approach Defendant, who was outside of his house in a running car at 9:30 p.m. Thus, the officers' actions in approaching Defendant were permissible and not unreasonable under the Fourth Amendment.

Accordingly, the officers did not exceed the scope of their implied license, they were lawfully present when they arrived at Defendant's vehicle, and the subsequent searches were valid under the Fourth Amendment.

STATE OF NORTH CAROLINA
v.
MARC CHRISTIAN GETTLEMAN, SR. AND MARC CHRISTIAN GETTLEMAN, II
AND DARLENE ROWENA GETTLEMAN

No. COA19-1143

Filed 15 December 2020

1. Appeal and Error—preservation of issues—criminal case—sufficiency of evidence—motion to dismiss specific charge or all charges—required

On appeal from multiple convictions, defendants failed to preserve for appellate review their arguments challenging the sufficiency of the State's evidence for charges of acting as an unlicensed bondsman or runner, where defendants neither moved to dismiss those specific charges nor moved to dismiss all charges at trial. Although defendants moved to dismiss some of the other charges against them, a motion to dismiss some charges for insufficiency of the evidence does not preserve for appellate review arguments

regarding the sufficiency of the evidence of other charges for which no motion to dismiss was made and upon which the trial court had no opportunity to rule.

2. Appeal and Error—preservation of issues—admissibility of evidence—improper lay opinion—different objection raised at trial

In a prosecution for acting as an unlicensed bondsman or runner, defendant failed to preserve for appellate review his argument challenging the admission of two recorded 911 calls on grounds that they constituted improper lay opinion testimony under Evidence Rule 701 where, at trial, defendant did not raise this argument and instead objected to the evidence on different grounds. Further, defendant was not entitled to plain error review on the Rule 701 issue, which could only be reviewed on appeal for an abuse of discretion (and the plain error rule does not apply to matters falling within the trial court's discretion).

3. Sureties—definition of "surety"—accommodation bondsman—criminal prosecution—acting as unlicensed bondsman

In a prosecution for acting as unlicensed bondsmen and other charges, where defendants paid a professional bail bondsman to post two bonds for one of their employees and then, in a car chase, apprehended the employee for skipping bail by allegedly overturning his brother's truck (with the employee inside) and threatening him at gunpoint, defendants' argument that they acted lawfully as "sureties" or "accommodation bondsmen" was meritless. Because N.C.G.S. § 15A-531 defines a "surety" as a professional bondsman who executes a bail bond, defendants could not be sureties on the bonds they paid the professional bondsman (the true surety) to execute. Further, their failure to qualify as "sureties" meant that defendants could not qualify as "accommodation bondsmen" under N.C.G.S. § 58-71-1(1).

Appeal by defendants from judgments entered 3 June 2019 by Judge V. Bradford Long in Harnett County Superior Court. Heard in the Court of Appeals 22 September 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General M. Denise Stanford and Daniel Snipes Johnson, and Assistant Attorney General Heather H. Freeman, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant Marc Christian Gettleman, Sr.

Kellie Mannette for defendant-appellant Marc Christian Gettleman, II.

Anne Bleyman for defendant-appellant Darlene Rowena Gettleman.

ZACHARY, Judge.

Defendants[1] Marc Christian Gettleman, Sr., ("Big Marc"), Defendant Marc Christian Gettleman, II, ("Little Marc") and Darlene Rowena Gettleman ("Darlene") appeal from judgments entered upon a jury's verdicts finding them guilty of multiple offenses, all relating to an incident that occurred on 15 March 2018. After careful review, we conclude that Defendants received a fair trial, free from prejudicial error.

Background

In October 2017, Justin Emmons was placed on probation for two felony offenses and was ordered to find gainful employment as one of the conditions of his probation. Big Marc and Darlene hired Justin in November 2017 as a mechanic for their towing service and garage. While working for Big Marc and Darlene, Justin lived with their adult son, Little Marc.

In December 2017, Justin violated the terms of his probation by missing scheduled appointments and failing drug tests, and he was arrested. Big Marc and Darlene posted bond for Justin, using their business and home as collateral. Then, one day in mid-January 2018, Justin failed to show up to work. When Justin appeared that evening, Big Marc handcuffed him, and Defendants took him to the Harnett County Jail and surrendered him in order to have their property released from the bonds.

Darlene and Big Marc then paid Robert West, a professional bail bondsman, $1,500 to post one of two $15,000 bonds for Justin ("the January bonds"). Justin agreed to make payments to West on the balance owed to West for posting the second $15,000 bond. In addition, West required that Darlene and Big Marc execute an indemnity agreement, guaranteeing payment to West of any amounts that he should have to pay to the State in the event of the January bonds' forfeiture due to Justin's failure to appear.

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1. For ease of reading and clarity—and consistent with the parties' briefs, the record, and the transcripts of the proceedings below—we refer to Defendant Marc Christian Gettleman, Sr., as "Big Marc," Defendant Marc Christian Gettleman, II, as "Little Marc," and Defendant Darlene Rowena Gettleman as "Darlene."

On or about 11 March 2018, Justin left his job and his residence without informing Defendants. Darlene and Little Marc repeatedly attempted to phone Justin, but he did not respond to any of their calls or voicemails. Defendants kept West informed as they "called everybody [they] knew" in an attempt to locate Justin. Among the people who Defendants contacted was Justin's girlfriend, Nina. Little Marc told her that he would pay her $100 for information concerning Justin's whereabouts.

On the morning of 15 March 2018, Justin's brother Ryan picked him up in his Ford F150 truck and took him to a friend's garage to work on Ryan's classic Ford Mustang. Around midday, the brothers went to a nearby convenience store to buy some lunch. Nina told Little Marc that Justin would be at the convenience store, and Defendants went there to apprehend Justin. Big Marc notified West that they knew where Justin was, that they were going to pick him up, and that they would bring Justin with them to the jail.

Darlene drove Big Marc and Little Marc to the convenience store in her Ford Expedition SUV. When they arrived, Big Marc went inside to use the restroom. However, Justin was at the convenience store earlier than expected, and he saw Big Marc enter the store. Justin then told Ryan that he was leaving to avoid a confrontation with Defendants. Justin walked past Darlene and Little Marc as they sat in the Expedition, and Darlene told Little Marc "to get out, see if he [could] catch him." Little Marc followed Justin, who then "took off through the neighborhood." Little Marc kept pace with Justin for two or three blocks before he ran out of breath.

Darlene called Big Marc and told him that Justin had exited the convenience store and that Little Marc had followed him. Big Marc came out to the Expedition, and he and Darlene drove around searching for Justin. While he was running, Justin called Ryan and told him to pick him up. Big Marc and Darlene saw Justin jumping into Ryan's truck at the entrance to a neighborhood.

At trial, the parties gave varying testimonies of what happened next. Justin testified that Big Marc exited the Expedition, pointed a gun at him, and said, "[F]reeze or I'll shoot you," but that Justin kept running. Justin further testified that Darlene got out of the car and fired a gun, either at him or at the ground, as she chased him. Then Justin saw Ryan pull his truck around, and he flagged Ryan down and jumped in the truck.

In contrast, Big Marc testified that he did not point a gun at Justin, but rather that he merely yelled at him from the Expedition. He further testified that Darlene got out of the vehicle, carrying his gun, and said

that she would run after Justin. Big Marc got in the driver's seat of the Expedition and strayed into the bushes and birdbath of a yard as he turned the vehicle around, prompting the homeowners to scream and yell at him. Big Marc then heard what he thought may have been gunshots coming from the yard behind him. Big Marc saw Darlene chasing Justin, but he thought that Justin was too far ahead for Darlene to catch him, so he parked the Expedition across the center median and told her to get back in the vehicle.

Darlene's account is similar to Big Marc's. She testified that she exited the Expedition, unarmed, started running after Justin, and fell. Darlene gathered herself and returned to the Expedition. She explained that, with traffic approaching from both directions, they could not move from the center median.

Big Marc and Darlene both testified that they saw Ryan's truck, with Justin inside, lurching haltingly toward the passenger's side of the Expedition, as if Ryan was alternatively hitting the gas and then the brake. Big Marc got out of the Expedition, saw traffic backed up behind them, and told Darlene to exit the vehicle on the driver's side. As Darlene climbed over the console, she saw Ryan's truck "in the air." Big Marc testified that Darlene was "three-quarters of the way out" of the vehicle when Ryan's truck hit the Expedition and "just rolled."

The State's evidence differed markedly in this respect from Defendants'. Ryan testified that Big Marc drove the Expedition, against traffic, "directly at" them, so Ryan tried to merge into the middle lane to avoid a collision. He testified that Big Marc followed "into the middle lane with me, like PIT maneuvered the right side of my -- back of my truck, and it flipped over[.]"[2] Justin testified that Ryan "tried to veer out around [Big Marc and Darlene], and they just rammed his truck, just hit his truck, and ended up rolling us over."

Ryan's truck flipped over onto its roof. Justin and Ryan crawled out of the passenger's side window as Big Marc and Darlene approached the truck. Big Marc handcuffed Justin. Ryan and Big Marc began shouting at each other, before Ryan ran off.

Detective Joshua Teasley, of the Harnett County Sheriff's Office, testified that he received a call that there were "shots fired" and responded to the scene. He saw Ryan's overturned pickup truck, and traffic backed

2. "[A] 'Precision Intervention Technique ("PIT") maneuver . . . causes [a] fleeing vehicle to spin to a stop.' " *Scott v. Harris*, 550 U.S. 372, 375, 167 L. Ed. 2d 686, 691 (2007).

up in both directions. Darlene approached Detective Teasley, wearing a camouflage jacket and a badge around her neck. She told Detective Teasley, "[W]e have a $35,000 bond on [Justin] and he is trying to skip bond[,]" which led the detective to believe that Darlene "was a bondsman." Detective Teasley then walked around to the other side of the vehicle, where he saw Justin, handcuffed, with Big Marc holding the other cuff, and "began to try to figure out what was going on."

Justin and Darlene exchanged words in Detective Teasley's presence. Justin "seemed incredulous that she shot at him. He kept saying, you shot at me, you shot at me." Darlene replied that she did not shoot at him, but rather "at the ground." Detective Teasley called for EMS, because Justin said that he was in pain from the knee injury that he suffered when Ryan's truck rolled. Big Marc handed the cuffs to Darlene, who handcuffed herself to Justin and said, "[G]uess we're both going to Central Harnett Hospital." Justin got into the ambulance, and Darlene rode with him.

As more law enforcement officers responded to the scene, Little Marc approached the Expedition on foot, having heard the collision. At the direction of a state trooper, Little Marc moved the Expedition to the parking lot of a nearby fire station. Detective Teasley testified that "some of Justin's family arrived, and there was a pretty heated incident down at the fire station." Law enforcement officers responded to that scene as well, and they escorted Little Marc to his own vehicle, which was parked nearby. Big Marc testified that, as officers responded to the fire station scene, a highway patrolman told him to pick up Darlene at the hospital. Big Marc drove the Expedition to the hospital, arriving at approximately the same time as West. West took custody of Justin at the hospital, and when Justin was released, West took him to jail.

By the time Detective Teasley and other law enforcement officers had "finished talking with the parties involved" in the scene at the fire station, Detective Teasley noticed that "the ambulances [were] gone, [Defendants] were gone and their vehicle was gone." Detective Teasley testified that "the tenor of the investigation changed" hours later, when they "found out [Defendants] were not bondsmen[.]" Detective Teasley called Little Marc and requested that Defendants return to the scene.

Law enforcement officers interviewed each Defendant separately. Defendants admitted that they were not bondsmen, but both Darlene and Little Marc claimed that West told them to "do whatever [they] ha[d] to do" to apprehend Justin, short of crossing state lines or "us[ing] deadly force unless deadly force [wa]s used" against them.

On 29 May 2018, a grand jury returned indictments charging Big Marc with two counts of assault by pointing a gun, two counts of assault with a deadly weapon, and one count each of injury to personal property causing damage in excess of $200, acting as an unlicensed bondsman or runner, reckless driving, disorderly conduct, armed robbery, second-degree kidnapping, conspiracy to commit armed robbery, conspiracy to commit second-degree kidnapping, and felony hit and run resulting in injury. The grand jury also returned indictments charging Darlene with two counts of assault by pointing a gun, two counts of assault with a deadly weapon, and one count each of injury to personal property causing damage in excess of $200, acting as an unlicensed bondsman or runner, going armed to the terror of the people, disorderly conduct, failure to remain at the scene of an accident, armed robbery, second-degree kidnapping, conspiracy to commit armed robbery, and conspiracy to commit second-degree kidnapping. Finally, the grand jury returned an indictment charging Little Marc with conspiracy to commit armed robbery, conspiracy to commit second-degree kidnapping, acting as an unlicensed bondsman or runner, and disorderly conduct.

On 20 May 2019, Defendants' cases came on for a joint jury trial in Harnett County Superior Court before the Honorable V. Bradford Long. On 23 May 2019, at the close of the State's evidence, Defendants' counsel made separate motions to dismiss some of the charges against Defendants: (1) the robbery and kidnapping charges, and each of the corresponding conspiracy charges; (2) the felony hit-and-run charge against Big Marc and the charge of failure to remain at the scene of an accident charge against Darlene; (3) the disorderly conduct charge against Little Marc; and (4) the charge of going armed to the terror of the people against Darlene. The trial court granted Defendants' motion to dismiss the conspiracy charges as to each Defendant, but denied the other motions. On 24 May 2019, the State voluntarily dismissed one count of assault with a deadly weapon against Darlene. At the close of all of the evidence, Defendants' counsel renewed the previously denied motions to dismiss, and the trial court again denied these motions.

On 28 May 2019, the jury returned its verdicts. The jury found Big Marc guilty of both counts of assault with a deadly weapon, as well as the counts of injury to personal property causing damage in excess of $200, acting as an unlicensed bondsman or runner, reckless driving, disorderly conduct, and second-degree kidnapping. The jury found Darlene guilty of acting as an unlicensed bondsman or runner, disorderly conduct, failure to remain at the scene of an accident, and second-degree kidnapping. Lastly, the jury found Little Marc guilty of acting as an

unlicensed bondsman or runner. The jury found Defendants not guilty of all remaining charges.

After consolidating Big Marc's and Darlene's offenses for sentencing, the trial court sentenced Big Marc to 25–42 months' imprisonment and Darlene to 18–34 months' imprisonment, both sentences to be served in the custody of the North Carolina Division of Adult Correction. The trial court sentenced Little Marc to 10 days in the custody of the Harnett County Sheriff. Defendants gave oral notices of appeal in open court.

Discussion

Defendants raise multiple issues on appeal. Both Darlene and Little Marc argue that the trial court erred in denying their motions to dismiss the charges of acting as an unlicensed bondsman or runner. Little Marc also argues that the trial court committed plain error due to a variance between the indictment and the jury instructions with respect to the charge of acting as an unlicensed bondsman or runner. Big Marc argues that the trial court erred in admitting into evidence, over his objection, a recording of a 911 call, in which the caller gave what Big Marc claims was inadmissible lay-opinion evidence.

Defendants' remaining arguments turn on the same question of statutory interpretation: whether Defendants acted as sureties or accommodation bondsmen under N.C. Gen. Stat. § 58-71-1 (2019). First, Defendants essentially argue that the trial court committed plain error in failing to instruct the jury that they could have considered their actions to be the lawful acts of either sureties or accommodation bondsmen.[3] For the same reason, Little Marc also argues that the indictment against him "fails to allege a crime and is fatally defective." Finally, Darlene argues that the trial court erred in denying her motions to dismiss the second-degree kidnapping charge where, *inter alia*, there existed insufficient evidence of an unlawful confinement because she "had the legal authority [as a surety] to restrain Justin."

I. *Motions to Dismiss*

[1] Both Darlene and Little Marc argue that the trial court erred in denying their motions to dismiss the charges of acting as an unlicensed

3. To wit: Big Marc argues that "when viewed in the light most favorable to [him], the evidence from trial is sufficient to support a surety defense." Darlene argues that "it was prejudicial error for the jury not to be instructed [she] did not need to be licensed as a bondsman." Little Marc argues that "the jury was instructed they could find Little Marc guilty for actions constituting no offense." The success of each of these arguments hinges on whether Defendants qualified as either sureties or accommodation bondsmen under N.C. Gen. Stat. § 58-71-1.

bondsman or runner. However, upon careful review of the transcript, we conclude that Darlene and Little Marc failed to move to dismiss these charges, and therefore arguments related to the sufficiency of the evidence on these charges were not preserved for appellate review.

At the close of the State's evidence, defense counsel[4] did not make one, single motion to dismiss all the charges, but rather made a series of targeted "motions to dismiss *some* of" the charges. (Emphasis added). After defense counsel moved to dismiss the armed robbery and kidnapping charges, as well as the corresponding conspiracy charges, the trial court asked: "Were there other charges you wanted to be heard on?" Counsel indicated that there were, and the trial court responded: "Well, let's do it piecemeal, then. What else do you want to be heard about[?]" Defense counsel then moved to dismiss the felony hit-and-run charge against Big Marc and Darlene's charge for failure to remain at the scene of an accident.[5] The trial court granted Defendants' motions to dismiss the conspiracy charges, but denied "[a]ll other motions to dismiss at the close of the [S]tate's evidence[.]"

The following exchange then occurred:

> [DEFENDANTS' COUNSEL]: And I had more charges that I was going to –
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> THE COURT: I beg your pardon. You're messing with me, man. I thought you were finished. You keep sitting down. Go ahead.
>
> [DEFENDANTS' COUNSEL]: And do you want me to do all of mine?
>
> THE COURT: Let's just – yeah, let's go through them.
>
> [DEFENDANTS' COUNSEL]: Okay. As to the –
>
> THE COURT: Let the record reflect that the court announcing that all motions were denied was based on

4. Although Defendants have separate appellate counsel, they shared the same trial counsel.

5. Defense counsel framed this motion as one to dismiss "both of the hit-and-run offenses as well as the charge against [Darlene] for failing to remain at the scene of an accident[.]" However, there was only one hit-and-run charge. The trial court interpreted this as a motion to dismiss the felony hit-and-run charge against Big Marc and the charge of failure to remain at the scene of an accident against Darlene. Insofar as the charges of acting as an unlicensed bondsman or runner are not implicated, our preservation analysis is not affected.

> the court's erroneous assumption [Defendants' counsel] had concluded his motion. The court now retracts that. The motion to dismiss as to the charge of armed robbery as to [Big Marc] and [Darlene] are denied. The motion to dismiss at the close of the [S]tate's evidence as to second-degree kidnapping lodged against [Big Marc] and [Darlene] are denied. The motion[ ] to dismiss [the charge against Darlene] for misdemeanor failure to remain at the scene of an accident as a passenger is denied. The motion to dismiss felony hit-and-run against [Big Marc] is denied.

Defense counsel then moved to dismiss Little Marc's charge for disorderly conduct, and Darlene's charge for going armed to the terror of the people. The trial court denied these motions as well.

At no point did defense counsel move to dismiss the charges of acting as an unlicensed bondsman or runner, or move to dismiss *all charges against Defendants*. Moreover, at the close of all of the evidence, defense counsel moved to "renew [the] motions to dismiss *that haven't previously been allowed*." (Emphasis added). Defense counsel did not make any new motions to dismiss either these now-challenged charges, or all of the charges, as permitted by our rules. *See* N.C. R. App. P. 10(a)(3) ("A defendant may make a motion to dismiss the action . . . at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion."); N.C. Gen. Stat. § 15A-1227(a)(2). In addition, the trial court did not consider or rule on the sufficiency of the evidence with regard to the charges of acting as an unlicensed bondsman or runner.

Our Supreme Court recently clarified that "under Rule 10(a)(3), a defendant's motion to dismiss preserves all issues related to sufficiency of the State's evidence for appellate review." *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020). However, at issue in *Golder*, in which the defendant moved to dismiss both charges against him, was whether all arguments regarding the sufficiency of the evidence are preserved for appellate review with a properly timed motion to dismiss, even if defense counsel makes specific arguments regarding certain elements of a particular charge before the trial court. *See id.* at 242–43, 839 S.E.2d at 785–86. The *Golder* Court reviewed a line of cases in which this Court had developed a categorical approach to reviewing different types of motions to dismiss, and held that this Court's "jurisprudence, which ha[d] attempted to categorize motions to dismiss as general, specifically

general, or specific, and to assign different scopes of appellate review to each category, is inconsistent with Rule 10(a)(3)." *Id.* at 249, 839 S.E.2d at 790.[6]

Nevertheless, the *Golder* Court recognized the fundamental precept that "Rule 10(a)(3) requires a defendant *to make a motion to dismiss* in order to preserve an insufficiency of the evidence issue[.]" *Id.* at 245, 839 S.E.2d at 788 (emphasis added). This is especially relevant because where, as here, a defendant moves to dismiss some—but *pointedly not all*—of the charges against him or her, it follows that the targeted motions to dismiss certain charges cannot preserve issues concerning the sufficiency of the evidence regarding the charges that the defendant *deliberately chose not to move to dismiss*.

In this case, defense counsel did not specifically move to dismiss the charges of acting as an unlicensed bondsman or runner, nor generally move for dismissal of *all charges* against Defendants. And as the trial court's oral ruling—quoted above—makes plain, the court did not rule upon the sufficiency of the evidence of the charges of acting as an unlicensed bondsman or runner in considering the motions to dismiss advanced by defense counsel at trial.

Although pursuant to *Golder* a timely motion to dismiss preserves for appeal all issues regarding sufficiency of the evidence with respect to *that charge*, we do not conclude that our Supreme Court intended its holding to cover the circumstances presented by this case, where Defendants specifically and deliberately did not move to dismiss *all charges*.[7] Accordingly, we hold that a targeted motion to dismiss one

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6. The *Golder* Court summarized our Court's "three categories" of motions to dismiss as:

> (1) a 'general,' 'prophylactic' or 'global' motion, which preserves all sufficiency of the evidence issues for appeal; (2) a general motion, which preserves all sufficiency of the evidence issues for appeal, even though a defendant makes a specific argument as to certain elements or charges; and (3) a specific motion, which narrows the scope of appellate review to only the charges and elements that are expressly challenged.

Id. (citation omitted).

7. Indeed, in its first substantive opinion interpreting *Golder*, our Supreme Court described a defendant's motion to dismiss the only charge against him as "a general motion to dismiss[.]" *State v. Smith*, 375 N.C. 224, 229, 846 S.E.2d 492, 494 (2020). This suggests that, although this Court's pre-*Golder* categorical analysis was "inconsistent with Rule 10(a)(3)," *Golder*, 374 N.C. at 249, 839 S.E.2d at 790, our Supreme Court nevertheless acknowledges that "a general motion to dismiss" remains distinguishable from more specific motions to dismiss.

charge for insufficiency of the evidence does not operate to preserve for appellate review arguments related to the sufficiency of the evidence of charges for which no motion to dismiss was made, and upon which the trial court has not had an opportunity to rule. We are unable to review issues upon which the trial court has not ruled.

Our Supreme Court's opinion in *Golder* also forecloses appellate review of Little Marc's argument that a fatal variance existed between the indictment and the jury instruction on the charge against him of acting as an unlicensed bondsman or runner. Although Little Marc cites several pre-*Golder* cases which have reviewed variances between an indictment and jury instructions for plain error, any fatal variance argument is, essentially, an argument regarding the sufficiency of the State's evidence. *Cf. State v. Locklear*, 259 N.C. App. 374, 382–84, 816 S.E.2d 197, 204–05 (2018) (finding plain error in jury-instruction variance based upon the sufficiency of the State's evidence at trial); *State v. Ross*, 249 N.C. App. 672, 676, 792 S.E.2d 155, 158 (2016) (same). Our Supreme Court made clear in *Golder* that "moving to dismiss at the proper time under Rule 10(a)(3) preserves *all* issues related to the sufficiency of the evidence for appellate review." *Golder*, 374 N.C. at 249, 839 S.E.2d at 790. As Little Marc's argument fundamentally presents an issue "related to the sufficiency of the evidence" that he did not "mov[e] to dismiss at the proper time", *id.*, he has waived appellate review of this issue.[8]

Darlene and Little Marc also petition this Court to suspend our rules of appellate procedure pursuant to N.C.R. App. P. 2, and to review these arguments despite the lack of preservation. Our appellate courts possess the "inherent authority to suspend the rules in order to prevent manifest injustice to a party[.]" *State v. Moore*, 335 N.C. 567, 612, 440 S.E.2d 797, 823 (citation and internal quotation marks omitted), *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174 (1994). However, as discussed below, we are

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8. Assuming, *arguendo*, that Little Marc's argument regarding a jury-instruction variance is reviewable for plain error, he cannot show that the trial court plainly erred because the asserted error does not concern "an *essential element* of the crime charged." *State v. Lu*, 268 N.C. App. 431, 435, 836 S.E.2d 664, 667 (2019) (citation omitted). Little Marc argues that while the indictment charged him with "violat[ing] the statute by attempting to and taking Justin into custody, the jury was instructed they could find Little Marc guilty of violating the statute for a large number of actions." However, as Little Marc recognizes in his appellate brief, in our *Golder* opinion this Court held that the State was not required "to specify the exact manner in which [a defendant] allegedly violated [s]ection 58-71-40" in an indictment charging the offense of acting as an unlicensed bondsman or runner. *State v. Golder*, 257 N.C. App. 803, 809, 809 S.E.2d 502, 506 (2018), *aff'd as modified*, 374 N.C. 238, 839 S.E.2d 782 (2020). Accordingly, this argument does not concern "an *essential element* of the crime charged," *Lu*, 268 N.C. App. at 435, 836 S.E.2d at 667 (citation omitted), and the trial court did not err, much less plainly err.

unpersuaded by Defendants' arguments concerning the charges against them of acting as unlicensed bondsmen or runners. We thus find no "manifest injustice" to justify our invocation of Rule 2, and we decline to do so. Accordingly, we dismiss these issues as unpreserved.

II. *Admissibility of 911 Call*

[2] Big Marc contends that the trial court erred by admitting a recorded 911 call in which the caller repeatedly states that Big Marc hit Ryan's truck with his Expedition "on purpose." On appeal, Big Marc argues that the recording was inadmissible as speculative lay-opinion testimony under Rule 701 of the North Carolina Rules of Evidence. However, careful review of the transcript reveals that Big Marc did not present this argument to the trial court. Thus, this issue was not preserved for appellate review.

Our Rules of Appellate Procedure provide that

> [i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1).

Where a defendant objects to the admission of evidence before the trial court and states a specific ground as the basis for that objection, but raises a different ground as the basis for his argument on appeal, the issue is not preserved. *State v. Hueto*, 195 N.C. App. 67, 71, 671 S.E.2d 62, 65 (2009). In *Hueto*, the defendant "never stated to the trial court that he objected to" the challenged evidence on the relevancy grounds he raised on appeal. Id. Instead, "it appear[ed] from the context that [the d]efendant objected . . . on hearsay grounds" before the trial court. *Id.* This Court therefore concluded that the defendant's issue was not preserved, and dismissed the issue. *Id.*

Here, Big Marc's counsel objected when the State moved to admit the recordings of two 911 calls, "on hearsay grounds as well as confrontational grounds." After hearing arguments from the parties, the trial court overruled Big Marc's "objection on both hearsay grounds and confrontation grounds." The parties never made, nor did the trial court rule upon, any arguments concerning Rule 701 and lay opinion testimony with respect to either of the 911 calls.

Our appellate courts have "long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (citation and internal quotation marks omitted). Accordingly, Big Marc may not present his new argument for appellate review.[9]

"In criminal cases, an issue that was not preserved by objection noted at trial . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4).

On appeal, Big Marc invokes the plain error rule, but only with regard to the sufficiency and timeliness of his hearsay and Confrontation Clause objections at trial, not his failure to raise the argument that he now advances on appeal. Although Big Marc contends that the judicial action questioned—the admission into evidence of the recorded 911 call—amounted to plain error, he does not do so "specifically and distinctly" with respect to the argument he now makes to this Court. *Id.* Accordingly, we conclude Big Marc has not complied with Rule 10(a)(4).

Moreover, assuming, *arguendo*, that Big Marc had adhered to Rule 10(a)(4)'s procedural requirements, he would still not be entitled to plain error review. Under Rule 701, "whether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). Our Supreme Court "has not applied the plain error rule to issues which fall within the realm of the trial court's discretion[.]" *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001).

For all of these reasons, we will not apply plain error review to the trial court's ruling in this instance. *See id.* Accordingly, we dismiss as unpreserved Big Marc's argument concerning the admission of the challenged 911 call.

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9. In his appellate brief, Big Marc references the Confrontation Clause argument made at trial solely to support his argument that the newly asserted Rule 701 error was prejudicial to him. Indeed, in his reply brief, Big Marc explicitly disclaims any implication that he raises a confrontation argument on appeal: "The State also appears to believe Big Marc is challenging the admission of the 911 call on confrontation grounds. *Big Marc raises no such argument on appeal.* He does discuss the lack of an opportunity to cross-examine the unavailable caller—but only in explaining how the inability to question the caller prejudiced Big Marc at trial. But *Big Marc makes no freestanding claim regarding the admissibility of the 911 call under the Confrontation Clause.*" (Emphases added) (citations omitted).

III. *"Surety" or "Accommodation Bondsman"*

[3] As previously mentioned, Defendants present several issues that turn on the question of whether, under our General Statutes, they acted lawfully as sureties or accommodation bondsmen with respect to the January bonds. Big Marc and Darlene argue that the trial court erred in failing to instruct the jury on their "surety defense"—that is, that they acted lawfully as sureties or accommodation bondsmen. For similar reasons, Little Marc argues that the indictment against him "fail[ed] to allege a crime" and thus was "fatally defective." Darlene additionally argues that the trial court erred in denying her motion to dismiss the charge of second-degree kidnapping because she had the legal authority as a surety or accommodation bondsman to confine or restrain Justin.

A. *Standard of Review*

Issues of statutory interpretation present questions of law, which this Court reviews de novo. *State v. Dudley*, 270 N.C. App. 771, 773, 842 S.E.2d 163, 164 (2020).

> Our task in statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment. The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish.

Id. (citations and internal quotation marks omitted).

B. *Analysis*

The parties agree that our statutes provide that "[n]o person shall act in the capacity of a professional bondsman, surety bondsman, or runner or perform any of the functions, duties, or powers prescribed for professional bondsmen, surety bondsmen, or runners under this Article *unless that person is qualified and licensed*[.]" N.C. Gen. Stat. § 58-71-40(a) (emphasis added). Defendants do not argue that they were so qualified and licensed. Instead, they present arguments that they acted lawfully, either as sureties or accommodation bondsmen. We disagree.

Big Marc and Darlene maintain that they were sureties on Justin's bonds, and that therefore their actions were lawful. Both cite the definition for "surety" from Chapter 58, Article 71 of our General Statues, which governs bail bondsmen and runners: "[o]ne who, with the principal, is liable for the amount of the bail bond upon forfeiture of bail." *Id.* § 58-71-1(10). Notably, there is no licensing requirement for a surety

under Chapter 58, Article 71. This is distinct from a "surety bondsman", which is separately defined as

> [a]ny person who is licensed by the Commissioner [of Insurance] as a surety bondsman under [Chapter 58, Article 71], is appointed by an insurer by power of attorney to execute or countersign bail bonds for the insurer in connection with judicial proceedings, and who receives or is promised consideration for doing so.

Id. § 58-71-1(11).

As Big Marc and Darlene do not argue that they were licensed bondsmen, their arguments that their unlicensed actions were lawful rest on the proposition that they were sureties on the January bonds, pursuant to the definition of section 58-71-1(10). Their arguments rely on our holding that "[t]he common law, recognized in North Carolina for many years and codified by statute, *authorizes the surety on a bail bond*, or a bail bondsman acting as his agent, *to arrest and surrender the principal* if he fails to make a required court appearance." *State v. Mathis*, 126 N.C. App. 688, 691, 486 S.E.2d 475, 477 (1997) (emphasis added), *aff'd*, 349 N.C. 503, 509 S.E.2d 155 (1998)[10]; *see also* N.C. Gen. Stat. § 15A-540(b) ("After there has been a breach of the conditions of a bail bond, ... [a] surety may arrest the defendant for the purpose of returning the defendant to the sheriff."). "This statutory right of arrest granted the surety does not change—but simply codifies a part of—the common law powers of sureties that have always been recognized in our state." *Mathis*, 349 N.C. at 513, 509 S.E.2d at 161.[11]

However, our holding in *Mathis* is immaterial in the present context unless Big Marc and Darlene were, in fact, acting as sureties on the January bonds. They contend that they were. Big Marc argues that "[b]oth the State's evidence and [Defendants'] testimony show Big Marc and Darlene were 'on' Justin's bonds as sureties." He particularly highlights the State's argument that "the Gettlemans' purpose in restraining the movement of Justin Emmons was financial. That is, they feared a loss." Likewise, Darlene argues she "was a surety who was personally

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10. For "a brief overview of the history of the American system of bail," see *Mathis*, 349 N.C. at 508–11, 509 S.E.2d at 158–60.

11. We note here that the sureties in *Mathis* were "licensed bail bondsmen." *Mathis*, 126 N.C. App. at 690, 486 S.E.2d at 476. *Mathis*, and its discussion of the statutory and common-law authority of sureties to arrest their principals, is thus inapplicable to the case at bar for this simple reason, in addition to the other reasons we discuss herein.

liable for the amount of Justin's two bail bonds upon forfeiture of that bail." However, these arguments lack merit.

First, these arguments do not account for the definition of "surety" found in section 15A-531, which supersedes the definition of "surety" in section 58-71-1(10) in circumstances where they conflict. *See id.* § 58-71-195 ("[I]n the event of any conflict between the provisions of this Chapter and those of Chapter 15A of the General Statutes of North Carolina, the provisions of Chapter 15A shall control and continue in full force and effect."). In section 15A-531, "surety" is defined more narrowly, to mean:

> a. The insurance company, when a bail bond is executed by a bail agent on behalf of an insurance company.
>
> b. *The professional bondsman, when a bail bond is executed by a professional bondsman or by a runner on behalf of a professional bondsman.*
>
> c. The accommodation bondsman, when a bail bond is executed by an accommodation bondsman.

Id. § 15A-531(8) (emphasis added). As a matter of interpreting the plain language of our statutes, we can come to no other conclusion than this: because the January bonds were executed by West, a professional bondsman[12], he is the "surety" on the bonds as a matter of statutory law. *See id.* § 15A-531(8)(b). Defendants cannot be sureties on the January bonds, because those bonds were "executed by a professional bondsman" who was the true surety. *Id.*

Further review of our bail bond statutes also defeats Big Marc's and Darlene's arguments that they acted as sureties. While Big Marc and Darlene may have been personally liable in the event of the forfeiture of the January bonds, they would not have been personally liable *to the State*. *See id.* § 15A-531(4) (defining a "[b]ail bond" as "an undertaking by the defendant to appear in court as required upon penalty of forfeiting bail *to the State* in a stated amount[,]" which may include "an appearance bond secured by at least one solvent surety." (emphasis added)); *accord id.* § 58-71-1(2). The evidence at trial suggested that Big Marc and Darlene would have been personally liable in the event of forfeiture,

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12. A "professional bondsman" is "[a]ny person who is approved and licensed by the Commissioner and who pledges cash or approved securities with the Commissioner as security for bail bonds written in connection with a judicial proceeding and who receives or is promised money or other things of value in exchange for writing the bail bonds." *Id.* § 58-71-1(8).

but only to West—the *actual* surety on the January bonds—and only as indemnitors. Simply put, agreeing to indemnify a bondsman on a bail bond does not a surety make.

Finally, Darlene argues in the alternative that she "was an accommodation bondsman who did not charge Justin a fee or receive any consideration for her action *as a surety*[,]" tracking the definition of "accommodation bondsman" found in Chapter 58, Article 71. That Article defines an "accommodation bondsman" as:

> A person who shall not charge a fee or receive any consideration for action as surety and who endorses the bail bond after providing satisfactory evidences of ownership, value, and marketability of real or personal property to the extent necessary to reasonably satisfy the official taking bond that the real or personal property will in all respects be sufficient to assure that the full principal sum of the bond will be realized if there is a breach of the conditions of the bond.

Id. § 58-71-1(1).[13]

However, in that Darlene did not act as a surety, she cannot meet this definition of an accommodation bondsman as a matter of plain statutory interpretation. Additionally, although Darlene references section 15A-531(8)(c) in her reply brief in support of this argument, she fails to reckon with its plain language: that definition only applies "when a bail bond is executed by an accommodation bondsman." *Id.* § 15A-531(8)(c). Darlene argues neither that *she* executed the January bonds as a purported accommodation bondsman, nor that West—who *did* execute the January bonds—acted as an accommodation bondsman. Thus, we find this alternative argument similarly unpersuasive.

We conclude that Defendants did not act lawfully, either as sureties or as accommodation bondsmen. Accordingly, we overrule Defendants' issues brought on this basis.

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13. Little Marc also relies on this definition to support his argument that "[t]he criminal act of acting as an unlicensed bondsman/runner cannot be committed by conduct Article 71 specifically authorizes for individuals who are not licensed bondsmen." In challenging the indictment charging him with acting as an unlicensed bondsman or runner, Little Marc argues that, "because the authority to arrest is specifically vested in unlicensed individuals under Article 71, it cannot serve as a violation of the law against acting as an unlicensed bondsman/runner." For the reasons discussed herein, we disagree.

Conclusion

Each Defendant failed to preserve an argument now raised on appeal: (1) Darlene and Little Marc failed to preserve their challenges to the sufficiency of the evidence to support the charges of acting as an unlicensed bondsman or runner, and (2) Big Marc failed to preserve his challenge to the admission of the second 911 call. Defendants have waived appellate review of those issues, and we dismiss those portions of Defendants' appeals.

As regards Defendants' other arguments on appeal, we conclude that Defendants received a fair trial, free from prejudicial error.

NO ERROR.

Chief Judge McGEE and Judge ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
MOISES JEMINEZ, DEFENDANT

No. COA19-843

Filed 15 December 2020

1. Constitutional Law—effective assistance of counsel—immigration consequences of guilty plea—motion for appropriate relief—insufficient findings for appellate review

After defendant—an undocumented immigrant against whom deportation proceedings were initiated after he pleaded guilty to multiple drug-related charges—filed a motion for appropriate relief (MAR) alleging ineffective assistance of counsel where his attorney advised him that a guilty plea "may" result in adverse immigration consequences, the trial court's order denying defendant's MAR was vacated and remanded. The attorney's failure to advise defendant that the guilty plea would make him permanently inadmissible to the United States (8 U.S.C. § 1182(a)(2)(A)(i)(II)) constituted deficient performance; however, further factual findings were necessary to determine whether 8 U.S.C. § 1229b(b)(1) (cancellation of removal) was also available to defendant and whether the attorney's deficient advice prejudiced defendant—that is, whether defendant would have rejected the plea deal but for the attorney's error.

2. Criminal Law—trial court—noncompliance with appellate court's prior order—failure to address validity of plea agreement

In a criminal case where the trial court denied defendant's motion for appropriate relief—alleging ineffective assistance of counsel where defendant, an undocumented immigrant, faced deportation after pleading guilty to drug-related charges based on his attorney's advice—without an evidentiary hearing, and where the Court of Appeals subsequently entered an order vacating the trial court's ruling and remanding the case for an evidentiary hearing, the Court of Appeals vacated and remanded the trial court's second order denying defendant's motion because the trial court failed to review, pursuant to the Court of Appeals' order, whether defendant's plea was knowingly and voluntarily entered.

Appeal by Defendant from judgment entered 5 October 2010 by Judge Anderson D. Cromer and from order entered 15 March 2019 by Judge Angela B. Puckett in Stokes County Superior Court. Heard in the Court of Appeals 3 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

MURPHY, Judge.

The trial court must make sufficient findings of fact and conclusions of law to permit appellate review of its ruling on a motion for appropriate relief. Here, we vacate in part and remand because the trial court did not make sufficient findings to allow review on appeal of Defendant's arguments underlying his motion for appropriate relief.

Further, trial courts must comply with orders from the appellate courts. Where a trial court fails to comply with our prior order, we remand for consideration of any unaddressed issue. Here, we remand for consideration of whether Defendant knowingly and voluntarily entered into a plea agreement because the trial court failed to address this issue as directed by our prior order.

BACKGROUND[1]

Defendant, Moises Jeminez, is a Mexican citizen who came to the United States without documentation in 1987 at the age of seven. Defendant remained in the United States undocumented for the following thirty years until 2017. Defendant has a daughter, born in 2008, who is a United States citizen. In 2010, police found cocaine, cash, and digital scales in Defendant's home and arrested him. Defendant was indicted for possession with intent to sell or deliver a controlled substance and felony maintaining a dwelling for keeping or selling controlled substances, and charged with possession of drug paraphernalia. Defendant pleaded guilty to these charges after consulting with his attorney, who told him the guilty plea "*may* result in adverse immigration consequences." Pursuant to the plea, Defendant's charge of possession with intent to sell or deliver a controlled substance was reduced to simple possession of cocaine, the charges were consolidated, and Defendant received a 4 to 5 month sentence suspended for 18 months of supervised probation.

In 2017, Defendant was arrested by immigration authorities and deportation proceedings were initiated against him. Defendant's immigration attorneys informed him, but for his guilty plea in 2010, he could have applied to have his deportation cancelled under 8 U.S.C. § 1229b; however, his conviction of a controlled substance related offense rendered him ineligible for cancellation of removal.[2] Additionally, for the same reasons, Defendant was informed he is permanently inadmissible to the United States.[3] Based on these facts and his attorney's prior advice regarding the immigration consequences of pleading guilty in 2010, Defendant filed a *Motion for Appropriate Relief and Request for Temporary Stay and Suspension of The Criminal Judgment* ("MAR")

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1. Although some information included in this background was not within the trial court's findings of fact, we include them for completeness of the discussion on appeal. *Infra* at 282. In no way do we express any view as to the truth of this information not appearing within the findings of fact below, and to the extent the trial court addresses this information on remand it may set out findings of fact contrary to the background discussed here. *Infra* at 290-93 (discussing the trial court's incomplete factual findings).

2. "The term 'removable' means—(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under [8 U.S.C. § 1182], or (B) in the case of an alien admitted to the United States, that the alien is deportable under [8 U.S.C. § 1227]." 8 U.S.C. § 1229a(e)(2) (2010). "Removal" is a synonym for deportation. *Mellouli v. Lynch*, 575 U.S. 798, __, 192 L. Ed. 2d 60, 64 (2015) ("This case requires us to decide how immigration judges should apply a deportation (removal) provision . . . .").

3. "The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A) (2010).

alleging ineffective assistance of counsel under *Padilla v. Kentucky*, 559 U.S. 356, 176 L. Ed. 2d 284 (2010).

In his MAR, Defendant argued his guilty plea to, and subsequent conviction of, a controlled substance offense resulted in his mandatory detention under 8 U.S.C. § 1226(c)(1)(A), inability to take advantage of executive discretion for cancellation of removal under 8 U.S.C. § 1229b, and inadmissibility for the rest of his life under 8 U.S.C. § 1182(a)(2)(A)(i)(II).[4] Defendant contended the loss of the exception to deportation and later admissibility following a conviction for a controlled substance were definitive and clear, and his attorney should have informed him of the consequences of his guilty plea as it related to these exceptions.

Initially, in 2017, the trial court entered an order ("the 2017 Order") denying the MAR without an evidentiary hearing. Defendant then filed a *Petition for Writ of Certiorari*, arguing the trial court erred in denying his MAR without an evidentiary hearing.[5] We granted this petition, vacated the 2017 Order, and remanded, stating

> [t]he petition filed in this cause by [D]efendant on 20 October 2017 and designated 'Petition for Writ of Certiorari' is allowed for the purpose of entering the following order: It appears an evidentiary hearing is required to resolve the issues of whether [D]efendant was denied effective assistance of counsel and whether his plea was knowingly and voluntarily entered. S*ee Padilla v. Kentucky*, 559 U.S. 356, 176 L. Ed. 2d 284 (2010); *State v. Nkiam*, [243] N.C. App. [777], 778 S.E.2d 863 (2015), *discretionary review improvidently allowed*, 369 N.C. 61, 791 S.E.2d 457 (2016). Accordingly, the order filed 9 October 2017 by Judge Anderson D. Cromer denying

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4. In Defendant's MAR, he refers to these statutes using their Immigration and Nationality Act ("INA") citations. We note INA 236(c)(1)(A) corresponds with 8 U.S.C. § 1226(c)(1)(A), INA 212(a)(2) corresponds with 8 U.S.C. § 1182(a)(2), and INA 240A(b) corresponds with 8 U.S.C. § 1229b(b).

5. Although Defendant's *Petition for Writ of Certiorari* is not in our Record, it is included in the record on appeal for COA P17-778, in which we granted Defendant's *Petition for Writ of Certiorari*. Therefore, we take judicial notice of its content because it appears within the record of the interrelated proceeding, with the same parties, and is referred to by Defendant. *See Lineberger v. N.C. Dep't of Corr.*, 189 N.C. App. 1, 6, 657 S.E.2d 673, 677, *aff'd in part, review dism. in part*, 362 N.C. 675, 669 S.E.2d 320 (2008) (citing *West v. G. D. Reddick, Inc.*, 302 N.C. 201, 202, 274 S.E.2d 221, 223 (1981)) ("In addition to the record on appeal, appellate courts may take judicial notice of their own filings in an interrelated proceeding.").

> [D]efendant's motion for appropriate relief without a hearing is hereby vacated and the matter remanded for an evidentiary hearing pursuant to N.C.[G.S.] 15A-1420(c)(4) and entry of an order pursuant to N.C.[G.S.] 15A-1420(c)(7). A copy of this order shall be mailed to the senior resident superior court judge and district attorney of Judicial District 17B and to the Office of the Appellate Defender.

After conducting an evidentiary hearing in 2019, the trial court entered an order ("the 2019 Order"), as follows:

> [FINDINGS] OF FACT
>
> 1. On [3 June 2010] a search warrant was executed on [] Defendant's residence and [] Defendant was charged with Possession With Intent to Manufacture, Sell and Deliver a Schedule II Controlled Substance, Maintaining a Dwelling for the Keeping of Controlled Substances, and Possession of Drug Paraphernalia.
>
> 2. On [7 June 2010] Brandon West was appointed to represent [] Defendant.
>
> 3. [] Defendant is not a citizen of the United States of America and is an undocumented Defendant.
>
> 4. On [5 October 2010] [] Defendant pled guilty in Stokes County Superior Court to Possession of Cocaine, Maintaining a Dwelling for the Keeping of Controlled Substances and Possession of Drug Paraphernalia. The charges were consolidated and [] Defendant received a probationary sentence.
>
> 5. [] Defendant was advised by his attorney and by the Court that his plea to the felonies *may* result in his deportation from this country, his exclusion from this country or the denial of his naturalization under federal law.
>
> 6. [] Defendant's plea resulted in convictions that could be classified as "presumptively mandatory" deportation. [] [D]efendant did not understand and was not advised by Mr. West of this fact.
>
> 7. In 2017 [] Defendant was picked up and ultimately deported from the United States.

CONCLUSIONS OF LAW

1. Under *Padilla v. Kentucky*, 559 U.S. 356, 176 L. Ed. 2d 284, 130 S. Ct. 1473 (2010), giving incorrect advice regarding the immigration consequences of a guilty plea may constitute Ineffective Assistance of Counsel. The North Carolina Court of Appeals in *State v. Nkiam*, 243 N.C. App. 777 (2015) held that in cases where the deportation consequences of [a] defendant's plea were "truly clear" the trial counsel is required to "give correct advice" and not just to advise [a] defendant that his "pending criminal charges may carry a risk of adverse immigration consequences." Mr. West failed to do so. However, the Court must also examine whether there was actual prejudice to [] [D]efendant for Mr. West's failure to fully advise him.

2. The Court next considers the prejudice prong of [] [D]efendant's claim for IAC. The State argues that [] Defendant was not prejudiced because he was an undocumented [D]efendant and was subject to being deported at any time regardless of whether he was convicted of any crime in this case.

3. The question of prejudice in a case where the defendant is undocumented and already subject to deportation has not been directly addressed in North Carolina. However, many jurisdictions throughout the United States, both state and federal courts (including the 4th Circuit), have addressed the issue. There is an almost unanimous line of authority finding there is no showing of prejudice where, as in this case, the defendant was already subject to deportation. See [non-binding cases].

4. In this case, [] Defendant was here illegally without documentation. He was deported in 2017 nearly 7 years after his conviction. [] [D]efendant was subject to being deported regardless of his plea in this criminal case. [Defendant] did not show he was prejudiced by Mr. West's failure to tell him anything other than he *may* be deported if he pled guilty because he was already subject to deportation regardless of whether he was convicted in this case. [] Defendant could still have been subject to deportation even if he had been acquitted of the charges he pled guilty to. He was subject to deportation per se on account of his

> unlawful status. [] [D]efendant presented no evidence that in 2017 his fate would have been different had his defense counsel obtained a different disposition of his cases.
>
> Therefore, [] Defendant has failed to prove he was prejudiced as a result of his attorney's lack of correct advice. As a result [] [D]efendant's motion for appropriate relief on the basis of ineffective assistance of counsel fails.

No findings of fact or conclusions of law in the 2019 Order directly resolve "whether [Defendant's] plea was knowingly and voluntarily entered." Similarly, no findings of fact or conclusions of law address Defendant's claims regarding mandatory detention, cancellation of removal, and/or inadmissibility.

ANALYSIS

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.'" *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). "'When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal.'" *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)).

A. Ineffective Assistance of Counsel

[1] In *Padilla v. Kentucky*, 559 U.S. 356, 176 L. Ed. 2d 284 (2010), the United States Supreme Court held *Strickland v. Washington*[6] applies to

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6. Under *Strickland v. Washington*,

> [a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

ineffective assistance of counsel ("IAC") for deportation and trial counsel must advise their clients "whether [a] plea carries a risk of deportation." 559 U.S. at 366, 374, 176 L. Ed. 2d at 294, 299.

> When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Id. at 369, 176 L. Ed. 2d at 296. "It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'" *Id.* at 371, 176 L. Ed. 2d at 297, (quoting *Hill v. Lockhart*, 474 U.S. 52, 62, 88 L. Ed. 2d 203, 212, (1985) (White, J., concurring in judgment)). In terms of prejudice, the Court stated, "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Id.* at 372, 176 L. Ed. 2d at 297 (Citing *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486, 145 L.Ed.2d 985, 997, 1000-01 (2000)).

We addressed *Padilla* in *State v. Nkiam*, in which we observed "*Padilla* mandates that when the consequence of deportation is truly clear, it is not sufficient for the attorney to advise the client only that there is a risk of deportation." *State v. Nkiam*, 243 N.C. App. 777, 786, 778 S.E.2d 863, 869 (2015). When discussing prejudice, we stated

> [i]n the plea context, "[t]he . . . 'prejudice[]' requirement[] . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59, 106 S. Ct. at 370, 88 L. Ed. 2d at 210. Thus, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* The Supreme Court in *Padilla* emphasized, that in applying *Hill*, "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under

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Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). Deficiency is shown where the representation "fell below an objective standard of reasonableness." *Id.* at 687-88, 80 L. Ed. 2d at 693. Prejudice is shown when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 80 L. Ed. 2d at 698.

> the circumstances." 559 U.S. at 372, 130 S. Ct. at 1485, 176 L. Ed. 2d at 297.

Id. at 792, 778 S.E.2d at 872-73. We further observed

> [w]hile the United States Supreme Court in *Hill* stated that "[i]n many guilty plea cases . . . the determination whether the error 'prejudiced' the defendant . . . will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial," 474 U.S. at 59, 88 L. Ed. 2d at 210, 106 S. Ct. at 370, "[t]he Supreme Court has 'never required an affirmative demonstration of likely acquittal at such a trial as the *sine qua non* of prejudice.'" *Padilla II*, 381 S.W.3d at 328-29 (quoting *Orocio*, 645 F.3d at 643). We believe cases focusing on the likelihood of acquittal rather than considering the importance a defendant places on avoiding deportation ignore the primary focus of *Padilla*, which was in large part the recognition that the likelihood of deportation may often be a much more important circumstance for a defendant to consider than confinement in prison for any length of time. 559 U.S. at 365, 368, 176 L. Ed. 2d at 293, 295, 130 S. Ct. at 1481, 1483. Thus, the consequence of deportation may, in certain cases, weigh more heavily in a defendant's risk-benefit calculus on whether he should proceed to trial. *For this reason, . . . we hold that a defendant makes an adequate showing of prejudice by showing that rejection of the plea offer would have been a rational choice, even if not the best choice, when taking into account the importance the defendant places upon preserving his right to remain in this country.*

Id. at 795, 778 S.E.2d at 874 (emphasis added).

In *Lee v. United States*, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017), the United States Supreme Court similarly interpreted prejudice in this context, holding

> [w]hen a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Lee at 1965, 198 L. Ed. 2d at 484-485. The United States Supreme Court also analyzed this issue according to the standard in *Padilla* that required "a defendant '[to] convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" *Id.* at 1968, 198 L. Ed. 2d at 488 (citing *Padilla*, 559 U.S. at 372, 176 L. Ed. 2d at 297).

Applying the above binding decisions, we first analyze Defendant's allegations of deficient performance according to whether each immigration statute implicated was "truly clear," and thus required trial counsel to provide Defendant with correct legal advice regarding them. *See Padilla*, 559 U.S. at 369, 176 L. Ed. 2d at 296. If "truly clear," we then analyze prejudice according to whether Defendant has shown a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial[,]" which can be accomplished by "convinc[ing] the court that a decision to reject the plea bargain would have been rational under the circumstances." *Lee*, 137 S. Ct. at 1965, 1968, 198 L. Ed. 2d at 484-485, 488; *accord Nkiam*, 243 N.C. App. at 792, 795, 778 S.E.2d at 872-873, 874.

1. Deportability under 8 U.S.C. § 1227(a)(2)(B)(i)

The trial court found, although "Defendant's plea resulted in convictions that could be classified as 'presumptively mandatory' deportation[,]"[7] Defendant was not prejudiced because he was "subject to deportation per se" due to his illegal presence in the country. As a preliminary matter, we note Defendant's guilty plea to a drug related offense did not impact whether Defendant was "subject to deportation." We believe the trial court was under the impression Defendant's conviction of controlled substance related charges made him deportable under 8 U.S.C. § 1227(a)(2)(B)(i), which reads "[a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, [or] the United States, . . . relating to a controlled substance . . . is deportable." 8 U.S.C. § 1227(a)(2)(B)(i) (2010). Although the United States Supreme Court held this statute has clear deportation consequences in *Padilla*, this provision does not apply here because Defendant was never "admitted." *See Padilla*, 559 U.S. at 368-69, 176 L. Ed. 2d at 295; *See* 8 U.S.C. § 1101(a)(13)(A) (2010) ("The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.").

7. We recognize this language comes from the analysis of 8 U.S.C. § 1227(a)(2)(B)(i) in *Padilla*. *Padilla*, 559 U.S. at 368-69, 176 L. Ed. 2d at 295 ("The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.").

As a result, there could not have been deficient performance by Defendant's trial counsel in failing to advise Defendant of the consequences of 8 U.S.C. § 1227(a)(2)(B)(i). Similarly, Defendant could not be prejudiced by not being informed of a statute that does not apply to him. To the extent the trial court concluded Defendant could not show prejudice resulting from this statute, it was correct.[8]

2. Mandatory Detention under 8 U.S.C. § 1226(c)(1)(A)

In Defendant's MAR, he refers to mandatory detention under 8 U.S.C. § 1226(c)(1)(A), stating

> [d]ue to his conviction for a controlled substance offense, among other things, he is subject to mandatory detention[.] . . . Had Defendant been given specific and correct advice that the guilty plea was almost certainly going to result in his future deportation . . . Defendant may have not been as motivated in pleading guilty . . . .

8 U.S.C. § 1226(c)(1)(A) reads "[t]he Attorney General shall take into custody any alien who . . . is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title." 8 U.S.C. § 1226(c)(1)(A) (2010). 8 U.S.C. § 1182(a)(2) reads, in relevant part, "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), . . . is inadmissible." 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2010); *see* 21 U.S.C. § 802(6) (2010) ("The term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter."); 21 U.S.C. § 812 (2010); 21 C.F.R. § 1308.12(b)(4) (2010) (cocaine is a schedule II controlled substance).

The trial court did not address mandatory detention or the related statute in its 2019 Order. However, on appeal Defendant makes no argument about mandatory detention under 8 U.S.C. § 1226(c)(1)(A). As a result, for the purposes of this appeal this argument is deemed

8. The trial court was also correct in concluding Defendant was already subject to deportation on the basis of being within the country without documentation. *See* 8 U.S.C. § 1182(a)(6)(A)(i) (2010) ("An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."); 8 U.S.C. § 1227(a)(1)(A) (2010) ("Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable."). Since 8 U.S.C. § 1227(a)(2)(B)(i) did not make Defendant deportable, 8 U.S.C. § 1227(a)(1)(A) was the basis for Defendant's deportation.

abandoned and we do not address it. N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

3. Discretionary Cancellation of Removal under 8 U.S.C. § 1229b(b)(1)

In his MAR, Defendant argues

> [d]ue to his conviction for a controlled substance offense . . . , he is . . . not eligible for cancellation of removal, which is his most promising form of relief from removal. . . . As a result of the plea, Defendant faces almost certain deportation from the United States.

8 U.S.C. § 1229b(b)(1), which establishes cancellation of removal, reads

> [t]he Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—
>
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1229b(b)(1) (2010). This statute is "truly clear" in terms of its application to someone convicted of a controlled substance offense; according to 8 U.S.C. § 1229b(b)(1)(C), if a defendant is convicted of an offense under 8 U.S.C. § 1227(a)(2), then he is ineligible for cancellation of removal.[9] As described above, 8 U.S.C. § 1227(a)(2) includes convictions related to controlled substances, such as cocaine.

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9. The United States Supreme Court suggested this is a clear consequence in *Padilla*, stating "if a noncitizen has committed a removable offense . . . , his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes

In order for trial counsel to have been obligated to inform Defendant of the impact of his conviction on the availability of cancellation of removal under 8 U.S.C. § 1229b(b)(1), the statute must be potentially available to Defendant. However, we are unable to determine this on appeal. In the trial court's order, there were no findings of fact regarding how long Defendant had been physically present in the country, whether Defendant had otherwise been a person of good moral character during this time period, whether he has other convictions implicating 8 U.S.C. § 1229b(b)(1)(C), or whether his "removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."[10] 8 U.S.C. § 1229b(b)(1)(D) (2010). In the absence of any of these findings, we cannot determine if the statute was available to Defendant.[11] Therefore, we must remand for the trial court to first make findings regarding the availability of cancellation of removal under 8 U.S.C. § 1229b(b)(1) to Defendant. *State v. Graham*, 841 S.E.2d 754, 771 (N.C. Ct. App. 2020) *temporary stay and discretionary review granted in part on separate issue*, 374 N.C. 428, 839 S.E.2d 352 (Mem), 375 N.C. 272, 845 S.E.2d 789 (Mem) (2020) ("A trial court must make sufficient findings of fact and conclusions of law [in its order on an MAR] to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.").

Assuming 8 U.S.C. § 1229b(b)(1) is available to Defendant, the statute is "truly clear" about the impact of a controlled substance conviction on the availability of discretionary cancellation of removal and trial counsel was required under *Padilla* to inform Defendant of its impact on his status. The legal advice provided by trial counsel to Defendant informed him "that his plea to the felonies *may* result in his deportation from this country, his exclusion from this country or the denial of his naturalization under federal law." Assuming 8 U.S.C. § 1229b(b)(1) applied to Defendant, such advice would constitute deficient performance;

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of offenses. *See* 8 U.S.C. § 1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance." 559 U.S. at 363-64, 176 L. Ed. 2d at 292. Although it only discussed trafficking, when read in conjunction with the language of the statute, it is "truly clear" "this discretionary relief is not available for an offense related to" controlled substances in general. *Id.*

10. Some discussion of Defendant's daughter occurred at the hearing and the trial court must evaluate this information considering the statutory requirements for cancellation of removal.

11. We note, because the invocation of this statute is within the authority of the United States Attorney General, the trial court cannot determine that Defendant has a meritorious claim under this statute—it simply must determine if it is available to Defendant.

correct advice on the clear impact of the statute would have informed Defendant that his guilty plea and convictions on charges related to cocaine would result in ineligibility for cancellation of removal.

Although we can conduct a limited analysis of deficiency relying on the findings of fact below, on appeal we are unable to determine prejudice. In order to determine if Defendant was prejudiced by trial counsel's failure to advise him of the impact of a guilty plea to a controlled substances charge on cancellation of removal under 8 U.S.C. § 1229b, the trial court must have made findings of fact and conclusions of law regarding whether Defendant "demonstrat[ed] a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee*, 137 S. Ct. at 1965, 1968, 198 L. Ed. 2d at 484-485, 488 (internal marks omitted); *accord Nkiam*, 243 N.C. App. at 792, 795, 778 S.E.2d at 872-873, 874. We note Defendant, in his affidavit in support of his MAR, claimed:

> I was not aware that the immigration consequences of my plea were so serious, permanent, and definite. If I was aware of the specific immigration consequences of the plea, I would have been less inclined to assist [a co-defendant] in getting her criminal charges dismissed, I would have attempted to negotiate a more immigration-friendly plea agreement, or I would have litigated this possession case, even if the risk involved potentially serving an active term of imprisonment in the North Carolina Department of Corrections.

The trial court must determine the credibility of this statement in its analysis under *Lee*.[12] *Lee*, 137 S. Ct. at 1965, 198 L. Ed.2d at 484-485. Here, the findings of fact made by the trial court do not allow us to review the prejudice inquiry because we do not have any indication as to the importance Defendant placed on remaining in the country. Therefore, we must remand for consideration of the importance Defendant placed on

12. *See State v. Howard*, 247 N.C. App. 193, 210, 783 S.E.2d 786, 798 (2016) ("[A recanting witness] should have been questioned about whether his recantation was truthful, or merely a product of [the] defendant's direction as to what to state. Accordingly, an evidentiary hearing was required in order to assess the truthfulness of [the recanting witness's] affidavit."); *State v. Brigman*, 178 N.C. App. 78, 94-95, 632 S.E.2d 498, 509 (2006) ("Based on the record before us, we cannot determine the veracity of [a recanting witness's] testimony. Nor can we discern whether there is reasonable possibility that a different result would have been reached at trial had [the witness's] testimony at trial been different or non-existent. Accordingly, we must remand the [MAR] based upon her alleged recantation to the trial court for an evidentiary hearing.").

remaining in the country, including, but not limited to, evaluation of the credibility of Defendant's affidavit alleging he would not have accepted the plea deal. *Graham*, 841 S.E.2d at 771.

4. Inadmissibility under 8 U.S.C. § 1182(a)(2)(A)(i)(II)

In his MAR, Defendant argues "the plea [to and conviction of a controlled substance offense] made Defendant inadmissible to the United States for life, absent a couple of unusual exceptions."

8 U.S.C. § 1182(a)(2)(A)(i)(II) reads,

> . . . any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—
>
> . . .
>
> (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),
>
> is inadmissible.

8 U.S.C. § 1182(a)(2)(A)(i)(II) (2010). As previously discussed, this statute applies to Defendant's convictions related to cocaine. *See* 21 U.S.C. § 802(6) (2010) ("The term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter."); 21 U.S.C. § 812 (2010); 21 C.F.R. § 1308.12(b)(4) (2010) (cocaine is a schedule II controlled substance). The language of this statute is "truly clear" in establishing that an alien is permanently inadmissible if he has been convicted of a controlled substance offense.

Additionally, it is "truly clear" this statute had an impact on Defendant's future admissibility. Had Defendant not been removed for a conviction related to controlled substances, he would have been inadmissible for only 10 years. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2010) ("Any alien (other than an alien lawfully admitted for permanent residence) who . . . has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States[] is inadmissible."). As a result, trial counsel had an obligation to inform Defendant, prior to his guilty plea to controlled substance charges, of the consequences of such a conviction on his future admissibility under 8 U.S.C. § 1182(a)(2)(A)(i)(II). By advising Defendant simply that his conviction

"*may* result in his deportation from this country, his exclusion from this country or the denial of his naturalization under federal law[,]" when the conviction clearly would result in Defendant's permanent exclusion from the country, absent some rare exceptions, trial counsel's advice was deficient under *Strickland* and *Padilla*.

However, like with cancellation of removal under 8 U.S.C. § 1229b(b)(1), we are unable to determine on appeal if Defendant was prejudiced by the failure to provide correct advice regarding future inadmissibility under 8 U.S.C. § 1182(a)(2)(A)(i)(II). In order to determine if Defendant was prejudiced by trial counsel's deficient advice, we must evaluate whether Defendant "demonstrat[ed] a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee*, 137 S. Ct. at 1965, 1968, 198 L. Ed. 2d at 484-485, 488 (internal marks omitted); *accord Nkiam*, 243 N.C. App. at 792, 795, 778 S.E.2d at 872-873, 874. For the same reasons as above, the findings of fact made by the trial court do not allow us to analyze prejudice. It is necessary to remand for consideration of the importance Defendant placed on remaining in the country, including evaluation of the credibility of Defendant's affidavit alleging he would not have accepted the plea deal, to determine prejudice resulting from the deficient advice provided regarding 8 U.S.C. § 1182(a)(2)(A)(i)(II) and 8 U.S.C. § 1229b(b)(1). *Graham*, 841 S.E.2d at 771.

B. Trial Court's Compliance with Our Prior Order

[2] The trial court erred in failing to review whether Defendant's plea was knowingly and voluntarily entered as directed by our 30 October 2017 order. Our order stated,

> [i]t appears an evidentiary hearing is required to resolve the *issues of whether* [D]efendant was denied effective assistance of counsel *and whether* his plea was knowingly and voluntarily entered. . . . Accordingly, the order filed 9 October 2017 . . . denying [D]efendant's motion for appropriate relief without a hearing is hereby vacated and the matter *remanded for an evidentiary hearing . . . and entry of an order pursuant to [N.C.G.S. §] 15A-1420(c)(7)*.

(Emphasis added). As ordered, there were two distinct issues—(1) the potential ineffective assistance of counsel and (2) whether Defendant's plea was knowingly and voluntarily entered—as we used the word "issues" and prior to each issue stated "whether." Additionally, the trial court recognized them as two distinct issues during the hearing on 14 March 2019.

Defendant's MAR supports such a reading as it lists these as two related, but separate grounds. Our prior order required the trial court to address the content of the MAR when it ordered the trial court to make "entry of an order pursuant to [N.C.G.S. §] 15A-1420(c)(7)." N.C.G.S. § 15A-1420(c)(7) states:

> The court must rule upon the motion [for appropriate relief] and enter its order accordingly. When the motion is based upon an asserted violation of the rights of the defendant under the Constitution or laws or treaties of the United States, the court must make and enter conclusions of law and a statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted.

N.C.G.S. § 15A-1420(c)(7) (2019). In addition to our phrasing, our reference to this statute in our prior order directed the trial court to address the merits of all grounds asserted in Defendant's MAR, including if Defendant's plea was knowingly and voluntarily entered.[13]

Despite our prior order instructing the trial court to have an evidentiary hearing and enter an order under N.C.G.S. § 15A-1420(c)(7), the trial court failed to address "whether [Defendant's] plea was knowingly and voluntarily entered" in the 2019 Order. Our Supreme Court has held

> courts, whose judgments and decrees are reviewed by an appellate court of errors, must be bound by and observe the judgments, decrees and orders of the latter court, within its jurisdiction. Otherwise the courts of error would be nugatory and a sheer mockery. There would be no judicial subordination, no correction of errors of inferior judicial tribunals, and every court would be a law unto itself.
>
> . . .
>
> [W]hen it comes to our attention that a lower court has failed to comply with the opinion of this Court, whether through insubordination, misinterpretation or inattention, this Court will, in the exercise of its supervisory jurisdiction, *ex mero motu* if necessary, enforce its opinion and mandate in accordance with the requirements of justice.

13. Although both our phrasing and reference to the statute are relevant here in determining if the trial court complied with our prior order, each of these failures would independently be sufficient to require remand.

Collins v. Simms, 257 N.C. 1, 8, 10, 125 S.E.2d 298, 303, 304-05 (1962). The trial court did not satisfy our earlier order and we remand the case with our prior instructions to address "whether [Defendant's] plea was knowingly and voluntarily entered."

CONCLUSION

Trial courts must make sufficient findings of fact and conclusions of law to permit appellate review of an order denying an MAR. When a trial court fails to do so, we must remand. Here, because there are no findings of fact or conclusions of law addressing Defendant's claimed loss of discretionary cancellation of removal and future admissibility, as argued in his MAR, we cannot review these issues on appeal and must remand for consideration.

Our orders to a trial court are binding. When a trial court has not fully complied with our prior order, we must act appropriately to ensure our mandate is enforced. In this case, the trial court's failure to address "whether [Defendant's] plea was knowingly and voluntarily entered" in contravention of our prior order requires us to remand for determination of said issue.

For the foregoing reasons, we vacate the trial court's order denying Defendant's MAR. We remand for entry of a new MAR order, and an evidentiary hearing if necessary, consistent with this opinion.

VACATED IN PART; REMANDED.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
RUFUS DURAND LYNCH

No. COA20-201

Filed 15 December 2020

Attorneys—potential conflict of interest—defense counsel serving as city attorney—police witnesses employed by city—insufficient inquiry regarding conflict

In a criminal prosecution, the trial court failed to conduct a sufficient inquiry regarding a potential conflict of interest—defendant's counsel served as the Lincolnton city attorney and the State's witnesses were Lincolnton police officers—where the court failed to determine whether defense counsel's role as city attorney required him to advise or represent the police department and its officers. The trial court also impermissibly shifted the responsibility to inquire into the potential conflict to the defendant and improperly focused its own questions on immaterial facts. Because the trial court's inquiry was insufficient, the Court of Appeals could not determine whether there was an actual conflict of interest and the case was remanded for further proceedings.

Appeal by Defendant from judgment entered 22 August 2019 by Judge Steve R. Warren in Lincoln County Superior Court. Heard in the Court of Appeals 9 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Rana M. Badwan, for the State-Appellee.

Sharon L. Smith for Defendant-Appellant.

COLLINS, Judge.

Defendant Rufus Durand Lynch appeals from judgment entered upon jury verdicts of guilty of felony assault on a female and attaining habitual felon status. Defendant argues that the trial court failed to properly inquire into his trial counsel's conflict of interest and failed to properly inform Defendant of the consequences of the conflict of interest. We remand this case to the trial court for a hearing to determine whether there was a conflict of interest arising from trial counsel's representation of both Defendant and the City of Lincolnton and for further proceedings consistent with that determination.

I. Procedural History and Factual Background

Following an investigation by officers from the Lincolnton Police Department, Defendant was indicted on one count of felony assault on a female, one count of habitual misdemeanor assault,[1] and one count of attaining habitual felon status.[2] Defendant was subsequently arrested by an officer of the Lincolnton Police Department on 16 November 2018.

Defendant was tried in Lincoln County Superior Court beginning on 20 August 2019. Defendant was represented by attorney T.J. Wilson, who also served as the City Attorney for Lincolnton. Law enforcement officers Randy Carroll, Rick Hensley, and Devon Rushing of the Lincolnton Police Department testified against Defendant. Following the charge conference but before closing arguments, Wilson informed the trial court that Defendant was "expressing some dissatisfaction at this point with his legal representation." The trial court asked to hear from Defendant himself on the issue. Defendant stated, "I don't think I've been represented right for the situation right here." After conferring with counsel, the trial court asked Defendant to "be a little bit more specific." Defendant responded, "I just think I've been mistreated in the situation . . . . What I'm saying is he's the city attorney, right? . . . So I'm thinking, you know, he worked for them. I don't think nobody—I'm going to get a fair trial, is what I'm trying to say."

The trial court then asked Defendant, "Other than that generalized complaint, Mr. Lynch, can you help the Court understand the specifics? Has something specific happened, sir, that you would like the Court to address?" Defendant answered that there was not, and raised his ongoing health issues. Following Defendant's answer, the trial court stated only that it was "prepared to proceed with the case."

After the jury was dismissed to deliberate, the trial court returned to the issue "to give Mr. Wilson an opportunity to respond to Mr. Lynch's concerns in the case, especially with regard to the representation of the Lincolnton Police Department." Wilson informed the trial court that he was the city attorney but "had no communication or contact with the Police Department concerning this case." Wilson contended that he had represented Defendant to the best of his ability and believed there was no conflict of interest. Wilson told the trial court that "ten years ago

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1. The record is silent as to the disposition of this charge.

2. Defendant was also charged with assault inflicting serious bodily injury, but the State voluntarily dismissed this charge at the close of evidence and the charging document was omitted from the record on appeal.

. . . maybe longer" he had sought an oral opinion from the State Bar and understood the representation to be appropriate. Wilson further informed the trial court that he had represented Defendant in the past on various minor criminal matters and the possible conflict of interest had not been raised.

The trial court again addressed Defendant directly and asked how long he had "known that Mr. Wilson represents the Lincolnton Police Department." Defendant could not recall, but admitted that it had been more than one year, and he had not raised the issue previously. When the trial court asked if there had been "anything about this case that makes you believe that Mr. Wilson's representation of the City of Lincolnton has adversely impacted the representation of you in this case," Defendant again expressed concern that he could not receive a fair trial. The trial court asked Defendant if he had any questions he would like to pose to Wilson in open court or under oath; Defendant declined. Likewise, the State declined to question Wilson. Without making any findings of fact or conclusions of law or otherwise ruling on Defendant's objections, the trial court proceeded to hear the jury verdict.

The jury found Defendant guilty of felony assault on a female and attaining habitual felon status. The trial court sentenced Defendant to a term of imprisonment of 89 to 119 months. Defendant gave notice of appeal in open court.

II. Discussion

Defendant argues on appeal that the trial court failed to conduct an adequate inquiry into his trial counsel's conflict of interest and failed to properly advise Defendant of the consequences of the conflict of interest.

"A criminal defendant subject to imprisonment has a Sixth Amendment right to counsel." *State v. Mims*, 180 N.C. App. 403, 409, 637 S.E.2d 244, 247 (2006). The Sixth Amendment right to counsel applies to the states through the Fourteenth Amendment of the United States Constitution. *State v. James*, 111 N.C. App. 785, 789, 433 S.E.2d 755, 757 (1993). Sections 19 and 23 of the North Carolina Constitution also provide criminal defendants in North Carolina with a right to counsel. *James*, 111 N.C. App. at 789, 433 S.E.2d at 757. "The right to counsel includes a right to 'representation that is free from conflicts of interests.'" *Mims*, 180 N.C. App. at 409, 637 S.E.2d at 248 (quoting *Wood v. Georgia*, 450 U.S. 261, 271 (1981)).

When a defendant fails to object to a conflict of interest at trial, the defendant "must demonstrate that an actual conflict of interest adversely

affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *see also State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996). However, when a trial court is made aware of a possible conflict of interest prior to the conclusion of a trial, "the trial court must 'take control of the situation.'" *James*, 111 N.C. App. at 791, 433 S.E.2d at 758 (citation omitted); *see also State v. Hardison*, 126 N.C. App. 52, 55-56, 483 S.E.2d 459, 461 (1997). Where the trial "court 'knows or reasonably should know' of 'a particular conflict,' that court must inquire 'into the propriety of multiple representation.'" *State v. Choudhry*, 365 N.C. 215, 220, 717 S.E.2d 348, 352 (2011) (quoting *Sullivan*, 446 U.S. at 346-47). The trial court may determine, in its discretion, whether a full-blown evidentiary proceeding is necessary or whether some other form of inquiry is sufficient. *Id.* at 223, 717 S.E.2d at 354. But the inquiry must be adequate "to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment." *Mims*, 180 N.C. App. at 409, 637 S.E.2d at 248 (quotation marks, alterations, and citations omitted). Failure to conduct an adequate inquiry constitutes reversible error. *James*, 111 N.C. App. at 791, 433 S.E.2d at 759.

A conflict of interest arises where "the representation of one client will be directly adverse to another client" or "the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer." N.C. R. Pro. Conduct 1.7(a) (2019). When a conflict of interest arises,

> [c]onfidential communications from either or both of a revealing nature which might otherwise prove to be quite helpful in the preparation of a case might be suppressed. Extensive cross-examination, particularly of an impeaching nature, may be held in check. Duties of loyalty and care might be compromised if the attorney tries to perform a balancing act between two adverse interests.

James, 111 N.C. App. at 790, 433 S.E.2d at 758. While a defendant may waive the Sixth Amendment right to conflict-free counsel in certain circumstances, *State v. Nations*, 319 N.C. 318, 326, 354 S.E.2d 510, 515 (1987), some conflicts are deemed to be so fundamental that they may not be waived, *see Wheat v. United States*, 486 U.S. 153, 160, 162-63 (1988) (noting that "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them" and

recognizing the trial court's discretion to decline a defendant's proffered waiver of the right to conflict-free counsel where the trial court finds an actual conflict to be unwaivable).

Though not precedential authority for this Court, North Carolina State Bar ethics opinions "provide ethical guidance for attorneys and . . . establish . . . principle[s] of ethical conduct." 27 N.C. Admin. Code 1D.0101(j) (2019).[3] RPC 73 addresses a factual situation in which a town attorney ("Attorney B") occasionally advised members of the town police department. In its inquiry into whether members of Attorney B's firm could represent criminal defendants in cases in which members of the town police force would be prosecuting witnesses, the Ethics Committee opined, in relevant part:

> Under the facts presented, Attorney B advises the police department and, in effect, represents the policemen. If Attorney B undertakes to represent criminal defendants arrested by town police, he is, in effect, simultaneously representing clients with adverse interests. It is presumed that the conflict created by this simultaneous representation is so fundamental that it cannot be waived by consent of the clients. Further, this disqualification is extended . . . to the other members of the attorney's firm. Therefore, the attorney's associates may not represent criminal defendants who were arrested by members of the police force.
>
> If, however, [the attorney] represents a governing body but does not represent the police department in criminal matters, neither he nor his partners would be disqualified from representing criminal defendants in cases where police officers are prosecuting witnesses.

N.C. RPC 73 (13 April 1990).

We are guided by N.C. RPC 73 and the rationale underpinning it and hold that a conflict of interest that cannot be waived arises where law enforcement officers testify against a defendant and the defendant's appointed counsel also advises the officers' department or its members and, in effect, represents the officers who are prosecuting witnesses against the defendant.

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3. Formal ethics opinions adopted under the current Revised Rules of Professional Conduct are designated as "Formal Ethics Opinions," those adopted under the repealed Rules of Professional Conduct are designated as "RPCs." *Id.* Opinions adopted under former rules remain valid unless overruled. *Id.*

Here, Defendant's objections and Wilson's responses put the trial court on notice of a sufficiently particular possible conflict of interest such that the trial court was obligated to conduct an inquiry. Though the trial court did so, its inquiry was insufficient because it did not determine whether Wilson advised the Lincolnton Police Department and, in effect, represented the police officers who testified against Defendant. When questioned, Wilson admitted that he was the city attorney and indicated that he "had no communication or contact with the Police Department concerning this case." But the trial court failed to determine the extent to which Wilson's role as city attorney required him to advise or represent the Lincolnton Police Department or its individual officers.

Moreover, the trial court impermissibly shifted the responsibility to inquire into the possible conflict to Defendant. *See Choudhry*, 365 N.C. at 224, 717 S.E.2d at 354-55 (holding that an inquiry was insufficient where, inter alia, the trial court primarily questioned only the defendant himself regarding whether he had any concerns pertaining to his representation, whether he was satisfied with the representation, and whether he desired to retain his counsel). The trial court repeatedly asked Defendant whether he had specific concerns regarding his representation; Defendant consistently articulated his worry that he was not receiving a fair trial. The trial court then invited Defendant himself to question Wilson concerning the possible conflict in open court and offered to place Wilson under oath. While Defendant declined, it was apparent that he remained concerned that a conflict of interest was impeding his right to zealous representation.

Additionally, the trial court focused much of its own questioning on how long Defendant had known Wilson was the city attorney and when he had raised his concern, facts immaterial to determining whether an actual conflict of interest existed. *See James*, 111 N.C. App. at 791, 433 S.E.2d at 758 (noting that the trial court's obligation to investigate the conflict arises so long as "the possibility of conflict is raised before the conclusion of trial").

Where, as here, this Court determines that the trial court's inquiry was insufficient, the remedy is to remand to the trial court for a hearing to determine whether a conflict exists. *State v. Gray*, 225 N.C. App. 431, 438, 736 S.E.2d 837, 842 (2013); *James*, 111 N.C. App. at 791, 433 S.E.2d at 759. Accordingly, we remand to the trial court to make that determination.

Should the trial court determine that Wilson advised or represented the Lincolnton Police Department or its members at any time relevant

to this case, Wilson labored under a conflict of interest that could not be waived and Defendant is entitled to a new trial. Should the trial court determine that Wilson did not advise or represent the Lincolnton Police Department or its members at any time relevant to this case, no conflict of interest existed and the judgment entered upon Defendant's convictions shall be left undisturbed.

III. Conclusion

Because the trial court's inquiry was insufficient, the record lacks key details concerning whether Wilson advised the Lincolnton Police Department or its members and, in effect, represented the law enforcement officers who testified against Defendant. This Court therefore cannot determine whether there was an actual conflict of interest, and we remand this case for further proceedings consistent with this opinion.

REMANDED WITH INSTRUCTIONS.

Judges STROUD and MURPHY concur.

STATE OF NORTH CAROLINA
v.
CHRISTIAN CAPICE MOORE

No. COA20-16

Filed 15 December 2020

1. Search and Seizure—search warrant—supporting affidavit—bad faith presentation of false and misleading information to magistrate

In a felony possession of marijuana case where the investigating officer, in the affidavit supporting the issuance of a search warrant for a house located at 133 Harriet Lane in Pollocksville, stated that an individual (not the defendant) who lived at the Harriet Lane address was selling powder cocaine and that a confidential informant made controlled buys "from this location," but the officer's investigation notes and his testimony showed that he knew when applying for the warrant that the drug buys actually occurred a mile from the Harriet Lane address, the officer's statements were false, made in bad faith, and were stricken from the affidavit.

2. Search and Seizure—probable cause—search warrant—false statements stricken from supporting affidavit—sufficiency of remaining allegations

In a felony possession of marijuana case, where statements in the supporting affidavit for a search warrant for defendant's house—alleging that controlled drug buys had occurred there—were stricken because they were false and made in bad faith, the remaining allegations—that another suspect who lived at defendant's house came out of the house one night, sold drugs to a confidential informant (the affidavit did not allege a particular location), and then returned to the house—did not show a sufficient nexus linking the residence to illegal activity, and therefore did not support a determination that probable cause existed to search the residence. The trial court's order denying defendant's motion to suppress and the judgment entered upon defendant's guilty plea were reversed.

Judge TYSON dissenting.

Appeal by Defendant from judgment entered 29 July 2019 by Judge Paul M. Quinn in Jones County Superior Court. Heard in the Court of Appeals 11 August 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melissa H. Taylor, for State-Appellee.

Benjamin J. Kull for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgment entered upon his guilty plea to felony possession of marijuana. Defendant argues that the trial court erred by denying his motion to suppress, where (1) the officer applying for a warrant to search Defendant's residence acted in bad faith by presenting the magistrate with false and misleading information and (2) no probable cause existed to issue the search warrant. We reverse the trial court's order denying Defendant's motion to suppress and reverse the judgment entered upon Defendant's guilty plea.

I. Background

Investigator Timothy W. Corey of the Jones County Sheriff's Office applied for a warrant on the eve of 25 November 2014 to search the premises at 133 Harriett Lane in Pollocksville ("133 Harriett Ln."), and

any persons or vehicles located on that premises at the time of the search. The affidavit in support of the application included a "Statement of Probable Cause" in which Corey alleged the following:

> (1) This investigation is part of a continuing and ongoing narcotics investigation that involves the possibility of further undiscovered illegal narcotics and/or other narcotics paraphernalia or contraband in the aforementioned home located at 133 Harriet Ln. Pollocksville[.]
>
> (2) The source of information is coming from a [sic] ongoing investigation that leads investigators with the Jones County Sheriff's Office to introduce an informant that would gain the trust of the subjects living at the home and make controlled buys of illegal narcotics from this location.
>
> (3) On 10-09-2014, investigators met with an Informant, who stated that he was able to make buys from a subject by the name of "Matt", who lives at this location on Harriett Ln. And stated that he is known for dealing powder cocaine. I had the informant to set up [sic] a buy from this subject for a gram of cocaine. That day we were able to buy with no problem.
>
> (4) On 10-21-2014, investigators met with the informant to make a second buy from the same location, that time we were able to set up and watch the suspect known as "Matt" come out of the house and meet with the informant and return back to the home afterwards.
>
> (5) On 11-07-2014, investigators met with the informant to make a third buy from this location same as the last with no problems; subject known as "Matt" came from inside the home and made the deal then returned back inside the residence.
>
> (6) On 11-25-2014, investigators met with the informant to make a forth [sic] buy from this location. At that time the suspect "Matt", made it clear that he was re-upping (getting more drugs) and told the informant that he would be good for whatever he needed.
>
> (7) Based off of this information in this investigation, I am requesting this search warrant of this suspect's property for any and all narcotics and cash proceeds. Due to my

> training and experience, I have reason to believe that illegal narcotics, narcotic/drug paraphernalia, large amounts of US Currency, are being kept and sold from this location.
>
> (8) Based on all of the findings of my investigation, I am able to show that the suspect listed above is in direct violation of the NC controlled substances act. By keeping and selling illegal narcotics at the residence located at 133 Harriet Ln. Pollocksville.

Upon the information and allegations contained in the application and affidavit, a magistrate determined that sufficient probable cause existed and issued the search warrant. Corey and other officers executed the warrant the following morning. Given the items seized during the search, Defendant, who is not the suspect "Matt" referred to in the affidavit, was arrested and indicted for possession with intent to sell or distribute a Schedule VI controlled substance, and maintaining a dwelling house for using, keeping, or selling controlled substances.

On 11 May 2016, Defendant filed a motion to suppress the evidence seized as a result of the search. Defendant argued that the search warrant was not supported by probable cause and that the affidavit "contains unsubstantiated information from an informant, false or misleading statements, and no allegations tending to establish that controlled substances were present in the residence or the vehicles located there."

On 22 January 2019, Defendant filed a supplemental affidavit in support of his motion to suppress in which defense counsel averred, in relevant part, as follows:

> 7. The [search warrant] application is written in such a way as to lead a reader to conclude that the "buys" were made at the property of 133 Harriett Lane, Pollocksville. However, [I have] reviewed copies of Detective Corey's reports concerning October 9, October 21, and November 7, 2014 reports of controlled buys from a suspect known as "Matt" on those days. According to those reports, the October 9, 2014 buy occurred at the corner of Ten Mile Fork Road and Highway 17, over one mile from 133 Harriett Lane, Pollocksville. The October 21, 2014 buy occurred "down the road"; and the November 7, 2014 buy occurred on Killis Murphy Road, over one mile from the 133 Harriet Lane address.
>
> . . . .

> 9. Upon information and belief, [t]he statements by the affiant in his application for a search warrant that all the "buys" were made from the same location, which he previously referred to 133 Harriett Lane are misleading, and to the extent intended to portray that the buys were made from 133 Harriett Lane are false. As they were made by Detective Corey, the same detective involved in conducting the alleged controlled buys on the dates in question, these statements were knowingly made, and made with a reckless disregard for the truth.

Attached to the supplemental affidavit were copies of Corey's police reports concerning the alleged controlled buys from a suspect known as "Matt" on 9 October, 21 October, and 7 November 2014.

The trial court held a hearing on Defendant's motion to suppress on 23 January 2019. The trial court first considered the four corners of Corey's search warrant application and affidavit and heard arguments of counsel. No testimony or other evidence was presented.

At the close of the arguments, the court announced, "I'll do the order on this, but I'm going to indicate to you the findings of fact that I'll be including in that order[.]" The court found that "[i]n the application for the search warrant, [Corey] asserts there's probable cause to believe that 133 Harriet Lane, Pollocksville, North Carolina, a tan in color double-wide, with gray shingles are [sic] storing and selling narcotics" and "[a]gain alleg[es] that it's happening at 133 Harriet Lane in Pollocksville." The court then turned to the affidavit and considered the "eight, numbered paragraphs which purport to be the statement of probable cause for the issuance of the search warrant." After reciting the allegations in those paragraphs, and finding that the magistrate relied solely upon those factual allegations in issuing the warrant, the trial court found, in part:

> [I]t appears that based on the information and personal observation of the detective, that a buy was made at the 133 Harriet Lane address in Pollocksville on October 9, 2014. And, as I read it, it seems to me the plain language of this affidavit is that on October 9, 2014, a gram of cocaine was purchased at that location from a subject by the name of Matt.
>
> . . . .
>
> [T]he Court finds -- and this is the totality of the circumstances, and giving proper deference to the decision

> of the magistrate -- it appears there were two purchases made, and that would be a substantial basis for concluding there was probable cause to issue the search warrant.

The trial court then considered Defendant's supplemental affidavit and Corey's police reports, and heard arguments from the State and Defendant on the threshold inquiry required under *Franks v. Delaware*, 438 U.S. 154 (1978). Under this inquiry, a defendant must make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" and the allegedly false statement must be necessary to the probable cause determination. *Id*. at 155-56. Defendant argued that the drug buys did not occur at 133 Harriet Ln., that Corey was the lead investigator present for all of the buys and had knowledge of the actual locations of the buys, and that Corey's affidavit statements to the contrary were false and demonstrated a reckless disregard for the truth. Defendant further argued that when the false allegations were stricken from the affidavit, the search warrant application was not supported by probable cause. The State argued to the contrary. The trial court determined that Defendant met the threshold inquiry and allowed Defendant to put on evidence of Corey's allegedly false statements. Defendant introduced the police reports and called Corey as witness.

During direct examination, Corey admitted that none of the buys actually took place at 133 Harriet Ln. and affirmed that he knew that at the time he wrote his affidavit in support of the search warrant. Defendant inquired about Corey's affidavit and his description that the informant made "controlled buys of narcotics from this location." He asked Corey, "are you talking about the home and location of [133 Harriet Ln.]?" Corey replied, "I'm talking about the subjects residing in that home that's selling narcotics, sir." On cross examination, the State asked, "So you're not really -- when you say 'the same location,' you don't mean Ten Mile Road or whatever it is, and you don't mean 133 Harriet Lane. You mean from this guy ['Matt'], the same location that we're watching come out of the house, and go back in the house, that's how you're characterizing this?" Corey replied, "Exactly. Yes."

At the conclusion of the hearing, the trial court ruled as follows:

> I am going to deny the motion. Here's why, and I'll do the order. I gave my reason about the motion to suppress the first motion and said that in reading it, I felt that you should conclude that the location of the transactions was the Harriet Lane address. At this stage, I've got

> the benefit of what the magistrate got, plus the attachments to the supplemental affidavit, and more importantly the testimony of the officer. And then we reading that language [sic], as the DA sort of focused in on, those allegations in the warrant just say, "the location."
>
> The officer's testified, you know, he's talking about a seller coming from Harriet Lane, going to these specific places that he's disclosed to where the transactions actually took place. So, in looking at it with the benefit of that extra information, I don't believe there's been any showing that the statements were false, the statements in the affidavit. I don't believe they were false, so I don't have to reach anything else.
>
> I think when you read them in light of the officer – I read them so I wouldn't look at them and, after the fact, based just on the warrant, and concluded that we're talking about Harriet Lane. When you go back and read them, they don't actually say the buys took place at Harriet Lane. They really don't say that. They don't say where. They don't say Harriet Lane. They just say "the location." So there's nothing about that statement in light of the officer's explanation for what prompted him to submit that affidavit that would lead the Court to conclude that he either made a false statement or was somehow recklessly in disregard of the truth. It appears to me, on its face, it's true at this point.

On 24 January 2019, the trial court issued a written order denying Defendant's motion to suppress. The trial court left undisturbed its oral findings of fact and conclusions of law based on the evidentiary *Franks* hearing and did not reduce them to writing. The written order included findings of fact upon which the trial court concluded that "the application and affidavit of Detective Corey provided adequate support for the magistrate's finding of probable cause for the issuance of the search warrant in this case." The trial court denied Defendant's motion to suppress.

Defendant pled guilty to felony possession of marijuana; pursuant to the plea agreement, the State dismissed the remaining charge of maintaining a dwelling for using, keeping or selling controlled substances. The trial court sentenced Defendant to 8-19 months' imprisonment, suspended the sentence, and placed Defendant on 24 months' supervised probation. Defendant was ordered to pay $372.50 in court costs and

remain gainfully employed while on probation. Defendant gave proper notice of appeal in open court.

II. Discussion

Defendant argues that the trial court erred by denying Defendant's motion to suppress, where (1) the officer applying for a warrant to search Defendant's residence acted in bad faith by presenting the magistrate with false and misleading information and (2) no probable cause existed to issue the search warrant.

A. False and Misleading Information

[1] The standard of review in evaluating a trial court's rulings on a *Franks* hearing is the same as the standard of review in evaluating a trial court's ruling on a motion to suppress. *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997). Thus, our review is limited to whether the trial court's findings of fact are supported by competent evidence, and whether the findings of fact support the trial court's conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "Further, the trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *Fernandez*, 346 N.C. at 11, 484 S.E.2d at 357 (citation omitted).

Although the trial court held an evidentiary *Franks* hearing on the veracity of Corey's allegations in the affidavit, the trial court did not include in its written order denying Defendant's motion to suppress findings of fact or conclusions of law resulting from the hearing. However, as the trial court made oral findings of fact and conclusions of law based on the *Franks* hearing, we will review the trial court's oral findings to determine if they are supported by competent evidence and to determine if they support the trial court's conclusions of law. *See State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012) ("While a written determination is the best practice, nevertheless the statute does not require that these findings and conclusions be in writing.") (citation omitted).

It is well settled that a search warrant must be based on probable cause. *Fernandez*, 346 N.C. at 13, 484 S.E.2d at 358; *see* U.S. Const. amend. IV. "Probable cause for a search [warrant] is present where facts are stated which establish reasonable grounds to believe a search of the premises will reveal the items sought and that the items will aid in the apprehension or conviction of the offender." *Fernandez*, 346 N.C. at 13, 484 S.E.2d at 358 (citation omitted). An application for a search warrant must include (1) a statement of probable cause indicating that the items specified in the application will be found in the place described;

and (2) "one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched[.]" N.C. Gen. Stat. § 15A-244 (2019).

"It is elementary that the Fourth Amendment's requirement of a factual showing sufficient to constitute 'probable cause' anticipates a truthful showing of facts." *Fernandez*, 346 N.C. at 13, 484 S.E.2d at 358 (citing *Franks*, 438 U.S. at 164-65). "[T]ruthful" in this context means "that the information put forth is believed or appropriately accepted by the affiant as true." *Franks*, 438 U.S. at 165; *see also* N.C. Gen. Stat. § 15A-978(a) (2019) ("[T]ruthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause."). There is a presumption of validity with respect to the affidavit supporting the search warrant. *Franks*, 438 U.S. at 171.

"A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance." N.C. Gen. Stat. § 15A-978(a). "Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, as incorporated in the Fourteenth Amendment, requires that a hearing be held at the defendant's request." *Franks*, 438 U.S. at 154.

Upon an evidentiary hearing, the only person whose veracity is at issue is the affiant himself. *Id.* at 171. "The defendant may contest the truthfulness of the testimony by cross-examination or by offering evidence." N.C. Gen. Stat. § 15A-978(a). "A claim under *Franks* is not established merely by evidence that contradicts assertions contained in the affidavit, or even that shows the affidavit contains false statements. Rather, the evidence must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith." *Fernandez*, 346 N.C. at 14, 484 S.E.2d at 358 (citation omitted). In the context of an omission, a violation occurs where an "affiant[] omit[s] material facts with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading." *U.S. v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990) (internal quotation marks and citation omitted).

If a defendant establishes by a preponderance of the evidence that a "false statement knowingly and intentionally, or with reckless disregard for the truth" was made by an affiant in an affidavit in order to obtain a

search warrant, that false information must be then set aside. *Franks*, 438 U.S. at 155-56. If "the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* at 156.

In this case, Corey's affidavit in support of the application for a warrant to search 133 Harriet Ln. stated that there was an investigation involving the possibility of drugs and paraphernalia in the "home *located at 133 Harriet Ln.*" (Emphasis added). Investigators "introduce[d] an informant that would gain the trust of the subjects living at the home and *make controlled buys of illegal narcotics from this location.*" (Emphasis added). The affidavit further stated:

> (3) On 10-09-2014, investigators met with an Informant, who stated that he was able to make buys from a subject by the name of "Matt", who lives *at this location on Harriett Ln.* And stated that he is known for dealing powder cocaine. I had the informant to set up a buy [sic] from this subject for a gram of cocaine. That day we were able to buy with no problem.
>
> (4) On 10-21-2014, investigators met with the informant to make a second buy *from the same location*, that time we were able to set up and watch the suspect known as "Matt" come out of the house and meet with the informant and return back to the home afterwards.
>
> (5) On 11-07-2014, investigators met with the informant to make a third buy *from this location same as the last* with no problems; subject known as "Matt" came from inside the home and made the deal then returned back inside the residence.
>
> (6) On 11-25-2014, investigators met with the informant to make a forth [sic] buy *from this location.* At that time the suspect "Matt", made it clear that he was re-upping (getting more drugs) and told the informant that he would be good for whatever he needed.
>
> (7) Based off of this information in this investigation, I am requesting this search warrant of this suspect's property for any and all narcotics and cash proceeds. Due to my training and experience, I have reason to believe

> that illegal narcotics, narcotic/drug paraphernalia, large amounts of US Currency, are being kept and sold *from this location*.

(Emphasis added).

Defendant moved to suppress the evidence seized from 133 Harriet Ln. on the grounds that the affidavit contained false and misleading information because none of the alleged controlled drug buys and meetings took place at 133 Harriet Ln. Attached to the supplemental affidavit supporting the motion to suppress were Corey's police reports concerning the alleged controlled buys from "Matt" on 9 October, 21 October, and 7 November 2014.

Corey's police report documenting the 9 October events states, in relevant part:

> I had the informant make a call to the suspect to set up a buy of cocaine. The suspect told the informant to meet with him at the corner of tem [sic] mile fork and hwy 17, stated that he didn't need anyone at the house right now.
>
> . . . .
>
> I . . . sent him to the meeting location to make the buy of cocaine from the suspect.
>
> Deputy Taylor and I then set up where we were able to see the suspects home Just as we got in place we saw the suspect come out of the house . . . and get in a small black four door car. We fallowed [sic] the suspect down to where our informant was weighting [sic] at the meeting location.
>
> As the suspect pulled in to meet with our informant we went down the road and parked where we had sight of the meeting location after the deal was complete we fallowed [sic] the suspect back to Harriett ln. . . .

Corey's police report documenting the 21 October events states, in relevant part:

> I had the informant make a call to the suspect to set up a buy of cocaine. The suspect told the informant to meet with him at the same spot as last time (tem [sic] mile fork and hwy 17).

. . . .

> Capt. Bateman and I then set up where we were able to see the suspects home. I received a call from the informant telling me that the suspect had called him and changed the meeting location. The informant stated that now he wanted him to pick up him up [sic] at the end of Harriett Ln. . . .
>
> We saw the suspect come out of the house, dressed in a dark shirt and pajama pants then got in the vehicle with the informant. they drove down the road a short way and turned around then came back and dropped the suspect off at the end of Harriett Ln. the transaction took place darning [sic] this short ride down the road and back.

Corey's police report documenting the 7 November events states, in relevant part:

> I had the informant make a call to the suspect to set up a buy of cocaine. The suspect told the informant to meet with him at the same spot as last time (tem [sic] mile fork and hwy 17). . . .
>
> . . . .
>
> . . . . I then . . . sent him to the meeting location to make the buy of cocaine from the suspect.
>
> Deputy Ervin and I then went to set up where we were able to see the suspects home. I received a call from the informant telling me that the suspect had called him and changed the meeting location. The suspect told the informant to follow him and the [sic] went down hwy 17 and turned on Killis Murphy rd. and the suspect stopped and motioned for the suspect to come up to him as the informant approached the vehicle the suspect gave him a clear plastic bag with white powder inside and the informant gave him the $85.00 in US Currency.

On direct examination, Corey admitted that, at the time he wrote his affidavit, he knew that none of the drug buys took place at 133 Harriet Ln.

Although the trial court found that Corey testified that he was "talking about a seller coming from Harriet Lane, going to these specific places that he's disclosed to where the transactions actually took place,"

this finding is not supported as Corey never "disclosed" in the affidavit "these specific places . . . where the transactions actually took place." Moreover, although the trial court found that the allegations in the affidavit "don't actually say the buys took place at Harriet Lane . . . [t]hey just say 'the location,' " this finding is not supported as the plain language of the affidavit indicates that "this location" is 133 Harriet Ln. and that the alleged controlled drug buys and meetings between "Matt" and the informant took place at 133 Harriet Ln.

The trial court was itself misled by the statements in the affidavit. After it first reviewed Corey's affidavit on its face, and found that the magistrate relied solely on those factual allegations in issuing the search warrant, the trial court announced

> it appears that based on the information and personal observation of the detective, that a buy was made at the 133 Harriet Lane address in Pollocksville on October 9, 2014. And, as I read it, it seems to me the plain language of this affidavit is that on October 9, 2014, a gram of cocaine was purchased at that location from a subject by the name of Matt.

The trial court determined that two of the four drug buys took place "at that address on Harriet Lane" and concluded that probable cause existed to believe that "drug offenses were being committed at that address on Harriet Lane." Only after the *Franks* hearing, wherein Defendant introduced Corey's reports and questioned Corey, did the trial court understand that the buys did not take place at 133 Harriet Ln.

The trial court's conclusion that the statements were not false is not supported by the evidence presented at the *Franks* hearing, including the plain language of Corey's affidavit, his police reports, or his testimony. Contrary to the trial court's conclusion, Corey's statements in his affidavit indicating that the alleged controlled drug buys and meetings between "Matt" and the informant took place at 133 Harriet Ln. were false and his material omissions regarding the actual locations of the drug buys and meetings were misleading.

While "every false statement in an affidavit is not necessarily made in bad faith[,]" *State v. Severn*, 130 N.C. App. 319, 323, 502 S.E.2d 882, 885 (1998), in this case, Corey admitted that none of the controlled drug buys took place at 133 Harriet Ln. and that he knew this at the time he applied for the search warrant. By omitting that "Matt" drove from 133 Harriet Ln. to conduct the drug buys at locations over a mile away, and indicating instead that they had occurred at 133 Harriet Ln., Corey

knowingly made false statements. "A person may not knowingly make a false statement in good faith for the purposes of an affidavit in support of a search warrant." *Id.*

Because the statements indicating the drug buys and meetings between "Matt" and the informant were false and made in bad faith, they must be stricken from the affidavit. *Franks*, 438 U.S. at 155-56. If "the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* at 156.

B. Probable Cause

[2] A magistrate's determination of probable cause must be based upon the totality of the circumstances. *State v. Benters*, 367 N.C. 660, 664, 766 S.E.2d 593, 597 (2014). Under the "totality of the circumstances" test,

> [t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . concluding" that probable cause existed.

State v. Arrington, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (brackets and citation omitted).

An application for a search warrant must be supported by statements "particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places . . . to be searched . . . ." N.C. Gen. Stat. § 15A-244(3). "Our case law makes clear that when an officer seeks a warrant to search a residence, the facts set out in the supporting affidavit must show some connection or nexus linking the residence to illegal activity." *State v. Bailey*, 374 N.C. 332, 335, 841 S.E.2d 277, 280 (2020). This nexus is generally established by "showing that criminal activity actually occurred at the location to be searched[.]" *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990). "[H]owever, where such direct information concerning the location of the objects is not available[,] . . . it must be determined what reasonable inferences may be entertained concerning the likely location of those items." *Id.* (quotation marks and citation omitted). "The affidavit

must also set forth circumstances from which the officer concluded that his informant was reliable." *State v. Altman*, 15 N.C. App. 257, 259, 189 S.E.2d 793, 795 (1972).

When Corey's false statements are stricken, the affidavit essentially alleges the following: There is an investigation involving the possibility of drugs and paraphernalia at 133 Harriet Ln. An informant was introduced who was to make controlled drug buys from 133 Harriet Ln. Investigators met with the informant on 9 October 2014. The informant stated he could make buys from "Matt," who lives at 133 Harriett Ln. and is known for dealing powder cocaine. The informant was able to buy an ounce of cocaine from Matt on 9 October 2014. Investigators met with the informant on 21 October 2014 and watched "Matt" come out of the Residence, meet with the informant, and go back into the Residence. Investigators met with the informant on 11 November 2014; "Matt" came from inside the Residence, sold drugs to the informant, then returned back inside the Residence. Investigators met with the informant on 25 November 2014; Matt would be getting more drugs and told the informant he would be good for whatever he needed.

The totality of the allegations potentially linking 133 Harriet Ln. to illegal activity are that "Matt" is known for dealing powder cocaine; "Matt" lives at 133 Harriet Ln.; and on 11 November 2014, "Matt" came from inside 133 Harriet Ln., sold drugs to the informant, then returned back inside 133 Harriet Ln. These allegations are not sufficient to show a nexus linking 133 Harriet Ln. to illegal activity. *See Bailey*, 374 N.C. at 338, 841 S.E.2d at 282 (holding that a nexus was established where a detective personally observed an encounter which he believed was a drug deal between two people who "had a history of dealing drugs"; the buyer was stopped shortly after purchasing the drugs and confirmed that she had just purchased heroin; that another officer continuously observed two of the participants travel from the drug deal to the residence; and that the detective knew that this was where the two participants lived).

There is no allegation that "Matt" sold the drugs to the informant from, on, or near 133 Harriet Ln.; no allegation that "Matt" was under continuous surveillance from the time he left 133 Harriet Ln. to the time he sold the drugs to the informant on 11 November 2014; and no allegation that the events on 11 November 2014 were based on Corey's own observation. *See State v. Campbell*, 282 N.C. 125, 131, 191 S.E.2d 752, 757 (1972) (holding an affidavit invalid where drugs were not possessed in or sold from the dwelling to be searched, but were instead found inside a trash can outside of the dwelling, and "[t]he inference the State [sought]

to draw from the contents of [the] affidavit . . . [did] not reasonably arise from the facts alleged"). The lack of nexus is even more stark when the omitted facts—the actual locations of the transactions, the fact that "Matt" drove to the first two transactions, and that the informant picked "Matt" up at the end of Harriet Ln. and conducted the transaction in the car—are read into the affidavit. *See United States v. Lull*, 824 F.3d 109, 118 (4th Cir. 2016) (determining that the investigators "omissions therefore prevented a neutral magistrate from being able to accurately assess the reliability and the veracity, and thus the significance, of the informant's statements").

Moreover, there are no allegations as to the reliability of the informant. *See Altman*, 15 N.C. App. at 259, 189 S.E.2d at 795 (The affiant's statement that the confidential informant "has proven reliable and credible in the past . . . are the irreducible minimum on which a warrant may be sustained.") (quotation marks omitted).

The allegations in the affidavit do not support a determination that there is a "fair probability that contraband or evidence of a crime will be found in" 133 Harriet Ln. *See McCoy*, 100 N.C. App. at 576, 397 S.E.2d at 357. Accordingly, " 'the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.' " *Severn*, 130 N.C. App. at 323, 502 S.E.2d at 884 (quoting *Franks*, 438 U.S. at 156).

III. Conclusion

The trial court erred by denying Defendant's motion to suppress, where Corey acted in bad faith by presenting the magistrate with false and misleading information and no probable cause existed to issue the search warrant. We reverse the trial court's order denying Defendant's motion to suppress and reverse the judgment entered upon Defendant's guilty plea.

REVERSED.

Chief Judge McGEE concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

Defendant failed to show the search warrant or the affidavit was false, made in bad faith, was contrary to the actual facts or was asserted

"to conceal from the defendant" how the evidence was obtained. *State v. Severn*, 130 N.C. App. 319, 323, 502 S.E.2d 882, 885 (1998). The majority's opinion erroneously substitutes its judgment on the evidence and findings, and reverses the trial court's denial of Defendant's motion to suppress. I respectfully dissent.

I. Standard of Review

The scope of this Court's review of a trial court's order denying a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002)).

The trial court's conclusions of law are reviewed *de novo*. *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citation omitted), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). Whether an application for a search warrant is invalid for including false or misleading information is a conclusion of law that is also reviewed *de novo*. *See State v. Parks*, 265 N.C. App. 555, 570-73, 828 S.E.2d 719, 729-31 (2019), *disc. review denied*, 374 N.C. 265, 839 S.E.2d 851 (2020).

II. Analysis

A. False and Misleading Information

"A defendant may contest the validity of a search warrant and the admissibility of evidence attained from the evidence by contesting the truthfulness of the testimony showing probable cause for its issuance." N.C. Gen. Stat. § 15A-978(a) (2019). A "truthful" showing of the facts does not require "every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded . . . upon information received from informants, as well as . . . the affiant's own knowledge that sometimes must be garnered hastily." *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997) (citing *Franks v. Delaware*, 438 U.S. 154, 165, 57 L. Ed. 2d 667, 678 (1978)). "Instead, truthful means that the information put forth is believed or appropriately accepted by the affiant as true." *Severn*, 130 N.C. App. at 322, 502 S.E.2d at 884 (citation and internal quotation marks omitted).

During the evidentiary hearing, only the affiant's veracity is at issue. *Id.* A defendant cannot suppress the warrant by simply presenting evidence which "contradicts assertions contained in the affidavit or . . .

shows the affidavit, contains false statements." *Id.* (citation omitted). Rather, the evidence presented "must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith." *Id.* (citation omitted).

Defendant asserts Detective Corey gave false information to the magistrate in bad faith because the drug buys did not take place at the residence, but rather from two separate locations. Defendant argues this case is analogous to *State v. Severn*. In *Severn*, during a drug investigation a detective surveilled the defendant's residence and searched through the defendant's trash bin, located outside of the residence. *Id.* at 321, 502 S.E.2d at 883. Inside the bin, the detective found "cocaine residue on the inside of [a] straw and two grams of marijuana." *Id.*

The detective applied for a search warrant. The detective claimed in an affidavit to have found the evidence inside the defendant's residence, by using "investigative means" in support of the search warrant. *Id.* at 320-21, 502 S.E.2d at 883-84. During the suppression hearing, the detective testified he had never "personally [gone] inside the residence" and he had "deduced that the [evidence] had been inside the residence." *Id.*

This Court held the detective knowingly made a false statement in bad faith because the statement was contrary to the actual facts, the detective knew it was false, and only did so "to conceal from the defendant" how the evidence was obtained. *Id.* at 323, 502 S.E.2d at 885.

In the present case, Defective Corey's affidavit stated: on 9 October 2014, the confidential informant was able to buy from "Matt, who lives at this location on Harriett Ln." On 21 October 2014, investigators met with the confidential informant to make a second buy from Matt, who lived at "the same location." During this drug buy, Detective Corey and other investigators watched the suspect known as Matt "come out of the house and meet with the [confidential] informant and return back" to the residence.

On 7 November 2014, "investigators met with the [confidential] informant to make a third buy from this location same as the last." The same suspect "Matt came from inside the home and made the deal then returned back inside the residence." On 25 November 2014, investigators met with the confidential informant to meet Matt and make a fourth "buy from this location."

Unlike in *Severn*, Detective Corey did not state anywhere in his affidavit that any of the drug buys were made at or from inside the Harriett Lane residence. Detective Corey testified that when he referred to "this

location" or "the same location," he was referring to the source or place from where Matt and the drugs are coming from, not the physical location of the drug buys. Defendant offers nothing to refute Detective Corey's testimony of the other assertions made in the application and affidavit. While the affidavit could have used clearer language, nothing asserted in the affidavit was false, made in bad faith, was contrary to the actual facts or was asserted "to conceal from the defendant" how the evidence was obtained. *Id.*

Unlike the inside/outside statement in the officer's affidavit from *Severn*, Detective Corey did not make any false statement in bad faith. *Id.* Defendant's argument is properly overruled.

B. Probable cause

The Fourth Amendment of the Constitution of the United States provides "no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularity describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Our Supreme Court has adopted the "totality of the circumstances" test for determining whether probable cause exists for issuance of a search warrant under the state's constitution. *State v. Lowe*, 369 N.C. 360, 364, 794 S.E.2d 282, 285 (2016).

Under this test, an application for a search warrant must be supported by an affidavit detailing "the facts and circumstances establishing probable cause to believe that the items are in the places . . . to be searched." N.C. Gen. Stat. § 15A-244(3) (2019). The information contained in the affidavit "must establish a nexus between the objects sought and the place to be searched." *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) (citation omitted). A magistrate must "make a practical, common-sense decision," based upon the totality of the circumstances, whether "there is a fair probability that contraband" will be found in the place to be searched. *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983).

Unlike the majority's opinion's analysis, the judicial officer's determination of probable cause is to be given "great deference" and "after-the-fact scrutiny should not take the form of a *de novo* review." *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984). Instead, as the trial court found, a reviewing court is responsible for ensuring that the issuing magistrate had a "substantial basis for . . . conclud[ing] that probable cause existed." *Gates*, 462 U.S. at 238-39, 76 L. Ed. 2d at 548 (citation omitted).

The trial court's order asserts the following factors, *inter alia*, to support the magistrate's finding of probable cause: (1) a confidential informant advised the investigators he was able to make illegal drug buys from Matt, who resided at the residence at Harriett Lane; (2) Detective Corey dispatched the confidential informant to make "buys" of illegal drugs from Matt on four separate occasions; (3) on 9 October 2014 the confidential informant purchased a gram of cocaine from Matt; (4) on every occasion, Detective Corey witnessed Matt leave the residence at Harriett Lane, meet with the confidential informant to complete the buy, and return to the residence; and, (5) on 25 November 2014, Matt told the confidential informant he was, "re-upping," getting more drugs, and would be "good" for further supply. Defendant's argument is properly overruled.

1. Stale Information

Defendant argues the evidence described in Detective Corey's affidavit was stale. "Generally, two factors determine whether evidence of previous criminal activity is sufficient to later support a search warrant: (1) the amount of criminal activity and (2) the time period over which the activity occurred." *McCoy*, 100 N.C. App. at 577, 397 S.E.2d at 358.

"[W]here the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant." *Id.* (citation omitted). This Court has held evidence, which occurred twenty months prior to the execution of a search warrant, was not so far removed to be considered stale as a matter of law. *State v. Howard*, 259 N.C. App. 848, 854, 817 S.E.2d 232, 237 (2018).

Over the course of only two months, the confidential informant was able to complete four illegal drug-related transactions with Matt while he resided at the residence on Harriett Lane. The last buy occurred eighteen days before the search warrant was issued. The last interaction, when Matt informed the confidential informant, he was re-upping his supply, occurred on the same day the search warrant was issued by the magistrate. The evidence of the four separate buys from Matt who lived at Harriett Lane and was described in the affidavit was not stale. A short time had passed from the last interaction with Matt, the search warrant being issued, and the search warrant being executed. Defendant's argument is properly overruled.

2. Reliable Information

Defendant also argues the application and affidavit did not establish probable cause because Detective Corey's affidavit did not show the

confidential informant was reliable. This Court has held probable cause may be shown through tips and information provided by informants. *State v. Brown*, 199 N.C. App. 253, 257, 681 S.E.2d 460, 463 (2009). "The indicia of reliability of an informant's tip" includes: (1) "whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be independently corroborated by the police." *Id.* at 258, 681 S.E.2d at 463 (citation omitted).

The information provided by the confidential informant was independently verified by Detective Corey, who surveilled all four illicit drug interactions as they occurred between "Matt" and the confidential informant at the residence. Also, officers met with the confidential informant on 9 October 2014 and then had the confidential informant buy one gram of cocaine from Matt on the same day. The affidavit states the confidential informant was involved in an ongoing drug investigation in Jones County. The magistrate could reasonably have concluded the informant was known to the investigator from the multiple transactions and had a history of reliability. Defendant's argument is overruled.

Finally, applying the totality of circumstances test, the trial court properly concluded a substantial basis was shown for finding probable cause to search the residence. The confidential informant had purchased drugs from Matt at least four times in a two-month period while Matt had lived at the residence. Detective Corey witnessed Matt leave the residence, meet with the confidential informant, the illicit exchanges occur, and Matt return to the residence. Matt told the confidential informant he had resupplied his drug inventory the day before the search warrant was issued.

The nexus and chain of custody between the residence, Matt, the informant, and the contraband recovered therefrom on numerous occasions was sufficiently established by the application and Detective Corey's affidavit. A substantial basis was presented for the magistrate to conclude illegal drugs were located inside of the residence and to deny Defendant's motion to suppress. Probable cause supports the issuance of the warrant to search the residence. Defendant's arguments are properly overruled.

III. Conclusion

Defendant failed to show Detective Corey provided false and misleading information or used bad faith in preparing the application for the search warrant and his supporting affidavit to the magistrate. The search warrant was based upon timely and reliable information of

multiple drug transactions over a two-month period to support probable cause to search the residence. Using the proper appellate standard of review of the trial court's order, Defendant's motion to suppress was properly denied. The judgments entered upon Defendant's guilty plea are properly affirmed. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
SHELLEY ANNE OSBORNE

No. COA18-9-2

Filed 15 December 2020

1. Drugs—issue preservation—immunity from prosecution—seeking medical assistance for drug overdose—not jurisdictional

The Court of Appeals held that N.C.G.S. § 90-96.2(c)—which provides that a person suffering from a drug overdose shall not be prosecuted for certain drug-related crimes if the evidence of those crimes was obtained because the person sought medical assistance relating to the overdose—does not impose a jurisdictional limit that can be raised at any time, but rather it contains a traditional immunity defense that must be raised in the trial court to be preserved for appellate review. Therefore, a defendant convicted of possession of heroin waived any arguments on appeal concerning immunity from prosecution under section 90-96.2(c) by failing to raise them at trial.

2. Evidence—drug possession—field tests and officer lay testimony identifying heroin—plain error analysis

In a prosecution for possession of heroin, which arose from a phone call to police about defendant's possible overdose in a hotel room, the trial court did not commit plain error by admitting into evidence field test results and officer lay testimony identifying the substance found in the hotel room as heroin. Defendant never objected to this evidence at trial, and even if the court had excluded the test results and lay testimony, the State presented ample other evidence that defendant possessed heroin, including defendant's statement to law enforcement at the scene that she had used heroin and the officers' discovery of a rock-like substance resembling heroin and drug paraphernalia typically used for consuming heroin.

On remand by opinion of the North Carolina Supreme Court filed 16 August 2019 in *State v. Osborne*, 372 N.C. 619, 831 S.E.2d 328 (2019), reversing and remanding this Court's decision filed 2 October 2018. Case originally appealed by defendant from judgments entered 21 February 2018 by Judge Edwin G. Wilson Jr. in Randolph County Superior Court. Heard in the Court of Appeals 20 August 2018 and 23 September 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alesia Balshakova and Assistant Attorney General Kristin J. Uicker, for the State.

Meghan Adelle Jones for defendant.

Hicks McDonald Noecker LLP, by David W. McDonald, court-assigned amicus curiae.

DIETZ, Judge.

Under state law, a person suffering a drug overdose "shall not be prosecuted" for certain drug crimes if the evidence of those crimes was obtained because the person sought medical assistance. N.C. Gen. Stat. § 90-96.2(c). The obvious purpose of this statute is to save lives by encouraging people to call emergency personnel when someone is experiencing a drug overdose.

On remand from the Supreme Court, the central issue in this appeal is whether this statute, which the General Assembly described as an "immunity," is a jurisdictional limit that can be raised at any time, or is a more traditional immunity defense that must be raised and preserved at trial. This is a critical question because Defendant Shelley Anne Osborne never raised this issue, either in the trial court or on appeal. The question is before us solely because a Supreme Court justice, in a concurring opinion in this case, invited this Court to examine it on remand.

As explained below, our State's criminal laws treat immunity from prosecution and subject matter jurisdiction as distinct concepts. Thus, we can interpret an immunity provision as jurisdictional only if the statute's language provides a "clear indication" that it is meant to be jurisdictional. That is not the case with this statute, and we therefore hold that N.C. Gen. Stat. § 90-96.2(c) contains a traditional immunity defense that must be raised by the defendant in the trial court to be preserved for appellate review.

We therefore decline to address this issue because it was not raised and preserved for appellate review. We also find no plain error in the remaining arguments before us on remand.

Facts and Procedural History

In late 2014, police responded to a call about a possible overdose in a hotel room. After arriving at the hotel room, officers found Defendant Shelley Anne Osborne in the bathroom. She was unconscious, unresponsive, and turning blue. Osborne regained consciousness after emergency responders arrived and administered an anti-overdose drug. When Osborne regained consciousness, she told an officer that she "had ingested heroin."

The responding officers searched the hotel room and found Osborne's two children, who were around four or five years old. The officers also found multiple syringes, spoons with burn marks and residue on them, and a rock-like substance that appeared to be heroin. An officer conducted a field test on the rock-like substance, which yielded a "bluish color" indicating a "positive reading for heroin."

The State charged Osborne with possession of heroin and two counts of misdemeanor child abuse. At trial, law enforcement officers testified about discovering the rock-like substance; described how it resembled heroin; explained the results of the field test indicating the substance was heroin; and discussed how other objects found in the hotel room, including the syringes and spoons with burn marks, were common paraphernalia used to consume heroin. An officer also performed a field test on the substance seized from the hotel room in open court and displayed the results to the jury. Osborne did not object to any of this evidence.

The jury convicted Osborne on all charges, and the trial court sentenced her to 6 to 17 months in prison for possession of heroin and a consecutive sentence of 60 days for the two counts of misdemeanor child abuse. The trial court suspended both sentences. Osborne appealed.

This Court vacated Osborne's conviction for possession of heroin, reasoning that there was no scientifically valid chemical analysis or other sufficient testimony to establish that the alleged unlawful substance was heroin. *State v. Osborne*, 261 N.C. App. 710, 715, 821 S.E.2d 268, 272 (2018), *rev'd and remanded*, 372 N.C. 619, 831 S.E.2d 328 (2019).

The Supreme Court took the case on discretionary review, reversed this Court's holding with respect to the sufficiency of the evidence, and remanded with instructions to consider Osborne's plain error

evidentiary challenge, which was mooted by this Court's prior opinion. *State v. Osborne*, 372 N.C. 619, 632, 831 S.E.2d 328, 337 (2019).

At oral argument and in a concurring opinion, Justice Earls discussed a state statute, N.C. Gen. Stat. § 90-96.2, that provides "limited immunity" for certain crimes connected to a drug overdose. Justice Earls invited this Court to "also address on remand the question of the application of N.C.G.S. § 90-96.2 to this case" including "whether the Good Samaritan/Naloxone Law is a limit on the court's jurisdiction to prosecute the defendant in this case" or, "if not purely jurisdictional, whether it is an issue that can be waived." *Id.* at 633, 636, 831 S.E.2d at 338–339 (Earls, J., concurring).

On remand to this Court, we ordered supplemental briefing from the parties on the issue identified in the concurring opinion from the Supreme Court. Osborne's counsel filed a notice "respectfully declining to submit supplemental briefing." Counsel explained that a "lien will be entered" against Osborne for the attorneys' fees and expenses of court-appointed counsel "because our Supreme Court denied her the highest relief sought on appeal." Thus, counsel explained, Osborne "has not given the undersigned authorization" to file a supplemental brief which would result in additional attorneys' fees and expenses from counsel.

In response, this Court appointed David W. McDonald as court-assigned amicus curiae to address the issues identified in the supplemental briefing order from Osborne's perspective.

Analysis

I. Statutory immunity under N.C. Gen. Stat. § 90-96.2

[1] We first address the statutory immunity issue raised by the concurring opinion from the Supreme Court. At the time of Osborne's trial, N.C. Gen. Stat. § 90-96.2(c) provided that any "person who experiences a drug-related overdose and is in need of medical assistance shall not be prosecuted" for felony possession of less than one gram of heroin if the evidence for the prosecution "was obtained as a result of the drug-related overdose and need for medical assistance." *Id.* (amended 2015).

The threshold question for this Court is whether we may consider this issue at all. Osborne never raised the issue—not in the trial court and not on appeal. The issue arose, for the first time, in questions from a justice at the oral argument in the Supreme Court.

Ordinarily, "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion."

N.C. R. App. P. 10(a)(1). Issues not raised in the trial court are waived on appeal. *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003).

But this waiver rule does not apply to defects in the trial court's subject matter jurisdiction because subject matter jurisdiction "cannot be conferred by consent or waiver." *State v. Mauck*, 204 N.C. App. 583, 586, 694 S.E.2d 481, 483 (2010). As a result, an "issue of subject matter jurisdiction may be raised at any time, and may be raised for the first time on appeal." *State v. Frink*, 177 N.C. App. 144, 147, 627 S.E.2d 472, 473 (2006). The interaction of these two contrasting preservation rules means that our ability to consider this statutory immunity argument turns on whether it impacts the trial court's subject matter jurisdiction.

We hold that it does not. "The extent, if any, to which a particular statutory provision creates a jurisdictional requirement hinges upon the meaning of the relevant statutory provisions." *State v. Brice*, 370 N.C. 244, 251, 806 S.E.2d 32, 37 (2017). In interpreting a statute, our task "is to determine the meaning that the legislature intended upon the statute's enactment. The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *State v. Rieger*, 267 N.C. App. 647, 649, 833 S.E.2d 699, 700–01 (2019) (citation omitted).

We begin with the statute's plain language. The relevant provision is contained in a statute entitled "Drug-related overdose treatment; limited immunity." The relevant provision then describes how, if certain conditions are met, a person experiencing an overdose "shall not be prosecuted" based on evidence obtained when emergency personnel respond to provide medical assistance. N.C. Gen. Stat. § 90-96.2.

This statutory language indicates Section 90-96.2(c) creates an immunity from prosecution. This type of immunity, to be fair, is stronger than a typical affirmative defense. Immunities are not mere bars to conviction or judgment; they are protections against being charged or haled into court at all. *See generally Ballard v. Shelley*, 257 N.C. App. 561, 564, 811 S.E.2d 603, 605 (2018). Even so, immunities are not ordinarily treated as matters of subject matter jurisdiction; immunities generally are waived if not asserted and cannot be raised for the first time on appeal. *See, e.g.*, *Lambert v. Town of Sylva*, 259 N.C. App. 294, 301, 816 S.E.2d 187, 193 (2018); *Nw. Fin. Grp., Inc. v. Cty. of Gaston*, 110 N.C. App. 531, 534, 430 S.E.2d 689, 691 (1993).

But the use of the phrase "immunity" in Section 90-96.2(c) is not determinative. The General Assembly is "free to attach the conditions that go with the jurisdictional label" to something that typically is not

jurisdictional. *Tillett v. Town of Kill Devil Hill*s, 257 N.C. App. 223, 225, 809 S.E.2d 145, 148 (2017). This means the General Assembly could label a provision an "immunity" but have that provision deprive trial courts of subject matter jurisdiction. For this to occur, there must be a "clear indication that the provision was meant to carry jurisdictional consequences." *Id.*

Here, that is not the case. Nothing in N.C. Gen. Stat. § 90-96.2(c) contains a clear indication that it must be jurisdictional. The statute "uses the term 'shall not' which is mandatory, not permissive." *State v. Osborne*, 372 N.C. 619, 636, 831 S.E.2d 328, 339 (2019) (Earls, J., concurring). But our Supreme Court has acknowledged that statutory provisions often "are couched in mandatory terms" but "that fact, standing alone, does not make them jurisdictional in nature." *Brice*, 370 N.C. at 253, 806 S.E.2d at 38. Moreover, other portions of our State's criminal statutes, applicable in this case, distinguish between immunities and jurisdictional arguments. For example, under N.C. Gen. Stat. § 15A-954, there are separate categories describing how to move to dismiss when the "defendant has been granted immunity by law from prosecution" and when the "court has no jurisdiction of the offense charged." *Id.* § 15A-954(a)(8), (9). Again, this demonstrates that the General Assembly views immunities and subject matter jurisdiction as distinct legal concepts. When drafting N.C. Gen. Stat. § 90-96.2(c), the legislature could have included language signaling that this provision was different from other immunities and should be treated as jurisdictional. It did not do so.

In sum, we hold that N.C. Gen. Stat. § 90-96.2(c) does not contain a clear indication that it is a jurisdictional requirement, and we therefore treat the provision as one granting traditional immunity from prosecution. This type of immunity must be asserted as a defense by the defendant in the trial court proceeding. *State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018). The failure to raise the issue waives it and precludes further review on appeal. *Haselden*, 357 N.C. at 10, 577 S.E.2d at 600.

Applying these principles, we hold that Osborne waived any arguments concerning immunity from prosecution under N.C. Gen. Stat. § 90-96.2(c) by failing to raise the argument in the trial court. We thank the court-assigned amicus curiae for the well-reasoned supplemental briefing and thoughtful arguments to this Court, but we ultimately conclude that the arguments raised by the amicus cannot be considered by this Court on direct appeal. Osborne must raise those arguments, if at all, through a motion for appropriate relief in the trial court asserting ineffective assistance of counsel.

II. Plain error challenge to drug identification

[2] We next address Osborne's remaining argument from her initial appellate brief. Osborne argues that the trial court committed plain error by admitting the results of field tests conducted on the alleged heroin found at the crime scene and by admitting the lay testimony of officers explaining that the substance resembled heroin.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Our Supreme Court has emphasized that we should invoke the plain error doctrine "cautiously and only in the exceptional case" where the consequences of the error seriously affect "the fairness, integrity or public reputation of judicial proceedings." *Id.* (citation omitted).

Here, law enforcement officers responded to a call about a possible overdose in a hotel room and found Osborne unconscious. When Osborne regained consciousness, she told the officers that she had used heroin. Officers found a rock-like substance resembling heroin in the hotel room. They also found drug paraphernalia, such as syringes and spoons with burn marks and residue, that are used for consuming heroin. To be sure, much of the State's evidence identifying that rock-like substance as heroin, such as the field test results, might have been excluded had Osborne objected. But she did not object. And, as explained above, the State had compelling evidence that the substance was heroin even setting aside the challenged evidence. Indeed, our Supreme Court described the record in this case as containing "ample evidence tending to show that the substance that defendant allegedly possessed was heroin." *Osborne*, 372 N.C. at 631, 831 S.E.2d at 337. In sum, the trial court's decision not to intervene, on the court's own initiative, to exclude some of this evidence, when there was "ample" evidence that the substance was heroin, is simply not the sort of fundamental error that calls into question the "fairness, integrity or public reputation of judicial proceedings." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation omitted). Accordingly, we find no plain error in the trial court's judgment.

Conclusion

We find no plain error in the trial court's judgment.

NO PLAIN ERROR.

Chief Judge McGEE and Judge HAMPSON concur.

STATE v. ROBINSON

[275 N.C. App. 330 (2020)]

STATE OF NORTH CAROLINA
v.
LEWIE P. ROBINSON

No. COA19-474

Filed 15 December 2020

1. Appeal and Error—guilty plea—review by certiorari

Where defendant lacked the statutory authority to appeal from his guilty plea to the charges of assault on a female, violation of a domestic violence protective order, assault inflicting serious bodily injury, and assault by strangulation, he petitioned the Court of Appeals for a writ of certiorari for appellate review of four issues. The Court allowed the petition for the limited purpose of reviewing only one argument regarding the factual basis of his guilty plea to three assault charges.

2. Assault—guilty plea to multiple assaults—no evidence of distinct interruption in original assault

In a case where defendant pleaded guilty to charges of assault on a female, violation of a domestic violence protective order, assault inflicting serious bodily injury, and assault by strangulation, the trial court erred by accepting defendant's guilty plea to—and entering judgment on—the three assault charges because the State's factual summary and other evidence before the court indicated a singular assault without a distinct interruption in the original assault followed by a second assault. Although defendant held the victim captive for three days, that fact alone was insufficient to support a conclusion that multiple assaults occurred during that period.

3. Sentencing—assault—multiple charges arising from the same conduct—sentencing only on charge with greatest punishment

Where defendant pleaded guilty to assault on a female, assault inflicting serious bodily injury, and assault by strangulation, but the factual basis for defendant's guilty plea as presented by the prosecutor only supported one assault conviction, defendant could only be sentenced on one charge—the one that carried the greatest punishment.

Judge BERGER dissenting.

Appeal by defendant by writ of certiorari from judgments entered 5 December 2018 by Judge Marvin P. Pope, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 22 January 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica Macari, for the State.

Dylan J.C. Buffum for defendant-appellant.

ZACHARY, Judge.

Defendant Lewie P. Robinson appeals from judgments entered upon his guilty plea to one count each of (1) assault on a female, (2) violation of a domestic violence protective order, (3) assault inflicting serious bodily injury, and (4) assault by strangulation. Defendant has filed a petition for writ of certiorari seeking review of his guilty plea. In our discretion, we allow his petition for the limited purpose of reviewing his challenge to the factual basis for his plea arrangement. After careful review, we conclude that there was an insufficient factual basis for Defendant's guilty plea. Moreover, the trial court was not authorized to enter judgment and sentence Defendant for two lesser assault offenses based on the same conduct as that underlying his conviction for assault inflicting serious bodily injury. *See State v. Fields*, 374 N.C. 629, 633, 843 S.E.2d 186, 189 (2020). Accordingly, we remand the judgments entered in 18 CRS 85370 and 18 CRS 85784 to the trial court with instructions to arrest judgment on Defendant's convictions for assault on a female and assault by strangulation. We affirm the remaining judgments.

Background

At the time of the events in question, Leslie Wilson was dating Defendant and, over the course of their relationship, she was repeatedly the victim of domestic violence. On or about 25 May 2018, Wilson and Defendant were drinking beer together when she noticed that Defendant "was getting ill[.]" Fearful that he would become violent, Wilson poured out the rest of the beer and locked herself in the bathroom. Defendant "broke two doors" attempting to reach Wilson in order to find out where she "hid the beer." He eventually gained entry into the bathroom and attacked her. Defendant held Wilson down on a bed and strangled her "with his elbow on [her] jawbone and [her] throat." Wilson "blacked out twice."

Defendant purportedly held Wilson captive for the next three days, when she was finally able to call 911.[1] Wilson required medical treatment, and she "was unable to eat food properly for about six weeks after the assault due to the condition of her [broken] jaw[.]" Defendant was

1. It is unclear from the record precisely when during Wilson's captivity the assault occurred.

subsequently charged with assault on a female, violation of a domestic violence protective order, assault inflicting serious bodily injury, and assault by strangulation.

On 5 December 2018, Defendant's case came on for hearing in Buncombe County Superior Court before the Honorable Marvin P. Pope, Jr. Defendant agreed to plead guilty to each of the charged offenses. Under the terms of the proposed plea arrangement, the State agreed to consolidate the offenses into one Class F felony judgment, with Defendant receiving a sentence of 23–37 months in the custody of the North Carolina Division of Adult Correction.

The prosecutor presented the trial court with a statement of the factual basis for Defendant's guilty plea. However, after learning of Defendant's history of domestic violence and hearing Wilson's account of the events underlying his plea, the trial court rejected the proposed plea arrangement. The court provided the parties with an opportunity to renegotiate, and twenty-four minutes later, the parties presented the trial court with a modified plea arrangement, which did not provide for consolidated charges. Instead, under the terms of the modified plea arrangement, Defendant agreed to serve 23–37 months in prison for the Class F felony of assault inflicting serious bodily injury, followed by 15–27 months' imprisonment for the Class H felony of assault by strangulation. As for the Class A1 misdemeanor offenses of assault on a female and violation of a domestic violence protective order, Defendant agreed to serve two 150-day suspended sentences "with supervised probation, consecutive to each other if ever activated."

The trial court accepted Defendant's guilty plea upon the prosecutor's prior statement of the factual basis, and entered judgment accordingly.

Petition for Writ of Certiorari

[1] A criminal defendant's limited right of appeal following his plea of guilty is provided by N.C. Gen. Stat. § 15A-1444(a1)-(a2) (2019). *State v. Jones*, 253 N.C. App. 789, 792, 802 S.E.2d 518, 521 (2017). The statute "explicitly grants [a] defendant the right to petition the appellate division for review by writ of certiorari." *Id.* at 793, 802 S.E.2d at 521 (internal quotation marks omitted). This Court may issue the writ of certiorari "in appropriate circumstances." N.C. R. App. P. 21(a)(1). The writ is discretionary, "to be issued only for good and sufficient cause shown." *State v. Rouson*, 226 N.C. App. 562, 563–64, 741 S.E.2d 470, 471 (citation omitted), *disc. review denied*, 367 N.C. 220, 747 S.E.2d 538 (2013). "A petition for the writ must show merit or that error was probably committed below." *Id.*

Lacking the statutory authority to appeal his case, on 5 August 2019, Defendant petitioned this Court to issue its writ of certiorari in accordance with N.C. Gen. Stat. § 15A-1444. Defendant requests review of the following issues: (1) that "the trial court placed improper pressure on [him] to enter a plea 'today' after rejecting the parties' negotiated agreement"; (2) that "[t]here was an insufficient factual basis for the trial court to accept a plea and enter judgments on two of the three assault charges" where the evidence failed to establish more than one assault; (3) that "[t]he trial court considered improper and irrelevant matters at sentencing"; and (4) that the trial court denied him "his right of allocution at the sentencing hearing."

This Court may choose to issue its writ of certiorari "to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause." *State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016). After reviewing the record and arguments of the parties, we deny Defendant's petition for writ of certiorari as to the first, third, and fourth issues for which he requests appellate review. In our discretion, we allow his petition solely for the limited purpose of reviewing Defendant's second argument regarding the sufficiency of the factual basis for his guilty plea to three assault charges.[2]

Discussion

Defendant contends that "[t]here was an insufficient factual basis for the trial court to accept a plea and enter judgments on two of the three assault charges." We agree.

I. Standard of Review

Defendant raises an issue of statutory construction. "Issues of statutory construction are questions of law, reviewed de novo on appeal." *State v. Jamison*, 234 N.C. App. 231, 238, 758 S.E.2d 666, 671 (2014) (citation omitted). In reviewing an issue de novo, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citation omitted).

II. Factual Basis for the Plea

[2] Defendant argues that "[t]he trial court erred when it accepted a plea and entered judgment on three assault charges because the State's

2. We have previously allowed petitions for the writ of certiorari in order to permit review of appeals concerning the adequacy of the factual bases underlying defendants' guilty pleas. *See, e.g.*, *State v. Keller*, 198 N.C. App. 639, 641–42, 680 S.E.2d 212, 213–14 (2009).

factual summary and other evidence before the trial court did not establish more than one assault." For the following reasons, we agree.

"[G]uilty pleas must be substantiated in fact as prescribed by" N.C. Gen. Stat. § 15A-1022(c). *State v. Agnew*, 361 N.C. 333, 335, 643 S.E.2d 581, 583 (2007). "The judge may not accept a plea of guilty . . . without first determining that there is a factual basis for the plea." N.C. Gen. Stat. § 15A-1022(c). A factual basis may be provided by, *inter alia*, "[a] statement of the facts by the prosecutor." *Id.* § 15A-1022(c)(1). The trial court may also "consider any information properly brought to [its] attention in determining whether there is a factual basis for a plea of guilty[.]" *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 186 (1980).

In the instant case, the State's summary of the factual basis for the plea was brief:

> Your Honor, this occurred on May the 28th, 2018. Officers responded just after midnight that morning, Your Honor, to 37 Amirite Drive, A-m-i-r-i-t-e, Drive in Candler, North Carolina. The caller was Ms. Leslie Wilson who is present today, Your Honor. She stated that she'd been held captive by [D]efendant for three days and there was an active [domestic violence protective order] in place.
>
> When officers arrived, Ms. Wilson was present and stated that [D]efendant, had grabbed her around the neck and that while he was choking her she had taken a box cutter from him. During the assault that occurred over that night, Your Honor, Ms. Wilson was punched a number of times causing a broken jaw and a dislodged breast implant. She also had small cuts on her hands that were consistent with the altercation, as well as bruising around her neck. Ms. Wilson describes that during the strangulation she was unable to breathe and felt like she was going to pass out. She had tenderness about her neck for a few days after. Additionally, she was unable to eat food properly for about six weeks after the assault due to the condition of her jaw, Your Honor. Thankfully, thanks to health insurance, she was not out-of-pocket any money for restitution which is why we're not seeking restitution in this case.

The State further noted that Wilson was "ready to move on with this relationship and . . . this case[.]"

The State's factual summary indicated that this was a singular assault, without distinct interruption, during which Wilson was strangled, beaten, and cut. However, "[i]n order for a defendant to be charged with multiple counts of assault, there must be multiple assaults. This requires evidence of a *distinct interruption* in the original assault followed by a second assault." *State v. Williams*, 201 N.C. App. 161, 182, 689 S.E.2d 412, 424 (2009) (emphasis added) (citation omitted).

"[T]he dispositive issue . . . is whether the State presented substantial evidence of an interruption" between the assaults. *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307, *disc. review denied*, 357 N.C. 510, 588 S.E.2d 377 (2003); *see also State v. McPhaul*, 256 N.C. App. 303, 304, 318, 808 S.E.2d 294, 298, 306 (2017) (determining that there was no evidence of a distinct interruption in the assault where (1) the victim was first "hit on the head from behind and fell to the ground"; (2) after attempting to stand back up, the victim was "hit . . . in the right shin with a metal baseball bat," causing him to fall again; and (3) while on the ground, the victim was struck again in the face), *disc. review improvidently allowed*, 371 N.C. 467, 818 S.E.2d 102 (2018) (per curiam); *State v. Brooks*, 138 N.C. App. 185, 188–90, 530 S.E.2d 849, 852–53 (2000); *State v. Dilldine*, 22 N.C. App. 229, 231, 206 S.E.2d 364, 366 (1974).

In the case at bar, nothing in the State's factual summary suggests that there was a distinct interruption that would support multiple assault convictions. Close examination of the prosecutor's language shows that she only referenced a singular assault during her summary of the factual basis for the plea arrangement, in which she described "*the assault* that occurred over that night[.]" (Emphasis added). The prosecutor also mentioned cuts on Wilson's hands that "were consistent with *the altercation*"—again, singular—between Wilson and Defendant. (Emphasis added). Moreover, Wilson's statement to the trial court at the hearing provided no evidence of a distinct interruption in the assault:

> We were both drinking and he was getting ill, so I dumped all the beer out. Dumped out everything I could find. And then I locked myself in the bathroom. And he broke two doors trying to get to me and he kept telling me to tell him where I had hid the beer. I didn't want to tell him then that I'd poured it out because I was so afraid. But I poured it out, trying to keep him from getting to this point. And then he got after me and I had a box cutter, which I was trying to defend myself at that point, and he held me down on the bed. I actually blacked out twice. And when he was strangling me and told me I needed to learn where the pressure

> points was, with his elbow on my jawbone and my throat. And then when I got back up I did -- I had the box cutter but I was trying -- I was scared to death. I thought he was going to kill me. I couldn't even hardly talk.

The fact that Defendant held Wilson captive for three days does not, alone, compel the conclusion that he committed multiple assaults against Wilson during that period. Given the factual summary delivered by the State, and the lack of "substantial evidence of an interruption" in the assault, *Littlejohn*, 158 N.C. App. at 635, 582 S.E.2d at 307, we conclude that Defendant has shown that the State did not provide a sufficient factual basis for the trial court to accept his guilty plea and enter judgments on multiple assault charges.

III. Separate Punishments

[3] Defendant further maintains that, because the State's factual basis for his guilty plea was insufficient to support multiple assault convictions, we should "vacate the judgments in this matter and remand to the trial court with instructions to arrest the judgments" for assault on a female and assault by strangulation.

Identical prefatory language is found in N.C. Gen. Stat. §§ 14-32.4(a), (b), and 14-33(c), with each providing that these statutes apply "[u]nless the conduct is covered under some other provision of law providing *greater* punishment[.]" N.C. Gen. Stat. §§ 14-32.4(a)-(b), 14-33(c) (emphasis added). Our Supreme Court recently addressed this prefatory language in *State v. Fields*, 374 N.C. at 632, 843 S.E.2d at 189. In that case, the issue presented was "whether [the] defendant could lawfully be convicted and sentenced for both habitual misdemeanor assault and felony assault where both offenses arose from the same assaultive act." *Id.* The *Fields* Court agreed with this Court's previous conclusion that the defendant "could not be separately convicted and punished for both misdemeanor assault and felony assault based on the same conduct due to the above-quoted prefatory language[.]" *Id.* at 633, 843 S.E.2d at 189.

In reaching this conclusion, our Supreme Court was guided by its review of identical prefatory language in another criminal statute. *Id.* at 634, 843 S.E.2d at 190. In *State v. Davis*, 364 N.C. 297, 306, 698 S.E.2d 65, 70 (2010), the issue was whether the defendant could be sentenced and punished for both felony serious injury by vehicle and assault with a deadly weapon inflicting serious injury arising from the same underlying conduct. *Davis*, 364 N.C. at 298, 698 S.E.2d at 66. The *Davis* Court held that the General Assembly's inclusion of the same prefatory language found in N.C. Gen. Stat. § 20-141.4(b) (establishing punishments

for various death or serious injury by vehicle offenses) as in those sections at issue here signaled the legislature's intention not to "authorize punishment for the enumerated offenses when punishment is imposed for higher class offenses that apply to the same conduct." *Id.* at 305, 698 S.E.2d at 70. "In such situations . . . the General Assembly intended an alternative: that punishment is *either* imposed for the more heavily punishable offense *or* for the section 20-141.4 offense, but not both." *Id.* at 304, 698 S.E.2d at 69. Accordingly, "the trial court . . . was not authorized to sentence [the] defendant for felony death by vehicle and felony serious injury by vehicle" in contravention of the clear intent and plain language of our General Assembly. *Id.* at 305, 698 S.E.2d at 70.

Based on the holding in *Davis*, the *Fields* Court concluded that "this same prefatory language would serve to prevent [the] defendant from being separately punished for both misdemeanor assault and felony assault." *Fields*, 374 N.C. at 634, 843 S.E.2d at 190. The *Fields* Court further explained that the absence of similar prefatory language in the habitual misdemeanor assault statute did not render that language wholly inapplicable. *Id.* Indeed, "in order for [the] defendant to be guilty of habitual misdemeanor assault, his conduct had to have first violated the misdemeanor assault statute." *Id.* at 635, 843 S.E.2d at 190.

> [The] defendant's guilt of habitual misdemeanor assault required that he first have violated the misdemeanor assault statute. But because the prefatory language of the misdemeanor assault statute was triggered, his conduct was not deemed to constitute a violation of that statute. Thus, absent a violation of the misdemeanor assault statute, he could not be guilty of habitual misdemeanor assault, and as a result, the trial court erred in sentencing him for that offense.

Id. at 635, 843 S.E.2d at 191.

In sum,

> [t]he effect of the prefatory language . . . did not simply disappear upon the misdemeanor assault conviction being upgraded to a conviction for habitual misdemeanor assault. Accordingly, the fact that the General Assembly did not repeat the prefatory language in the habitual misdemeanor assault statute is of no consequence. Once [the] defendant was found guilty of both misdemeanor assault and felony assault, this invoked the prefatory language of the misdemeanor assault statute, which served

> to invalidate the misdemeanor assault conviction. This, in turn, meant that [the] defendant could not be punished for habitual misdemeanor assault.

Id. at 635–36, 843 S.E.2d at 191.

The analysis in *Fields* guides our resolution of the case at bar. Because the factual basis for Defendant's guilty plea, as delivered by the prosecutor, supported just one assault conviction, the trial court was only authorized to enter judgment and sentence Defendant for one assault—that which provided for the greatest punishment of the three assault offenses to which Defendant pleaded guilty. *See id.* Assault inflicting serious bodily injury is a Class F felony. N.C. Gen. Stat. § 14-32.4(a). By comparison, assault by strangulation (a Class H felony), *id.* § 14-32.4(b), and assault on a female (a Class A1 misdemeanor), *id.* § 14-33(c)(2), are lesser offenses. Accordingly, Defendant could only be punished for the offense of assault inflicting serious bodily injury, and not for the other two assault offenses as well.

Conclusion

For the reasons stated herein, the trial court lacked authority to enter judgment and sentence Defendant for assault on a female and assault by strangulation where his convictions were based upon the same underlying conduct as his conviction for assault inflicting serious bodily injury. As our Supreme Court explained in *Fields*, the appropriate course of action is to arrest judgment on Defendant's convictions for assault on a female in 18 CRS 85370, and assault by strangulation in 18 CRS 85784. *Fields*, 374 N.C. at 636–37, 843 S.E.2d at 191; *see also State v. Carter*, 167 N.C. App. 582, 586, 605 S.E.2d 676, 679 (2004) (arresting judgment on one of three convictions, while affirming the remaining judgments).[3]

Because Defendant was sentenced pursuant to a modified plea arrangement, which did not consolidate the charges against him, and because we conclude that two of the judgments must be arrested, we remand to the trial court with instructions to arrest the judgments entered in 18 CRS 85370 and 18 CRS 85784, and to resentence Defendant on the remaining charges, consistent with this opinion. We affirm the remaining judgments.

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3. We reiterate that we allowed Defendant's petition for writ of certiorari for the limited purpose of addressing this sole issue; therefore, we decline to address Defendant's additional arguments.

AFFIRMED IN PART; REMANDED FOR RESENTENCING.

Judge YOUNG concurs.

Judge BERGER dissents by separate opinion.

BERGER, Judge, dissenting in separate opinion.

I respectfully dissent.

A defendant seeking a writ of certiorari from this Court "must show merit or that error was probably committed below." *State v. Killette*, 268 N.C. App. 254, 256 834 S.E.2d 696, 698 (2019) (citation and quotation marks omitted). In addition, the petitioner must also demonstrate "that the ends of justice will be [ ] promoted." *King v. Taylor*, 188 N.C. 450, 451, 124 S.E. 751, 751 (1924). Defendant here has failed to make the required showing, and I would deny certiorari.

Defendant pleaded guilty to assault on a female in violation of N.C. Gen. Stat. § 14-33(c)(2), assault inflicting serious bodily injury in violation of N.C. Gen. Stat. § 14-32.4, and assault by strangulation in violation of N.C. Gen. Stat. § 14-32.4(b). In addition, Defendant pleaded guilty to violation of a domestic violence protective order.

Defendant argues that "[t]he trial court erred when it accepted a plea and entered judgment on three assault charges because the State's factual summary and other evidence before the trial court did not establish more than one assault." However, the factual showing demonstrated that Defendant (1) grabbed the victim by her neck and choked her;[1] (2) punched the victim in the face and chest, breaking her jaw and dislodging a breast implant;[2] and (3) placed his forearm on the victim's neck causing bruising and restricting her airflow.[3] Because Defendant's separate and distinct actions are not the same conduct, I respectfully dissent.

Here, in an opinion woefully short on analysis, the majority concludes that nothing in the State's factual summary suggests there was "substantial evidence of an interruption" that would support multiple

1. Charged in 18 CRS 85370 as assault on a female pursuant to N.C. Gen. Stat. § 14-33(c)(2).

2. Charged in 18 CRS 85783 as assault inflicting serious bodily injury pursuant to N.C. Gen. Stat. § 14-32.4.

3. Charged in 18 CRS 85784 as assault by strangulation pursuant to N.C. Gen. Stat. § 14-32.4(b).

assault convictions. In reaching this result, the majority ignores binding precedent and fails to conduct an analysis under *State v. Rambert*, 341 N.C. 173, 459 S.E.2d 510 (1995).

Precedent in *State v. Dew*, 270 N.C. App. 458, 840 S.E.2d 301 (2020), which the majority fails to discuss or distinguish, sets forth the proper analysis on the issue of multiple assaults.

> "In order for a defendant to be charged with multiple counts of assault, there must be multiple assaults." *State v. McCoy*, 174 N.C. App. 105, 115, 620 S.E.2d 863, 871 (2005) (citation and quotation marks omitted). To establish that multiple assaults occurred, there must be "a distinct interruption in the original assault followed by a second assault[,] so that the subsequent assault may be deemed separate and distinct from the first." *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307 (2003) (*purgandum*). To determine whether Defendant's conduct was distinct, we are to consider: (1) whether each action required defendant to employ a separate thought process; (2) whether each act was distinct in time; and (3) whether each act resulted in a different outcome. *State v. Rambert*, 341 N.C. 173, 176-77, 459 S.E.2d 510, 513 (1995).
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> In *State v. Wilkes*, 225 N.C. App. 233, 736 S.E.2d 582 (2013), the defendant initially punched the victim in the face, breaking her nose, causing bruising to her face, and damaging her teeth. The victim's son entered the room where the incident occurred with a baseball bat and hit the defendant. *Id.* at 235, 736 S.E.2d at 585. The defendant was able to secure the baseball bat from the child, and he began striking the victim with it. *Id.* at 235, 736 S.E.2d at 585. The defendant's actions in the subsequent assault "crushed two of [the victim]'s fingers, broke[] bones in her forearms and her hands, and cracked her skull." *Id.* at 235, 736 S.E.2d at 585.
>
> This Court, citing our Supreme Court in *Rambert*, determined that there was not a single transaction, but rather "multiple transactions," stating, "[i]f the brief amount of thought required to pull a trigger again constitutes a separate thought process, then surely the amount of thought put into grabbing a bat from a twelve-year-old boy and then turning to use that bat in beating a woman

constitutes a separate thought process." *Wilkes*, 225 N.C. App. at 239-40, 736 S.E.2d at 587.

In *State v. Harding*, 258 N.C. App. 306, 813 S.E.2d 254, 263, *writ denied*, *review denied*, 371 N.C. 450, 817 S.E.2d 205 (2018), this Court again applied the "separate-and-distinct-act analysis" from *Rambert*, and found multiple assaults "based on different conduct." *Id.* at 317, 813 S.E.2d at 263. There, the defendant "grabb[ed the victim] by her hair, toss[ed] her down the rocky embankment, and punch[ed] her face and head multiple times." *Id.* at 317, 813 S.E.2d at 263. The defendant also pinned down the victim and strangled her with his hands. This Court determined that multiple assaults had occurred because the "assaults required different thought processes. Defendant's decisions to grab [the victim]'s hair, throw her down the embankment, and repeatedly punch her face and head required a separate thought process than his decision to pin down [the victim] while she was on the ground and strangle her throat to quiet her screaming." *Id.* at 317-18, 813 S.E.2d at 263. This Court also concluded that the assaults were distinct in time, and that the victim sustained injuries to different parts of her body because "[t]he evidence showed that [the victim] suffered two black eyes, injuries to her head, and bruises to her body, as well as pain in her neck and hoarseness in her voice from the strangulation." *Id.* at 318, 813 S.E.2d at 263.

Dew, 270 N.C. App. at 462-63, 840 S.E.2d at 304-05.

The majority on this panel once again "reaches this result without conducting a *Rambert* analysis, or discussing that decision from our Supreme Court." *State v. Prince*, 271 N.C. App. 321, 328, 843 S.E.2d 700, 705 (2020) (Berger, J., dissenting). The majority, as it did in *Prince*, relies on *State v. Williams*, 201 N.C. App. 161, 689 S.E.2d 412 (2009), which also failed to discuss *Rambert*, and *State v. McPhaul*, 256 N.C. App. 303, 808 S.E.2d 294 (2017), which involved a robbery with a baseball bat in which the victim was struck three times in succession.

At the plea hearing, the State presented the following factual basis to the court:

> Your Honor, this occurred on May the 28th, 2018. Officers responded just after midnight that morning, Your Honor, to 37 Amirite Drive, A-m-i-r-i-t-e, Drive in Candler, North

> Carolina. The caller was Ms. Leslie Wilson who is present today, Your Honor. She stated that she'd been held captive by [ ] [D]efendant for three days and there was an active [domestic violence protective order] in place.
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> When officers arrived, Ms. Wilson was present and stated that . . . [D]efendant, had grabbed her around the neck and that while he was choking her she had taken a box cutter from him. During the assault that occurred over that night, Your Honor, Ms. Wilson was punched a number of times causing a broken jaw and a dislodged breast implant. She also had small cuts on her hands that were consistent with the altercation, as well as bruising around her neck. Ms. Wilson describes that during the strangulation she was unable to breathe and felt like she was going to pass out. She had tenderness about her neck for a few days after. Additionally, she was unable to eat food properly for about six weeks after the assault due to the condition of her jaw, Your Honor. Thankfully, thanks to health insurance, she was not out-of-pocket any money for restitution which is why we're not seeking restitution in this case.

Additionally, the victim stated:

> We were both drinking and he was getting ill, so I dumped all the beer out. Dumped out everything I could find. And then I locked myself in the bathroom. And he broke two doors trying to get to me and he kept telling me to tell him where I had hid the beer. I didn't want to tell him then that I'd poured it out because I was so afraid. But I poured it out, trying to keep him from getting to this point. And then he got after me and I had a box cutter, which I was trying to defend myself at that point, and he held me down on the bed. I actually blacked out twice. And when he was strangling me and told me I needed to learn where the pressure points was, with his elbow on my jawbone and my throat. And then when I got back up I did – I had the box cutter but I was trying – I was scared to death. I thought he was going to kill me. I couldn't even hardly talk.

Based on this factual showing, the trial court could determine that Defendant (1) grabbed the victim by her neck and choked her; (2) punched the victim in the face and chest, breaking her jaw and dislodging a breast implant; and (3) placed his forearm on the victim's neck causing bruising and restricting her airflow. Properly analyzed under

Rambert, Defendant's conduct consisted of at least three separate and distinct acts.

Defendant's decisions to grab the victim by the throat, strike the victim in the face and chest, and place his forearm upon her neck each required a different thought process. *Rambert*, 341 N.C. at 176-77, 459 S.E.2d at 513; *see also Harding*, 258 N.C. App. at 317-18, 813 S.E.2d at 263 (finding that the defendant's decisions to grab the victim's hair, throw her down the embankment, and repeatedly punch her face and head required a separate thought process than his decision to pin down the victim while she was on the ground and strangle her throat to quiet her screaming).

Moreover, the assaults were distinct in time. The trial court could infer that the assaults did not, and could not, occur simultaneously. The factual showing clearly set forth that Defendant first grabbed the victim by her neck and choked her. Defendant had to cease choking the victim with his hands in order to punch the victim in the face and chest with his fists. Defendant then had to cease punching the victim in order to place his forearm on the victim's neck. Defendant could not strike the victim with both fists and still carry out the assault by strangulation. *See Dew*, 270 N.C. App. at 462-64, 840 S.E.2d at 304-05*; see also Prince*, 271 N.C. App. at 328-29, 843 S.E.2d at 705 (Berger J., dissenting) (noting that the two assaults were distinct in time because the defendant had to cease punching the victim in order to carry out the assault by strangulation).

Finally, the injuries sustained by the victim were to different body parts. *Rambert*, 341 N.C. App. at 176-77, 459 S.E.2d at 513. The injuries from the assault inflicting serious bodily injury were a broken jaw and a dislodged breast implant, while the assault by strangulation resulted in a bruised neck and the inability to eat food for six weeks. *See Harding*, 258 N.C. App. at 318, 813 S.E.2d at 263 (finding that the assaults were separate and distinct because the evidence showed that the victim sustained injuries to different parts of her body). The State was not required to prove or otherwise show that Defendant injured the victim for the assault on a female conviction. Rather, the State was only required to demonstrate that Defendant was over the age of eighteen when he committed an assault on a female victim. *See* N.C. Gen Stat. § 14-33(c)(2) (2019).

Here, the trial court could have reasonably inferred from the factual showing that Defendant committed an assault on a female pursuant to N.C. Gen Stat. § 14-33(c)(2), an assault inflicting serious bodily injury pursuant to N.C. Gen. Stat. § 14-32.4, and an assault by strangulation pursuant to N.C. Gen. Stat. § 14-32.4(b) because of Defendant's separate and distinct actions.

STATE OF NORTH CAROLINA
v.
MARVIN LEE TYSINGER, DEFENDANT

No. COA19-6

Filed 15 December 2020

1. Appeal and Error—preservation of issues—exclusion of evidence—no offer of proof—content and relevance of evidence

Even though defendant failed to make an offer of proof to preserve appellate review of evidence excluded by the trial court in his trial for multiple sexual offenses against a child, the issue was nonetheless preserved because it was obvious from the context that defendant sought to elicit testimony about the witness's *Alford* plea in order to undermine her credibility, and the plea transcript (which required the witness to testify against defendant) was an exhibit before the trial court and in the record on appeal.

2. Evidence—Rule 403—confusion of issues—Alford plea

The trial court did not abuse its discretion in a prosecution for multiple sexual offenses against a child by excluding evidence under Evidence Rule 403 that the guilty plea entered by the victim's mother—which required the mother to testify against defendant—was an *Alford* plea. Such evidence would likely have confused the issues or misled the jury.

3. Appeal and Error—preservation of issues—failure to object at trial—failure to notice appeal properly—request for two extraordinary steps to reach merits

Where defendant's oral notice of appeal of a lifetime satellite-based monitoring (SBM) order was insufficient to confer jurisdiction on the Court of Appeals and defendant also failed to argue before the trial court that imposition of SBM constituted an unreasonable search, the Court of Appeals declined to take the two extraordinary steps necessary to hear his appeal—a writ of certiorari and invocation of Appellate Rule 2—where defendant failed to identify any evidence of manifest injustice warranting such steps.

Judge MURPHY concurring in result only.

Appeal by defendant from judgments entered on or about 16 February 2018 by Judge Martin B. McGee in Superior Court, Davidson County. Heard in the Court of Appeals 12 May 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Glover and Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

STROUD, Judge.

Marvin Lee Tysinger (Defendant) appeals judgments convicting him of multiple sexual offenses against a child. We conclude there was no error.

I. BACKGROUND

In 2012, Davidson County DSS began an investigation into the homelife of approximately ten-year-old Isabel[1] following reports of her acting out sexually with other children. Isabel was living with her mother, in her grandparents' home. Isabel's mother had been sexually abused by Isabel's grandfather as a child as well as in her adult life. Her physical examination raised some concerns but did not show any clear physical evidence of sexual abuse, but due to the overall health concerns of the living environment, Isabel and her brother were placed outside the grandparents' home into a nearby friends' home.

In 2014, Davidson County DSS discovered Isabel and her brother had been sleeping in the bed with their grandfather. During a second physical examination, the doctor discovered changes consistent with penetrating trauma and suspected Isabel had been sexually abused. Isabel admitted to DSS she had been sexually abused by Marvin Tysinger (Defendant). Isabel stated her mother had taken her to Defendant's home and allowed him to touch her inappropriately in exchange for drugs. This abuse occurred on two occasions: first, sometime between 23 January 2011 and 22 January 2012 when Isabel was ten, and second, in September 2014, when she was thirteen.

For the first alleged incident of abuse, Defendant was charged with: (1) rape of a child by adult; (2) sexual offense with a child by an adult; and (3) indecent liberties with a child. For the second alleged incident of abuse, Defendant was charged with: (1) statutory rape of a thirteen to fifteen year-old; (2) statutory sexual offense with a thirteen to fifteen year old; and (3) indecent liberties with a child.

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

At trial, Isabel's mother testified she had been using drugs and got them from Defendant. She testified she paid for the drugs by doing household chores, having sex with Defendant, and bringing Isabel to Defendant to have sex with him. Isabel's mother further testified that she had initially lied to the DSS during its investigation of Isabel's sexual abuse to protect both Defendant and herself, but she later admitted her knowledge of what Defendant had done. She also testified she had been charged with felony child abuse and pled guilty to attempted felony child abuse in exchange for her truthful testimony at Defendant's trial.

On cross-examination of Isabel's mother, Defendant's attorney questioned her extensively regarding her plea deal. After she was asked if she "actually plead guilty," she answered, "No[,]" and the State objected and asked to be heard. The trial court excused the jury, and then heard the State's objection to further questioning regarding "new aspects of the terms of the guilty plea[,]" specifically that Isabel's mother entered an *Alford* plea.[2] The State argued that the aspects of the plea related to the meaning of an *Alford* plea are not relevant and will be confusing to the jury. The trial court heard the arguments of both sides and excluded the evidence, finding "that it is not relevant to this testimony. Rather I would find it wouldn't survive the balancing test. I think the nuances of what an *Alford* plea is, why someone would do that, as far as all that detail, I would sustain that objection." Shortly thereafter, the trial court clarified that the "sustaining of the objection is two part. First, I don't find it's relevant. And, second, to the extent it is relevant, I find it does not survive the [Rule 403] balancing test."

Defendant was found guilty on all six charges, with the trial court combining the six verdicts into four judgments: (1) rape of a child; (2) felony statutory rape of a person 13-15 years old; (3) consolidation of statutory sexual offense with a person 13-15 years old and indecent liberties with a child, and (4) consolidation of sexual offense with a child with indecent liberties with a child. Defendant was sentenced to an active sentence of 300 to 420 months for each judgment, with the four sentences to run consecutively.

Following the guilty verdicts, the trial court asked, "does anybody wish to be heard further on [sex offender registration and satellite-based

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2. "An *Alford* plea allows a defendant to 'voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.' *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970)." *State v. Kimble*, 141 N.C. App. 144, 145 n.2, 539 S.E.2d 342, 343 n.2 (2000).

monitoring]?" The State responded, "No, other than the premarked findings I believe the Court should find[;]"and Defendant neither objected nor commented on sex offender registration or satellite-based monitoring at any point in the proceedings. Defendant was ordered to enroll in the sex offender registry and submit to SBM for life without a hearing. Following Defendant's sentencing, he gave oral notice of appeal in open court from the judgments. Defendant has also filed a Petition for Writ of Certiorari asking this Court to consider the SBM order.

II. ANALYSIS

A. Criminal Judgments

Defendant first contends "the trial court erred by sustaining the State's objection to evidence that . . . [Isabel's] mother, would not admit guilt when she entered her guilty plea." (Original in all caps.) Isabel's mother testified on direct examination regarding the plea deal, and defendant's counsel extensively cross-examined her:

> Q. And you and Mr. Taylor talked about you pled guilty to an attempted felony child abuse, right?
>
> A. Yeah.
>
> Q. When you came before the Court you had counsel, right, an attorney?
>
> A. Yes.
>
> Q. Who helped you with the case and talked to you all about the nature of the charges against you, right?
>
> A. Yes.
>
> Q. And you were aware of the prison time exposure on that charge, right?
>
> A. Yes.
>
> Q. Thank you. And when you pled guilty to the attempted child abuse that was part of a plea deal, wasn't it?
>
> A. Yes.
>
> Q. . . . The original charge was not attempted felony child abuse, right, it was just felony child abuse, correct?
>
> A. Correct.

Q. And under our laws that was a Class D felony, does that sound right, it was a higher level felony?

A. Yes.

. . . .

Q. The charge you pled guilty to was different from the original charge in that it was a lower level offense, right?

A. Yes.

Q. You were aware that if convicted of the original charge, the minimum exposure even for a first time offender would have been no less than 38 months or three years in prison, right?

A. Yes.

Q. But pleading to the reduced charge you knew limited your exposure on a lower level felony where a sympathetic judge could give you as little as 15 months in terms of punishment, right?

A. Yes.

Q. So it greatly reduced by more than a year the time of exposure you were facing, right?

A. Yeah.

Q. And you knew that if you were convicted of the original charge that it was mandatory prison time, right?

A. Yes.

Q. And you knew that when you pled down to the lower charge there was an opportunity for a nonprison sentence or probation, right?

A. Right.

Q. So you got that benefit in exchange for your plea, right?

A. Yes.

Q. . . . You are still awaiting sentencing on that case with an understanding there is no guarantees from the DA's office, the sentencing is totally at the discretion of the sentencing judge later, right?

A. Right.

Q. The only strings attached with your plea arrangement were that you had to testify truthfully and consistently with your previous statements and your affidavit today, right?

A. Yes.

Q. If you don't do that they can pull this deal and it's voidable, right?

A. Yes.

Q. So in that sense you have an extra motivation to stick to your story, right?

A. Yes.

Q. When you went in front of the judge in this case September 14th of last year, you didn't actually plead guilty, did you?

A. No.

At this point, as noted in the Background, the State objected. After hearing from both parties, the trial court sustained the State's objection on the basis of Rules of Evidence 401 and 403. When the jury returned, the trial court gave the following instruction:

There is evidence which tends to show that a witness testified or is testifying under an agreement with the prosecutor for a charge reduction in exchange for testimony. If you find that the witness testified for this reason in whole or in part, you should examine this testimony with great care and caution. If, after doing so, you believe the testimony in whole or in part, you will treat what you believe the same as any other believable evidence.

1. Offer of Proof

[1] Before we consider Defendant's issue, we note that the State contends Defendant failed to make an offer of proof to preserve appellate review.

> This Court has previously held that to prevail on a contention that evidence was improperly excluded, either a defendant must make an offer of proof as to what the evidence would have shown or the relevance and content

of the answer must be obvious from the context of the questioning. Further,

> this Court has explained that the reason for such a rule is that the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred. In the absence of an adequate offer of proof, we can only speculate as to what the witness' answer would have been.

State v. McCravey, 203 N.C. App. 627, 635-36, 692 S.E.2d 409, 417 (2010) (citations, quotation marks, and brackets omitted).

While it is correct that Defendant did not question Isabel's mother on *voir dire*, her plea transcript is part of the record on appeal and marked as "DEFENDANT'S EXHIBIT POST VERDICT 1[.]" Even assuming that Defendant did not admit the plea transcript at the time of the trial court's ruling on the evidence, it is in the record and was an exhibit before the trial court, and the State has stipulated and agreed to the settlement of the record.[3] Further, given the extensive line of questions and answers on cross-examination before the jury was excused from the courtroom, it is "obvious from the context of the questioning" that Defendant wished to probe the details of Isabel's mother's plea agreement even further in an attempt to undermine her credibility.[4] *Id.* The only aspect of her plea agreement not yet addressed in Isabel's mother's testimony was that it was an *Alford* plea. We thus turn to Rules 401 and 403 to consider the trial court's ruling on the evidence of Isabel's mother's plea.

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3. The State contends "[t]here is nothing in the record or counsel's arguments that even merely suggests that [Isabel's mother] understood what an *Alford* plea was and could fully explain the purpose and difference to the jury" but the plea transcript, signed by Isabel's mother, would be some evidence.

4. To the extent the State deems that "the significance of the excluded evidence" is not "obvious from the record[,]" we note "[o]ur Supreme Court has never held that a formal offer of proof is the only sufficient means to make an offer of proof: We wish to make it clear that there may be instances where a witness need not be called and questioned in order to preserve appellate review of excluded evidence. *State v. Simpson*, 314 N.C. 359, 372, 334 S.E.2d 53, 61 (1985). Rather, our Supreme Court has merely stated that a formal offer of proof is the preferred method and that the practice of making an informal offer of proof should not be encouraged, *State v. Willis*, 285 N.C. 195, 200, 204 S.E.2d 33, 36 (1974). Our Court has held that an informal offer of proof may be sufficient in certain situations to establish the essential content or substance of the excluded testimony. *State v. Walston*, 229 N.C. App. 141, 145, 747 S.E.2d 720, 724 (2013), *reversed on other grounds*, 367 N.C. 721, 766 S.E.2d 312 (2014)." *State v. Martin*, 241 N.C. App. 602, 605, 774 S.E.2d 330, 332–33 (2015) (quotation marks omitted).

2. *Alford* Plea Evidence

[2] Defendant argues the trial court erred in not allowing evidence of Isabel's mother's *Alford* plea because it was

> relevant to the question of whether the jury could accept as credible [Isabel's mother's] testimony that she actually witnessed a sexual assault on [Isabel] by . . . [Defendant] and allowed it to happen. Prior to her written statement implicating [Defendant] and her plea agreement which required her to give testimony in accord with it, [Isabel's mother] had consistently maintained that she had never seen any sexual assault on [Isabel] by [Defendant] and didn't believe he would do something like that, a claim that she was innocent of allowing her child to be sexually assaulted. If the jury had been able to hear that evidence, despite the substantial benefits of the plea terms, [Isabel's mother] was unwilling to say that she was guilty, that she was unwilling to say that she was present at sexual assault on her child and allowed it to happen, the jury could have seen this as evidence that [Isabel's mother]'s statement and testimony was the product of pressure on her from facing the risk of a mandatory three year prison sentence if convicted of the original charge.

In summary, Defendant contends evidence of the *Alford* plea would assist the jury in evaluating Isabel's mother's credibility, particularly as to her "testimony that she actually witnesses a sexual assault on [Isabel] by . . . [Defendant] and allowed it to happen" given her prior inconsistent statements regarding the matter.

a. Standard of Review

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citations and quotation marks omitted). Thus, a Rule 401 review is less deferential than a Rule 403 review which considers whether "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

b. Rules of Evidence 401 and 403

In ruling on the State's objection to evidence regarding the *Alford* plea, the trial court stated, "First, I don't find it's relevant. And, second, to the extent it is relevant, I find it does not survive the balancing test." Rule 401 provides that " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2010). Further, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2010). Furthermore, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2010).

We will assume for purposes of this appeal that the evidence of Isabel's mother's *Alford* plea was relevant. But as noted by the trial court, an *Alford* plea is "nuance[d]" and a defendant may have many reasons for an *Alford* plea. Defendant's argument itself is a nuanced way of contending that Isabel's mother lied about seeing Defendant have sex with Isabel, and the evidence of this untruthfulness, according to Defendant, is the fact that she was only willing to plead guilty to an *Alford* plea; this argument requires extensive speculation on both Isabel's mother's intent in testifying and her understanding of the relevance of an *Alford* plea.[5] Further, while Defendant focuses on the difference between what he deems a standard guilty plea and an *Alford* plea, an *Alford* plea *is* a guilty plea, just as Isabel's mother testified. In *State v. Alston*, 139 N.C. App. 787, 792-93, 534 S.E.2d 666, 669-70 (2000), this Court stated:

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5. Since Defendant did not make an offer of proof of Isabel's mother's testimony regarding her own understanding or beliefs about the meaning of an *Alford* plea, the record before us does not allow us to consider this aspect of Defendant's argument.

Nonetheless, an "*Alford* plea" constitutes "a guilty plea in the same way that a plea of *nolo contendere* or no contest is a guilty plea." *State ex rel. Warren v. Schwarz*, 219 Wis.2d 615, 579 N.W.2d 698, 706 (1998); *see Alford*, 400 U.S. at 37, 91 S.Ct. at 167–68, 27 L.Ed.2d at 171 (no "material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence"); *Birdsong*, 958 P.2d at 1130 ("An *Alford* plea is to be treated as a guilty plea and a sentence may be imposed accordingly.").

As a consequence, in accepting an "*Alford* plea" as

> a concession to a defendant, the trial court accords that defendant no implications or assurances as to future revocation proceedings.

Birdsong, 958 P.2d at 1129. In other words, an "*Alford* plea" is in no way "infused with any special promises," *Warren*, 579 N.W.2d at 711, nor does acceptance thereof constitute a promise that a defendant will never have to admit his guilt[.] *[I]d.*

As the Wisconsin Supreme Court stated in *Warren*:

> [a] defendant's protestations of innocence under an *Alford* plea extend only to the plea itself.
>
> "*There is nothing inherent in the nature of an Alford plea that gives a defendant any rights, or promises any limitations, with respect to the punishment imposed after the conviction.*"
>
> Put simply, an *Alford* plea is not the saving grace for defendants who wish to maintain their complete innocence. Rather, it is a device that defendants may call upon to avoid the expense, stress and embarrassment of trial and to limit one's exposure to punishment [and it is] not the saving grace for defendants who wish to maintain their complete innocence.

Id. at 707 (citations omitted) . . . ; *see generally Smith v. Com.*, 27 Va.App. 357, 499 S.E.2d 11, 13 (1998) (quoting *State v. Howry*, 127 Idaho 94, 896 P.2d 1002, 1004 (Ct. App.1995)) (" '[A]lthough an *Alford* plea allows a defendant

> to plead guilty amid assertions of innocence, it does not require a court to accept those assertions . . . [but the court may] consider all relevant information regarding the crime, including [the] defendant's lack of remorse.' ").

Id. (alterations in original) (ellipses omitted).

Under the circumstances of this case, we agree with the trial court that evidence Isabel's mother entered an *Alford* plea would serve to confuse the jury regarding the legal details of her plea. In particular, someone would have to explain the meaning of an *Alford* plea, and Isabel's mother's own understanding of the exact meaning of an *Alford* plea may have been different that the technical legal meaning or the intent Defendant assumes she had. Defendant's counsel cross-examined Isabel's mother at length regarding her prior inconsistent statements of the sexual abuse and her guilty plea. The trial court did not abuse its discretion in excluding evidence that the plea was an *Alford* plea because this evidence in the context of this case would likely lead to "confusion of the issues, or misleading the jury[.]" N.C.G.S. § 8C-1, Rule 403. This argument is overruled.

B. Defendant's SBM Order

[3] Defendant also contends "the trial court erred by ordering that . . . [he] submit to lifetime satellite[-based] monitoring with[out] first determining that it was a reasonable search." (Original in all caps). However, appellate review of this argument is limited in two meaningful ways: (1) Defendant's oral notice of appeal is insufficient to confer jurisdiction on this Court, and (2) Defendant did not argue before the trial court that the imposition of SBM constituted an unreasonable search under the Fourth Amendment.

First, pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, a defendant must file a written notice of appeal from an SBM order based on the civil nature of SBM proceedings. N.C. R. App. P. 3 ("Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties[.]"); *see also State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010) (holding oral notice from SBM orders does not confer jurisdiction on this Court). Our appellate courts, however, are authorized to issue writs of certiorari "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). Defendant concedes that his

oral notice of appeal from the SBM order was improper under Appellate Rule 3 and requests we grant his Petition for Writ of Certiorari to enable review of the SBM order.

Second, under Rule 10 of the North Carolina Rules of Appellate Procedure, "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). A review of the transcript shows that Defendant did not argue that the imposition of SBM constituted an unreasonable search under the Fourth Amendment. As a result, defendant has waived the ability to argue it on appeal. *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002) ("It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal."). However, in contrast to the violation under Appellate Rule 3, which Defendant concedes and attempts to remedy by issuance of writ of certiorari, Defendant does not acknowledge that he violated the preservation requirement of Rule 10.

We recognize this Court has utilized Rule 2 of the North Carolina Rules of Appellate Procedure to permit a defendant to raise an unpreserved argument concerning the reasonableness of an SBM order. Under Rule 2, "[t]o prevent manifest injustice to a party. . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it . . . upon its own initiative[.]" N.C. R. App. P. 2. "Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis in original) (citation and quotation marks omitted).

Although Defendant only acknowledges one of the extraordinary steps, he "essentially asks this Court to take two extraordinary steps to reach the merits, first by issuing a writ of certiorari to hear his appeal, and then by invoking Rule 2 of the North Carolina Rules of Appellate Procedure to address his unpreserved constitutional argument." *State v. DeJesus*, 265 N.C. App. 279, 291, 827 S.E.2d 744, 753 (citation, quotation marks, and bracket omitted), *disc. review denied*, 372 N.C. 707, 830 S.E.2d 837 (2019). However, "[d]efendant fails to identify any evidence of manifest injustice warranting the invocation of Rule 2." *State v. Worley*, 268 N.C. App. 300, 303, 836 S.E.2d 278, 282 (2019), *disc. review denied*, 375 N.C. 287, 846 S.E.2d 285 (2020). As a result, we decline to

grant Defendant's Petition for Writ of Certiorari and to invoke Rule 2 to remedy this failure. We dismiss this issue for lack of jurisdiction.

III. CONCLUSION

We conclude there was no error in the trial court's judgment, and we dismiss Defendant's request to review the SBM order.

NO ERROR IN PART; DISMISSED IN PART.

Chief Judge McGEE concurs.

Judge MURPHY concurs in the result only with separate opinion.

MURPHY, Judge, concurring in result only.

Although I rely on the same facts set out in the Majority and come to the same conclusions as the Majority, my reasoning in coming to these conclusions differs and I write separately to fully set out that reasoning.

Defendant appeals the trial court's exclusion of evidence of the victim's mother taking an *Alford* plea under N.C.G.S. § 8C-1, Rule 401 ("Rule 401") and 403 ("Rule 403"). Defendant also filed a *Petition for Writ of Certiorari* requesting this court to permit review of the order entered subjecting Defendant to lifetime satellite-based monitoring ("SBM") as it was made without a reasonableness inquiry in accordance with *Grady v. North Carolina*, 575 U.S. 306, 191 L. Ed. 2d 459 (2015). The trial court erred by finding the evidence irrelevant, as the evidence had a tendency to make the events underlying the charge less likely to have occurred, as well as by conducting a Rule 403 balancing test in which the evidence being weighed was not found to be relevant. These errors were not prejudicial, as the exclusion of the evidence did not have a reasonable possibility to have changed the outcome of the trial. Due to Defendant's failure to preserve his SBM argument by raising it at trial and failure to timely appeal the SBM order in accordance with N.C. R. App. P. 3 ("Rule 3"), I would decline to grant his *Petition for Writ of Certiorari* and invoke N.C. R. App. P. 2 ("Rule 2") to remedy these failures. I would deny his *Petition for Writ of Certiorari* and dismiss the SBM issue for lack of jurisdiction.

ANALYSIS

A. Exclusion of Evidence

Defendant argues the trial court committed error by excluding evidence of the victim's mother, Mindy,[1] accepting an *Alford* plea[2] because the exclusion prevented the jury hearing that "even after agreeing to testify that she witnessed a sexual assault on [Isabel] by [Defendant] and did nothing to stop it, [Mindy] continued to maintain that she was innocent of the charge of allowing [Isabel] to be sexually assaulted by [Defendant]." Defendant argues this was

> relevant to the question of whether the jury could accept as credible [Mindy's] testimony that she actually witnessed a sexual assault on [Isabel] by [Defendant] and allowed it to happen. . . . [From which] the jury could have seen this as evidence that [Mindy's] statement and testimony was the product of pressure on her from facing the risk of a mandatory three year prison sentence if convicted of the original charge.

Defendant argues this error was prejudicial because it kept the jury from finding Mindy not credible due to the incentivized testimony, and from considering other people as perpetrators of the sexual assault. He argues this had a reasonable possibility of changing the jury's verdict.

1. Preservation of Review

To preserve appellate review of excluded evidence, a formal or informal offer of proof must be made, unless the significance of the evidence is obvious from the Record. *State v. Jacobs*, 363 N.C. 815, 818, 689 S.E.2d 859, 861 (2010). "[A] formal offer of proof is made when counsel calls the witness[] to provide [her] proposed testimon[y] at the hearing." *State v. Martin*, 241 N.C. App. 602, 605, 774 S.E.2d 330, 333 (2015) (emphasis omitted). A formal offer of proof must show the "essential content or substance" of the excluded evidence to determine whether the evidence's exclusion was prejudicial. *Currence v. Hardin*, 296 N.C. 95, 100, 249 S.E.2d 387, 390 (1978). When a party fails to make a formal

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

2. An *Alford* plea is a plea entered pursuant to *North Carolina v. Alford*, which allows a defendant to be sentenced as if they had entered a guilty plea without actually admitting guilt. *North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970).

offer of proof, an informal offer of proof suffices if counsel "represent[s] to the [trial] court the content of the testimon[y the] witness[] would provide." *Martin*, 241 N.C. App. at 605, 774 S.E.2d at 333. Again, the question becomes whether the "essential content or substance of the excluded testimony" is communicated to preserve the right of appeal. *State v. Walston*, 229 N.C. App. 141, 145, 747 S.E.2d 720, 724 (2013), *rev'd on other grounds*, 367 N.C. 721, 766 S.E.2d 312 (2014). Additionally, when a formal or informal offer of proof is absent, the issue can be preserved if "the significance of the evidence is obvious from the [R]ecord." *State v. Hester*, 330 N.C. 547, 555, 411 S.E.2d 610, 615 (1992) (citing *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985)). Outside of these bases of preservation, "we can only speculate as to what [a witness's testimony] would have been." *State v. Barton*, 335 N.C. 741, 749, 441 S.E.2d 306, 310-11 (1994) (alterations omitted).

Mindy was never called to provide her anticipated testimony, and as a result no formal offer of proof was ever made. However, when discussing Mindy's *Alford* plea, Defendant stated:

> It's a guilty plea with an asterisk, one in which she is clearly an interested party. She has been granted quasi immunity in exchange for her testimony. And she in one breath says I've pled guilty to this. But this case relies on an understanding of all of these nuances and all of these distinctions. And in a situation where she came before the Court and pled guilty with an asterisk pursuant to [*Alford*] in a situation where she pled guilty but didn't actually admit her guilt, I think that's absolutely relevant to the defense in this case.

Defendant's statement is insufficient as an informal offer of proof because Defendant failed to provide a "specific forecast of what the testimony would be." *Walston*, 229 N.C. App. at 145, 747 S.E.2d at 724. Instead, Defendant simply argued for its admission as relevant evidence. Defendant failed to present the purpose for the evidence and its application with any particularity, but rather only broadly asserts its inclusion was needed. *See Martin*, 241 N.C. App. at 606, 774 S.E.2d at 333 ("A 'specific forecast' would typically include the substance of the testimony[,] as opposed to merely stating what he plans to ask the witness[], the basis of the witness'[s] knowledge, the basis for the attorney's knowledge about the testimony, and the attorney's purpose in offering the evidence. The informal offer should be made with *particularity* and not be made in a summary or conclusory fashion.").

The only remaining basis for preservation is if the significance of Mindy's *Alford* plea is obvious from the Record. Before the State's objection, Defendant began to cross-examine Mindy on whether she "actually plead guilty" when she appeared before the court previously, and when arguing for the admission of this evidence Defendant made clear he intended to show "she pled guilty but didn't actually admit her guilt." In this case, it is obvious from the Record Defendant intended to elicit testimony that described Mindy's *Alford* plea. The significance of her *Alford* plea is obvious from the Record. Her *Alford* plea is contained in the Record in her *Transcript of Plea*, which required her to testify against Defendant to get the benefit of her plea. Further, Mindy's inconsistencies regarding Defendant's abuse of Isabel are contained in the Record. From these sections of the Record, it is obvious Defendant's counsel was seeking to inquire about her *Alford* plea, in which she accepted guilt for sentencing purposes without actually capitulating guilt, in order to suggest she was only testifying against Defendant for her own benefit and to cast doubt on her testimony Defendant committed these acts. Defendant could argue because she did not admit her involvement in the abuse, her claim that Defendant engaged in that same abuse is undermined. Given the obvious significance of the testimony from the Record, Defendant's challenge to the exclusion of Mindy's testimony about her *Alford* plea is preserved for review.

2. Exclusion Under Rule 401 and Rule 403

In ruling on the exclusion of the *Alford* plea, the trial court stated, "[f]irst, I don't find it's relevant. And, second, to the extent it is relevant, I find it does not survive the balancing test." First, I address the relevance determination, then the subsequent balancing test in light of the relevance determination.

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. . . . Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (internal citation and marks omitted). "Abuse of discretion results where the

[trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible." N.C.G.S. § 8C-1, Rule 402 ("Rule 402") (2019). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2019). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (2019).

Even giving the trial court great deference, its finding that the evidence of Mindy's *Alford* plea was not relevant was error. Testimony related to Mindy's *Alford* plea would have shown Mindy maintained her innocence despite accepting a guilty plea. *See State v. Alston*, 139 N.C. App. 787, 792, 534 S.E.2d 666, 669 (2000) (an *Alford* plea allows a "defendant [to] enter a guilty plea while continuing to maintain his or her innocence"). By maintaining her innocence, she effectively refused to admit the events alleged actually occurred. Mindy's refusal to admit the events alleged actually occurred, which she testified Defendant participated in, has a tendency to make the existence of a fact of consequence—that Defendant actually abused Isabel—less probable than it would be without the evidence. Therefore, by definition, this evidence was relevant. Although abuse of discretion is not the standard of review here, the ruling finding the evidence not relevant is manifestly unsupported by reason, and thus would even satisfy the abuse of discretion standard. As a result, under the great deference standard of review given to Rule 401 relevancy determinations, which is less deferential than abuse of discretion, I would find this relevancy determination to be error.

The trial court proceeded to conduct a Rule 403 analysis after having found the evidence was not relevant under Rule 401. Conducting a Rule 403 analysis of evidence that is not relevant is unnecessary and improper as this evidence is inadmissible under Rule 402. N.C.G.S. § 8C-1, Rule 402 (2019). To the extent the trial court excluded the evidence based on a Rule 403 balancing test, I would find an abuse of discretion.

Despite being unnecessary, the Rule 403 balancing test here was improper as the trial court did not believe the evidence was relevant at all. Therefore, the trial court's analysis under Rule 403 evaluated whether the evidence that it assigned no relevance to was substantially outweighed by any of the Rule 403 factors. A piece of evidence assigned no relevance could never survive a Rule 403 balancing test. Accordingly, the trial court excluded the evidence. However, as explained above, the evidence is in fact relevant, making the balancing test as conducted improper. To weigh the evidence here as having no relevance is manifestly unsupported by reason, and thus is an abuse of discretion, as Mindy's denial of the events underlying her felony child abuse charge clearly makes a fact of consequence—whether or not the sexual assault by Defendant actually occurred—less likely to have occurred. To the extent the trial court excluded the evidence based on Rule 403, the trial court abused its discretion.

3. Prejudicial Error

Despite the erroneous exclusion of Mindy's testimony regarding her *Alford* plea, in order to reverse we must find the exclusion was prejudicial. "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility 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." N.C.G.S § 15A-1443(a) (2019). "The exclusion of evidence constitutes reversible error only if the appellant shows that a different result would have likely ensued had the error not occurred. . . . The burden is on the appellant not only to show error, but to show *prejudicial* error . . . ." *Latta v. Rainey*, 202 N.C. App. 587, 603, 689 S.E.2d 898, 911 (2010) (internal marks and citations omitted). Here, Defendant has not shown "that a different result would have likely ensued had the error not occurred." *Id.*

Defendant argues the exclusion of evidence was prejudicial because the additional evidence would undermine Mindy's credibility and allow jurors to consider alternative perpetrators of the crimes against Isabel. However, in Mindy's testimony, she stated: she was getting a benefit for her testimony in the form of a reduced charge; initially she told DSS Defendant did not, and would not, commit the crimes charged; as a child and an adult she was sexually assaulted by her father whom she and Isabel lived with at multiple points; and Isabel had told her mother she was sexually assaulted by her mother's boyfriend at the time. Thus, the evidence otherwise introduced showed Mindy had said Defendant did not commit the crimes on multiple occasions, there were other

potential perpetrators of the crime, and she was testifying in exchange for a benefit.

Additionally, immediately after excluding the evidence of Mindy's *Alford* plea, the trial court gave an instruction addressing the benefit she was receiving in exchange for her testimony:

> There is evidence which tends to show that a witness testified or is testifying under an agreement with the prosecutor for a charge reduction in exchange for testimony. If you find that the witness testified for this reason in whole or in part, you should examine this testimony with great care and caution. If, after doing so, you believe the testimony in whole or in part, you will treat what you believe the same as any other believable evidence.

This instruction partially addressed Defendant's concerns related to the credibility of Mindy. Also, as discussed above, the other evidence presented showed there were other potential perpetrators of the crime to consider and Mindy initially denied Defendant's involvement.

In light of this, Defendant has not shown "that a different result would have likely ensued had the error not occurred." *Latta*, 202 N.C. App. at 603, 689 S.E.2d at 911. The jury considered evidence that could establish everything Defendant argues he was robbed of as a result of the trial court excluding the evidence of the *Alford* aspect of Mindy's plea. The trial court did not commit prejudicial error in excluding this evidence.

B. Defendant's SBM Order

Defendant also challenges the trial court's order subjecting him to lifetime SBM without first holding a *Grady* hearing to determine whether the order was reasonable under the Fourth Amendment. Defendant entered oral notice of appeal for his criminal judgements; however, SBM orders are civil and therefore cannot be appealed by this method. *See Brooks*, 204 N.C. App. at 194-95, 693 S.E.2d at 206 ("In light of our decisions interpreting an SBM hearing as not being a criminal trial or proceeding for purposes of appeal, we must hold that oral notice pursuant to N.C. R. App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court. Instead, a defendant must give notice of appeal pursuant to N.C. R. App. P. 3(a) . . . ."). Defendant concedes he failed to properly appeal this issue under Rule 3 and requests we grant his *Petition for Writ of Certiorari* to enable review of the SBM order. Although he does not acknowledge it, Defendant also asks us to reach the merits

of this issue despite failing to preserve it due to his failure to object to it on constitutional grounds at trial. *See State v. Bishop*, 255 N.C. App. 767, 805 S.E.2d 367 (2017). To reach this issue, we would have to grant Defendant's *Petition for Writ of Certiorari* to hear the untimely appeal, as well as invoke Rule 2 to waive his failure to preserve the issue at trial. I would decline to do so.

"If this Court routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of noticing appeals." *Bishop*, 255 N.C. App. at 769, 805 S.E.2d at 369. Further, "[i]t is well settled that an error, even one of constitutional magnitude, that [a] defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002). This is equally true when applied to Fourth Amendment arguments under *Grady* as it relates to an SBM order. *Bishop*, 255 N.C. App at 769-770, 805 S.E.2d at 369-370. Further,

> Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances. . . . This assessment—whether a particular case is one of the rare instances appropriate for Rule 2 review—must necessarily be made in light of the specific circumstances of individual cases and parties, such as whether substantial rights of an appellant are affected. . . . In simple terms, precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis.

State v. Campbell, 369 N.C. 599, 603, 799 S.E.2d 600, 602-03 (2017) (internal citations, marks, emphasis, and footnote omitted). Defendant's failure to properly preserve and appeal the imposition of SBM without a *Grady* hearing is without excuse, and the facts of this case do not warrant the grant of Defendant's *Petition for Writ of Certiorari* or our invocation of Rule 2 to review this issue. "In consideration of the 'specific circumstances' of this case, *and only this case*, I reach the same result as the Majority and [would] choose [not] to [grant Defendant's *Petition for Writ of Certiorari* or] exercise our Rule 2 discretion . . . ." *State v. Ennis*, 848 S.E.2d 311 (Table), COA 19-896, 2020 WL 5902804, *11, (N.C. Ct. App. 2020) (unpublished) (Murphy, J., *concurring in part and*

concurring in result only in part). Having denied Defendant's *Petition for Writ of Certiorari*, I would dismiss this issue for lack of jurisdiction.

CONCLUSION

I would find that although the trial court erred by excluding relevant evidence concerning victim's mother's *Alford* plea under Rule 401 and Rule 403, this error was not prejudicial in this case. Additionally, due to Defendant's failure to properly preserve and appeal his SBM order, I would deny his *Petition for Writ of Certiorari*, leaving his appeal on this basis without jurisdiction.

STATE OF NORTH CAROLINA
v.
CIERA YVETTE WOODS, DEFENDANT

No. COA19-985

Filed 15 December 2020

1. Embezzlement—lawful possession of controlled substance by virtue of employment—motion to dismiss—sufficiency of the evidence

The trial court properly denied defendant's motion to dismiss the charge of embezzlement of a controlled substance by an employee of a registrant or practitioner (N.C.G.S. § 90-108(a)(14))—which defendant based on an alleged insufficiency of the evidence to show she lawfully possessed a prescription obtained by fraud—where the evidence showed defendant was a pharmacy tech for CVS pharmacy, she received an incomplete prescription for Oxycodone along with a $100 bill from an unidentified individual, she accessed the CVS patient portal and completed the prescription with another patient's information, she sent the prescription to the pharmacist to be filled, and once it was filled and placed in the waiting bin she retrieved the fraudulently filled prescription and delivered it to the unidentified individual. Because defendant was allowed to take prescriptions from the waiting bins once they were filled by the pharmacist, she had access to the fraudulently filled prescription by virtue of her employment.

2. Embezzlement—embezzlement of controlled substance by employee of registrant—motion to dismiss—sufficiency of evidence that employer is a registrant

In a trial for embezzlement of a controlled substance by an employee of a registrant (N.C.G.S. § 90-108(a)(14)) where two witnesses testified that the employer, CVS pharmacy, was a registrant with several organizations such as the State Board of Pharmacy and the DEA and was authorized to dispense medications—but did not clearly identify CVS as a registrant of the Commission of Mental Health Disabilities, and Substance Abuse Services under N.C.G.S § 90-87(25)—there was more than a scintilla of evidence which would permit a reasonable juror to conclude that CVS was an entity that was registered and authorized to distribute controlled substances. Therefore, the trial court did not err by denying defendant's motion to dismiss based upon an alleged insufficiency of the evidence to show CVS was a "registrant."

3. Embezzlement—embezzlement of a controlled substance by an employee of a registrant—failure to instruct jury on definition of registrant—plain error analysis

In a case involving embezzlement of a controlled substance by an employee of a registrant (N.C.G.S. § 90-108(a)(14)) where defendant did not request a jury instruction regarding the definition of "registrant," the trial court did not commit plain error by failing to give such an instruction. Defendant could not show any error which seriously affected the fairness, integrity, or public reputation of judicial proceedings where the instruction given by the court mirrored the statutory language of N.C.G.S. § 90-108(a)(14) and required the State to prove CVS Pharmacy was a registrant beyond a reasonable doubt, and where witness testimony provided sufficient evidence that CVS was a registrant of the State of North Carolina and was authorized to fill and deliver prescriptions.

Judge BROOK dissenting.

Appeal by defendant from judgment entered 10 May 2019 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew L. Liles, for the State.

Appellate Defender Glenn Gerding, by Appellate Defender Glenn Gerding and Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

BERGER, Judge.

On May 9, 2019, a Mecklenburg County jury found Ciera Yvette Woods ("Defendant") guilty of embezzlement of a controlled substance by an employee of a registrant or practitioner under N.C. Gen. Stat. § 90-108(a)(14). Defendant appeals, arguing that the trial court (1) erred when it denied Defendant's motion to dismiss because the State did not prove Defendant's actions constituted embezzlement or that CVS Pharmacy ("CVS") was a "registrant;" and (2) plainly erred when it failed to instruct the jury on the statutory definition of "registrant." We disagree.

Factual and Procedural Background

Defendant was employed as a pharmacy technician at CVS in Charlotte, North Carolina. As a pharmacy technician, Defendant was responsible for the intake of prescriptions, entry of prescriptions to create labels for medication, and ensuring that the information on the prescriptions was correct. Once Defendant verified that the prescription information was correct, the pharmacist would fill the prescription and place it in a waiting bin for Defendant to retrieve and distribute to the customer.

On April 16, 2016, Defendant was receiving patient prescriptions at the drive-thru window. During Defendant's shift, an unidentified male provided Defendant with two prescriptions – one for Oxycodone, and one for Percocet. The Percocet prescription was complete, but the Oxycodone prescription only had the "drug listed and quantity" and did not provide patient information. A $100 bill was placed in between the two prescriptions. The unidentified male asked Defendant to complete the Oxycodone prescription with another patient's information.

Defendant accepted $100.00 from the unidentified individual and then accessed CVS's "patient portal system," retrieved a different patient's information, and fraudulently filled out the incomplete Oxycodone prescription using that patient's information. The two prescriptions were filled by the pharmacist and placed in a waiting bin. Defendant retrieved the prescriptions from the bin and gave them to the unidentified individual.

That same day, a CVS pharmacist filed a report expressing her concern that a technician may be passing fraudulent prescriptions. CVS then initiated an investigation. The following day, after reviewing the security footage and the prescriptions filled the prior day, the investigators interviewed Defendant. Defendant signed a written statement

admitting that she took prescriptions from an individual in the drive-thru, and that she received $100.00 in payment to fraudulently process the two prescriptions.

Defendant was indicted on one count of embezzlement of a controlled substance by an employee of a registrant or practitioner pursuant to N.C. Gen. Stat. § 90-108(a)(14). At trial, Defendant made a motion to dismiss arguing that she did not violate N.C. Gen. Stat. § 90-108(a)(14) because she did not rightfully possess the prescriptions when she forged the patient information. Defendant also argued at trial that traditional embezzlement requires authorized possession of the diverted property. The trial court denied Defendant's motion to dismiss, and Defendant was convicted of embezzlement of a controlled substance by an employee of a registrant or practitioner under N.C. Gen. Stat. § 90-108(a)(14).

Defendant appeals, arguing that the trial court (1) erred when it denied Defendant's motion to dismiss because the State did not prove Defendant's actions constituted embezzlement or that CVS was a "registrant;" and (2) plainly erred when it failed to instruct the jury on the statutory definition of "registrant."

Analysis

I. Motion to Dismiss

"We review the trial court's denial of a motion to dismiss *de novo*." *State v. Blakney*, 233 N.C. App. 516, 518, 756 S.E.2d 844, 846 (2014) (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).

> "If there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court's duty to submit the case to the jury." *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958). "The terms 'more than a scintilla of evidence' and 'substantial evidence' are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002) (citation omitted). "In ruling on a motion to dismiss for insufficient

> evidence, the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence." *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91 (1997) (citation omitted).

State v. Pabon, 273 N.C. App. 645, 651-52, 850 S.E.2d 512, 520 (2020). Further, "in borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury." *State v. Coley*, 257 N.C. App. 780, 789, 810 S.E.2d 359, 365 (2018) (*purgandum*).

A. Access

[1] Defendant contends that the evidence presented at trial did not show embezzlement because Defendant never lawfully possessed the prescriptions which were obtained through fraud. However, Defendant was not charged with embezzlement of property received by virtue of employment pursuant to N.C. Gen. Stat. § 14-90. Rather, Defendant was convicted of violating N.C. Gen. Stat. § 90-108(a)(14), which states, in relevant part:

> (a) It shall be unlawful for any person:
>
> > (14) Who is a registrant or practitioner or an employee of a registrant or practitioner and who is authorized to possess controlled substances or has access to controlled substances by virtue of employment, to embezzle or fraudulently or knowingly and willfully misapply or divert to his or her own use or other unauthorized or illegal use or to take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or divert to his or her own use or other unauthorized or illegal use any controlled substance which shall have come into his or her possession or under his or her care.

N.C. Gen. Stat. § 90-108(a)(14) (2019).

"[T]his Court's duty is to carry out the intent of the legislature. As a cardinal principle of statutory interpretation, if the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *State v. Reaves-Smith*, 271 N.C. App. 337, 343, 844 S.E.2d 19, 24 (2020) (citation omitted).

By its plain language, N.C. Gen. Stat. § 90-108(a)(14) makes it unlawful for an employee who is "authorized to possess controlled substances"

or who has "access to controlled substances by virtue of their employment," to misapply or divert a controlled substance for an unauthorized or illegal use. N.C. Gen. Stat. § 90-108(a)(14). *See State v. Moraitis*, 141 N.C. App. 538, 541, 540 S.E.2d 756, 757-58 (2000) ("A statute that is clear on its face must be enforced as written . . . [w]e presume that the use of a word in a statute is not superfluous and must be accorded meaning, if possible" (citation and quotation marks omitted)). Accordingly, because N.C. Gen. Stat. § 90-108(a)(14) has two clauses connected by the disjunctive "or," the State had the burden of proving Defendant was either "authorized to possess controlled substances" or had "access to them by virtue her employment." *See State v. Conway*, 194 N.C. App. 73, 77-78, 669 S.E.2d 40, 43 (2008) ("[W]here a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g. 'or'), the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them." (citation and quotation marks omitted)).

At trial, Dr. Lauren Kaskie, a CVS pharmacist, testified that when a prescription was dropped off at the pharmacy, the pharmacy technician had "access to patient portals" which included patient information, and would "go to [the] computer system, . . . to generate a label." Once a label is generated, the prescription is then filled by the pharmacist and placed in a "waiting bin" where the pharmacy technician would then "walk to the waiting bin to retrieve" the prescription for the customer. Dr. Kaskie further testified that pharmacy technicians cannot count or fill Schedule II prescriptions, including Oxycodone and Percocet, but "they are entrusted with handing prescriptions to the appropriate customer."

Here, after Defendant received the incomplete Oxycodone prescription, she accessed the CVS patient portal system and completed the prescription with a different patient's information. Defendant then sent the prescription to the pharmacist to be filled. After being placed in the waiting bin, Defendant took the fraudulently filled prescription and delivered it to the unidentified individual. Accordingly, Defendant had "access to [the prescriptions] by virtue of her employment" because she was allowed to take prescriptions from the waiting bins once they were filled by the pharmacist. Therefore, the trial court did not err in denying her motion to dismiss.

B. Registrant

[2] Defendant next argues that the State failed to present evidence that CVS was a "registrant" under N.C. Gen. Stat. § 90-87(25). " 'Registrant' means [any legal entity] registered by the [Commission for Mental

Health, Developmental Disabilities, and Substance Abuse Services] to manufacture, distribute, or dispense any controlled substance as required by this Article." N.C. Gen. Stat. § 90-87(3a), (20), (25) (2019).

At trial, two witnesses testified that CVS was a "registrant." During the State's direct examination of Dr. Kaskie, the following colloquy occurred:

> [THE STATE]: Is CVS Pharmacy, Incorporated, a registrant of any boards or commissions?
>
> [DR. KASKIE]: Yes.
>
> [THE STATE]: And do you know which?
>
> [DR. KASKIE]: They register with both the State, so the North Carolina Board of Pharmacy, and also the DEA.
>
> [THE STATE]: And what does that mean that they are a registrant of any of these boards or commissions?
>
> [DR. KASKIE]: Those boards are responsible for making sure that things are in check, such as the amounts and limits of certain medications and substances that are dispensed through the course of time. They make sure those things are not in excess.
>
> [THE STATE]: Does that registration with those boards and the DEA enable or authorize CVS to dispense prescription medication?
>
> [DR. KASKIE]: Yes, they do.

Further, during the State's direct examination of Ms. Yolanda Smith, a CVS pharmacy technician, the following exchange occurred:

> [THE STATE]: And do you know whether CVS is a registrant that is authorized by law to dispense medications?
>
> [SMITH]: Yes, ma'am.

Although the testimony presented at trial did not clearly identify CVS as a "registrant" of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services under N.C. Gen. Stat. § 90-87(25), when taken as a whole and in the light most favorable to the State, there was "more than a scintilla of competent evidence" which would permit a reasonable juror to conclude that CVS is an entity that is registered and authorized to distribute or dispense controlled substances. *See State v. Johnson*, No. COA16-509, 2016 WL 7100632, at *7 (N.C. Ct. App. Dec. 6, 2016) (unpublished) (finding the VA a practitioner

because sufficient evidence was presented tending to show the VA was a federally funded hospital capable of dispensing or administering controlled substances).

Accordingly, when viewed in the light most favorable to the State, there was more than a scintilla of competent evidence which "permits a reasonable inference that Defendant" committed embezzlement of a controlled substance by an employee of a registrant or practitioner pursuant to N.C. Gen. Stat. § 90-108(a)(14). Therefore, the trial court did not err in denying Defendant's motion to dismiss.

II. Jury Instructions

[3] Defendant concedes that she failed to object to the jury instructions and that she did not request an instruction on the statutory definition of "registrant." However, Defendant argues that the trial court committed plain error by not instructing the jury on the statutory definition of "registrant." We disagree.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

Reaves-Smith, 271 N.C. App. at 346-47, 844 S.E.2d at 26 (quoting *State v. Lawrence*, 365 N.C. 506, 516-17, 723 S.E.2d 326, 334 (2012)).

"In instructing the jury, it is well settled that the trial court has the duty to declare and explain the law arising on the evidence relating to each substantial feature of the case." *Id.* at 347, 844 S.E.2d at 26 (citation and quotation marks omitted). "[I]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333 (citation and quotation marks omitted).

Here, the trial court instructed the jury on embezzlement of a controlled substance by an employee of a registrant or practitioner as follows:

> The defendant has been charged with embezzlement of a controlled substance by an employee of a registrant

> or a practitioner, which occurs when an employee of a registrant, CVS Pharmacy, Incorporated, which is an entity capable of owning property, intentionally, fraudulently and dishonestly misapplies or diverts a Schedule II controlled substance to an unauthorized or illegal use.
>
> For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that the defendant was an employee of a registrant, CVS Pharmacy, Incorporated, an entity capable of owning property. . . .

Even if we assume the trial court erred in its instruction to the jury, Defendant has failed to show that the "error had a probable impact on the jury's finding that the defendant was guilty." *Reaves-Smith*, 271 N.C. App. at 346-47, 844 S.E.2d at 26 (citation omitted). In fact, the trial court's instruction mirrored the statutory language of N.C. Gen. Stat. § 90-108(a)(14). Specifically, the instruction provided that the State must prove CVS was a "registrant" beyond a reasonable doubt. Further, the testimony of Dr. Kaskie and Ms. Smith provided sufficient evidence that CVS was a registrant of the State of North Carolina and was authorized to fill and deliver prescriptions. Thus, Defendant cannot show that the trial court's alleged error prejudiced Defendant. Moreover, Defendant has failed to demonstrate that this is the exceptional case in which the purported error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 347, 844 S.E.2d at 26 (quoting *Lawrence*, 365 N.C. at 516-17, 723 S.E.2d at 334). Accordingly, Defendant's argument is overruled.

Conclusion

For the reasons stated herein, the trial court did not err when it denied Defendant's motion to dismiss, and Defendant has failed to demonstrate plain error in trial court's instructions to the jury.

NO ERROR.

Judge ZACHARY concurs.

Judge BROOK dissents in separate opinion.

BROOK, Judge, dissenting.

I respectfully dissent. Because I would conclude that there was insufficient evidence that Defendant embezzled oxycodone under N.C.

Gen. Stat. § 90-108(a)(14), as the State charged, I would hold the trial court erred in denying Defendant's motion to dismiss for insufficient evidence and reverse Defendant's conviction.

I. Background

A. Factual Background

On 16 April 2016, Defendant worked as a pharmacy technician at CVS pharmacy located at 5100 Beatties Ford Road in Charlotte, North Carolina. As a pharmacy technician, Defendant received and counted prescriptions, performed data entry, and assisted the pharmacist with other requests.

On that date, Defendant volunteered to work at the drive-through window at CVS. An unidentified man drove to the drive-through window, handed Defendant two prescriptions, both for oxycodone, a Schedule II medication, and a $100 bill. One prescription was filled out in the name of Pamela Crowe, but the other was incomplete except for the medication and dosage. The unidentified man asked Defendant to complete the blank prescription with another patient's information, William Thompson, and provided her with a date of birth. Defendant retrieved information regarding a customer in the CVS database named William Thompson and filled out the remainder of the prescription with that information. Defendant then initiated the process of filling the prescriptions. The man who provided Defendant with the prescriptions and the $100 bill later returned to the drive-through to pick up the medications. She provided the unknown man with at least one and up to six prescriptions in this manner. Defendant later admitted to retrieving information regarding Pamela Crow in the CVS database and entering her information on a prescription as well.

At trial, the pharmacist who worked at that CVS location, Dr. Lauren Kaskie, testified regarding the process of filling a prescription. She testified that, upon receiving a written prescription from the patient, the pharmacy technician examines the prescription to ensure it includes (1) the patient's name, (2) the name of the medication, and (3) the prescribing doctor's signature. Then the technician enters the information from that prescription into the computer system to generate a label and bill the insurance company.

Dr. Kaskie also testified that different types of medications are classified according to the legal limitations on their prescription. She testified that "CI" or Class I medications "are illegal drugs in this country." "CII" or Class II medications, in contrast, can be obtained via a prescription but "are the second highest class of controlled substance

[with] the most potential for abuse and misuse and are a lot of times [obtained] illegally because of potential street value." Class III, IV, and V medications "have much less of a chance [for abuse and misuse] as you step down the ranks[.]" The process for filling a prescription differs depending on the classification level of the medication. When a customer presents with a prescription for a CIII, IV, or V medication, the pharmacy technician "retrieve[s] the medication from the shelf, count[s] it out, and pass[es] it to the pharmacist for final verification." However, pharmacy technicians do not have the authority to fill prescriptions for CII drugs. Dr. Kaskie testified that "in the case of a CII controlled substance, they print the label and then send it to the pharmacist who is the only person allowed to handle the CII narcotics." The pharmacist retrieves the CII medication from a locked safe and fills the prescription, and only the pharmacist possesses the code to enter the safe containing CII medications.

After a pharmacist has counted the pills for a CII medication prescription and placed the pills in a bottle, the pharmacist places the bottle in a bag, the bag is stapled shut with a prescription label, and the bagged medication is placed in a waiting bin. When a patient returns to collect the CII prescription, the technician requests the patient's name, date of birth, and identification, and then may hand the packaged medication to the patient.

Dr. Kaskie testified that she began to suspect illegal activity on 16 April 2016 when she noticed the CII prescriptions coming into the pharmacy were for high doses, and that they were in the names of regular customers whom she did not know to be prescribed controlled substances. She also noticed that one of the prescriptions was not billed to insurance, which she "considered a red flag for controlled substances." When she noticed she had seen the same doctor's name on three or four prescriptions for controlled substances throughout the day, she "became suspicious of the legitimacy of the prescriptions" and ceased to fill them. Defendant ultimately admitted to this conduct and that her conduct violated CVS policy.

B. Procedural History

A Mecklenburg County grand jury indicted Defendant by a superseding indictment on 2 April 2018 for "embezzlement of a controlled substance by employee of a registrant or practioner [sic]" under N.C. Gen. Stat. § 90-108(a)(14). The indictment reads as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 16th day of April, 2016,

> in Mecklenburg County, [Defendant] unlawfully, willfully and feloniously did as an employee of a registrant, CVS Heath [sic] Corp., a corporation, doing business as CVS Pharmacy, a legal entity capable of owning property, and who had access to controlled substances by virtue of her employment, embezzle and fraudulently, knowingly, and willfully misapply and divert to an unauthorized or illegal use, Oxycodone . . . in that the defendant accessed the patient profile system to obtain and enter biographical information of a patient on to a prescription that lacked patient information. The defendant then filled the prescription in return for $100.00 which the defendant used for personal use. At the time the defendant . . . was the agent and employee of CVS Heath [sic] and in that capacity had been entrusted to receive the property described above and in that capacity the defendant did receive and take into her care and possession that property.

Defendant was tried at the 6 May 2019 Criminal Session of the Superior Court in Mecklenburg County before the Honorable Karen Eady-Williams. At the close of the State's evidence, Defendant made global motions to dismiss based on insufficient evidence and fatal variances between the allegations in the indictment and the evidence presented at trial. She renewed these motions after declining to present evidence for the defense.

The jury found Defendant guilty of "embezzlement of a controlled substance by an employee" on 10 May 2019. The trial court entered judgment on the jury's verdict and sentenced her to eight to nineteen months of active imprisonment, suspended for 18 months of supervised probation. Defendant entered notice of appeal in open court.

II. Standard of Review

"The denial of a motion to dismiss for insufficient evidence is a question of law[ ] which this Court reviews *de novo*[.]" *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (internal citations omitted). "Under a *de novo* review, th[is C]ourt 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) (internal marks and citation omitted).

III. Analysis

I agree with the majority that Defendant's conduct falls within the broad reach of N.C. Gen. Stat. § 90-108(a)(14) because the evidence at

trial established that she had "access to controlled substances by virtue of [her] employment" and that she "fraudulently or knowingly and willfully misappl[ied] or divert[ed] to . . . her own use or other unauthorized or illegal use" oxycodone. N.C. Gen. Stat. § 90-108(a)(14) (2019).

However, the State did not charge her with *only* having misapplied or diverted the oxycodone; the State charged her with having "embezzle[d] *and* fraudulently, knowingly, and willfully misappl[ied] and divert[ed] to an unauthorized or illegal use, Oxycodone[.]" (Emphasis added.) In other words, whereas the statute at issue requires that a defendant have "embezzle[d] *or* fraudulently or knowingly and willfully misappl[ied] or divert[ed]" a controlled substance, *id.* (emphasis added), the State took it upon itself to charge Defendant with having both embezzled *and* misapplied or diverted oxycodone. And because the State did not establish that Defendant both diverted the oxycodone *and* that she embezzled it, I respectfully dissent.

In reviewing a motion to dismiss for insufficient evidence, the trial court must determine

> whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. In deciding whether substantial evidence exists[, t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Hill, 365 N.C. 273, 275, 715 S.E.2d 841, 842-43 (2011) (internal marks and citations omitted).

Additionally, "[t]he Due Process Clause of the United States Constitution requires that the sufficiency of the evidence to support a conviction be reviewed with respect to the theory of guilt upon which the jury was instructed." *State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510 (1996) (citing *Presnell v. Georgia*, 439 U.S. 14, 16, 99 S. Ct. 235, 236-37, 58 L. Ed. 2d 207, 211 (1978)). Indeed, "[i]t is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the

bill of indictment. The allegation and proof must correspond." *State v. Jackson*, 218 N.C. 373, 376, 11 S.E.2d 149, 151 (1940). Where there is "[a] variance between the criminal offense charged and the offense established by the evidence[,]" the State has "in essence [ ] fail[ed] . . . to establish the offense charged." *State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971). A motion to dismiss based on a fatal variance

> is based on the assertion, not that there is no proof of a crime having been committed, but that there is none which tends to prove that the particular offense charged in the bill has been committed. In other words, the proof does not fit the allegation, and therefore leaves the latter without any evidence to sustain it. It challenges the right of the State to a verdict upon its own showing, and asks that the court, without submitting the case to the jury, decide, as matter of law, that the state has failed in its proof.

State v. Law, 227 N.C. 103, 104, 40 S.E.2d 699, 700 (1946) (citation omitted).

Particularly pertinent to the case in controversy, in *State v. Campbell*, 257 N.C. App. 739, 810 S.E.2d 803 (2018), *aff'd as modified*, 373 N.C. 216, 835 S.E.2d 844 (2019), our Court held that an indictment charging the defendant with larceny of property belonging to a pastor and a church fatally varied from the evidence adduced at trial, which tended to show that only the church owned the property. 257 N.C. App. at 766, 810 S.E.2d at 819.

The key question in this appeal is whether the conduct proved by the State supports the conduct charged by the indictment. Defendant was charged by indictment under N.C. Gen. Stat. § 90-108(a)(14) for "embezzlement of a controlled substance by employee of a registrant or practioner [sic]." The relevant portions of the indictment state, "[Defendant] unlawfully, willfully and feloniously did as an employee of a registrant, . . . CVS Pharmacy, . . . and who had access to controlled substances by virtue of her employment, embezzle and fraudulently, knowingly, and willfully misapply and divert to an unauthorized or illegal use, Oxycodone." Therefore, in order to survive a motion to dismiss, the State must have offered sufficient evidence to prove that Defendant (1) had access to controlled substances by virtue of her employment; that she (2) unlawfully, willfully and feloniously embezzled oxycodone; and that she (3) fraudulently, knowingly, and willfully misapplied and diverted oxycodone to an unauthorized or illegal use. *See Jackson*, 218 N.C. at 376, 11 S.E.2d at 151 ("It is a rule of universal observance in the

administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. The allegation and proof must correspond."). Defendant does not dispute that the State offered sufficient evidence of elements (1) and (3) above. Instead, she argues that her motion to dismiss should have been granted because the State charged her with having embezzled the oxycodone but failed to introduce any evidence of embezzlement, only of fraudulent, willful, or knowing misapplication or diversion.

Determining whether the State offered sufficient evidence of embezzlement thus turns on what that term means in the statute at issue. The State argues that "to embezzle" under § 90-108(a)(14) means something different than our appellate courts have interpreted it to mean in the context of § 14-90, the "traditional" embezzlement statute. The State argues that § 90-108(a)(14)

> is clearly worded in the disjunctive to cover both employees with authorized possession and employees like defendant with mere access. . . . The fact that the General Assembly chose to include not only employees with authorized possession but those with mere access within N.C. Gen. Stat. § 90-108(a)(14) is clear intent to broaden its application beyond that of traditional embezzlement.

Defendant contends that § 90-108(a)(14), "as written, appears to create *multiple* offenses, one of which is embezzlement[,]" and that our case law's "traditional" definition of embezzlement applies to § 90-108(a)(14).

In statutory interpretation, "[t]he beginning point is the relevant statutory text." *United States v. Quality Stores, Inc.*, 572 U.S. 141, 145, 134 S. Ct. 1395, 1399, 188 L. Ed. 2d 413, 419 (2014). The relevant language of N.C. Gen. Stat. § 90-108(a) is as follows:

> It shall be unlawful for any person . . . [w]ho is . . . an employee of a registrant or practitioner and who is authorized to possess controlled substances or has access to controlled substances by virtue of employment, to embezzle or fraudulently or knowingly and willfully misapply or divert to his or her own use or other unauthorized or illegal use or to take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or divert to his or her own use or other unauthorized or illegal use any controlled substance which shall have come into his or her possession or under his or her care.

N.C. Gen. Stat. § 90-108(a)(14) (2019). In determining the plain meaning of a statute, "we give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009).

Moreover, the prior construction canon applies here, and it states that "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute is presumed to incorporate that interpretation." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 330, 135 S. Ct. 1378, 1386, 191 L. Ed. 2d 471, 480 (2015) (internal marks and citation omitted). Relatedly, "it is always presumed that the Legislature acted with full knowledge of prior and existing law." *Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977). "Where the text permits[,]" the Legislature's "enactments should be construed to be consistent with one another." *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 108, 130 S. Ct. 2433, 2447, 177 L. Ed. 2d 424, 442 (2010).

Applying the above rules of statutory interpretation makes plain Defendant's conduct does not constitute embezzlement pursuant to § 90-108(a)(14).

The majority opinion does not address the State's argument that Defendant's conduct constitutes embezzlement in this context and instead concludes that Defendant's motion to dismiss was properly denied because the State proved that Defendant had "access to [controlled substances] by virtue of her employment" and that she misapplied or diverted a controlled substance for an unauthorized or illegal use. This reasoning ignores the fact that the State charged Defendant with embezzlement. In so doing, the majority implicitly reads the statute's "to embezzle" as covering the same conduct as to "fraudulently or knowingly and willfully misapply or divert to his or her own use or other unauthorized or illegal use[.]" N.C. Gen. Stat. § 90-108(a)(14) (2019). But this impermissibly renders the "to embezzle" language superfluous in contravention of the requirement that we give each word in the statute meaning. *See N.C. Dep't of Corr.*, 363 N.C. at 201, 675 S.E.2d at 649.

The State's argument, that the language of § 90-108(a)(14) changes the meaning of "to embezzle," presents a somewhat closer question than the interpretation put forward by the majority[1] but must meet a similar fate. Returning to the pertinent portions of the statutory text, it merits its mention that the statute's provisions describe *to whom* the statute

1. Tellingly, the State does not make the argument adopted by the majority.

applies and *what* conduct it covers. The who: "any person . . . who is authorized to possess controlled substances or has access to controlled substances by virtue of employment[.]" N.C. Gen. Stat. § 90-108(a)(14) (2019). The what: "to embezzle or fraudulently or knowingly and willfully misapply or divert to his own use or other unauthorized or illegal use[.]" *Id*. As Defendant notes in her brief, "[t]he statute, as written, appears to create *multiple* offenses, one of which is embezzlement." It also criminalizes, for example, secreting controlled substances with the intent to take them later, as well as "tak[ing or] mak[ing] away with . . . any controlled substance[.]" *Id.* As noted above, however, the State must establish embezzlement *and* fraudulent or knowing misapplication or diversion when it charges both offenses. The crux of the State's argument is that the "who" language—including those with "access" under the broad reach of the statute—changes the meaning of the "what" language—"embezzle[ment]."

Our courts have long settled the meaning of embezzlement, including in interpreting § 14-90(b), the pertinent language of which also appears in § 90-108(a)(14). Section 14-90(b) reads in relevant part as follows:

> Any person who shall: (1) **Embezzle or fraudulently or knowingly and willfully misapply or convert to his own use**, or (2) Take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, any money, goods or other chattels, . . . shall be guilty of a felony.

N.C. Gen. Stat. § 14-90 (2019) (emphasis added). Nearly identically, § 90-108(a)(14) states in relevant part that it is unlawful for any person who is an employee of a registrant or practitioner and has access to controlled substances

> **to embezzle or fraudulently or knowingly and willfully misapply or divert to his or her own use** or other unauthorized or illegal use or to take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or divert to his or her own use or other unauthorized or illegal use any controlled substance[.]

Id. § 90-108(a)(14) (emphasis added). Because the relevant language regarding what conduct the statutes proscribe is identical, we turn to our case law interpreting "embezzle" under § 14-90 for guidance regarding the term's meaning in § 90-108(a)(14). A review of this case law

seriously undermines the State's argument as our appellate courts have long drawn a distinction between mere access to property and the rightful possession that is a necessary component of embezzlement.

In *State v. Weaver*, 359 N.C. 246, 607 S.E.2d 599 (2005), our Supreme Court addressed the issue of whether the defendant committed embezzlement when she, an administrative employee, "took a corporate signature stamp without permission and wrote unauthorized corporate checks, thereby misappropriating funds from her employer." *Id.* at 247, 607 S.E.2d at 599. Because "the employee did not lawfully possess or control the misappropriated funds[,]" the Supreme Court concluded that the State did not satisfy "the lawful possession or control element of the crime of embezzlement" and affirmed the decision of the Court of Appeals which reversed the defendant's convictions. *Id.* The Supreme Court considered that the defendant did not have authority to use her employer's signature stamp or to write checks from the business's accounts without the express authorization of her employer on a case-by-case basis. *Id.* at 256, 607 S.E.2d at 605. First, the Court noted that "[h]istorically, since the General Assembly codified the criminal offense of embezzlement in North Carolina, the criminal act has hinged on a defendant's misappropriation of property in his/her lawful possession or care due to employment or fiduciary capacity." *Id.* Interpreting the defendant's conduct in the context of the embezzlement statute, the Supreme Court concluded as follows:

> While [the defendant] had *access* to the checks and signature stamp by virtue of her status as an employee at R&D and International Color, we cannot say, based on these facts, that [the defendant]'s possession of this property was *lawful*[,] nor are we persuaded that this property was under [the defendant]'s care and control as required by N.C.G.S. § 14-90. Because [the defendant] never lawfully "possessed" the misappropriated funds and because the funds were not "under her care" we conclude that [the defendant] did not commit the crime of embezzlement as defined in N.C.G.S. § 14-90.

Id. (alterations omitted). In short, despite the fact that the defendant had access to the funds, "[b]ecause her possession [of the misappropriated funds], if any, was not lawful, the crime of embezzlement has not occurred." *Id.* at 259, 607 S.E.2d at 607 (citing *State v. Speckman*, 326 N.C. 576, 578, 391 S.E.2d 165, 166 (1990) ("This Court has held that to constitute embezzlement, the property in question initially must be acquired lawfully, pursuant to a trust relationship, and then wrongfully converted.")).

Where a defendant obtains property "by a trick or fraudulent device[,]" and where it is "only by this trick or fraudulent device that the taking was accomplished," he is not guilty of embezzlement but of obtaining property by false pretenses or "larceny by trick." *State v. Griffin*, 239 N.C. 41, 45, 79 S.E.2d 230, 233 (1953); *see also State v. Keyes*, 64 N.C. App. 529, 532, 307 S.E.2d 820, 822-23 (1983) ("There is a difference between having *access* to property and possessing property in a fiduciary capacity. Embezzlement is the fraudulent conversion of property by one who has *lawfully* acquired possession of it for the use and benefit of the owner, i.e., in a fiduciary capacity. Larceny is the fraudulent conversion of property by one who has acquired possession of it by trespass.") (emphasis added). In contrast to embezzlement, "to constitute false pretenses the property must be acquired unlawfully at the outset, pursuant to a false representation." *Speckman*, 326 N.C. at 578, 391 S.E.2d at 166. "The fact that a defendant is an employee of a business does not change theft of goods from larceny to embezzlement if the defendant never had lawful possession of the property." *Keyes*, 64 N.C. App. at 532, 307 S.E.2d at 823.

This case law makes three things plain, each of which calls the State's argument here further and further into doubt. First, there is a settled meaning of embezzlement in our case law, creating a presumption that it is used in the same sense in § 90-108(a)(14). *See Armstrong*, 575 U.S. at 330, 135 S. Ct. at 1386. Second, that settled meaning centers around misappropriation of something lawfully possessed. *Weaver*, 359 N.C. at 247, 607 S.E.2d at 599. Third, access to property does not determine whether it is lawfully possessed. *Id.*

Moreover, and echoing the central failing of the majority opinion, adopting the State's capacious interpretation of embezzlement in this context renders the "fraudulently . . . misapply" language that follows it superfluous. Put another way, if "to embezzle" is unmoored from lawful possession as the State suggests, the statute need not also prohibit fraudulent misapplication.

All this being said, I think the best reading of § 90-108(a)(14) is that it uses the concept of embezzlement in the traditional sense and, as a consequence, the State cannot prevail here. Though the State referred to Defendant's conduct as "embezzlement" in the indictment, in its opening statement, in its closing argument, and in the jury instructions, Defendant did not embezzle oxycodone because she did not obtain it lawfully. Instead, she obtained it by "trick or fraudulent device[,]" i.e., fraudulent prescriptions. *Griffin*, 239 N.C. at 45, 79 S.E.2d at 233. Dr. Kaskie testified that "the filling of that prescription was done . . .

fraudulently," and that "if [she] had known that this was a fraudulent prescription, the drugs would never have been filled[.]" The CVS loss prevention manager testified that "CVS policy and rules [do not] allow for a pharmacy technician to have access to Schedule II drugs" and that, but for the "fraudulent prescriptions," "those drugs would not [have] exit[ed] the safe[.]" This case is thus similar to *Weaver*, in which the defendant "took a corporate signature stamp without permission and wrote unauthorized corporate checks, thereby misappropriating funds from her employer." 359 N.C. at 247, 607 S.E.2d at 599. Here, Defendant took patient information from the patient portal without permission and wrote unauthorized and fraudulent prescriptions, thereby misappropriating oxycodone from her employer. Just as our Supreme Court concluded in *Weaver*, that conduct cannot constitute embezzlement. *Id.* at 256, 607 S.E.2d at 605.

The State took it upon itself to prove embezzlement, a burden it could not bear in the current controversy. Accordingly, I would conclude that Defendant's motion to dismiss for insufficient evidence was improperly denied.

IV. Conclusion

Because I would reverse Defendant's conviction for embezzlement, I would not reach the additional issues, namely whether the State proved CVS is a "registrant" as defined by N.C. Gen. Stat. § 90-108(a)(14) or whether the trial court erred by failing to instruct the jury on the statutory definition of the term "registrant."

THE UMSTEAD COALITION, RANDAL L. DUNN, JR., TAMARA GRANT DUNN, WILLIAM DOUCETTE, AND TORC (A/K/A TRIANGLE OFF-ROAD CYCLISTS), PLAINTIFFS
v.
RALEIGH-DURHAM AIRPORT AUTHORITY AND WAKE STONE CORPORATION, DEFENDANTS

No. COA20-129

Filed 15 December 2020

1. Appeal and Error—interlocutory appeal—counterclaim pending—motion to take judicial notice of voluntary dismissal—improper method

In an action challenging an airport authority's decision to lease land for a gravel mine, the Court of Appeals denied plaintiffs' motion to take judicial notice of a voluntary dismissal of a counterclaim—which, once dismissed, rendered an otherwise interlocutory order immediately appealable—because the proper method to bring the dismissal to the appellate court's attention was to make a motion to amend the record on appeal.

2. Appeal and Error—record on appeal—amended on appellate court's own motion—Appellate Procedure Rule 9

In an action challenging an airport authority's decision to lease land for a gravel mine, the Court of Appeals opted to amend the record on appeal pursuant to Appellate Procedure Rule 9(b)(5)b to include a voluntary dismissal of a counterclaim, the dismissal of which rendered an otherwise interlocutory order immediately appealable, and dismissed plaintiffs' petition for writ of certiorari as moot.

3. Constitutional Law—standing—violation of Open Meetings Law—any person may initiate suit

In an action challenging an airport authority's decision to lease land for a gravel mine, all plaintiffs (including adjacent property owners, a cyclist organization, and a nonprofit corporation dedicated to preserving a nearby park) had standing to bring claims against the airport authority alleging it violated the Open Meetings Law (N.C.G.S. § 143-318.9 et seq.) when it voted for the lease in a public meeting, because the statutory language gives "[a]ny person" the right to bring an action based on a violation of that law without the need to demonstrate special damages.

4. Constitutional Law—standing—challenge to validity of land lease—special damages

In an action challenging an airport authority's decision to lease land for a gravel mine, only the adjacent property owners had standing to challenge the validity of the lease, and not the remaining plaintiffs (including a cyclist organization and a nonprofit corporation dedicated to preserving a nearby park), where the neighboring landowners presented uncontroverted evidence that the mine's operation would cause them to suffer special damages, including reduced enjoyment of their property and diminished property value.

5. Statutes—lease by airport authority—N.C.G.S. § 63-56(f)—N.C.G.S. § 160A-272—applicability

In an action challenging an airport authority's decision to lease land for a gravel mine, the trial court properly determined that the airport authority's decision was not subject to the requirements or limitations contained in N.C.G.S. § 63-56 (governing jointly operated municipal airports) or N.C.G.S. § 160A-272 (governing municipal leasing procedures) where the airport authority was established by a public-local law prior to the enactment of those statutes, and the legislature gave no indication, either expressly or by implication, that it intended for those statutes to repeal any part of the airport authority's charter. Further, section 160A-272 did not apply to the airport authority since it is not a "city" as defined by Chapter 160A.

6. Cities and Towns—enabling statute—delegation of legislative authority—airport authority's charter—scope of powers

In an action challenging an airport authority's decision to lease land for a gravel mine, the trial court properly concluded the airport authority's board operated within the scope of its powers granted by the enabling statute (charter), which unambiguously gave the airport authority the power to lease, without joining the Governing Bodies (the cities of Raleigh and Durham, and Wake and Durham Counties), any property under its administration, and to enter into transactions with any business so long as the board deemed the project advantageous to airport development. The lease agreement in this case fit within the governing statutory authority and did not violate any federal grants.

7. Open Meetings—airport authority—decision to lease land—private negotiations before public meeting

In an action challenging an airport authority's decision to lease land for a gravel mine, where the authority was not subject to the provisions of N.C.G.S. § 160A-272 (governing municipal leasing procedures), the authority did not have to give thirty days' notice of its

special meeting on the lease decision, and its email notice more than 48 hours before the meeting complied with the applicable provision of the Open Meetings Law (N.C.G.S. § 143-138.12(b)(2)). Further, neither the Open Meetings Law nor other statutes governing public meetings required the airport authority to allow public comment or to hold a formal debate prior to voting on the lease.

Appeal by Plaintiffs from an Order entered 8 November 2019 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 23 September 2020.

Nigle B. Barrow, Jr. and Mattox Law Firm, by Isabel Worthy Mattox and Matthew J. Carpenter, for plaintiffs-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster and Steven M. Sartorio, and Hedrick, Gardner, Kincheloe & Garofalo LLP, by Patricia P. Shields, for defendants-appellees.

Heidgerd & Edwards, LLP, by Eric D. Edwards and C.D. Heidgerd, and Ron Sutherland, for amicus Wild Earth Society, Inc.

HAMPSON, Judge.

Factual and Procedural Background

The Umstead Coalition, Randal L. Dunn, Jr., Tamara Grant Dunn, William Doucette, and TORC (a/k/a Triangle Off-Road Cyclists) (collectively, Plaintiffs) appeal an Order granting Summary Judgment to Raleigh-Durham Airport Authority (RDUAA) and Wake Stone Corporation (Wake Stone) (collectively, Defendants) and denying Plaintiffs' request for a Preliminary Injunction related to RDUAA's lease of airport real property known as the Odd Fellows Tract to Wake Stone for a gravel mine. Relevant to this appeal, the Record before us tends to show the following:

The Umstead Coalition is a North Carolina nonprofit corporation dedicated to the appreciation, use, and preservation of the William B. Umstead State Park abutting the Odd Fellows Tract. Randal and Tamara Dunn (Dunns) are Wake County residents and live on property adjacent to the Odd Fellows Tract. William Doucette is a Wake County resident and Umstead Coalition member. TORC is a North Carolina nonprofit corporation seeking to establish and maintain mountain biking trails in the Triangle region to promote responsible mountain biking and ensure its future.

The North Carolina General Assembly chartered RDUAA in 1939 through a public-local law. An Act Enabling the City of Raleigh, the City of Durham, the County of Durham, and the County of Wake, to Jointly Establish an Airport and Providing for the Maintenance of a Joint Airport by said Cities and Counties, 1939 N.C. Sess. Laws ch. 168 (Charter). The Charter allows the cities of Raleigh and Durham, and the counties of Wake and Durham (Governing Bodies), to jointly acquire land suitable for "airports or landing fields[.]" *Id.* §§ 2-5. The Charter instructs the Governing Bodies to elect a Board of Directors (the Board) for RDUAA—with each of the Governing Bodies appointing an equal number of directors. *Id.* §§ 5-6. The Charter also required the Board to "act in an administrative capacity" and to have "the authority to control, lease, maintain, improve, operate, and regulate the joint airport or landing field." The Board was vested with "complete authority over any airport or landing field jointly acquired" by the Governing Bodies. *Id.* § 7. As a public-local law, the Charter only applied to the Governing Bodies. *Id.* § 8 ("This Act shall apply only to the City of Raleigh, City of Durham, County of Durham, and the County of Wake.").

During World War II, the federal government took ownership of the airport property administered by RDUAA. In 1946, Congress enacted the Federal Airport Act requiring any airport receiving federal funding to abide by federal aviation laws and regulations. Pub. L. 79-377, 60 Stat. 170 (1946), (later codified at 49 U.S.C. ch. 471). In 1947, the federal government executed a deed granting the airport land back to RDUAA subject to certain conditions subsequent and the right for the federal government to reenter in the event those conditions subsequent occurred.

In the ensuing decades, the General Assembly amended RDUAA's Charter and expanded the Board's authority in each successive iteration. In 1955, the General Assembly specifically added language giving the Board authority:

> To lease (without the joinder in the lease agreements of the [Governing Bodies]) for a term not to exceed 15 years, and for purposes not inconsistent with the grants and agreements under which the said airport is held by said owning municipalities, real or personal property under the supervision of or administered by the said Authority.

1955 N.C. Sess. Laws ch. 1096 § 1. This amendment also vested the Board with the authority to "operate, own, control, regulate, lease or grant" the right to operate "restaurants, apartments, hotels, motels, agricultural fairs, tracks, motion picture shows, cafes, soda fountains, or other

businesses, amusements or concessions . . . as may appear to said Authority advantageous or conducive to the development of said airport" for a term not to exceed fifteen years. *Id.* The amendment granted RDUAA the authority to erect buildings and facilities, borrow money, enter contracts, and expend funds—received from fees and rents from the operation of the above operations—for airport purposes. *Id.*

In 1957, the General Assembly further expanded RDUAA's authority to include "[i]n addition to all other rights and powers herein conferred" the "powers granted political subdivisions under the Model Airport Zoning Act contained within Article 4," within Chapter 63 of the General Statutes[1], and "by the terms of Article 6, Chapter 63 . . . concerning public airports and related facilities." 1957 N.C. Sess. Laws ch. 455 § 2. Then in 1959, the General Assembly reiterated and expanded RDUAA's authority to lease real or personal property under its administration, without joining the Governing Bodies, for terms not to exceed forty years. 1959 N.C. Sess. Laws ch. 755 § 1. The 1959 amendment also reaffirmed RDUAA's authority to "own, control, regulate, lease or grant to others the right to operate . . . restaurants, apartments, hotels, motels, agricultural fairs, tracks, motion picture shows, cafes, soda fountains, or other businesses, amusements or concessions" RDUAA deemed advantageous or conducive to airport development for terms not to exceed forty years. *Id.*

Since its creation, RDUAA has acquired land surrounding the airport pursuant to the Charter. Specific to this case, the Governing Bodies and RDUAA acquired real estate known as the Odd Fellows Tract in separate conveyances during the 1970s and 1980s. In 1979, the General Assembly again amended RDUAA's Charter to grant RDUAA the authority to bring condemnation actions under its own name without joining the Governing Bodies. 1979 N.C. Sess. Laws ch. 666 § 2.

In September of 2017, RDUAA issued a request for land lease proposals (RFP) to lease three tracts of land RDUAA controlled, including the Odd Fellows Tract. On 9 October 2017, the Conservation Fund submitted a proposal, including a lease-to-purchase proposal for the Old Fellows Tract—with a term of forty years at $12,000 per year. Wake Stone also submitted a proposal to lease the Odd Fellows Tract. On 19 October 2017, RDUAA voted to reject all proposals to lease the Odd

1. Chapter 63 of the North Carolina General Statutes broadly titled as "Aeronautics" codifies a number of different statutes adopted over the years and governs, *inter alia*, regulation of airports including authorizing municipalities and counties to establish, acquire, and operate airports. N.C. Gen. Stat. ch. 63 arts. 4, 6 (2019).

Fellows Tract. On 27 February 2019, approximately fifteen months later, RDUAA sent a Notice of Special Meeting of the Board, via email, to be held on 1 March 2019. The Special Meeting Notice announced the Board would consider a proposal for a twenty-five-year lease with Wake Stone to operate a gravel mine on the Odd Fellows Tract. *Id.* The Record indicates RDUAA and Wake Stone negotiated this lease agreement in private during the fifteen-month gap between the Board's rejection of the original RFP proposals and the Special Meeting. At the 1 March meeting, the Board announced it would discuss the lease—without public comment as the meeting was not a public hearing—and vote on the lease. The Board, with one abstention, unanimously voted to approve the lease. That same day, consistent with the Board's vote, RDUAA and Wake Stone executed an agreement for a mineral lease on the Odd Fellows Tract for a term of twenty-five years—with RDUAA to receive 5.5% of Wake Stone's annual net sales from the gravel mine.

On 12 March 2019, Plaintiffs filed a Verified Complaint for Declaratory Judgment and Injunctive Relief in Wake County Superior Court alleging: (1) RDUAA exceeded its authority and violated the Open Meetings Law by executing the lease without the Governing Bodies' approval; and (2) RDUAA violated state and federal law by approving the lease without required FAA approvals. Plaintiffs also filed Motions for a Temporary Restraining Order and a Preliminary Injunction. Plaintiffs argued Defendants' lease violated N.C. Gen. Stat. § 63-56(f), which generally applies to regulate the governing boards of airports jointly operated by two or more municipalities. *See* N.C. Gen. Stat. § 63-56 (2019). Plaintiffs contended this statute requires jointly operated municipal airport boards to obtain approval from the governing bodies prior to leasing land for non-aeronautic uses. Plaintiffs also argued the lease violated N.C. Gen. Stat. § 160A-272 requiring municipalities to follow certain procedures for the extended-term lease of real property. Finally, Plaintiffs argued RDUAA violated North Carolina's Open Meetings Law, N.C. Gen. Stat. § 143-318.9 *et seq*., governing procedures for conducting public meetings and hearings.

On 17 April 2019, RDUAA filed an Answer and a Counterclaim specifically against TORC alleging TORC, "through its members and agents," was trespassing on RDUAA property. Wake Stone filed its Answer on 20 May 2019. With the trial court's leave, Plaintiffs filed an Amended Verified Complaint for Declaratory Judgment and Injunctive Relief on 24 July 2019. The Amended Complaint added an allegation RDUAA violated state and federal law by approving the lease without FAA approval, and its 2017 RFP by conducting subsequent private negotiations. RDUAA and Wake Stone filed new Motions to Dismiss and for Summary

Judgment on 7 August 2019. Plaintiffs filed a new Motion for Partial Summary Judgment that same day. RDUAA filed an Answer to Plaintiffs' Amended Complaint and renewed its counterclaim against TORC on 23 August 2019. Plaintiffs then filed a Motion for Permanent Injunction on 5 September 2019. TORC filed an Answer to RDUAA's Counterclaim on 13 September 2019.

Following a hearing and after considering the parties' briefs, arguments, and supporting materials, the trial court entered a Final Order and Decision (Order) on 8 November 2019. As part of its Order, the trial court included a list of "Undisputed Facts." The trial court concluded there was "no genuine dispute as to the material facts" and RDUAA was entitled to summary judgment as a matter of law because the lease with Wake Stone was within the "expansive powers" the General Assembly vested in RDUAA. The trial court also ruled N.C. Gen. Stat. § 63-56 did not apply to RDUAA because RDUAA was not "a board formed by an agreement between . . . municipalities," but was an "independent creation of the General Assembly[.]" Moreover, the trial court determined N.C. Gen. Stat. § 160A-272 did not apply to RDUAA because RDUAA was not a "city" within the scope of Chapter 160A, but rather a corporation "organized for a special purpose." The trial court also concluded RDUAA satisfied the Open Meetings Law because the Special Meeting was properly noticed and public comments were not required. Accordingly, the trial court granted Summary Judgment in Defendants' favor and denied Plaintiffs' Motion for Partial Summary Judgment and Motion for Preliminary Injunction. The trial court did not rule on RDUAA's Counterclaim for trespass against TORC. On 4 December 2019, Plaintiffs filed written Notice of Appeal from the trial court's Order denying Plaintiffs' Motions for Partial Summary Judgment and for a Preliminary Injunction and granting Defendants' Motions for Summary Judgment.

Jurisdiction

As a threshold matter, when it was entered, the trial court's Order was interlocutory because it left open the Counterclaim against TORC. Plaintiffs have, however, filed both a Petition for Writ of Certiorari and a Motion requesting us to take judicial notice of Wake Stone's subsequent Voluntary Dismissal of its Counterclaim. Additionally, the parties dispute whether Plaintiffs have standing to bring their claims in the first place. We address these jurisdictional issues in turn.

A. Appealable Judgment

[1] Initially, the trial court's dismissal of Plaintiffs' claims was interlocutory in nature because RDUAA's Counterclaim was still pending. *Veazey*

v. City of Durham, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court[.]"). Because the trial court's Order was interlocutory, Plaintiffs may not have had a right to immediately appeal the Order. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990) ("Generally, there is no right of immediate appeal from interlocutory orders and judgments."). Plaintiffs have filed a Motion to Take Judicial Notice of Defendants' Voluntary Dismissal of the Counterclaim against TORC. Although the Voluntary Dismissal disposes of the case with the trial court—rendering the Order a final judgment—a motion to take judicial notice is not the proper mechanism to establish this fact on the Record. *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 267-68, 468 S.E.2d 856, 857 (1996) ("[T]he proper method to request amendment of the record, when the inclusion of the document has not been addressed by a trial court order settling the record on appeal, is to make a motion in the appellate court to amend the record under N.C. R. App. P. 9(b)(5)."). Accordingly, we deny Plaintiffs' Motion to Take Judicial Notice.

[2] However, under Rule 9 of our Rules of Appellate Procedure, we may also amend the Record on our own initiative. N.C. R. App. P. 9(b)(5)(b) (2020). In the absence of any objection by any party to our consideration of the Voluntary Dismissal, we amend the Record to include the Voluntary Dismissal. Thus, the Record before us, as amended, demonstrates the trial court's Order is now final and Plaintiffs have an immediate right to appeal under N.C. Gen. Stat. § 7A-27(b)(1). Plaintiffs, recognizing their appeal was initially interlocutory, also filed a Petition for Writ of Certiorari seeking review of this case on appeal. Because we have amended the Record and determined Plaintiffs have the right to appellate review from a final judgment, we dismiss Plaintiffs' Petition for Writ of Certiorari as moot.

B. Standing

[3] The parties also dispute whether Plaintiffs have standing to bring their claims. Although the parties argued standing to the trial court, the trial court's Order disposes of the Motions for Summary Judgment without expressly addressing standing. "When the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). The question here is whether the Record before us is adequate to establish that Plaintiffs have standing.

Defendants present no argument against Plaintiffs' standing to challenge an Open Meetings Law violation. Indeed, the Open Meetings Law

allows "[a]ny person" to "bring an action in the appropriate division of the General Court of Justice seeking . . . an injunction" based on violations of the Open Meetings Law without a showing of "special damage different from that suffered by the public at large." N.C. Gen. Stat. § 143-318.16(a) (2019). Moreover, "[a]ny person" may "institute a suit in the superior court requesting . . . a judgment declaring that any action of a public body was taken . . . in violation of this Article. Upon such a finding, the court may declare any such action null and void." N.C. Gen. Stat. § 143-318.16A(a) (2019). Because Plaintiffs allege RDUAA voted for the lease in a public meeting that violated the Open Meetings Law, they all have statutory standing to bring those claims.

[4] Defendants instead contend Plaintiffs have no standing to challenge the validity of the lease itself in the absence of any showing the Board's approval of the lease resulted in special damages to any of the Plaintiffs. Plaintiffs, in response, contend at a minimum the Dunns have standing, as adjacent property owners, to challenge the lease agreement. Plaintiffs assert the Dunns have shown standing to challenge the lease because they presented evidence the use of the Odd Fellows Tract adjacent to their property as a gravel mine—in conjunction with RDUAA's condemnation authority—would diminish their property value resulting in special damages to them. Defendants argue the Dunns have no standing to challenge the lease, even as adjacent property owners, because the lease is a legal use of RDUAA's real property.

At a minimum, standing contains three elements:

> (1) "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

McDaniel v. Saintsing, 260 N.C. App. 229, 232, 817 S.E.2d 912, 914 (2018) (citation and quotation marks omitted).

Here, the Dunns allege Defendants' lease agreement was outside the scope of RDUAA's statutory authority to enter leases—and thus not a lawful land use—and have alleged a reduction in their property value, as well as an increase in noise and vibration as a result of Wake Stone's expansion of its existing mine next to the Dunns' property. In addition, for purpose of summary judgment, the Dunns supported these allegations with an affidavit from Robert Mulder, a licensed real estate broker, opining the presence of the gravel mine on property adjacent to

the Dunns' would have a material adverse effect on the Dunns' property value. Defendants have offered no forecast of evidence controverting this opinion. Accordingly, for purposes of our review of the trial court's grant of Summary Judgment, we conclude the Dunns have forecast sufficient evidence of their standing to challenge Defendants' lease agreement.

Issues

The dispositive issues on appeal are whether the trial court properly concluded: (I) Defendants' lease agreement was within RDUAA's statutory authority; and (II) RDUAA's Special Public Meeting complied with North Carolina's Open Meetings Law.

Standard of Review

Plaintiffs contend the trial court erred in denying their Motion for a Preliminary Injunction and in granting Defendants' Motion for Summary Judgment when the trial court concluded N.C. Gen. Stat. § 63-56, governing jointly operated municipal airports, and N.C. Gen. Stat. § 160A-272, governing municipal leasing procedures, did not apply to RDUAA; Defendants' lease agreement was within RDUAA's statutory authority; and RDUAA's Special Meeting where the Board voted in favor of the lease agreement satisfied the Open Meetings Law.

When reviewing a trial court's denial of a preliminary injunction, "an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself[;]" however, "a trial court's ruling . . . is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *Goad v. Chase Home Finance, LLC*, 208 N.C. App. 259, 261, 704 S.E.2d 1, 3 (2010) (citations and quotation marks omitted). In order to succeed on a motion for a preliminary injunction, a plaintiff must be able to show—in part—the likelihood of success on the merits of the plaintiff's case. *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). Therefore, our review of whether the trial court erred in denying Plaintiffs' Motion for a Preliminary Injunction first turns on whether it erred in granting Defendants' Motion for Summary Judgment.

"Our standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is only appropriate "when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* (citation and quotation marks omitted).

Analysis

I. RDUAA's Authority to Enter into the Lease with Wake Stone

A. Applicable law governing RDUAA's authority

[5] Plaintiffs argue Defendants' lease agreement violates statutory leasing requirements for airports created under N.C. Gen. Stat. § 63-56(f). Plaintiffs also contend Defendants' lease agreement violates leasing procedures for municipalities under N.C. Gen. Stat. § 160A-272. Under Section 63-56(f):

> No real property and no airport, other air navigation facility, or air protection privilege, owned jointly, shall be disposed of by the board, by sale, or otherwise, except by authority of the appointed governing bodies, but the board may lease space, area or improvements and grant concessions on airports for aeronautical purposes or purposes incidental thereto.

N.C. Gen. Stat. § 63-56(f) (2019). Section 160A-272(a1) states a municipal governing board is only permitted to lease municipal property "pursuant to a resolution of the [board] authorizing the execution of the lease or rental agreement adopted at a regular council meeting upon 30 days public notice." N.C. Gen. Stat. § 160A-272(a1) (2019). Meanwhile, Section 160A-272(b1) states leases of municipal property for more than ten years must be treated as property sales subject to advertisement and bidding requirements. N.C. Gen. Stat. § 160A-272(b1) (2019). Thus, Plaintiffs contend Defendants' twenty-five-year lease of the Odd Fellows Tract for a non-aeronautic purpose, adopted at a special meeting with two-days notice, and not subject to a bidding process—after the original RFP—would violate both of these statutes if these statutes applied to limit RDUAA's authority to enter into the gravel mine lease.

First:

> [W]here one statute deals with the subject matter in detail with reference to a particular situation and another statute deals with the same subject matter in general and comprehensive terms, the particular statute will be construed as controlling the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto . . . .

Nat'l Med. Enters., Inc. v. Sandrock, 72 N.C. App. 245, 249, 324 S.E.2d 268, 271 (1985) (citation and quotation marks omitted). Moreover, as the

trial court noted, "[a] local statute enacted for a particular municipality is intended to be exceptional, and for the benefit of such municipality, and is not repealed by an enactment of a subsequent general law." *Bland v. City of Wilmington*, 278 N.C. 657, 663, 180 S.E.2d 813, 817 (1971) (quoting *City of Charlotte v. Kavanaugh*, 221 N.C. 259, 263, 20 S.E.2d 97, 99 (1942)). Indeed, "[a] public local law applicable to a particular county or municipality is not repealed by a subsequently enacted public law, statewide in its application, on the same subject matter, unless repeal is expressly provided for or arises by necessary implication." *Fogle v. Gaston Cnty. Bd. of Ed.*, 29 N.C. App. 423, 426, 224 S.E.2d 677, 679 (1976). "The general law will not . . . repeal an existing particular or special law, unless it is plainly manifest from the terms of the general law that such was the intention of the lawmaking body. A general later affirmative law does not abrogate an earlier special one by mere implication." *Id.* (quoting *Kavanaugh*, 221 N.C. 259, 20 S.E.2d 97 (1942)) (quotation marks omitted).

The General Assembly allowed RDUAA's Governing Bodies to establish a jointly owned airport by public-local law in 1939. Nothing in Chapter 63 expressly repeals any prior law relating to RDUAA's Charter. Nor is there any indication the General Assembly subsequently acted to repeal any RDUAA Charter provisions by necessary implication. To the contrary, the General Assembly's subsequent amendments to RDUAA's Charter specifically address the Board's authority to lease property owned by the Governing Bodies and administered by the Board. Thus, the General Assembly confirmed its intent to remove RDUAA from limitations imposed by N.C. Gen. Stat. § 63-56 on leasing of airport property and expressly granted the Board specific authority to lease land for terms not exceeding forty years. *Nat'l Med. Enters.*, 72 N.C. App. at 249, 324 S.E.2d at 271.

Plaintiffs further argue the 1957 amendment to the Charter authorizing RDUAA to exercise authority granted to municipalities under Article 6 of Chapter 63, which contains Section 63-56, demonstrates the General Assembly intended to incorporate Chapter 63, and specifically Section 63-56, into RDUAA's Charter as a limitation on RDUAA's authority. As the trial court correctly concluded, however, the plain language of the 1957 amendment shows this amendment was a grant of authority "[i]n addition to all other rights and powers herein conferred" and did not serve to limit RDUAA's authority under its Charter.[2]

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2. Plaintiffs argue the fact RDUAA previously appeared to rely on authority granted under the Uniform Airport Act, including in a 1977 condemnation action and a 1982 timber deed, is evidence the General Assembly did, in fact, intend to limit RDUAA's authority by

Similarly, the trial court also properly concluded the provisions of N.C. Gen. Stat. § 160A-272 do not apply to limit RDUAA's authority. Although, Section 160A-272 serves to regulate leasing of property by a "city," N.C. Gen. Stat. § 160A-272, "city" is a defined term under Chapter 160A and "[t]he term 'city' does not include . . . municipal corporations organized for a special purpose" like RDUAA. N.C. Gen. Stat. § 160A-1(2) (2019). Even if it did, Section 160A-2 provides: "Nothing in this Chapter shall repeal or amend any city charter in effect as of January 1, 1972, . . . unless this Chapter or a subsequent enactment . . . shall clearly show a legislative intent to repeal or supersede all local acts." N.C. Gen. Stat. § 160A-2 (2019); *see also* N.C. Gen. Stat. § 160A-3 (2019) (titled "General laws supplementary to charters"). Again, nothing in the Record before us demonstrates Chapter 160A contains "any clear legislative intent to repeal or supersede" any authority or power granted to RDUAA by its Charter and subsequent amendments. Therefore, the trial court correctly concluded Sections 63-56 and 160A-272 did not apply to limit or regulate RDUAA's authority to enter into the lease with Wake Stone.

B. RDUAA's authority to enter the lease under its Charter

[6] Having concluded RDUAA's Charter is not limited by Sections 63-56 or 160A-272 of our General Statutes, we must determine whether the Board had the authority to execute the lease agreement under the terms of its Charter. Plaintiffs argue RDUAA did not have a broad grant giving it "complete authority" over airport property, and the lease was inconsistent with the grants and agreements under which the airport is held; therefore, RDUAA could not enter into this lease agreement without joining the Governing Bodies. For the following reasons, we disagree.

"The General Assembly delegates express power to municipalities by adopting an enabling statute, which includes implied powers . . . essential to the exercise of those which are expressly conferred." *Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 19, 789 S.E.2d 454, 457 (2016) (citation and quotation marks omitted). "When determining the extent of legislative power conferred upon a municipality, the plain language of the enabling statute governs." *Id.* If the enabling statute's

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enactment of the Uniform Airport Act and that RDUAA relied on the provisions of the Uniform Airport Act to engage in these transactions. However, the timber deed contains no citation to any general statute requiring the Governing Bodies' joinder in the conveyance. Also, it appears RDUAA had to use the authority granted under Chapter 63 in the condemnation action because the General Assembly did not grant RDUAA the independent authority to conduct condemnation proceedings in its own name until 1979. The judgment confirming RDUAA's condemnation action cites Chapter 63 as a source of authority, not a limit on RDUAA's authority.

language is "clear and unambiguous," courts must give the language its "plain and definite meaning." *Id.* However, if the enabling language is ambiguous, "the legislation 'shall be broadly construed . . . to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect.' " *Id.* (quoting N.C. Gen. Stat. § 160A-4).

In this case, the enabling statute delegating legislative authority to RDUAA is the Charter and its subsequent amendments as enacted through public-local laws. In pertinent part, the Charter—as amended—grants RDUAA the authority to lease, without joining the Governing Bodies and for purposes not inconsistent with the grants and agreements under which the airport is held, real or personal property administered by RDUAA. 1959 N.C. Sess. Laws ch. 755 § 1. This amendment restricted such leases to those consistent with the "grants and agreements" controlling the property and to terms not longer than forty years. The Charter also grants RDUAA the authority to "operate, own, control, regulate, *lease* or grant . . . any airport premises, restaurants, apartments, hotels, motels, agricultural fairs, tracks . . . *or other businesses*, *amusements or concessions* for a term not to exceed 40 years, as may appear to [RDUAA] advantageous or conducive to the development of said airport." *Id.* (emphasis added).

First, the Charter is unambiguous in that it grants the Board authority to lease[3] *any* property administered by RDUAA. This unambiguous language, by its plain and definite meaning, grants RDUAA broad authority subject only to the "grants and agreements" under which the property is held and for terms not to exceed forty years. The applicable "grants and agreements" would include any grant or agreement which imposes restrictions on the use of airport property. The only such grants or agreements in the Record are the deed reconveying certain property the federal government controlled during World War II and any grants governed by the FAA.

There is no evidence on this Record the lease agreement violated any FAA grants.[4] Plaintiffs, nevertheless, argue the lease agreement

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3. Plaintiffs also argue the term "lease" does not include a mineral lease like the one in question. As with the statute's other language, we hold the term "lease" is unambiguous and includes any type of lease. If the term unambiguously prohibited mineral leases, the Charter would have to do so expressly. It does not. Moreover, if we found the term ambiguous, we would have to construe the term broadly to give RDUAA the authority to enter any lease it deemed advantageous to airport development.

4. Plaintiffs contend there is a genuine dispute as to whether RDUAA complied with Federal Aviation Administration (FAA) requirements regarding its Airport Layout Plan

violated the deed reconveying property after World War II because the deed prohibited use of the property for industrial purposes and reserved a right of reentry if the terms were violated. However, the deed reconveying property commandeered by the federal government only applies to the property in existence at the time of the reconveyance, not to land acquired thereafter such as the Odd Fellows Tract. Even if the deed restrictions applied, there is no evidence any federal agency has determined the lease agreement in this case violates the deed restrictions or that the federal government has attempted to exercise its right of reentry.

Thus, the remaining question is whether the language authorizing RDUAA to operate, own, control, or lease property for the list of express uses or for "other businesses" RDUAA deems advantageous for airport development provides authority for the lease in question. Plaintiffs argue this language is unambiguous and the list of expressly permitted uses governs the types of "other businesses" to which RDUAA may lease property.

The North Carolina Supreme Court's decision in *Quality Built Homes Inc. v. Town of Carthage* is instructive here. 369 N.C. 15, 789 S.E.2d 454. In *Quality Built Homes Inc.*, the Town of Carthage enacted ordinances requiring landowners seeking to subdivide property to pay impact fees for planned water and sewer services. *Id.* at 16-17, 789 S.E.2d at 456. As a municipality established under Chapter 160A, the Town of Carthage was subject to enabling language stating a "city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises . . . to furnish services." N.C. Gen. Stat. § 160A-312(a) (2015). Moreover, the statute granted the town "full authority to finance the cost of any public enterprise by levying taxes, borrowing money, and appropriating any other revenues therefor." N.C. Gen. Stat. § 160A-313 (2015). The Court held these statutes unambiguously allowed the town to charge for *contemporaneous* water and sewer usage. *Quality Built Homes Inc.*, 369 N.C. at 20, 789 S.E.2d at 458. However, because the

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(ALP) approval prior to leasing airport land to third parties. We are not convinced the Record establishes a dispute on this fact as the FAA has conditionally approved RDUAA's ALP, and it does not appear on the Record before us that there has been any attempt to challenge this conditional approval with the FAA or in federal courts. *See* 49 U.S.C. § 46110(a) ("[A] person" challenging an order "issued by . . . the Administrator of the [FAA] . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia or . . . the circuit in which the person resides . . . .").

ordinances charged impact fees in contemplation of *future* services, the ordinances fell outside the scope of the town's statutory authority. *Id*. at 21-22. 789 S.E.2d at 458-59.

In this case, the enabling statute—the Charter—is unambiguous with respect to the list of expressly authorized concessions and amusements. However, the General Assembly included "or other businesses, concessions, or amusements"—the list was not exhaustive and was not restrictive. The only restriction added to this sentence requires RDUAA to deem other such businesses advantageous or conducive to airport development. Therefore, RDUAA could enter into a lease with *any* other business, subject only to: (1) the forty-year term limit; (2) any FAA restrictions based on federal grants; and (3) the requirement RDUAA deem the transaction advantageous to airport development.

Here, unlike in *Quality Built Homes Inc.*, RDUAA's Charter expressly contemplates the Board engaging in transactions *prospectively* to bring financial benefits to the airport. The lease agreement in question would provide 5.5% of net sales from any material sold by Wake Stone. Therefore, the lease satisfies the requirement RDUAA only enter into leases it deems *may* be advantageous to airport development. Accordingly, the trial court properly concluded Defendants' lease agreement was within RDUAA's statutory authority under its Charter. We likewise conclude because RDUAA was not governed by the limitations on jointly operated municipal airports in Section 63-56 and had independent statutory authority to enter into the lease with Wake Stone, the joinder of the Governing Bodies in the lease was not required.

II. Open Meetings Law

[7] Plaintiffs also contend RDUAA's months of private negotiations and the email notice two days prior to a special public meeting, where the Board allowed no public comment, violated North Carolina's Open Meetings Law.

N.C. Gen. Stat. § 143-318.9 *et seq.* comprises North Carolina's Open Meetings Law. Section 143-318.9 expresses the General Assembly's intent where:

> the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people's business, it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly.

N.C. Gen. Stat. § 143-318.9 (2019). The General Assembly applied these laws to all public bodies conducting "the people's business." As an "appointed authority [or] board," RDUAA must comply with the Open Meetings Law. N.C. Gen. Stat. § 143-318.10(b) (2019). "[E]ach official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting." N.C. Gen. Stat. § 143-318.10(a) (2019). Every public body conducting regularly scheduled meetings must post a schedule as the statute directs. N.C. Gen. Stat. § 143-318.12(a) (2019). If a public body holds a "special meeting" outside of a regularly scheduled meeting, it must provide notice at least forty-eight hours before the meeting. N.C. Gen. Stat. § 143-318.12(b)(2) (2019). "Any person" may bring an action for injunctive relief or declaratory judgment for alleged violations of these laws. N.C. Gen. Stat. §§ 143-318.16, 318.16A (2019).

Here, the meeting to vote on the lease agreement was scheduled as a Special Meeting subject to requirements outlined in Section 143-318.12(b). The Record shows RDUAA emailed notice of the Special Meeting more than 48 hours before the meeting.[5] Plaintiffs contend the 48-hour notice was improper, arguing the Board could only consider the lease agreement at a regularly scheduled Board meeting with thirty-days notice pursuant to N.C. Gen. Stat. § 160A-272. Plaintiffs concede, however, that if Section 160A-272 does not apply, then the forty-eight-hour notice of the Special Meeting was valid. Thus, we conclude the notice of Special Meeting complied with N.C. Gen. Stat. § 143-318.12(b)(2).

Nevertheless, Plaintiffs argue the Board should have permitted public comment on the lease prior to deliberating and voting to approve the lease at the Special Meeting. We disagree.

This Court has previously recognized:

> There is nothing in section 143-318.9 requiring the solicitation of public comment as a prerequisite to a vote on a pending motion. Furthermore, although section 143-318.9 requires "deliberations" of public bodies "be conducted openly," we do not read this statute to mandate a formal discussion or debate of an issue. Section 143-318.9 simply requires that if there is any discussion or debate of "public business" at an "official meeting," that discussion or debate must occur in a meeting open to the

5. Plaintiffs argue RDUAA violated statutory provisions requiring municipalities and counties give thirty-days notice for a public meeting regarding municipal land leases. As we conclude above, these general statutes regarding municipal land leases do not apply to RDUAA as an entity created by public-local laws.

public with "any person . . . entitled to attend." N.C.G.S. § 143-318.10(a), (d) (1999).

Sigma Constr. Co. v. Guilford Cnty. Bd. of Ed., 144 N.C. App. 376, 381, 547 S.E.2d 178, 181 (2001). Moreover, there is no independent statutory provision requiring RDUAA's Board to receive public comments or conduct a public hearing prior to consideration of a lease agreement under the Charter. *See*, *e.g.*, N.C. Gen. Stat. § 153A-304(c) (2019) (requiring public hearings when counties seek to consolidate districts); N.C. Gen. Stat. § 160A-191 (2019) (requiring public hearings before cities enact Sunday closing ordinances). Therefore, RDUAA did not violate the Open Meetings Law. *See Sigma Constr. Co.*, *Inc.*, 144 N.C. App. at 381, 547 S.E.2d at 181. Thus, the trial court did not err in concluding RDUAA's Special Meeting did not violate the Open Meetings Law.

Conclusion

Consequently, for the foregoing reasons, we conclude the trial court did not err in granting Summary Judgment in favor of Defendants. Therefore, Plaintiffs could also not demonstrate a likelihood of success on the merits of their claims; thus, the trial court did not err in denying Plaintiffs' Motion for a Preliminary Injunction and Motion for Partial Summary Judgment. Accordingly, we affirm the trial court's Order.

AFFIRMED.

Judges BRYANT and COLLINS concur.

UNITED DAUGHTERS OF THE CONFEDERACY, N. CAROLINA DIV., INC. v. CITY OF WINSTON-SALEM

[275 N.C. App. 402 (2020)]

UNITED DAUGHTERS OF THE CONFEDERACY, NORTH CAROLINA DIVISION, INC., AND JAMES B. GORDON CHAPTER #211 OF THE UNITED DAUGHTERS OF THE CONFEDERACY, NORTH CAROLINA DIVISION, INC., PLAINTIFFS

v.

CITY OF WINSTON-SALEM, BY AND THROUGH ALLEN JOINES, MAYOR OF WINSTON-SALEM, NORTH CAROLINA, COUNTY OF FORSYTH, BY AND THROUGH DAVID R. PLYER, CHAIRMAN OF THE BOARD OF COMMISSIONERS, AND WINSTON COURTHOUSE, LLC, DEFENDANTS

No. COA19-947

Filed 15 December 2020

1. Civil Procedure—dismissal with prejudice—Rule 12—lack of subject matter jurisdiction—failure to state a claim

In a declaratory judgment action regarding the removal of a Confederate statue from a local county courthouse, the trial court properly dismissed plaintiff's complaint with prejudice where it did so pursuant to both Civil Procedure Rule 12(b)(1) (lack of subject matter jurisdiction) and Rule 12(b)(6) (failure to state a claim). Although dismissal with prejudice operates as an adjudication on the merits while a dismissal pursuant to Rule 12(b)(1) does not, dismissal with prejudice pursuant to Rule 12(b)(6)—which does operate as an adjudication on the merits—was proper, and therefore any error resulting from dismissal pursuant to Rule 12(b)(1) was rendered harmless.

2. Civil Procedure—failure to state a claim—lack of standing—injury in fact—removal of Confederate statue

In a declaratory judgment action filed after a city and its mayor (defendants) informed an association commemorating Confederate Civil War soldiers (plaintiff) of its plans to remove a Confederate statue from a county courthouse, the trial court properly dismissed plaintiff's complaint for lack of standing pursuant to Civil Procedure Rule 12(b)(6) (failure to state a claim). Specifically, plaintiffs failed to allege ownership rights or any other legally protected interest in the statue, which was located on private property, and therefore failed to allege the "injury in fact" required to show it had standing to bring the action.

Judge TYSON dissenting.

**UNITED DAUGHTERS OF THE CONFEDERACY, N. CAROLINA DIV., INC.
v. CITY OF WINSTON-SALEM**

[275 N.C. App. 402 (2020)]

Appeal by plaintiff from order entered 8 May 2019 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 17 March 2020.

James A. Davis & Associates, by James A. Davis, and James B. Wilson & Associates, by James Barrett Wilson, Jr., for plaintiff-appellant United Daughters of the Confederacy, North Carolina Division, Inc.

City Attorney Angela I. Carmon, and Assistant City Attorney Anargiros N. Kontos, for defendant-appellee City of Winston-Salem.

B. Gordon Watkins III for defendant-appellee Forsyth County.

Allman Spry Davis Leggett & Crumpler, P.A., by Jodi D. Hildebran, for defendant-appellee Winston Courthouse, LLC.

BRYANT, Judge.

Where the trial court dismissed plaintiff's complaint pursuant to Rules 12(b)(1) and 12(b)(6), we hold that it did not err in dismissing the complaint with prejudice on the basis of Rule 12(b)(6). Where the allegations in plaintiff's complaint—taken as admitted—failed to allege an injury in fact, the trial court did not err in granting defendants' motions to dismiss the complaint for failure to state a claim. Accordingly, we affirm the order of the trial court.

Factual and Procedural Background

On 31 January 2019, plaintiff United Daughters of the Confederacy, North Carolina Division, Inc., filed a verified complaint in Forsyth County Superior Court seeking a declaratory judgment against defendants City of Winston-Salem, by and through Allen Joines, its mayor, and Forsyth County, by and through David R. Plyer, chair of the Board of Commissioners. In its complaint, plaintiff alleged that in 1903, the James B. Gordon Chapter #211 (of plaintiff organization) sought to place a confederate monument, a statue, in Courthouse Square in Winston, North Carolina, and in 1905, the Forsyth County Board of Commissioners granted permission to do so. The Forsyth County Courthouse was nominated to the National Registry of Historic Places in 2012, and the nomination was accepted in 2013. In 2014, the property designated as the Courthouse, with the exception of a plaque inside the building and a buried time capsule, was conveyed to Winston Courthouse, LLC

by Forsyth County.[1] In April of 2017, Mayor Joines agreed to move the statue to the Salem Cemetery, and on 31 December 2018, the City and Mayor Joines contacted plaintiff and informed plaintiff that it had until 31 January 2019 to remove the statue. Plaintiff sought a declaratory judgment to determine the rights of the parties with respect to the statue. Contemporaneously, plaintiff also filed a motion for a temporary restraining order and preliminary injunction, to prevent the relocation of the statue pending the litigation. The trial court denied the motion for a temporary restraining order.

On 6 February 2019, plaintiff filed a verified amended complaint joining James B. Gordon Chapter #211 of the United Daughters of the Confederacy, North Carolina Division, Inc., as a plaintiff[2] and Winston Courthouse, LLC, as a defendant. The amended complaint combined the two prior pleadings seeking a declaratory judgment and a preliminary injunction. Plaintiff also filed a separate amended motion for preliminary injunction.

On 8 March 2019, the City filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, alleging a lack of subject matter jurisdiction and failure to state a claim, respectively. Specifically, the City argued that plaintiff did not claim to own the statue or the real property beneath it, that plaintiff failed to forecast evidence that the County owned the statue, and that plaintiff, in fact, had conveyed the statue to a third party. Accordingly, plaintiff lacked standing to bring the action regarding the removal of the statue. The City further noted that plaintiff's statutory argument regarding statues on public property did not apply, because the real property on which the statue stood was not public property; the land was owned by Winston Courthouse, LLC. Finally, because plaintiff did not assert ownership of the statue, and the City and Winston Courthouse, LLC, planned to remove the statue for safety reasons, the City argued that plaintiff failed to show "a violation of [its] legal rights, and [has] therefore failed to state a claim for relief[.]" The County and Winston Courthouse, LLC, filed similar motions to dismiss plaintiff's action.

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1. The trial court subsequently found that "public monuments located outside of the building on the land" were likewise exempted from the transfer.

2. On 1 May, 2019, James B. Gordon Chapter #211 of the United Daughters of the Confederacy, North Carolina Division, Inc., filed a voluntarily dismissal. As such, we will refer only to the initial plaintiff, United Daughters of the Confederacy, North Carolina Division, Inc., throughout this opinion.

On 20 March 2019, plaintiff filed a second amended motion for preliminary injunction alleging that the City had removed the statue. Plaintiff sought the injunction to force the City to return the statue to Courthouse Square.

On 8 May 2019, the trial court entered an order on defendants' motions to dismiss. The court found that plaintiff did not claim ownership of the statue and in fact, never alleged any rights. The court concluded that plaintiff's membership requirement of genealogical relationship to a Confederate soldier was insufficient to convey standing, that plaintiff did not allege ownership or any "other legally enforceable right" to the statue sufficient to convey standing, and that plaintiff failed to establish "that there [wa]s any injury in fact that [wa]s either concrete or particularized to this specific plaintiff." The court therefore held that plaintiff lacked standing, and granted defendants' motions to dismiss pursuant to Rule 12(b)(1), for lack of subject matter jurisdiction. Further, the court granted defendants' motions to dismiss pursuant to Rule 12(b)(6), for failure to state a claim on which relief could be granted. Accordingly, the trial court dismissed plaintiff's amended complaint with prejudice.

Plaintiff appeals.

In two separate arguments, plaintiff contends that the trial court erred by granting defendants' motion to dismiss the complaint. We address each in turn.

Standard of Review

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

Dismissal With Prejudice

[1] In its first argument, plaintiff contends the trial court erred by dismissing the complaint with prejudice. We disagree.

Plaintiff argues that a court "cannot dismiss a complaint with prejudice if it has held that it lacks jurisdiction over the proceeding." In support of this contention, plaintiff cites this Court's opinion in *Cline v. Teich*, 92 N.C. App. 257, 374 S.E.2d 462 (1988). In *Cline*, the spouse

of an incompetent brought a claim in district court seeking an award of support from the incompetent's estate. The incompetent's guardian moved to dismiss the complaint pursuant to Rule 12(b)(6) based on the existence of a premarital agreement, and the trial court granted the motion. The spouse appealed. On appeal, this Court held that the district court lacked jurisdiction in this matter altogether, for while a district court has jurisdiction over the question of alimony, the superior court has jurisdiction over the estates of incompetents. Where no divorce was alleged or sought, this was an issue of an incompetent's estate, and thus, the district court lacked jurisdiction to hear it. Therefore, this Court vacated the decision of the trial court and remanded the matter with instructions to dismiss the complaint for lack of subject matter jurisdiction.

Plaintiff contends this case stands for the principle that it is improper to dismiss a complaint with prejudice when jurisdiction is lacking. This is an incomplete statement of law, as well as an inaccurate statement of the holding in *Cline*. Plaintiff argues, albeit circuitously, that a dismissal with prejudice operates as an adjudication on the merits, while a dismissal on the basis of subject matter jurisdiction does not. This much is true. However, that does not preclude the outcome in this case.

In *Street v. Smart Corp.*, 157 N.C. App. 303, 578 S.E.2d 695 (2003), the defendant moved to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6). The trial court granted the motion to dismiss dismissing the action with prejudice based on lack of standing. The plaintiff appealed, and this Court held that the trial court's dismissal with prejudice, which operated as an adjudication on the merits, "implicate[d] a Rule 12(b)(6), rather than a Rule 12(b)(1), dismissal." *Id.* at 305, 578 S.E.2d at 698. Key to the holding was that while dismissal pursuant to Rule 12(b)(1) did not operate as an adjudication on the merits, dismissal pursuant to Rule 12(b)(6) did, and the latter remedies any error with regard to the former. We ultimately affirmed the trial court's decision.

Thus, even assuming *arguendo* that it was improper to dismiss the complaint with prejudice on the basis of Rule 12(b)(1), it was not improper to do so on the basis of Rule 12(b)(6), which operates as an adjudication on the merits. Defendants did indeed move for dismissal pursuant to both Rules 12(b)(1) and 12(b)(6), and the trial court granted dismissal on both bases. We therefore hold that the trial court did not err in dismissing the complaint with prejudice pursuant to Rule 12(b)(6), and that any error in doing so pursuant to Rule 12(b)(1) was rendered harmless as a result.

Standing

[2] In its second argument, plaintiff contends the trial court erred in dismissing the complaint based on a lack of standing. We disagree.

Through several arguments, plaintiff contends that dismissal for lack of standing was inappropriate because plaintiff was entitled to adjudicate the issue of ownership rights in the statue. We disagree. Plaintiff's complaint, on its face, established no basis for ownership or any other interest in a statue which plaintiff did not claim to own, and which was located on privately-owned property.

To establish standing, a plaintiff must demonstrate three things: injury in fact, a concrete and actual invasion of a legally protected interest; the traceability of the injury to a defendant's actions; and the probability that the injury can be redressed by a favorable decision. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51–52 (2002). The mere filing of a declaratory judgment is not sufficient, on its own, to grant a plaintiff standing. *See Beachcomber Prop., L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 824, 611 S.E.2d 191, 194 (holding that a plaintiff who lacked "injury in fact" lacked standing to bring a declaratory judgment action).

Thus, to pursue a declaratory judgment as to its rights in the statue, plaintiff had to show, at the very least, that it possessed some rights in the statue—a legally protected interest invaded by defendants' conduct. In an attempt to make such a showing, plaintiff cites this Court's opinion in *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 684 S.E.2d 709 (2009). In that case, the plaintiffs sought to challenge, by declaratory judgment, Buncombe County's sale of a lot on property thatwhich had been dedicated for public use. The defendant, Black Dog Realty, moved to dismiss the complaint for lack of standing, which the trial court denied. On appeal, we examined the issue of standing. We noted that the plaintiffs failed to show standing in their pleadings. However, we were presented with a quandary: Black Dog Realty had filed a counterclaim to quiet title, which raised the identical legal issues. We resolved this dilemma by treating the plaintiffs' complaint and Black Dog Realty's counterclaim as a claim to quiet title and held that the trial court did not err in denying the motion to dismiss for lack of standing.

However, *Metcalf* is inapposite to the present case. In *Metcalf*, we specifically held that the plaintiffs failed to show standing. The only reason their claim was permitted to proceed was the counterclaim filed by the defendant raised identical legal issues. In the instant case, as in

Metcalf, plaintiff has failed to show standing. However, here, there is no counterclaim keeping plaintiff's complaint alive.

Further, aside from acknowledging their role in funding the erection of the statue over a century ago, plaintiffs alleged no ownership rights to the statue. Every case and statute cited by plaintiffs stands for the principle that, when a city or county acts in the manner described in plaintiff's complaint, *the owner of affected property* has rights that are implicated. Plaintiff has failed to demonstrate or allege any legal interest in the statue.

"In ruling on the motion [to dismiss] the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citation omitted), *disapproved on other grounds in Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1987). What matters here, and what was relevant to the trial court's consideration, was one question: Whether plaintiff, in its complaint, alleged standing. Viewing the allegations in plaintiff's complaint as true, we hold that the complaint fails to allege an actual ownership right or legal interest in the statue. Notwithstanding plaintiff's contentions on appeal as to what defendants did or the implications thereof, nowhere in plaintiff's complaint was a legal interest alleged. This is the first element of standing, and it is key: A plaintiff must allege an "injury in fact." *See Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 51–52. Plaintiff failed to do so.

The dissent cites to several statutes including our General Statutes, Chapter 100 ("Monuments, Memorials and Parks"), as well as 18 U.S.C. § 1369 ("Destruction of veterans' memorials") and 36 CFR § 60.15 ("Removing properties from the national register"). We note that with the exception of N.C. Gen. Stat. § 100-2.1 (which was presented and considered in regard to plaintiff's standing argument), these authorities and arguments were not presented before this Court on appeal. Further, the dissent also cites to biblical passages that were not a part of the record nor presented to this Court on appeal. "It is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam).

Accordingly, we hold that the trial court did not err by granting defendants' Rule 12(b)(6) motions to dismiss plaintiff's complaint for lack of standing.

AFFIRMED.

Judge ARROWOOD concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion erroneously affirms the trial court's order granting Defendants' Rule 12(b)(1) and (6) motions to dismiss and holds the United Daughters of the Confederacy, North Carolina Division, Inc. ("the Daughters") do not possess standing and their complaint fails for lack of subject matter jurisdiction. N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2019). The majority's opinion then presumes jurisdiction and standing, yet dismisses the Daughters' complaint with prejudice for failure to state a claim upon which relief can be granted. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2019).

Reviewing the allegations in the light most favorable to Plaintiff and taking the Daughters' assertions as true, their complaint properly asserts standing, invokes the superior court's jurisdiction, and states a claim upon which relief can be granted to survive Defendants' Rule 12(b)(1) and (6) motions to dismiss. I also write separately to address the pre-emptive and unlawful actions of the City of Winston-Salem. I vote to reverse the order to dismiss and remand. I respectfully dissent.

I. Background

The Daughters is an active entity in good standing chartered by the North Carolina Secretary of State as a North Carolina non-profit corporation on 16 September 1992. The Daughters qualified as a 26 U.S.C. § 501(c)(3) (2018) non-profit entity by the United States Department of the Treasury, Internal Revenue Service. The Daughters' stated purpose in its charter is for "historical, benevolent, memorial, educational and patriotic programs, plan events and scholarships[.]"

In 1905, the Daughters and members of its James B. Gordon Chapter solicited and raised contributions, paid for, and erected a granite statue of an unidentified, common, and representative soldier and veteran as a memorial and war grave to Forsyth County soldiers killed and not returned home and veterans wounded and dead in the Civil War, mounted on an inscribed stone base ("Memorial"). The Forsyth County Board of Commissioners by order dated 20 March 1905 accepted the

Memorial to be prominently placed on the grounds of the then Forsyth County Courthouse ("Courthouse property"). The Lieutenant Governor of North Carolina, Francis D. Winston, attended and addressed the dedication ceremony and presented the Memorial on behalf of the Daughters, followed by a reception with over 600 individuals in attendance.

The Courthouse property ceased to be used as the Forsyth County Courthouse in 1974. It housed Forsyth County offices for the next thirty years until 2004 when a new county office building was erected. The former Forsyth County Courthouse, including the grounds and all improvements thereon, including the Memorial, was nominated by the county and state to be placed and listed on the National Registry of Historic Places in 2012.

The application and nomination for the National Registry of Historic Places describes the Memorial as a "contributing" factor to the historical significance of the historic property to be qualified and listed in the National Register and describes the Memorial as follows:

> This monument stands at the northwestern corner of the block and memorializes the Confederate dead from Forsyth County. Erected in 1905 by the James B. Gordon Chapter of the United Daughters of the Confederacy, the monument faces northwest. The monument is executed in granite and consists of a sculpture of a man in a Confederate uniform with a rifle on a stone pedestal. The tall pedestal is composed of a rusticated stepped base, a smooth block with the words 'Our Confederate Dead' in relief, and a short shaft with a smooth surface with an incised inscription with the date and organization that erected the statue. This is topped with a projecting section with a medallion on each side. Above this the shaft tapers terminating in a base that holds the statue of the Confederate soldier. The upper shaft has a bas relief shield on the front.

A. Reservation of the Memorial to Forsyth County

In 2014, the Courthouse property was conveyed by the Forsyth County Commission to Winston Courthouse, LLC, with exemption from the conveyance and the express reservation to Forsyth County of a plaque mounted inside the building, a buried time capsule, and "public monuments located outside of the building on the land" from the transfer. Winston Courthouse, LLC asserted in its pleadings: "The Deed did

not convey ownership of certain items of personal property, such as a time capsule located within the historic building . . . a plaque located on the Building, and any public monuments located on and about the property." Winston Courthouse, LLC, also alleged it did not know who owned the public monuments and the Memorial.

B. Order Appealed

After receipt of a thirty-day demand letter from the City of Winston-Salem to remove the Memorial, the Daughters filed and sought a declaratory judgment to determine the rights of the parties with respect to the Memorial. Contemporaneously, the Daughters also filed a motion for a temporary restraining order and preliminary injunction, to preserve *status quo* and prevent the alteration, removal or relocation of the Memorial pending the litigation. The trial court denied the motion for temporary restraining order to maintain *status quo*.

On 6 February 2019, the Daughters filed a verified amended complaint joining Winston Courthouse, LLC, as a defendant. The Daughters also filed a separate amended motion for preliminary injunction.

The City of Winston-Salem filed a motion to dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6) on 8 March 2019, alleging a lack of subject matter jurisdiction and asserting the Daughters' failure to state a claim. On 20 March 2019, the Daughters filed a second amended motion for preliminary injunction alleging the City of Winston-Salem had inexplicitly dismantled and removed the Memorial without agreement or consent. The Daughters' second amended motion sought an injunction to force the City of Winston-Salem to return the Memorial to Courthouse Square.

On 8 May 2019, the trial court entered an order on Defendants' motions to dismiss. The trial court found the Daughters did not claim ownership of the statute and in fact, never alleged any rights. The trial court concluded that the Daughters did not allege ownership or any "other legally enforceable right" to the Memorial sufficient to convey standing, and that the Daughters had failed to establish "that there [wa]s any injury in fact that [wa]s either concrete or particularized to this specific plaintiff."

The trial court erroneously concluded the Daughters lacked standing and granted Defendants' motions to dismiss pursuant to Rule 12(b)(1), for lack of *subject matter jurisdiction*. The trial court also erroneously granted Defendants' motions to dismiss for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6) with prejudice.

II. Standard of Review

Our Supreme Court has held:

> For the purpose of a motion to dismiss, the allegations of the complaint are treated as true. A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant notice of the nature and basis of plaintiffs' claim so as to enable him to answer and prepare for trial.

Forbis v. Honeycutt, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981) (internal citations omitted).

This Court has also stated: "[a] complaint should not be dismissed for failure to state a claim unless it *appears beyond doubt* that plaintiff could prove *no set* of facts in support of his claim which would entitle him to relief. In analyzing the sufficiency of the complaint, *the complaint must be liberally construed*." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987) (internal citations omitted) (emphasis supplied).

III. Motion to Dismiss

The pleadings assert and the record raises factual disputes over who currently owns the Memorial. According to the City of Winston-Salem, the Memorial remains owned by the Daughters and its members. The City of Winston-Salem sent the Daughters a letter on 31 December 2018 demanding of them, as owners, to remove the Memorial within thirty (30) days by 31 January 2019.

The current owner of the underlying property, Winston Courthouse, LLC, disclaims any ownership to the Memorial and notes, as the trial court found, the Memorial was expressly excluded with reserved easements for access to and maintenance in and from its deed from Forsyth County to the property. Forsyth County alleges it owns the Memorial.

The majority's opinion affirms the trial court's erroneous Rule 12(b)(1) dismissal on subject matter jurisdiction for lack of standing, asserting the Daughters do not claim current ownership. The Daughters do not have to claim sole ownership to possess standing in this declaratory judgment action. The City of Winston-Salem repeatedly asserted the Daughters' ownership in its demands and in other communications Defendants sent to Plaintiffs, while the other Defendants assert varying or unknown ownership. Defendants are bound by their allegations.

"[T]he law does not permit parties to swap horses between courts to get a better mount[.]" *Balawejder v. Balawejder*, 216 N.C. App. 301, 307, 721 S.E.2d 679, 683 (2011). It does not appear "beyond doubt" the Daughters' complaint being "liberally construed" asserts "no set of facts" to support their claims. *Dixon*, 85 N.C. App. at 340, 354 S.E.2d at 758.

In addition, our General Statutes also mandate prior notice guidelines and procedures for unclaimed property to ascertain ownership and for the transfer of such property to the State. *See* N.C. Gen. Stat. §§ 116B-56 and 116B-59 (2019). Any unclaimed property, whose owner cannot be ascertained, escheats to the State. N.C. Gen. Stat. § 116B-2 (2019). If the Memorial is determined to be held or owned by the State, additional notice and proceedings must occur as described below.

IV. Standing

The trial court dismissed the Daughters' declaratory judgment action for lack of *subject matter* jurisdiction under Rule 12(b)(1) for lack of standing. In a declaratory judgment action concerning standing, our Supreme Court has held:

> [T]he gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.

Goldston v. State, 361 N.C. 26, 30, 637 S.E.2d 876, 879 (2006) (citations, alternations, and internal quotation marks omitted).

Our Supreme Court further held:

> [A] declaratory judgment action must involve an actual controversy between the parties, plaintiffs are not required to allege or prove that a traditional cause of action exists against defendant[s] in order to establish an actual controversy. [A] declaratory judgment should issue (1) when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.

Id. at 33, 637 S.E.2d at 881 (alterations in original) (internal citations and quotation marks omitted). The Daughters' claims clearly assert and "involve an actual controversy between the parties." *Id.*

As an association of Chapters and members, the Daughters also possess representational standing for its Chapters and individual members if, "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (citation omitted); *see Fuller v. Easley*, 145 N.C. App. 391, 395-96, 553 S.E.2d 43, 46-47 (2001). ("[P]laintiff may have had standing to bring a taxpayer action, not as an individual taxpayer, but on behalf of a public agency or political subdivision, if the proper authorities neglected or refused to act. To establish standing to bring an action on behalf of public agencies and political divisions, a taxpayer must allege that he is a taxpayer of [that particular] public agency or political subdivision, . . . [and either,] (1) there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the political agency or political subdivision; or (2) a demand on such authorities would be useless.") (alterations in original) (internal citations and quotation marks omitted).

Here, members of the Daughters as citizens of Forsyth County also have standing as individuals to seek relief and for the Daughters to represent them. It is undisputed the Memorial was paid for and erected by the Daughters' members and Chapter, and it is directly related to the stated non-profit and charitable goals of the organization. The declaratory judgment claim asserted and the relief requested does not require the participation of the individual members or Chapters of the Daughters. *See River Birch Assocs.*, 326 N.C. at 130, 388 S.E.2d at 555. The trial court's order and dismissal for lack of standing and *subject matter* jurisdiction under Rule 12(b)(1) is properly reversed and remanded. *See id.* The majority's opinion clearly bases its holding under Rule 12(b)(6), apparently recognizing the trial court's error under Rule 12(b)(1).

V. Memorial to Veterans

The Courthouse property, which includes the Memorial specifically commissioned, erected, and dedicated to dead and wounded Forsyth County veterans, was recommended for protection and preservation by Forsyth County and the North Carolina Department of Cultural and Natural resources for its historic significance and was accepted and listed on the National Register of Historic Places by the United States Park Service of the United States Department of the Interior on 23 April 2013. National Historic Preservation Act of 1966, as amended, 16 U.S.C.

470 *et seq.* (2018). *See* 54 U.S.C. 3021 (2018); 36 CFR § 60.3(f); 36 CFR § 60.15. The record is undisputed.

Under Federal law, the term "veteran" is defined to include persons who "served for ninety days or more in the active military or navel service during the Civil War." *See* 38 U.S.C. § 1532 (2018). The Congress of the United States also defines and grants the status and benefits of being an American "veteran" to any person "who served in the military or naval forces of the Confederate States of America during the Civil War[.]" 38 U.S.C. § 1501 (2018).

The Congress of the United States also instructed: "That the Secretary of the Army is authorized and directed to furnish, when requested, appropriate Government headstones or markers at the expense of the United States for the unmarked graves of the following[.]" The first category listed is "Soldiers of the Union and Confederate Armies of the Civil War." 24 U.S.C. § 279(a) (repealed 1 September 1973).

The Memorial was constructed and dedicated "to honor the men that fought and lost their lives" who were from Forsyth County. As a veteran's memorial and a war grave for those who did not return home and listed on the National Register, the Memorial is arguably protected from injury or destruction by the "Veterans' Memorial Preservation and Recognition Act of 2003." 18 U.S.C. § 1369 (2018) ("**Destruction of veterans' memorials** (a) Whoever . . . willfully injures or destroys, or attempts to injure or destroy, any structure, plaque, statute, or other monument on public property commemorating the service of any person or persons in the armed forces of the United States shall be fined under this title, imprisoned not more than 10 years, or both. . . . (b)(2) the structure, plaque, statue, or other monument described in subsection (a) is located on property owned by, or under the jurisdiction of, the Federal Government.").

VI. N.C. Gen. Stat. § 100-2.1

N.C. Gen. Stat. § 100-2.1, as amended in 2015, applies to and protects the Memorial. N.C. Gen. Stat. § 100-2.1 (2019). "[A]ny monument, memorial, or work of art owned by the State may not be removed, relocated, or altered in any way without the approval of the North Carolina Historical Commission." N.C. Gen. Stat. § 100-2.1(a). The statute protects monuments and memorials from being disturbed, removed, or relocated except in certain circumstances and are subject to certain exceptions. *Id.* The record is devoid of any "approval of the North

Carolina Historical Commission," prior to the City's dismantling and removal of the Memorial. *Id.*

As Plaintiff, the Daughters are seeking a declaratory judgment, restraining order, and injunction to enforce the statute, consistent with their threshold ownership of and role in securing and erecting the Memorial and the specific goals expressed in their charter. While the Daughters nor anyone else asserts the Memorial has escheated to the State of North Carolina, if the Memorial is determined to be owned by the State, by no one claiming ownership, or is located on State-owned property, additional restrictions and requirements must be satisfied *prior to* any efforts are commenced to alter or remove the Memorial. N.C. Gen. Stat. § 100-2.1.

VII. N.C. Gen. Stat. § 100-2.1(b)

N.C. Gen. Stat. § 100-2.1(b) provides the mandatory statutory mechanisms for the lawful alteration, removal or relocation of monuments and memorials. The City of Winston-Salem, any government or private entity, or any other person is mandated to comply with this and other statutes prior to any alteration or removal. N.C. Gen. Stat. § 100-2.1(b) additionally states: "As used in this section, the term 'object of remembrance' means a monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina's history." This statute clearly applies to and protects the Memorial. Nothing in the record shows any compliance by the Defendants therewith.

A. Actions by the City of Winston-Salem

N.C. Gen. Stat. § 160A-193 (2019) grants statutory authority to a municipality to act when a building or structure constitutes an imminent danger to the public health or safety, creating an emergency necessitating the structure's immediate demolition. *See Monroe v. City of New Bern*, 158 N.C. App. 275, 580 S.E.2d 372 (2003). Before taking action, the municipality must comply with federal and state laws and give required notice, a hearing, and ample opportunity to make the structure safe. *Id.* at 278, 580 S.E.2d at 374.

The City of Winston-Salem, a political subdivision chartered by the General Assembly of North Carolina and which is located wholly within Forsyth County, would act *ultra vires* to purport to declare a Memorial and war grave dedicated to dead and wounded veterans of that county,

whether owned by Forsyth County or the Daughters or the State to be a public nuisance.

The Memorial was erected by county order, dedicated and maintained on reserved property easements to the county. The City of Winston-Salem has no lawful basis to declare the Memorial to be a public nuisance or to pre-emptively demand and then unilaterally remove it from a property listed on the National Register of Historic Places without prior permission or agreement. The City of Winston-Salem can only act to seek removal of the Monument after compliance with the applicable federal and state statutes. 18 U.S.C. § 1369 (2018); 36 CFR § 60.15; N.C. Gen. Stat. § 100-2.1(b).

Such unilateral and pre-emptive action is unlawful under these laws and statutes and is not allowed within N.C. Gen. Stat. § 160A-193(a) ("A city shall have authority to summarily remove, abate, or remedy everything in the city limits or within one mile thereof, that is dangerous or prejudicial to the public health or public safety."). The Daughters' declaratory judgment complaint invokes subject matter jurisdiction and states standing and claims for relief to survive Defendants' motions to dismiss.

B. Compliance with the Statutes

While the laws and statutes limit the authority of the City of Winston-Salem, Forsyth County, or anyone else to alter, remove or relocate the monuments or Memorial, the North Carolina statute does not totally prohibit removal or relocation. After compliance with federal and state requirements, the Memorial may be relocated to a "site of similar prominence, honor, visibility, availability and access that are within the boundaries of the jurisdiction from which it was located." N.C. Gen. Stat. § 100-2.1(b).

Since the dedicated location of the Memorial was erected by order of the County Commission near the front door of one of the County's most prominent building for over 115 years, and the only former public building in Forsyth County listed on the National Register of Historic Places, any substituted location in equal prominence may be a difficult standard to meet, although the statute requires the memorial to be of "similar prominence" and not "the same prominence." In any event, the statutory restrictions on relocation make removal of the Memorial not an option without prior "approval of the North Carolina Historical Commission," or an express agreement with the owner, which is the subject of the declaratory judgment action. N.C. Gen. Stat. § 100- 2.1(a)(b).

VIII. No Agreement to Relocate

The City of Winston-Salem inexplicitly and unlawfully sought to declare the Memorial to dead and wounded veterans from Forsyth County to be a public nuisance, used taxpayer funds to dismantle and remove the Memorial, and sought to relocate the Memorial to the Salem Cemetery without the agreement of the owners and in violation of federal and state law. On 31 December 2018, City of Winston-Salem Mayor Joines wrote to the Daughters and purported to demand the Daughters to remove the Memorial within thirty days, no later than 31 January 2019. The Memorial had remained in place and undisturbed since 20 March 1905 until April 2019.

There is no allegation or agreement with any purported owner to remove or relocate the Memorial or any showing of prior compliance with the federal and state statutes. Temporary removal is permitted by agreement with the owner when required to preserve the Memorial, which must be re-erected within ninety (90) days thereafter. N.C. Gen. Stat. § 100-2.1(b). Defendants make no allegations of actions or threats of action to physically damage the Memorial, so that provision would not appear to apply. *Id.*

The statutes provide one exception, presuming the Memorial is owned by the Daughters or other private owners that may be applicable, which provides that an object of remembrance owned by a private party that is located on public property may be removed, if it is subject to a legal agreement governing its removal or relocation. Defendants do not assert any agreement with the Daughters, Forsyth County, the State, or any other potential owner to dismantle, remove, or relocate the Memorial. *Id.* Defendant Winston Courthouse, LLC specifically disclaims any ownership of the Memorial.

Prior to the Memorial being unlawfully dismantled and removed, only two instances of the Memorial being spray painted had occurred and that desecration was immediately removed and cleaned. There was no evidence of violence or other direct substantiated threats to public safety from the 115-year-old Memorial to permit the City of Winston-Salem to act unilaterally to remove the Memorial.

IX. Conclusion

The superior court clearly possesses jurisdiction and Daughters possess standing on multiple grounds to assert the declaratory judgment action and claims to survive dismissal under Rule 12(b)(1). N.C.

Gen. Stat. §§ 1-277; 7A-27 (2019); *see Goldston*, 361 N.C. at 30, 637 S.E.2d at 879. The Daughters possess the individual standing of its members and Chapters and representational standing to seek a declaratory judgment and other relief. *River Birch Assocs.*, 326 N.C. at 130, 388 S.E.2d at 555. The trial court's order of dismissal "with prejudice" to the contrary is clearly erroneous.

When the complaint is "liberally construed" it does not appear "beyond doubt" the Daughters' complaint asserts "no set of facts" to support their claims and entitlement to relief. *See Dixon*, 85 N.C. App. at 340, 354 S.E.2d at 758. The Daughters' allegations clearly assert an "injury in fact" from Defendants' actions. *See Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 51-52. The trial court granting of either of Defendants' Rule 12(b)(1) or 12(b)(6) motions with prejudice was error. "Thou shalt not remove thy neighbour's landmark, which they of old time have set[.]" *Deuteronomy* 19:14 (King James). "Remove not the ancient landmark, which thy fathers have set." *Proverbs* 22:28 (King James).

The majority's opinion does not address, explain, distinguish nor refute any of the rules, precedents, laws, and statutes that are plead at the trial court, cited on appeal, and as controlling law, are clearly applicable to the facts and record that is before us. The order of dismissal with prejudice is erroneous and is properly reversed and remanded. I respectfully dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 DECEMBER 2020)

ANGEL v. SANDOVAL No. 20-236	Surry (14CVD335)	Affirmed
CHARZAN v. N.C. DEP'T OF PUB. SAFETY No. 20-97	N.C. Industrial Commission (TA-24298)	Dismissed
ELITE GUARD, INC. v. VETERANS ALT., INC. No. 19-1154	Cumberland (18CVS7460)	Affirmed
EMBERY v. GOODYEAR TIRE & RUBBER CO. No. 19-782	N.C. Industrial Commission (16-038373)	Affirmed
IN RE A.H. No. 19-1115	Orange (17JA36-37)	Vacated and Remanded
IN RE A.O. No. 20-175	Mecklenburg (13JA441) (13JA443)	Affirmed
IN RE J.B. No. 20-25	McDowell (19JA27) (19JA28)	Affirmed in part and Remanded in part
IN RE K.A.W. No. 20-99	Gaston (18JA208) (18JA209)	Affirmed
SCHWARZ v. WEBER No. 19-1164	Mecklenburg (18CVS4097)	Affirmed
STATE v. ABDULLAH No. 19-867	Wake (17CRS211984)	No plain error
STATE v. ALLEN No. 19-1004	Cleveland (19CRS000988) (19CRS050406)	New Trial
STATE v. BELL No. 19-1147	Brunswick (17CRS55091) (18CRS2146-47) (19CRS819)	No Error.
STATE v. BULLOCK No. 20-187	Onslow (18CRS51429)	Reversed

STATE v. CAMPBELL No. 19-1035	Granville (15CRS50053-55) (15CRS50059-60)	No Error
STATE v. EDWARDS No. 19-505	McDowell (12CRS52005) (12CRS52016)	NO ERROR; REMANDED TO CORRECT TYPOGRAPHICAL ERROR.
STATE v. FOSTER No. 19-891	Rockingham (18CRS50950) (18CRS924)	Dismissed
STATE v. GILMORE No. 20-288	Cumberland (18CRS53917)	No error in part, vacated in part.
STATE v. GONZALEZ No. 19-192	Johnston (16CRS57241)	No Error
STATE v. GRIMES No. 20-244	Bertie (18CRS50453-55) (18CRS50457)	No Error; Remand for Correction of Clerical Errors
STATE v. HARRIS No. 19-1156	Pitt (16CRS50571)	No Error
STATE v. HIGGINS No. 20-133	Mecklenburg (18CRS238246-47)	No Error
STATE v. HOLDEN No. 19-830	Wake (14CRS208087) (14CRS208088) (14CRS2275)	Remanded for rehearing.
STATE v. KORSCHUN No. 20-81	Wayne (17CRS53453)	No Error
STATE v. MILLS No. 20-84	McDowell (18CRS569-570)	No error in part; Remanded in part
STATE v. NEAL No. 20-134	Wake (16CRS219065) (16CRS219207) (16CRS4952) (16CRS5069)	No Error
STATE v. PEAY No. 19-698	Forsyth (18CRS50965-67) (18CRS586-87)	Affirmed in part; No error in part.

STATE v. RICE No. 19-1105	Robeson (10CRS54101-04)	No Error
STATE v. SHARMA No. 19-591	Wake (17CRS215065-66) (17CRS218038-39)	Affirmed in part; dismissed in part; no error in part.
STATE v. SLADE No. 19-969	Guilford (15CRS93186-88) (19CRS25103-07)	Affirmed in Part, Reversed in Part and Remanded
STATE v. STEVENSON No. 19-1096	Union (17CRS50549) (18CRS731)	NO ERROR IN PART; VACATED AND REMANDED IN PART.
STATE v. THOMAS No. 19-361	Forsyth (17CRS50492) (17CRS50494-96)	No Error
STATE v. WOODY No. 20-195	Burke (16CRS53902)	NO ERROR IN PART; VACATED IN PART; REMANDED IN PART

ANDERSON CREEK PARTNERS, L.P. v. CNTY. OF HARNETT

[275 N.C. App. 423 (2020)]

ANDERSON CREEK PARTNERS, L.P.; ANDERSON CREEK INN, LLC; ANDERSON CREEK DEVELOPERS, LLC; FAIRWAY POINT, LLC; STONE CROSS, LLC D/B/A STONE CROSS ESTATES, LLC; RALPH HUFF HOLDINGS, LLC; WOODSHIRE PARTNERS, LLC; CRESTVIEW DEVELOPMENT, LLC; OAKMONT DEVELOPMENT PARTNERS, LLC; WELLCO CONTRACTORS, INC.; NORTH SOUTH PROPERTIES, LLC; W.S. WELLONS CORPORATION; ROLLING SPRINGS WATER COMPANY, INC.; AND STAFFORD LAND COMPANY, INC., PLAINTIFFS

v.

COUNTY OF HARNETT, DEFENDANT

PF DEVELOPMENT GROUP, LLC, PLAINTIFF

v.

COUNTY OF HARNETT, DEFENDANT

No. COA19-533

Filed 31 December 2020

1. **Public Works—water and sewer services—fees for future services—mandatory condition of approval for permits—judicial notice**

Where plaintiff developers filed suit seeking refunds for fees they paid to defendant county for water and sewer services "to be furnished" to their future real estate development, the trial court did not abuse its discretion by taking judicial notice of two interlocal agreements (from 1984 and 1998) concerning the operation and administration of the county's water and sewer systems in the court's consideration of a Civil Procedure Rule 12(c) motion on the pleadings. The two agreements were public contracts between government entities, not subject to reasonable dispute, and germane to the resolution of the case.

2. **Public Works—water and sewer services—fees for future services—county's authority to collect—exercise of water and sewer districts' authority**

Where plaintiff developers filed suit seeking refunds for fees they paid to defendant county for water and sewer services "to be furnished" to their future real estate development, even though the county had no statutory authority to collect prospective fees, a 1998 interlocal agreement between the county and its water and sewer districts granted the county the ability to exercise the districts' prospective fee-collecting authority. Therefore, the pleadings failed to present a material issue of fact regarding the county's authority to collect prospective fees.

3. Public Works—water and sewer services—fees for future services—mandatory condition of approval for permits—unconstitutional conditions doctrine

Where plaintiff developers filed suit seeking refunds for fees they paid to defendant county for water and sewer services "to be furnished" to their future real estate development, the developers' pleadings failed to present a constitutional takings claim under the unconstitutional conditions doctrine as a matter of law where the fees were predetermined, set out in an ordinance, and uniformly applied.

Consolidated appeal by Plaintiffs from order entered 26 November 2018 by Judge Michael J. O'Foghludha in Superior Court, Harnett County. Heard in the Court of Appeals 6 February 2020.

Ferguson, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay, and Scarbrough & Scarbrough, PLLC, by James E. Scarbrough, Madeline J. Trilling, and John F. Scarbrough, for Plaintiffs-Appellants.

Fox Rothschild LLP, by Kip David Nelson, Bradley M. Risinger, and Troy D. Shelton, and Christopher Appel, for Defendant-Appellee.

McGEE, Chief Judge.

Plaintiffs Anderson Creek Partners, L.P., et al. ("Anderson Creek"), and PF Development Group, LLC ("PF Development") (together, the "Developers"), each brought suit seeking refunds for fees paid to Defendant Harnett County (the "County") for water and sewer services "to be furnished" to their future real estate developments. Each of the two cases was designated to be an exceptional civil case and the two cases were consolidated for a single decision in the trial court, as well as consolidated for appeal to this Court.

The Developers appeal from the 26 November 2018 order of the trial court granting the County's motion for judgment on the pleadings. The Developers contend that (1) the trial court erred by taking judicial notice of an interlocal agreement between the County and its water and sewer districts; (2) the pleadings presented material issues of fact with respect to whether the County was authorized to charge fees for services "to be furnished;" and (3) the pleadings presented a viable unconstitutional conditions claim.

We hold (1) that the trial court did not err in taking judicial notice of the interlocal agreements because the agreements are public documents;

(2) there were no issues of material fact in the pleadings with respect to whether the County had authority to charge prospective fees; and (3) the capacity use fees collected by the County are not subject to review under the unconstitutional conditions doctrine. We affirm the trial court's order.

I. Factual and Procedural Background

A. *Interlocal Agreements and Assessment of Fees*

The Harnett County Board of Commissioners created a water and sewer district in Buies Creek (the "Buies Creek District") to collect wastewater within the district. The County and the Buies Creek District entered into an interlocal agreement in 1984 (the "1984 Buies Creek Agreement"), whereby the County agreed to operate the Buies Creek District's water and sewer system. The 1984 Buies Creek Agreement was the subject of the North Carolina Supreme Court decision in *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990). In *McNeill*, the North Carolina Supreme Court held that counties could lawfully enter into and act upon an interlocal agreement to operate a water and sewer system on behalf of a water and sewer district, and could exercise the water and sewer district's "rights, powers, and functions" in carrying out those operations. *Id.* at 559–60, 398 S.E.2d at 479.

By 1998, the County created eight water and sewer districts (the "Districts") to manage wastewater across its entire jurisdiction. The County and the Districts then entered into a joint interlocal agreement in May 1998 (the "1998 Agreement"), whereby the County agreed to administer the Districts' water and sewer systems. Per the 1998 Agreement, the County and the Districts agreed that the County would lease the Districts' property; the Districts would transfer their intangible assets to the County; the County would assume most of the Districts' liabilities; and the County would "administer all operations and maintenance" of the Districts' water and sewer systems.

The County then incorporated its duties under the 1998 Agreement into the Harnett County Water and Sewer Ordinance (the "Ordinance"). *See* Harnett County, N.C., Water and Sewer Ordinance (July 1, 2016) [hereinafter, Ordinance]. Pursuant to section 28(h) of the Ordinance, the County charges landowners "capacity use" fees (the "Fees") for future water or sewer service as a mandatory condition prior to the County issuing approvals and/or permits for developments to real property. Ordinance § 28(h). The Fees for a single-family residential lot are a one-time, non-negotiable payment of $1,000 for water and $1,200 for sewer. Ordinance § 28(h).

B. *Anderson Creek's Case*

The Developers each sought to build a number of residences in the County in or around 2017. Cumulatively, the County required the Developers to pay over $25,000 in Fees prior to issuing its approval for the Developers' proposed plans.

Anderson Creek filed a complaint against the County on 1 March 2017. The complaint initially alleged six claims for relief, requesting:

> (1) a declaration that the Ordinance and Fees were unlawful because the County exceeded its authority under N.C. Gen. Stat. § 153-277 in adopting and enforcing the Ordinance and Fees, and/or because the Fees lacked an "essential nexus" and "rough proportionality" to the impact of the proposed developments on the County's water and sewer systems;
>
> (2) a declaration that the Ordinance and Fees violated the Developers' rights to equal protection and substantive due process under Article I, Section 19 of the North Carolina Constitution;
>
> (3) a refund to the Developers of all fees exacted by the County, together with interest at the rate of 6% per annum pursuant to N.C. Gen. Stat. § 153A-324;
>
> (4) an award of costs, expenses, and attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.7 and/or other applicable law;
>
> (5) an accounting of all fees exacted by the County from the Developers; and
>
> (6) an order allowing any future Fees required to be paid into escrow pending the litigation resolution.

The County filed an amended[1] answer, counterclaims, and motion for sanctions in response to Anderson Creek's complaint on 19 May 2017. Anderson Creek then filed a motion to amend its complaint on 23 August 2017. The trial court granted the motion, and Anderson Creek filed an amendment to its complaint asserting a seventh and eighth claim for relief:

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1. The County's original answer, counterclaims, and motion for sanctions is not included in the record on appeal.

(7) alleging that the County breached the terms of a 4 April 2018 agreement with Anderson Creek, specifically; and

(8) requesting a declaration regarding the severability of a provision of the agreement with Anderson Creek relating to the payment of fees from Anderson Creek's development properties.

The Anderson Creek case was designated an exceptional civil case under Rule 2.1 of the General Rules of Practice for the Superior and District Courts on 27 September 2017 and was reassigned to another Superior Court Judge in Chatham County.

The County filed an answer and counterclaim in response to Anderson Creek's amended complaint on 1 February 2018.[2] The County's counterclaim requested a declaration that the 1998 Agreement gave the County authority to collect fees through the Ordinance.

On 12 February 2018, the County filed a Rule 12(c) motion for judgment on the pleadings as to claims 1 through 6 and 8 of Anderson Creek's amended complaint, and filed a motion to join necessary parties or, in the alternative, motion for permissive joinder of parties. The County attached to its motions the 1984 Buies Creek Agreement at issue in *McNeill*, as well as the subsequent 1998 Agreement. The motions were heard at the 6 August 2018 civil session of Chatham County, Superior Court.

C. *PF Development's Case*

PF Development's complaint was filed against the County on 19 July 2017. Six claims for relief were alleged in PF Development's complaint. These claims were identical to the claims raised in Anderson's Creek initial complaint. The County filed an answer denying the material allegations of the complaint and a counterclaim for declaratory relief on 9 October 2017. PF Development filed a reply to the counterclaim on 9 November 2017.

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2. The record indicates that the trial court did not grant Anderson Creek's motion to amend its complaint until 22 February 2018 and that Anderson Creek's amended complaint was not filed until 16 March 2018. According to these filing dates, the County filed its answer, counterclaims, and motion for judgment on the pleadings in response to Anderson Creek's amended complaint over one week before the trial court granted the motion to amend and over a month before the amended complaint was filed. Nevertheless, the County's answer, counterclaims, and motions evidence its receipt of the amended complaint and the parties do not bring any arguments regarding the timeliness or authenticity of the amended complaint.

The County filed a Rule 12(c) motion for judgment on the pleadings as to all six of PF Development's claims, and a motion to join necessary parties or, in the alternative, motion for permissive joinder of parties on 12 February 2018. The PF Development case was designated an exceptional civil case on 4 October 2018 and also reassigned to the same Superior Court Judge in Chatham County.

D. *Consolidation for Decision and Appeal*

The Developers initially filed a motion to consolidate their cases before the trial court on 30 January 2018. After consideration of the pleadings, arguments of counsel at the 6 August 2018 hearing in Anderson Creek's case, and materials submitted to the trial court, the trial court informed the Developers that the County's Rule 12(c) motion would be partially allowed in Anderson Creek's case. The Developers again filed a joint consent motion to consolidate their cases with the trial court on 5 October 2018. The trial court entered an order granting the consent motion to consolidate on 26 November 2018. The parties to the PF Development case elected to accept the result of the Anderson Creek case and did not request additional oral argument for PF Development's case.

On 26 November 2018, the trial court entered an order (the "Consolidated Order") resolving each case, granting: (1) in the Anderson Creek case, the County's motion for judgment on the pleadings on claims 1 through 6 and 8 and dismissing each with prejudice; and (2) in the PF Development case, the County's motion for judgment on the pleadings on all claims and dismissing all with prejudice. The Consolidated Order noted that the court had "taken judicial notice of public documents appended to [the County's] Rule 12(c) Motion [] which are May 1998 and July 1984 Agreements entered into among and between [the County] and other North Carolina governmental units that are relevant to the matters involved in this action." The Consolidated Order also stated that the County's motions to join necessary parties or, in the alternative, motions for permissive joinder of parties in each of the Developers' cases were moot based on its decision. The Developers filed a consolidated notice of appeal on 21 December 2018.

II. Analysis

A. *Judicial Notice of Public Contracts*

[1] We first address the Developers' argument that the trial court erred by (1) taking judicial notice of the 1984 Buies Creek Agreement and the 1998 Agreement, each of which the County attached to its motion for judgment on the pleadings, and (2) considering the documents

in the determination of its Consent Order. The Developers contend that the Consent Order is, "in essence, a motion for summary judgment by ambush" because they were not "afford[ed] an opportunity to reasonably confront these documents." Essentially, the Developers claim that they were unduly surprised by the County's presentation of the agreements, and placed in the "untenable position" of having to "defend matters external to the allegations of their Complaint[.]" We disagree.

The Developers are correct that "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]" N.C. Gen. Stat. § 1A-1, Rule 12 (2017). However, in deciding a Rule 12(c) motion for judgment on the pleadings, our Court has held that "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, *and matters of which a court may take judicial notice*." *QUB Studios, LLC, v. Marsh*, 262 N.C. App. 251, 260, 822 S.E.2d 113, 120–21 (2018) (emphasis added) (adopting the United States Supreme Court's language in *Tellabs, Inc., v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 168 L. Ed. 2d 179, 193 (2007)). To be clear, a court may take judicial notice of matters outside the pleadings, where appropriate, without causing the proceeding to convert from a Rule 12(c) motion to one for summary judgment under Rule 56. *Id.*

Judicial notice is appropriate where a fact is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201 (2017). North Carolina Courts have long held that "important public documents will be judicially noticed." *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 287, 221 S.E.2d 322, 323 (1976) (citing *Staton v. Atl. Coast Line Rail Co.*, 144 N.C. 135, 145, 56 S.E. 794, 797 (1907)). "Important public documents" in this context have been held to include, among other things, a Utilities Commission order modifying a joint venture agreement, *Town of Midland v. Morris*, 209 N.C. App. 208, 214, 704 S.E.2d 329, 335 (2011); a vehicle insurance classification scheme composed by the North Carolina Rate Bureau, *State ex rel. Com'r of Ins. v. N.C. Auto. Rate Admin. Office*, 293 N.C. 365, 381, 239 S.E.2d 48, 58 (1977); and contractual agreements between a Native American tribe and both the state government and private entities, *Hatcher v. Harrah's N.C. Casino Co., LLC*, 169 N.C. App. 151, 154, 610 S.E.2d 210, 212 (2005). "[A] trial court's

decision concerning judicial notice will not be overturned absent an abuse of discretion." *Muteff v. Invacare Corp.*, 218 N.C. App. 558, 568, 721 S.E.2d 379, 386 (2012) (citation omitted).

The 1984 Buies Creek Agreement and the 1998 Agreement are public contracts between government entities, Harnett County and its municipal water and sewer districts. *See* N.C. Gen. Stat. § 132-1 (2017) (defining documents created by municipalities, counties, and special districts "in connection with the transaction of public business" to be public records). These documents are subject to public review, N.C. Gen. Stat. § 132-1, and their existence is therefore "not subject to reasonable dispute." The agreements are important public documents germane to the resolution of this case; indeed, some of the Developers reference—or even incorporate—the 1998 Agreement in their pleadings. The Developers' position was far from "untenable." The trial court took judicial notice of the existence of the agreements and of the language therein, then interpreted that language as a matter of law. It was, therefore, not an abuse of discretion for the trial court to take judicial notice of the 1984 Buies Creek Agreement and the 1998 Agreement and to consider the documents in its review of the parties' pleadings.

B. *Preemptive Collection of Fees*

[2] The Developers primarily contend that the trial court erred in granting the County's motion for judgment on the pleadings because the pleadings presented material issues of fact with respect to whether the County had authorization to prospectively collect fees for water and sewer services "to be furnished" in the future. We hold that the County had authority to collect prospective fees by virtue of the 1998 Agreement.

i. *Standard of Review*

"We review de novo a trial court's order granting a motion for judgment on the pleadings under Rule of Civil Procedure 12(c)." *Tully v. City of Wilmington*, 370 N.C. 527, 532, 810 S.E.2d 208, 213 (2018) (citation omitted). The moving party must show that, after considering all well-pleaded factual allegations in the nonmoving party's pleadings as true, "no material issue of fact exists and that he is entitled to judgment as a matter of law." *Id.* A defendant moving for judgment on the pleadings must prove, essentially, that the plaintiff's pleadings "fail[] to allege facts sufficient to state a cause of action or admit[] facts which constitute a complete legal bar to a cause of action." *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51–52, 790 S.E.2d 657, 659–60 (2016) (citations and quotation marks omitted).

This case also requires our review of two interlocal agreements between the parties. "Generally, 'the purport of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument.' " *China Grove 152, LLC, v. Town of China Grove*, 242 N.C. App. 1, 9, 773 S.E.2d 566, 572 (2015) (citation omitted).

ii. *Authorization to Collect Prospective Fees*

A clear understanding of the question before us first requires discussion of the statutes and seminal cases which comprise the relevant fee-collecting authority of the municipal entities involved. Municipalities are entities born purely from "legislative will" and have no authority or powers apart from those given to them by the General Assembly. *Lutterloh v. City of Fayetteville*, 149 N.C. 65, 69, 62 S.E. 758, 760 (1908) (citations omitted). The General Assembly allows for the creation of municipalities and expressly delegates powers and authorities to them via enabling statutes. N.C. Const. art. VII, § 1; *Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 150, 731 S.E.2d 800, 807 (2012) (citations omitted). Acts taken by a municipality that extend beyond the scope of the powers and authorities statutorily granted to it are void. *City of Asheville v. Herbert*, 190 N.C. 732, 735, 130 S.E. 861, 863 (1925) (citations omitted).

When the Developers sought development permits in early 2017, the County had the statutory authority only to collect fees for past and present "services furnished." The governing statute then stated:

> A county may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or *the services furnished* by a public enterprise.

N.C. Gen. Stat. § 153A-277(a) (2015) (emphasis added).

The North Carolina Supreme Court held that a nearly identical statute regarding the fee-collecting authorities of cities did not authorize the collection of prospective impact fees in its 2016 decision in *Quality Built Homes Inc. v. Town of Carthage*, 369 N.C. 15, 789 S.E.2d 454 (2016). In *Quality Built Homes*, the town of Carthage required developers to pay a progressively scaling fee prior to final approval of the developers' plats and building permits. *Id.* at 17, 789 S.E.2d at 456. Carthage claimed authority to charge these prospective fees under N.C. Gen. Stat. § 160A-314, which then read:

> A city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or *the services furnished* by a public enterprise.

N.C. Gen. Stat. § 160A-314 (2015) (emphasis added). Our Supreme Court held the plain language of N.C. Gen. Stat. § 160A-314 "clearly and unambiguously empower[ed] Carthage to charge for the contemporaneous use of water and sewer services—*not* to collect fees for future [] spending." *Id.* at 20, 789 S.E.2d at 458 (emphasis added) (citation omitted). The statute's provisions were "operative in the present tense." *Id.*

Our Court addressed similar language enabling a utilities commission to collect fees in *Kidd Construction Group, LLC, v. Greenville Utilities Commission*, 271 N.C. App. 392, 845 S.E.2d 797 (2020). In *Kidd*, the Greenville Utilities Commission (the "GUC"), a local government entity created by our General Assembly to provide water and sewer services to Pitt County, collected prospective capacity fees "as a precondition to development approval, to the issuance of building permits, and to receiving service." *Id.* at 395, 845 S.E.2d at 799. The charter establishing creation of the GUC and outlining its powers authorized the GUC to "fix uniform rates for *all services rendered*[.]" *Id.* at 398, 845 S.E.2d at 801. This Court held that the operative language in GUC's charter was "functionally equivalent" and "nearly identical" to the enabling language at issue in *Quality Built Homes*, and "also fail[ed] to confer prospective charging authority by lacking the critical 'to be' language." *Id.* ("Just as the 'services furnished' language did not empower Carthage to impose impact fees prior to any service being provided, so too does 'services rendered' fail to empower GUC to impose impact fees on builders and developers as a condition of final development approval." (citation omitted)).

The only difference between the text of N.C. Gen. Stat. § 160A-314 reviewed in *Quality Built Homes* and the text of N.C. Gen. Stat. § 153A-277(a) subject to our review in this case is the substitution of the word "city" for "county." We interpret the nearly identical, plain language of N.C. Gen. Stat. § 153A-277(a) in the same manner. N.C. Gen. Stat. § 153A-277(a) authorized the County only to assess fees for the "contemporaneous use" of its water and sewer systems, and otherwise "clearly and unambiguously fail[ed] to give [the County] the essential prospective charging power necessary to assess [the Fees]." *Quality Built Homes*, 369 N.C. at 22, 789 S.E.2d at 459.

In response to the *Quality Built Homes* decision, our General Assembly modified both N.C. Gen. Stat. § 153A-277(a) and N.C. Gen. Stat. § 160A-314 to authorize counties and cities to collect fees for

"services furnished or to be furnished by any public enterprise." N.C. Gen. Stat. § 153A-277(a) (2019); N.C. Gen. Stat. § 160A-314 (2019). The General Assembly thus amended each statute to permit the prospective fee-collecting acts complained of here. The amended language of N.C. Gen. Stat. § 153A-277(a) became effective 1 October 2017; however, the General Assembly specified that "[n]othing in th[e] act provides retroactive authority for any system development fee, or any similar fee for water or sewer services to be furnished, collected by a local governmental unit prior to October 1, 2017." PUBLIC WATER AND SEWER SYSTEM DEVELOPMENT FEE ACT, 2017 North Carolina Laws S.L. 2017-138 (H.B. 436).

The Districts, on the other hand, were authorized to collect prospective fees in 2016. Each of the Districts involved in this case are water and sewer districts created under chapter 162A of the North Carolina General Statutes and governed by the Harnett County Board of Commissioners. Water and sewer districts are bodies corporate and politic which are and were, at all times relevant to this case, authorized to "contract and be contracted with" and to "establish, revise and collect rates, fees or other charges and penalties for the use of or the services furnished or *to be furnished*[.]" N.C. Gen. Stat. § 162A-88 (2015) (emphasis added). Unlike the versions of N.C. Gen. Stat. §§ 153A-277 and 160A-314 in effect when the Developers were required to pay the Fees, N.C. Gen. Stat. § 162A-88 "included the language 'services furnished and to be furnished' and thus 'plainly allowed the charge for prospective services[.]' " *Kidd*, 271 N.C. App. at 397-98, 845 S.E.2d at 800 (quoting *Quality Built Homes*, 369 N.C. at 20, 789 S.E.2d at 458) (distinguishing N.C. Gen. Stat. § 160A-314 (2015) and N.C. Gen. Stat. § 162A-88 (2015)).

Additionally, local government entities may generally cooperate through interlocal agreements to carry out their purposes. *See* N.C. Gen. Stat. §§ 153A-275, 153A-278 (2015). Our Supreme Court has made it clear that a county may contract with another local government entity to enable the county to exercise authority given to that entity. Specifically, this issue has been addressed with respect to the County and its water and sewer districts. In *McNeill v. Harnett County*, our Supreme Court held that the 1984 Buies Creek Agreement—the prior interlocal agreement between the County and the Buies Creek District, one of the Districts in this case—properly enabled the County to exercise all "rights, powers, and functions granted to water and sewer districts as found in N.C.G.S. § 162A-88[.]" *McNeill*, 327 N.C. at 559, 398 S.E.2d at 479.

At all times relevant to this action, counties did not have the authority to collect prospective fees themselves. However, the Districts each

had the authority to collect prospective fees and were free to contract with the County to enable the County to collect prospective fees by exercising the statutory authority of the Districts. Therefore, the only way the County could have had the authority to charge any prospective fees would be pursuant to an interlocal agreement through which the County could exercise authority held by the Districts.[3]

iii. *Issues of Fact*

Having explained that the County may only collect fees for services "to be furnished" by virtue of an interlocal agreement granting such rights, the question before this Court is whether the 1998 Agreement did grant the County the Districts' authority to collect prospective fees under N.C. Gen. Stat. § 162A-88.

In *McNeill*, our Supreme Court held that the County could lawfully enter into and act under an interlocal agreement to operate a water and sewer system on behalf of its water and sewer districts:

> [P]ursuant to an interlocal cooperative agreement and pursuant to authority granted in article 15 of chapter 153A, a county may, among other things, operate a water and/or sewer system for and on behalf of another unit of local government, such as a water and sewer district, and in conjunction therewith may exercise those rights, powers, and functions granted to water and sewer districts as found in N.C.G.S. § 162A-88 and those rights, powers, and functions granted to counties in N.C.G.S. ch. 153A, art. 15.

McNeill, 327 N.C. at 559, 398 S.E.2d at 479. The *McNeill* Court recognized that the County and the Buies Creek District had entered into the 1984 Buies Creek Agreement "on 23 July 1984 wherein it was agreed that the [Buies Creek District's] sewer system, which had been completed that year, would be operated by Harnett County through its Department of Public Utilities." *Id.* The *McNeill* Court held that, pursuant to the 1984

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3. We note that the impact fees charged in *Quality Built Homes* were assessed on a progressively scaling basis, whereas the Fees charged by the County in the present case are flat and non-negotiable charges which the County deems "capacity use" fees. This difference is not material to our consideration of the County's prospective fee-collecting authority. The Fees charged by the County here are "not assessed at the time of actual use, but are payable in full at the time of final subdivision plat approval—a time when water, sewer, or other infrastructure might not have been built and only a recorded plat exists" and "requir[e] [the County] to invoke prospective charging power" for future services. *Quality Built Homes*, 369 N.C. at 21, 789 S.E.2d at 458–59 (quotation marks and brackets omitted).

Buies Creek Agreement, the County was "clothed" with "those powers granted to the [Buies Creek District] in N.C.G.S. § 162A-88[,]" as well as "those powers set forth in chapter 153A, article 15 of the General Statutes[.]" *Id*. Therefore, the 1984 Buies Creek Agreement granted the County the power, among other things, to "establish, revise and collect rates, fees or other charges and penalties for the use of or the services furnished or *to be furnished* by any sanitary sewer system, water system or sanitary sewer and water system" and to "exercise those powers[.]" N.C. Gen. Stat. § 162A-88 (emphasis added); *McNeill*, 327 N.C. at 559, 398 S.E.2d at 479.

The terms of the 1984 Buies Creek Agreement stated, in relevant part, that the County and the Buies Creek District "agreed to enter into [the] contract for . . . the operation of the wastewater collection system as a County operated sewer and wastewater collection system[.]" The contract provided that a newly constructed "wastewater treatment plant owned by the County" would be operated by the County to serve the sewer and wastewater needs of the Buies Creek District. In so doing, the County was "entitled to fund or cause to be funded the construction of any sewer line to be connected to the [Buies Creek District's] system as an extension . . . for the purpose of serving needy users with wastewater utility services[.]" Notably, the 1984 Buies Creek Agreement made no direct reference to N.C. Gen. Stat. § 162A-88.

The 1998 Agreement provides the County with substantially the same rights as it was granted in the 1984 Buies Creek Agreement and more clearly incorporates the Districts' prospective fee-collecting authority. The 1998 Agreement opens by acknowledging that it exists pursuant to statutory authority, which includes a number of statutes "[w]ithout limitation." The enumerated statutory authorities include the authority of "two or more . . . units of local government [to] cooperate" in the "joint provision of enterprisory services" as granted by N.C. Gen. Stat. § 153A-278. The 1998 Agreement then expressly recognizes that the Districts have the ability to assess fees for "services furnished or to be furnished" pursuant to N.C. Gen. Stat. § 162A-88. In a section labeled "Purpose of the Agreement," the 1998 Agreement states that its purpose is to "provide a cost efficient method for the administration, operation, maintenance and expansion of water and . . . wastewater services to each of the Districts through [the County's] Department of Public Utilities." Like the 1984 Buies Creek Agreement, the 1998 Agreement does not make a specific reference to the County's receipt of the Districts' authority to collect prospective fees, but does wholly acknowledge an intent between the parties to have the County step into the Districts' shoes to

efficiently provide water and sewer services throughout each District. We therefore hold that the 1998 Agreement granted the County the ability to exercise the Districts' prospective fee-collecting authority, and that the pleadings failed to present a material issue of fact regarding the County's authority to collect prospective fees.

The Developers' argue that this case turns, instead, on a different issue: whether the pleadings show a material issue of fact regarding how the County assessed the Fees, either by managing the Districts' infrastructure or by operating its own county infrastructure. In the Developers' view, this case presents a "complex puzzle regarding the Ordinance, the Fees, and the true relationship of the County and the Districts in the provision of water and sewer service." The Developers contend the County had no authority to collect the Fees because "[t]he clear inference from the [1998 Agreement] is that the County is operating its own, countywide water and sewer system—not the systems of the Districts."

We disagree with the Developers' statement of the issue in this case. The pleadings may show an issue of fact with respect to whose infrastructure the County used to assess the Fees, and whether the District even maintained any water and sewer system of its own, but these issues are not material to the resolution of this case. Regardless of whether the County is operating its own physical water and sewer infrastructure, the Districts' infrastructure, infrastructure it acquired from the Districts, or a combination thereof, the issue is whether the County had the authority to use any means to assess prospective fees for water and sewer services to be furnished in the future.[4] Indeed, the *McNeill* Court found that the County had this authority where the 1984 Buies

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4. After hearing arguments from counsel regarding the County's motion for judgment on the pleadings, the trial court properly understood the issue in this case to be the same:

> Legally, it doesn't matter how they do it; legally, it matters can they legally do it? But, how they do it doesn't matter. Isn't that kind of irrelevant?
>
> . . . .
>
> They have to have the authority, but, as long as they continue to have the authority, that's—that's the legal threshold issue.
>
> . . . .
>
> [T]he threshold issue for me to decide in this case is whether the [1998 Agreement] is legally—legally different than the [1984 Buies Creek Agreement] and *whether the [1998 Agreement] is not done pursuant to [N.C. Gen. Stat. § 162A*].

(Emphasis added).

Creek Agreement specified that the County would operate a "wastewater treatment plant owned by the County" and a "wastewater treatment facility owned by the County[,]" which were located within the boundaries of the Buies Creek District and thereafter referred to as "the [Buies Creek District's] wastewater collection system" and "the [Buies Creek District's] wastewater treatment facility[.]" It was immaterial to the holding of *McNeill* that the County owned the infrastructure used. We hold that the 1998 Agreement gave the County the rights to exercise the Districts' fee-collecting authority—by any legal means—and therefore affirm the Consolidated Order.

C. *Unconstitutional Conditions Doctrine*

[3] Lastly, the Developers argue that the pleadings presented a material issue of fact of whether assessment of the Fees constituted an unconstitutional condition under the United States Supreme Court's decision in *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 186 L. Ed. 2d 697 (2013). The Developers' pleadings claim that, assuming the County had the authority to assess the Fees, the Fees were nonetheless an unconstitutional condition on the exercise of their property rights. Thus, this Court is asked to determine whether a generally applicable fee assessed as a condition precedent to approval of a land-use permit warrants review under the "unconstitutional conditions doctrine." For the reasons below, we hold that it does not and further affirm the Consolidated Order.

The "unconstitutional conditions doctrine" rests on the principle that "the government may not deny a benefit to a person because he exercises a constitutional right," *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545, 76 L. Ed. 2d 129, 136–37 (1983) (citation omitted), and works to "vindicate[] the Constitution's enumerated rights by preventing the government from coercing people into giving them up[,]" *Koontz*, 570 U.S. at 604, 186 L. Ed. 2d at 708. The United States Supreme Court has held that the unconstitutional conditions doctrine is particularly relevant in the context of the land-use permitting process, as landowners are especially vulnerable to the government's broad discretion in imposing potentially "[e]xtortionate demands" on the grant of land-use permits. *Koontz*, 570 U.S. at 605, 186 L. Ed. 2d at 708. Government conditions that request the landowner deed land as an easement or designate a portion of his or her land for a particular use "can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation." *Id.*; U.S. Const. amend. V. However, where a landowner's proposed use of real

property "threaten[s] to impose costs on the public" the government may constitutionally require the landowner to "internalize the negative externalities of their conduct" and make contributions of real property or finances to mitigate the public costs imposed. *Id.*

The Supreme Court recognized these competing realities in *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 129 L. Ed. 2d 304 (1994). In *Nollan* and *Dolan*, the Court ruled that the government is allowed to condition approval of land-use permits by requiring the landowner to mitigate the impact of his or her proposed use. *Dolan*, 512 U.S. at 391, 129 L. Ed. 2d at 320; *Nollan*, 438 U.S. at 837, 97 L. Ed. 2d at 689. The government may require that the landowner agree to a particular public use of the landowner's real property, as long as there is an "essential nexus" and "rough proportionality" between the public impact of the landowner's proposed developments and the government's requirements. *Dolan*, 512 U.S. at 391, 129 L. Ed. 2d at 320; *Nollan*, 438 U.S. at 837, 97 L. Ed. 2d at 689.

In *Koontz*, the Court extended the application of *Nollan/Dolan*'s "essential nexus" and "rough proportionality" requirements to government demands for monetary contributions where there is a "direct link between the government's demand and a specific parcel of real property." *Koontz*, 570 U.S. at 614, 186 L. Ed. 2d at 714 (footnote omitted). The plaintiff in *Koontz* was required to obtain a Wetlands Resource Management Permit before he could make improvements to his property which would, among other impacts, raise the elevation of the improved property. *Id.* at 599–602, 186 L. Ed. 2d at 704–06. The plaintiff offered to deed a portion of his property as a conservation easement to the water district to mitigate the environmental impact of his proposed improvements. *Id.* The water district considered the plaintiff's offer inadequate, and refused to grant the plaintiff's permit unless he either (1) agreed to increase the amount of property encumbered by the proposed conservation easement, or, in the alternative, (2) to deed the conservation easement as offered and to also pay for environmental improvements to district-owned real property several miles away. *Id.* The *Koontz* Court held that the district's second condition also warranted *Nollan/Dolan* review because such demands for money operated, essentially, "in lieu of" relinquishments of real property rights, were therefore "functionally equivalent to other types of land use exactions[,]" and accomplished the same diminution in the landowner's property rights: the landowner could comply with the request, or be denied the right to use his or real property in the desired way. *Id.* at 612, 186 L. Ed. 2d at 713.

In the case before us, the County assessed the Fees as a condition precedent to its approval of the Developers' building permits; if the Developers declined to pay the Fees, the County would have denied the Developers' permission to begin their desired construction projects. The Fees in this case were categorized as impact fees and referred to as "capacity use fees," despite the County's requirement that the fees be paid prior to approval of a developer's permits.

The *Koontz* Court stressed that taxes and fees do not trigger review under the unconstitutional conditions doctrine, and stated: "It is beyond dispute that '[t]axes and user fees . . . are not "takings." ' " *Id.* at 615, 186 L. Ed. 2d at 715 (citation omitted). The *Koontz* Court explained that its holding did "not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on landowners." *Id.* But the *Koontz* Court otherwise provided little guidance on how courts should tread the fine line between unconstitutional exactions and constitutional, routine taxes and fees. *See* Michael B. Kent, Jr., *Viewing the Supreme Court's Exactions Cases Through the Prism of Anti-Evasion*, 87 U. Colo. L. Rev. 827, 871 (2016); Adam Lovelady, The *Koontz* Decision and Implications for Development Exactions, Coates' Canons: N.C. Local Government Law Blog (Dec. 17, 2020), https://canons.sog.unc.edu/the-koontz-decision-and-implications-for-development-exactions/ (opining that the majority opinion in *Koontz* did not provide a clear test for distinguishing permissible taxes and fees from potentially unconstitutional exactions). Indeed, the dissenting justices in *Koontz* warned that the majority's decision extended the "notoriously 'difficult' and 'perplexing' standards" of the Fifth Amendment Takings Clause "into the very heart of local land-use regulation and service delivery[,]" including the levy of fees to "cover the direct costs of providing services like sewage or water to [a] development." *Koontz*, 570 U.S. at 626, 186 L. Ed. 2d at 722 (Kagan, J., dissenting) (citations omitted). The dissenting justices concluded that these fees—such as the Fees at issue in the present case—"now must meet *Nollan* and *Dolan*'s nexus and proportionality tests." *Id.* at 627, 186 L. Ed. 2d at 722.

Neither party in this case briefed any North Carolina precedent, and our own review has found no precedent, which speaks directly to the application of the unconstitutional conditions doctrine to monetary exactions in North Carolina. *Cf. Homebuilders Ass'n of Charlotte, Inc., v. City of Charlotte*, 336 N.C. 37, 46, 442 S.E.2d 45, 51 (1994) (assessing the legality of the city's user fees without reviewing their constitutionality); *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 120–22,

388 S.E.2d 538, 550–51 (1990) (applying *Nollan* and holding no constitutional taking occurred where the city required a dedication of real property as condition precedent to permit approval, but the plaintiff's permit was denied for other valid reasons). At a minimum, this is the first time North Carolina appellate courts have been asked to address this issue since the United States Supreme Court decided *Koontz* in 2013.

This Court most closely addressed the constitutionality of government exactions in any form as takings in its 1989 decision in *Franklin Road Properties v. City of Raleigh*, 94 N.C. App. 731, 381 S.E.2d 487 (1989). In *Franklin Road*, the city of Raleigh refused to issue building permits for a subdivision requested by the plaintiff because the plaintiff would not comply with city ordinances which required the plaintiff to "dedicate and pave a portion of its property as part of [a] right-of-way" prior to approval of a building permit. *Franklin Rd.*, 94 N.C. App. at 734, 381 S.E.2d at 489. The plaintiff sued seeking a declaratory judgment of its rights with respect to the city ordinances, and the trial court granted summary judgment to the defendant city of Raleigh. *Id.* This Court reviewed the constitutionality of the city ordinance's requirement that the plaintiff dedicate a portion of its land as a public right-of-way. *Id.*

The *Franklin Road* Court concluded that the city ordinance was an "exaction" which required constitutional scrutiny under North Carolina's "rational nexus" test, adopted only six months earlier in the 1989 opinion of *Batch v. Town of Chapel Hill*, 92 N.C. App. 601, 376 S.E.2d 22 (1989), *rev'd*, 326 N.C. 1, 387 S.E.2d 655 (1990). *Id.* at 737, 381 S.E.2d at 491. The *Franklin Road* Court explained:

> In [a] portion of our opinion in *Batch* we concluded that the town's requirement that plaintiff dedicate a portion of her property as a right-of-way for the proposed [parkway] was an "exaction." In defining "exaction" we stated:
>
> [A]n exaction is a condition of development permission that requires a public facility or improvement to be provided at the developer's expense. Most exactions fall into one of four categories: (1) requirements that land be dedicated for street rights-of-way, parks, or utility easements and the like; (2) requirements that improvements be constructed or installed on land so dedicated; (3) requirements that fees be paid *in lieu* of compliance with dedication or improvement provisions; and (4) *requirements that developers pay "impact" or "facility" fees reflecting their respective prorated shares of the cost of providing new*

> *roads, utility systems, parks, and similar facilities serving the entire area.*
>
> We further stated that "Not all exactions are constitutional takings." To aid a trial court in determining whether an exaction is an unconstitutional taking, we adopted the following rational nexus test:
>
> To determine whether an exaction amounts to an unconstitutional taking, the court shall: (1) identify the condition imposed; (2) identify the regulation which caused the condition to be imposed; (3) determine whether the regulation substantially advances a legitimate state interest. If the regulation substantially advances a legitimate state interest, the court shall then determine (4) whether the condition imposed advances that interest; and (5) whether the condition imposed is proportionally related to the impact of the development.

Id. at 736, 381 S.E.2d at 490 (emphasis added) (citing *Batch*, 92 N.C. App. at 613–14, 621, 376 S.E.2d at 30, 34).

Notably, though, the North Carolina Supreme Court reversed *Batch* a year later, holding that the Town of Chapel Hill properly denied the plaintiff's request for a subdivision building permit because the permit failed to comply with town ordinances requiring permits to contemplate coordination with the town's transportation plans. *Batch v. Town of Chapel Hill*, 326 N.C. 1, 13, 387 S.E.2d 655, 663 (1990). Based on this holding, the Court declined to address any other reason why the permit was or may have been denied, and, particularly, did "not find it necessary to review or decide any of [the] plaintiff's constitutional claims or other issues arising upon her complaint." *Id.* at 13, 14, 387 S.E.2d at 663.

As a result, North Carolina law in regard to exactions as takings is without foundation and has not been updated following *Dolan* and *Koontz*. The definition of "exaction" and the "rational nexus" test presented in *Franklin Road* (and derived from the Court of Appeals decision in *Batch*) were developed after the United States Supreme Court decided *Nollan*, but prior to its decisions in *Dolan* and *Koontz*. Nonetheless, *Franklin Road* addressed potentially unconstitutional exactions in North Carolina by employing a "rational nexus" test which in many ways mirrors the "essential nexus" and "rough proportionality" requirements of *Nollan/Dolan*, and which also preemptively addressed *Koontz*'s later extension of those requirements to monetary exactions

"in lieu of" physical takings of land or as recompensation for the impact of a proposed development.

The Developers cite to decisions from other states that have issued rulings regarding the thin line between unconstitutional exactions and constitutional user fees. However, we find most of these cases unpersuasive because they involve these courts' attempts to apply the real property-focused decisions in *Nollan/Dolan* alone to exactions and fees, prior to the United States Supreme Court's decision in *Koontz*. *See Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 356 (Ohio 2000); *Trimen Dev. Co. v. King Cty.*, 877 P.2d 187, 194 (Wash. 1994); *N. Ill. Home Builders Ass'n, Inc. v. Cty. of Du Page*, 621 N.E.2d 1012, 1020 (Ill. App. Ct. 1993), *aff'd in part*, *rev'd in part*, 649 N.E.2d 384 (Ill. 1995). These cases were part of the pre-*Koontz* division of authority over whether a demand for money could give rise to an unconstitutional conditions claim under *Nollan/Dolan*—a division which *Koontz* settled in the affirmative. *See Koontz*, 570 U.S. at 603, 186 L. Ed. 2d at 707.

The most persuasive case cited by the parties is the 2018 decision of Maryland's highest court in *Dabbs v. Anne Arundel County*, 182 A.3d 798 (Md. 2018), which cites to *Koontz* in holding that a generally applicable fee does not invoke the unconstitutional conditions doctrine. In *Dabbs*, the plaintiffs sought refunds for impact fees paid to their county in connection with real estate developments; the fees were collected to facilitate future improvements to transportation and education infrastructure within the county. *Id.* at 801–02. The impact fees at issue were "legislatively-imposed[,] predetermined, based on a specific monetary schedule, and applie[d] to any person wishing to develop property in the district." *Id.* at 811. The plaintiffs argued that the impact fees were takings subject to the "essential nexus" and "rough proportionality" requirements of *Nollan/Dolan*. *Id.* at 807–08. The *Dabbs* Court acknowledged that *Koontz* extended the protections of *Nollan/Dolan* to instances where there is a " '*direct link* between the *government's demand* and *a specific parcel of real property*[,]' " but noted *Koontz*'s insistence that " 'taxes [and] user fees . . . that may impose financial burdens on [land]owners' " are not takings under *Nollan/Dolan*. *Id.* at 809–10 (citing *Koontz*, 570 U.S. at 614, 615, 186 L. Ed. 2d at 714, 715).

The *Dabbs* Court held that the impact fees were not subject to scrutiny under *Nollan/Dolan* because, "[u]nlike *Koontz*, the Ordinance [did] not direct a [land]owner to make a conditional monetary payment to obtain approval of an application for a permit of any particular kind, nor [did] it impose the condition on a particularized or discretionary

basis." *Id.* at 811 (citation omitted). Instead, the ordinance at issue in *Dabbs* "applied on a generalized district-wide basis, making no determination as to whether an actual permit will issue to a payor individual with a property interest." *Id.* (citing *Koontz*, 570 U.S. at 628, 186 L. Ed. 2d at 723 (Kagan, J., dissenting) (commenting that the majority's holding should apply "only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable")). The *Dabbs* Court further based its decision on its understanding that *Dolan* recognized that impact fees "imposed on a generally applicable basis are not subject to a rough proportionality or nexus analysis." *Id.* (citing *Dolan*, 512 U.S. at 385, 129 L. Ed. 2d at 316).

We find the holding of *Dabbs* persuasive and find it in harmony with both the United States Supreme Court's decision in *Koontz* and the definition of "exaction" employed by this Court in *Franklin Road.* In *Franklin Road*, this Court defined "exaction" to include fees assessed "in lieu of compliance with dedication or improvement provisions" or fees "reflecting [developers'] respective prorated shares of the cost of providing new [infrastructure.]" *Franklin Rd.*, 94 N.C. App. at 736, 381 S.E.2d at 490. This definition did not include fees assessed on a generally applicable basis in a static quantity indifferent to the particular developers' prorated share of any resulting impact. We hold that impact and user fees which are imposed by a municipality to mitigate the impact of a developer's use of property, which are generally imposed upon all developers of real property located within that municipality's geographic jurisdiction, and which are consistently imposed in a uniform, predetermined amount without regard to the actual impact of the developers' project do not invoke scrutiny as an unconstitutional condition under *Nollan/Dolan* nor under North Carolina precedent.

The Fees assessed in the present case are similar to those assessed in *Dabbs*. The parties agree that, under Section 28(h) of the Ordinance, any landowner who wishes to develop a single-family residential lot in the County must pay one-time fees of $1,000 for water and $1,200 for sewer. Ordinance § 28(h). The Fees are predetermined, set out in the Ordinance, and non-negotiable; the Fees are not assessed on an *ad hoc* basis or dependent upon the landowner's particular project. Ordinance § 28(h). The Fees are assessed in conjunction with the landowner's intent to make use of real property located within the County's jurisdiction, but, unlike the conditions imposed in *Koontz*, the County does not view a landowner's proposed project and then make a demand based upon that specific parcel of real property. *Koontz*, 570 U.S. at 613, 186 L. Ed. 2d at 714 (holding *Nollan/Dolan* scrutiny applied where there is a

"direct link between the government's demand and a specific parcel of real property").

We recognize that *Dabbs* is distinguishable from the present case in that the Fees here were assessed *prior to* the County's grant of building permits, thus making them a condition of approval. The *Dabbs* Court expressly based its holding, in part, on the fact that the fees at issue were *not* "a conditional monetary payment to obtain approval of an application for a permit of any particular kind[.]" *Dabbs*, 182 A.3d at 811. This distinction speaks directly to the types of coercive harms that the United States Supreme Court sought to prevent in *Koontz*: the unconstitutional conditions doctrine seeks to prevent the government from leveraging its legitimate interest in mitigating harms by imposing "[e]xtortionate demands" which may "pressure a[] [land]owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation." *Koontz*, 570 U.S. at 605–06, 186 L. Ed. 2d at ___; *but see id*. at 607, 186 L. Ed. 2d at 709 ("Our unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent." (citation omitted)). Nonetheless, we do not find the distinction material in this case. Regardless of whether the Fees were to be paid prior to or after the Developers began their projects, the fees were predetermined and are uniformly applied—not levied against the Developers on an *ad hoc* basis—and thus do not suggest any intent by the County to bend the will or twist the arm of the Developers.

Therefore, we hold that the Developers' pleadings failed to present a constitutional takings claim under current federal and state unconstitutional conditions jurisprudence as a matter of law. The trial court had no duty to apply the unconstitutional conditions doctrine to the Fees; rather, the court needed only ensure that, if the County "[did] have the authority to assess user fees to defray the costs of [future services to be rendered,] such fees [were not] upheld if they [were] unreasonable." *Homebuilders Ass'n of Charlotte*, 336 N.C. at 46, 442 S.E.2d at 51 (citation omitted).

III. Conclusion

We hold that the trial court did not abuse its discretion in taking judicial notice of the 1984 Buies Creek Agreement and the 1998 Agreement. Further, we hold that the 1998 Agreement granted the County the contractual right to exercise the Districts' prospective fee-collecting authority, and the County properly exercised that authority in collecting the Fees. We further hold that the Developers failed to present a viable constitutional claim because generally applicable impact and user fees,

such as the Fees in this case, are not subject to the unconstitutional conditions doctrine. We affirm the trial court's Consolidated Order.

AFFIRMED.

Judges STROUD and BROOK concur.

WILLIAM E. BENSON, III, AND WIFE, MONIQUE L. RIBANDO, PLAINTIFFS
v.
R. LEE PREVOST, AND WIFE SCHARME S. PREVOST,
DEFENDANTS AND THIRD-PARTY PLAINTIFFS
v.
MICHAEL S. BURNHAM, DANIEL SMITH, AND WIFE, DENISE B. SMITH,
THIRD-PARTY DEFENDANTS

No. COA19-962

Filed 31 December 2020

1. Easements—driveway—ambiguous in scope—parking cars

In a dispute between next-door neighbors who purchased their lots from a common owner, an easement labeled "Proposed Driveway Easement" in the recorded map—with no clear language defining the easement's scope—was determined, in light of the map as a whole, to generally allow the defendants, who owned the dominant estate, to park cars on the driveway easement and to allow plaintiffs, who owned the servient estate, to use the land in any manner that does not interfere with defendants' enjoyment of the easement, which may at times include the right for plaintiffs to drive on the easement.

2. Deeds—recording—pure race—deed first registered—evidence of mistake

In a dispute between next-door neighbors who purchased their lots from a common owner, where the previous owner contracted to sell boat slip A to defendants but actually deeded boat slip C to defendants instead and subsequently deeded boat slip A to plaintiffs, plaintiffs' interest in boat slip A was superior to defendants' claimed interest and the trial court erred by ordering the deeds to be reformed.

3. Attorney Fees—prevailing party—reversal on appeal—attorney fees award vacated

An award of attorney fees in favor of defendants in a property dispute was vacated where defendants were no longer the prevailing party after the same opinion reversed the trial court's order granting summary judgment in favor of defendants.

Appeal by Plaintiffs from order entered 25 April 2019, order entered 23 May 2019, and order entered 29 May 2019 by Judge Paul M. Quinn in New Hanover County Superior Court. Heard in the Court of Appeals 25 August 2020.

Fox Rothschild LLP, by Robert H. Edmunds, Jr., and Elizabeth Brooks Scherer for Plaintiff.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., and Jennifer L. Carpenter, for Plaintiff.

Shipman & Wright, LLP, by Gary K. Shipman for Defendants.

Block, Crouch, Keeter, Behm, & Sayed, LLP, by Auley M. Crouch, III, for Third-Party Defendants.

DILLON, Judge.

I. Background

This matter concerns a real property dispute between next-door neighbors who purchased their lots from Third-Party Defendants (the "Developers"). Developers originally owned the two lots and a third waterfront lots (Lots 1-3) at Wrightsville Beach, and adjacent dock with three boat slips (Slips A-C).

In 2015, Defendants R. Lee Prevost and Scharme S. Prevost purchased Lot 2 from the Developers. The conveyance also included exclusive use of a specific boat slip, Slip C, and the use of a driveway easement located on Lot 1 next door.

The following year, in 2016, Plaintiffs William E. Benson and Monique L. Ribando purchased Lot 1 from an affiliate of Developers,[1] the lot which was burdened by the driveway easement. The conveyance also included exclusive use of Slip A.

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1. In September 2015, a month after selling Lot 2/Slip C to Defendants, the Developers conveyed Lot 1/Slip A to an affiliate entity in anticipation of building the home on Lot 1. This affiliate entity conveyed Lot 1/Slip A to Plaintiffs. However, for ease of reading, the "Developers" refers either to the Developer or its affiliate, depending on the context.

A dispute subsequently arose between the parties regarding Defendants' parking of vehicles within the driveway easement. Also, a dispute arose regarding which party owned which boat slip.

Plaintiffs brought this action against Defendants to resolve their two disputes. After a hearing on the matter, the trial court entered summary judgment in favor of Defendants on both issues and awarded Defendants attorney's fees. Plaintiffs appeal.

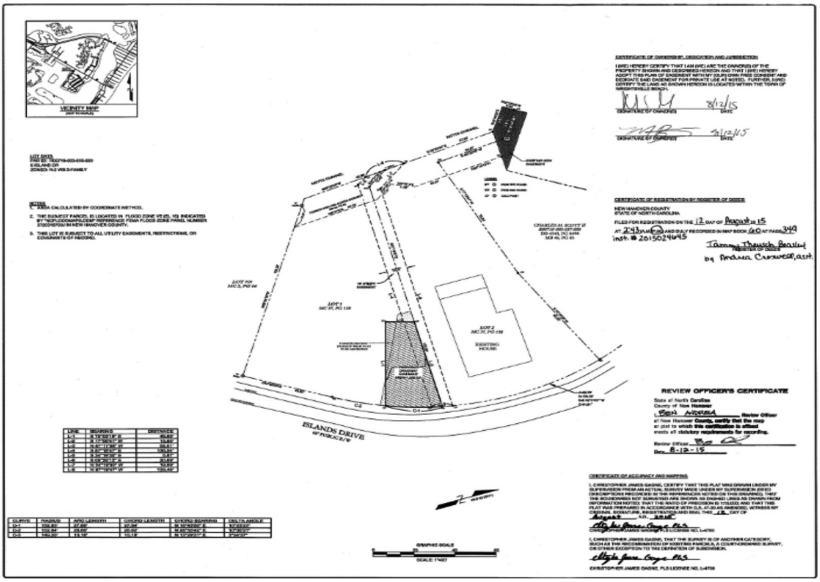
II. Analysis

Summary judgment is appropriate when there is no genuine issue of material fact; and we review a summary judgment order *de novo*. *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 186, 835 S.E.2d 411, 415 (2019); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). We address the two property issues and the attorney's fee issue in turn.

A. Driveway Easement

[1] The parties dispute the "scope" of the parties' rights to use the driveway easement (the "Easement") located on Lot 1.

In 2015, just prior to conveying any of the lots, the Developers recorded the Map below, which depicts the driveway easement shaded on Lot 1.



The recording of this Map did not actually convey anything, as both the dominant estate (Lot 2) and the servient estate (Lot 1) were still held by the same owner.

On 28 August 2015, shortly after Developers recorded the Map, they conveyed Lot 2 (with an existing home as depicted on the Map) to Defendants. The deed contained the following language, which also granted Defendants rights to the Easement depicted on the recorded Map:

> Together with and subject to a Driveway Easement, shown as "Proposed Driveway Easement Area = 1050 S.F." [as recorded on the Map].

At the time Defendants purchased Lot 2, Lot 1 had not yet been developed. The garage area of the existing home on Lot 2 faced (and continues to face) the Easement, as shown in the photographs below. (These photos were offered as exhibits at the summary judgment hearing and were taken years later, after Lot 1 had been developed. The area depicted as the "Driveway Easement" in these photos do not appear to match the Easement as depicted on the Map.)

In 2016, the Developers constructed a home on Lot 1 and sold it to Plaintiffs. The photos show that Lot 1, as developed, contains a privacy wall adjacent to the part of the Easement that is now paved, a "back gate" which leads into Lot 1's back yard, and a "side gate" which accesses the home on Lot 1. The Developers built the home on Lot 1 with the garage on the side of the home opposite the Easement and is accessed by a different driveway (unrelated to the dispute), also on Lot 1.

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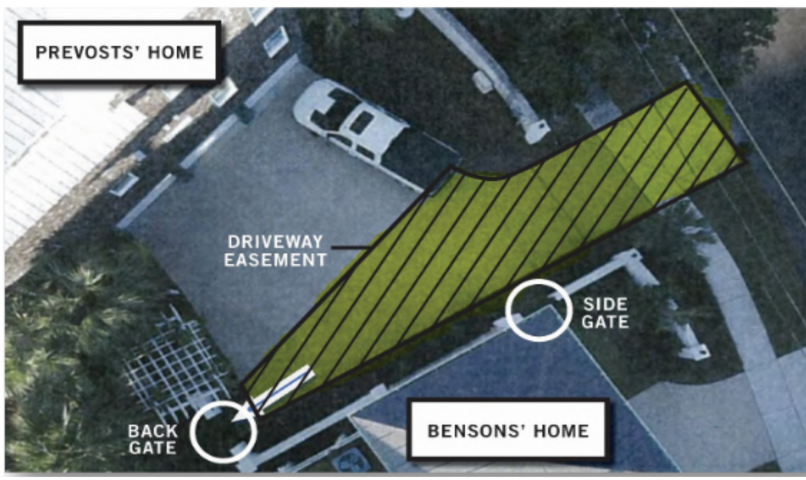

Since purchasing Lot 2 in 2015, Defendants have made use of the Easement to access their garages and parking pad on Lot 2. They have also occasionally parked cars on the Easement. Sometime after purchasing Lot 1, Plaintiffs began protesting Defendants' parking of vehicles within the Easement, contending it blocks their ability to access their back gate. For their part, Defendants contend that Plaintiffs have no right to drive vehicles on the Easement to access the back gate, as this use would interfere with Defendants' Easement rights.

The trial court entered summary judgment in favor of Defendants on this issue. The court determined that Defendants and their successors "are

entitled to make reasonable use of the [ ] Easement [as recorded on the Map]" and that the parking of vehicles is a reasonable use. Further, the trial court determined that Plaintiffs and their successors could only use the Easement to access their side and back gates by foot and not by a vehicle. For the below reasoning, we affirm as modified herein.

An easement is an interest in land and is subject to the statute of frauds. *See* N.C. Gen. Stat. § 22-2 (2015). An easement, like any other conveyance, "is to be construed in such a way as to effectuate the intention of the parties *as gathered from the entire instrument*" and not from detached portions. *Higdon v. Davis*, 315 N.C. 208, 215-16, 337 S.E.2d 543, 547 (1985) (emphasis added).

Here, the instrument defining the Easement is the recorded Map, referenced in the recorded deed to Defendants. *See Collins v. Land Co.*, 128 N.C. 563, 565, 39 S.E. 21, 22 (1901) ("[A] map or plat, referred to in a deed, becomes a part of the deed, as if it were written therein[.]"). When Plaintiffs purchased Lot 1, they took title subject to Defendants' Easement rights as recorded. *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953) ("Grantees take title to lands subject to duly recorded easements which have been granted by their predecessors in title.").

The Map referenced in the Developers deed to Defendants unambiguously marks *the specific location* of the Easement. The Easement is depicted as the shaded area on Lot 1, adjacent to its shared property line with Lot 2. The Map describes the shaded area to be "Area 1,060 S.F.", which appears to be accurate: the area forms a trapezoid, with the average length from the street being a slightly over fifty (50) feet and the average width being a slightly over twenty (20) feet. Neither party makes any argument that the location of the Easement is not as described on the Map or has been relocated. *See Cooke v. Wake Electric*, 245 N.C. 453, 458, 96 S.E.2d 351, 354 (1957). Therefore, the location of the Easement is as described in the Map.

There is no clear language, however, defining *the scope* of Defendants' rights to use the Easement beyond the language labeling the shaded area on the Map as a "Proposed Driveway Easement" and the reference in the deed Defendants conveying the Easement rights as a "Driveway Easement."

Our task is to determine whether the intent of the parties regarding the Easement's scope – specifically whether Defendants can park vehicles in the Easement – can be gleaned from these recorded instruments. We note that our Court has instructed that if the language in an easement is ambiguous as to its scope:

> [T]he scope may be determined by reference to the attendant circumstances, the situation of the parties, and by the acts of the parties in the use of the easement immediately following the grant [but that] if the conveyance is silent as to the scope of the easement, extrinsic evidence is inadmissible as to the scope or extent of the easement. However, in the latter situation, a reasonable use is implied.

Swaim v. Simpson, 120 N.C. App. 863, 864, 463 S.E.2d 785, 786 (1995). Also, our Supreme Court has instructed that an easement extends to all "uses directly or incidentally conducive to the advancement of the purpose for which the right of way was acquired, and the owner retains merely the title in fee, carrying the right to make such use as in no way interferes with the full and free exercise of the easement." *Light Co. v. Bowman*, 229 N.C. 682, 688, 51 S.E.2d 191, 195 (1949) (citation omitted).

It is unambiguous that the purpose of the easement is to allow Defendants to use the Easement as a "driveway." What is less clear is whether "driveway" use includes the right to park vehicles in the Easement or simply the right to use the driveway for ingress and egress between the road and Lot 2. There is no express language which restricts the use of the driveway easement for "ingress and egress." We note that many driveways are used also to park cars, while others are used generally only for just ingress and egress based on their width.

Looking at the Map *as a whole*, we conclude that the trial court correctly determined that the scope of Defendants' rights includes the right to park vehicles in parts of the Easement area. We are persuaded in large part by the fact that the Easement, as defined in the Map, is on average over twenty (20) feet wide. We are also persuaded by the fact that the Easement is short and immediately adjacent (close to) Defendants' home, as shown on the Map. A narrower driveway easement would suggest an intent by the grantor that it be used only for ingress and egress. But the creation of a driveway easement that is approximately twenty (20) feet wide to be used by the owner of a vacation home, especially where the easement is close to the home, suggests an intent that the "driveway" use also includes the right to park cars, at least on occasion. This right, though, does not extend to the parking of cars in a way which obstructs the entire width of the Easement *as shown on the Map*, as such use would prevent the owner of the servient estate an opportunity to make reasonable use of that part of their property.

There is plenty of room within the Easement as shown on the Map for Defendants to park vehicles and still leave room for Plaintiffs to use the Easement for their ingress and egress to the back part of

Lot 1. We note, however, that it *appears* from the photos that *after* conveying Easement rights to Defendants, the Developers placed permanent obstructions in the Easement when they developed the house on Lot 1. That is, the easement area as depicted in the photos *appears* smaller than the Easement depicted on the Map. For instance, the boundary at the end of the Easement is depicted on the Map as being approximately fourteen (14) feet long. That boundary as depicted on the aerial photo, though, appears much shorter (comparing it to the width of the truck in the photo). It *appears* from the photos that after conveying Easement rights to Defendant, the Developers built the privacy wall within the Easement, an area the owner of Lot 1 could have used for ingress and egress.

We affirm the trial court's determination that the parking of cars by Defendants in the Easement is generally allowed. Our Supreme Court instructs, though, that "[t]he reasonable use and enjoyment of an easement is to be determined in the light of the situation of the property and the surrounding circumstances [and] what is a reasonable use is a question of fact [for a jury]." *Shingleton v. State*, 260 N.C. 451, 457, 133 S.E.2d 183, 187 (1963). Therefore, the parking of cars by Defendants in the Easement must be reasonable. And it may be that a jury, for instance, may deem the parking of cars by Defendant in the Easement, while leaving the parking pad and garages on Lot 2 vacant, is an unreasonable use. (The trial court made no ruling regarding the extent that Defendants may utilize the Easement for parking, as such questions *might* be for a jury to resolve, based on specific facts.)

We modify the trial court's determination regarding Plaintiffs' rights to use the Easement, striking the portion that Plaintiffs may *never* drive a vehicle over the Easement to access the back of their property, but only may use the Easement for pedestrian traffic. To be sure, Plaintiffs may not use the Easement in a way that interferes with the rights of Defendants to use the Easement for ingress and egress and to park vehicles. However, Plaintiffs, as the owner of the servient estate, "may [still] use the land in any manner and for any purpose which does not interfere with the full and free use of the easement[.]" *Harris v. Southern Railway Co.*, 100 N.C. App. 373, 378, 396 S.E.2d 623, 626 (1990). There may be instances where using the Easement for vehicle ingress and egress to access the back or side gate of Lot 1 would not interfere with Defendants' enjoyment of their Easement rights. For instance, such use may be reasonable during times when Defendants do not need to park cars in the Easement area.[2] Accordingly, we reverse

2. We note that, assuming the privacy fence is actually within the Easement, Defendants have made no argument or claim that the use by Plaintiffs' predecessor in title of Easement to construct the fence interferes with their ability to use the Easement.

that portion of the order and hold that Plaintiffs may use the land in any manner which does not interfere with Defendants' enjoyment of the Easement, which *may* include at times, the right to drive vehicles on the Easement to access their back and side gates.

B. Boat Slips

[2] The second issue involves a dispute between Plaintiffs and Defendants as to the ownership of Slip A and Slip C. Though Slip C was deeded to Defendants by the Developers, Defendants claim that this was a mistake, a mistake which Plaintiffs knew about when they purchased Lot 1/Slip A from the Developers.

The timeline relevant to this dispute is as follows:

At the beginning of the summer of 2015, the Developers owned three adjacent waterfront lots, Lots 1-3. Appurtenant to the entire waterfront of the property is a dock and three boat slips, Slips A-C. Slip A was the most desirable slip as it had a lift already installed.

In July 2015, Defendants entered into a written contract to purchase Lot 2, with exclusive rights to Slip A, the one with the boat lift.

On 25 August 2015, before closing on the sale of Lot 2 with Defendants, the Developers recorded covenants which stated, "Boat Slip A has been made appurtenant to and runs with the land of Lot 1 . . . Boat Slip C has been made appurtenant to and runs with the land of Lot 2." This recorded instrument conflicts with the July purchase contract.

On 28 August 2015, Defendants closed their purchase of Lot 2 from the Developers. The deed of conveyance provided that Defendants were receiving Lot 2 "[t]ogether with Boat Slip C[,]" which was consistent with the covenants recorded days before, but which conflicted with Defendants' purchase contract. Defendants, though, began using Slip A, the boat slip with a lift.

In 2016, the Developers sold Lot 1 to Plaintiffs. There is evidence that before closing Plaintiffs believed that they were getting Slip C, the inferior slip. However, they came to learn about the supposed error in the conveyance of Slip C to Defendants. But Plaintiffs told the Developers at closing that they wanted to "keep the deed [conveying Slip A to them] as it was." Accordingly, the deed conveyed Lot 1 to Plaintiffs, together with "the exclusive use of Slip A[.]"

There is evidence that after closing, Plaintiffs made use of the inferior Slip C, as Defendants were already making use of Slip A. However,

when Defendants refused to stop parking cars in the Easement, Plaintiffs began protesting that Defendants were using the wrong boat slip.

Plaintiffs brought this action, not only to determine the parties' rights with respect to the Easement, but also for an order declaring them to be the owners of Slip A. The trial court, though, granted summary judgment in favor of Defendants on this issue. For the reasons stated below, we reverse the trial court on this issue.

With the passage of the Connor Act, our General Assembly made North Carolina a pure race state. N.C. Gen. Stat. § 47-18(a) (2015). Under our pure race recording statute, "[a]s between two purchasers for value of the same interest in land, the one whose deed is first registered acquires title." *Bourne v. Lay & Co.*, 264 N.C. 33, 35, 140 S.E.2d 769, 771 (1965).

While land *under* navigable waters in North Carolina belong to the State of North Carolina, *see Miller v. Coppage*, 261 N.C. 430, 435, 135 S.E.2d 1, 5 (1964), an interest in land that abuts navigable water includes certain littoral or riparian rights to that navigable water, *see Jones v. Turlington*, 243 N.C. 681, 683, 92 S.E.2d 75, 77 (1956). These rights may include the right to construct docks, piers, and the like to access the water:

> A littoral proprietor and a riparian owner, as universally conceded, has a *qualified property* in the water-frontage belonging, by nature, to their land, the chief advantage growing out of the appurtenant estate in the submerged land being *the right of access* over an extension of their water fronts to natural water, and the right to construct wharves, piers, or landings, subject to such general rules and regulations as the Legislature, in the exercise of its powers, may prescribe for the protection of public rights in rivers or navigable waters.

Capune v. Robbins, 273 N.C. 581, 588, 160 S.E.2d 881, 886 (1968) (citations and quotation marks omitted). We hold that access to boat slips is a littoral or riparian right and is therefore an interest in land.

It may be that as Plaintiffs were closing their purchase of Lot 1 in 2016, they were aware that the Developers had intended to convey Slip A to Defendant. But there was no deed in the Developers chain of title to indicate that they had yet parted with Slip A. And Defendants had not filed any litigation to reform their deed from the Developers. *Hill*

v. Pinelawn Memorial Park, Inc., 304 N.C. 159, 163, 165, 282 S.E.2d 779, 782, 783 (1981) (finding "[i]f [a purchaser] finds no record of [a prior conveyance], even if he knows there has been a prior conveyance, he may record his deed with the assurance that his title will prevail" and "[w]hile actual notice of another unrecorded conveyance does not preclude the status of innocent purchaser for value, actual notice of pending litigation affecting title to the property does preclude such status.").

Additionally, Defendants contend that Plaintiffs did not purchase the rights to Slip A for value and thus are not protected by the Connor Act. However, the record shows that Plaintiffs paid $1.9 million dollars for Lot 2, including use of Slip A. For instance, the deed from Developers shows revenue stamps reflecting that this price was paid. The parties conceded this point, and there is nothing to indicate that Slip A was given to them. At the very least, Plaintiffs gave up their "right" to receive Slip C at closing (that they had originally been promised) to receive Slip A, and Slip C has significant value. *King v. McRacken*, 168 N.C. 621, 624, 84 S.E. 1027, 1029 (1915) ("The party assuming to be a purchaser for valuable consideration must prove a fair consideration, not up to the full price, but a price paid which would not cause surprise or make any one exclaim, 'He got the land for nothing!' ").

We are unpersuaded by the Developers' argument concerning their evidence that Plaintiffs orally promised that they would trade boat slips after their closing, to correct the mistake made when Developers conveyed the wrong slip to Defendants the year before. The evidence is conflicting, and there is nothing in writing which states that they made any such promise. Defendants could have protected themselves by filing an action against the Developers, and then giving notice to the public of this action by recording a notice of *lis pendens* anytime prior to Plaintiffs' purchase of Lot 1/Slip A, ten (10) months later. But they did not.

Developers could have done the same before closing with Plaintiffs, but they did not. They could have required Plaintiffs to enter some express agreement to make the transfer. But they did not.

C. Attorney's Fees

[3] Finally, Plaintiffs appeal the award of attorney's fees to Defendants and the Developers. As we have reversed the trial court's order granting summary judgment in favor of Defendants and Developers on the issue of the boat slips, we must vacate the trial court's order granting these parties attorney's fees as they are no longer a prevailing party.

III. Conclusion

This matter concerns a recorded easement and conveyances of boat slips between next door neighbors who never entered into a contract with each other, but who purchased their lots from a common owner. There is conflicting evidence about what might have been said at various times regarding these instruments, but we must remember:

> There is no other stake for which men will play so desperately. In men and nations there is an insatiable appetite for lands, for the defence or acquisition of which money and even blood sometimes are poured out like water. The evidence of land-title ought to be as sure as human ingenuity can make it. But if left in parol, nothing is more uncertain, whilst the temptations to perjury are proportioned to the magnitude of the interest.
>
> The infirmity of memory . . . the honest mistakes of witnesses, and the mis-understanding of parties, these are all elements of confusion and discord which ought to be excluded[.]

Moore v. Small, 19 Pa. 461, 465 (1852).

Here, regarding the Easement, we affirm in part and reverse in part. Defendants may make reasonable use of the Easement, which may include the parking of cars within the Easement area. Plaintiffs may make use of the Easement which does not interfere with Defendants' rights to the Easement. This use may include, at times, the right to use the Easement for ingress and egress by vehicles.

Regarding the boat slips, we reverse, specifically the portion of the order directing that the deeds conveying Slip A to Plaintiffs and Slip C be reformed. We conclude that Plaintiffs' interest in Slip A is superior to Defendants' claim.

Regarding the attorney's fees, we reverse. Defendants are not the prevailing party, such that they are entitled to attorney's fees.

AFFIRMED IN PART, REVERSED IN PART, MODIFIED IN PART.

Chief Judge McGEE and Judge MURPHY concur.

BISHOP v. BISHOP

[275 N.C. App. 457 (2020)]

JOHN EDWARD BISHOP, III, PLAINTIFF
v.
SARA ELIZABETH BISHOP, DEFENDANT

No. COA19-600

Filed 31 December 2020

Child Custody and Support—child support—increase in parent's income—outside of Child Support Guidelines

The trial court did not abuse its discretion by increasing plaintiff father's child support obligation where the father's income had increased significantly since the previous order and where the court properly considered the parties' estates, earnings, conditions, and the accustomed standard of living of the child and the parties pursuant to N.C.G.S. § 50-13.4(c). The fact that the order awarded almost 110% of the child's total reasonable needs was not fatal; because the case fell outside the Child Support Guidelines, the trial court was not required to use a specific formula to set the amount of support.

Judge BERGER dissenting.

Appeal by plaintiff from orders entered 30 April and 27 November 2018 by Judge Anna Worley in District Court, Wake County. Heard in the Court of Appeals 4 February 2020.

Jonathan McGirt, for plaintiff-appellant.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellee.

STROUD, Judge.

Father appeals from an order increasing his child support obligation. Because the trial court did not abuse its discretion in its consideration of "the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case," N.C. Gen. Stat. § 50-13.4(c) (2019), we affirm the trial court's order.

I. Background

The parties married in 1998 and separated in 2007. They had one child during the marriage, Sarah.[1] An initial child custody and child

1. A pseudonym is used to protect the privacy of the child.

support order was entered on 31 December 2012 in District Court, Wake County ("2012 Order"). The 2012 Order provided for joint legal and physical custody for Sarah and required Father to pay $2,064.00 per month in child support and to pay 93% unreimbursed medical expenses. After entry of the 2012 Order, the parties filed several motions which did not result in a change in child support or custody but did result in the appointment of a parenting coordinator.

In February 2017, Mother filed a motion to modify child support, and the trial court held a hearing on this motion on 13 June 2017. On 30 April 2018, the trial court entered an order ("2018 Order") increasing Father's child support to $3,289.00 per month and changing the parties' respective percentages of the responsibility for unreimbursed medical expenses "with [Father] bearing 83% of such cost, and [Mother] bearing 17% of such cost." Father moved for a new trial and other relief from the April 2018 Order. The trial court denied Father's motions, and Father appealed from both the 2018 Order and the order denying the post-trial motions.

II. Standard of Review

> On appeal, "[c]hild support orders entered by a trial court are accorded substantial deference . . . and our review is limited to a determination of whether there was a clear abuse of discretion." Under this standard of review, the trial court's order will be upheld unless its "actions were manifestly unsupported by reason."

Hart v. Hart, 268 N.C. App. 172, 179, 836 S.E.2d 244, 250 (2019) (alterations in original) (citations omitted).

III. Child Support

Father argues, "[t]he trial court erred as a matter of law in modifying the prior child support order and abused its discretion in determining the amount of child support." (Original in all caps.) Except for a portion of one finding, Father does not challenge the trial court's findings of fact as unsupported by the evidence, but he contends these findings demonstrate mathematical errors in the calculation of the child support. Father does challenge Finding No. 62, "Plaintiff has had a significant increase in his income from the time of the 2012 Order . . . ." Father argues his income had actually decreased. But Father's primary argument is that the trial court ordered him to pay child support in excess of the reasonable needs of the minor child, based upon the trial court's findings.

Father does not dispute the most important findings of fact, namely: (1) Father's income was $44,846.29 per month; (2) Mother's income was

$7,542.00 per month; and (3) The child's total reasonable needs were $7,926.23 per month, of which Father then incurred $5,431.18 per month, and Mother then incurred $2,495.05 per month. Father argues that the percentages of responsibility assigned to each party do not appear to coincide with the findings of the parties' incomes and the child's reasonable needs. In short, he contends the trial court's math is wrong.

A. Father's Income

Father's primary argument focuses on the child's needs, but he does contend the trial court erred in finding his income had significantly increased since the 2012 Order. The hearing in 2012 was held in May, so the evidence addressed the income up to that point in the year. In the 2012 Order, the trial court made findings regarding Father's income each year from 2007 until 2011. Over these years, his gross income increased substantially from $162,517.00 in 2007 to $775,586 in 2011, when he began his employment with Cisco. Father's adjusted gross income for 2011 was $653,278, which would be approximately $54,440 per month. Father was a "founder and officer" of Inlet Technologies, Inc., where he worked from 2007 until 2011, when Cisco Systems Inc. purchased Inlet. Due to the buyout of Inlet, Father received additional payments including a "cash retention bonus" of $150,000 payable over two years, half in 2012 and half in 2013. In 2012, his base salary at Cisco was $200,000 and he was eligible for performance bonuses of an additional 35% of his annual gross salary.

Father argues that although the trial court made detailed findings in 2012 regarding his income, "[u]nfortunately, the trial court did not synthesize this cascade of data into an actual figure for [Father's] monthly income." Father proposes that we should "reverse-engineer" the 2012 Order to determine Father's monthly income in 2012, and based upon the order's assignment of 93% of the responsibility for uninsured medical expenses to the amount of child support ordered, he contends the trial court tacitly found his income to be $60,888.43 per month. Father is correct that the trial court did not "synthesize the cascade of data" in the 2012 Order, and Father's mathematical argument is quite interesting. But the 2012 Order was not appealed. And the trial court did make a finding regarding the monthly income it used "*for the purposes of child support*." (Emphasis added.) The trial court found in the 2012 Order that Father's "gross monthly income, including base salary and bonuses, for the purposes of child support currently exceeds $30,000 per month." Thus, for our purposes also, Father's income in 2012, for purposes of child support, was in excess of $30,000 per month.

In the order on appeal, after quoting the findings from the 2012 Order regarding Father's income as of 2012, the trial court found Father "has had a significant increase in his income" and determined his "current ongoing monthly income to be $44,846.29 per month." The trial court made detailed findings regarding Father's employment history since 2012. He changed employers to Akamai Technologies and had a gross income in 2015 of $837,165. His gross income in 2016 was $607,622. As of the time of trial in 2017, in mid-May, Father had "earned salary and bonus totaling $246,500" and was not expecting any more bonuses for the year. His base salary was $13,281 every two weeks, and the trial court extrapolated this to a "total salary and bonus" for the year 2017 of $432,500, or $36,041.66 per month. The trial court also made findings noting that Father had "historically received restricted stock shares from his employer," which "show up in his compensation and paystubs separate from his salary and bonus." In 2017, he had received about $233,000 in restricted stock shares, but he did not intend to redeem any shares at that time.

Thus, Father's income stream was complex and included elements of base salary, bonuses, and stock. His income varied over the years, but the overall trajectory was upward. In 2012, the trial court determined Father's income "for the purposes of child support" was in excess of $30,000 per month. In 2017, the trial court found Father's income "total salary and bonus" for the year 2017 to be $432,500, or $36,041.66 per month. The trial court did not err in finding Father "has had a significant increase in his income" since 2012.

B. Reasonable Needs of Minor Child

Father contends the trial court erred in its calculation of the child's reasonable needs. He argues that the amount of child support is greater than the child's total needs based upon his mathematical analysis of the order. In the 2012 Order, the trial court made this finding regarding the child's needs:

> 74. Defendant's current reasonable monthly needs for her regular recurring expenses benefitting the minor child and for the minor child together, are $2,345, including before and after school care. The reasonable monthly expenses of the minor child, alone, including before and after school care, are $1,595.

Father argues that in the 2012 Order, "The trial court provided no explanation of the methodology used to derive its award of the oddly specific monthly child support award of $2,064 per month." Father proposes

another complex mathematical analysis to determine exactly how the trial court may have calculated this amount in the 2012 Order, but again, the 2012 Order is not on appeal.

In the 2018 Order, the trial court found:

> 23. The Court has determined the child's total reasonable needs between the parties to be $7,926.23 per month. Out of the child's reasonable needs, the Plaintiff currently incurs needs of $5,431.18 per month, and the Defendant currently incurs needs of $2,495.05 per month. The disparity in the parties' respective reasonable needs for the minor child is directly related to the amount of respective discretionary income the parties have available for the minor child.

Father contends that the order on appeal did not "break out the child's expenses into the categories of, for example, 'the child's portion of total recurring expenses at Plaintiff's/Defendant's household' versus 'the child's individual monthly needs[,]' " making a direct comparison of the changes in the child's needs or expenses difficult.

Mother responds that Father did not challenge the trial court's findings of fact and notes the trial court made extensive findings regarding both parties' lifestyles, assets, and debts and set child support based upon all of these factors. Father responds that he is "utterly mystified as to why Defendant's supplemental 'Statement of Facts,' should venture off into a wide-ranging review of Plaintiff's income, assets, and lifestyle. Defendant's diversionary hand-waving here is completely irrelevant to the arguments addressed in Plaintiff-Appellant's Brief." (Citation and emphasis omitted.) According to Father, it's all about the math, and the math is wrong.

Math is important, but it is not the only thing the trial court may consider. North Carolina General Statute § 50-13.4 provides the standard for child support, and Mother's discussion of the trial court's findings regarding "Plaintiff's income, assets, and lifestyle" is not "diversionary hand-waving." These are some of the factors the trial court *should* consider in calculating child support. *See* N.C. Gen. Stat. § 50-13.4.

Father's argument overlooks the trial court's determination that the child's needs are *greater* than the expenses stated on Mother's financial affidavit. The trial court explained this when rendering its ruling denying Father's post-trial motions,

> The fact that [Father] is in fact paying a certain amount that was attributed specifically to the child in his

> household—I know where you're getting your math, Mr. Sokol. In a pure mathematical calculation it makes sense. As a matter of equity in dividing up what the child herself should get, it doesn't make sense. . . .
>
> . . . .
>
> And therefore, the child should be entitled to have similar opportunities in both households, and the only way to do that is to divide the child's needs rather than trying to do this mathematical calculation of what I do actually provide for in my household.

Our cases have long recognized that the reasonable needs of a child are determined based upon the ability of the parents to provide:

> In addition to the actual needs of the child, a father has a legal duty to give his children those advantages which are reasonable considering his financial condition and his position in society.
>
> In *Hecht v. Hecht*, 189 Pa.Super. 276, 283, 150 A.2d 139, 143, Woodside, J., observed:
>
> > "Children of wealthy parents are entitled to the educational advantages of travel, private lessons in music, drama, swimming, horseback riding, and other activities in which they show interest and ability. * * * It is possible that a child with nothing more than a house to shelter him, a coat to keep him warm and sufficient food to keep him healthy will be happier and more successful than a child who has all the 'advantages,' but most parents strive and sacrifice to give their children 'advantages' which cost money. * * * Much of the special education and training which will be of value to people throughout life must be given them when they are young, or be forever lost to them."
>
> What amount is reasonable for a child's support is to be determined with reference to the special circumstances of the particular parties. Things which might properly be deemed necessaries by the family of a man of large income would not be so regarded in the family of a man whose earnings were small and who had not been able to accumulate any savings. In determining that

> amount which is reasonable, the trial judge has a wide discretion with which this court will not interfere in the absence of a manifest abuse.

Williams v. Williams, 261 N.C. 48, 57-58, 134 S.E.2d 227, 234 (1964) (citations omitted).

The trial court gave substantial consideration to the disparity in the parties' lifestyles and the parties' accustomed standards of living. Even if Father's income had decreased since the 2012 Order, as Father contends, the change in *his* income was not the relevant change. Whether Father's income is $44,846.00 per month (2018 Order) or over $30,000 per month (2012 Order), it is more than sufficient to cover Father's individual expenses, the child's expenses, and the amount of child support ordered. The issue is not Father's ability to pay; it is the reasonable needs of the child. The change alleged in the motion to modify child support was the increase in the child's needs. Father does not challenge the trial court's determination that the child's needs have increased since 2012, so modification is appropriate. This is a discretionary determination, and in an above-the-guidelines case, the trial court is not required to use a particular formula. *See* N.C. Child Support Guidelines, AOC-A-162, at 2 (2015).

For cases falling within the N.C. Child Support Guidelines, calculation of child support and review of orders is normally straightforward. Once the trial court has determined the numbers to put into the formula, math provides the answer. But in cases above the child support guidelines, the trial court must make a discretionary determination based upon the factors set out in North Carolina General Statute § 50-13.4(c):

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c) (2019).

The judge's consideration of the interplay of these factors is not dictated by a "magic formula." *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 867 (1985).

> To comply with G.S. 50–13.4(c), the order for child support must be premised upon the interplay of the trial

> court's conclusions of law as to the amount of support necessary "to meet the reasonable needs of the child" and the relative ability of the parties to provide that amount. To support these conclusions of law, the court must also make specific findings of fact so that an appellate court can ascertain whether the judge below gave "due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." Such findings are necessary to an appellate court's determination of whether the judge's order is sufficiently supported by competent evidence. If the record discloses sufficient evidence to support the findings, it is not this Court's task to determine *de novo* the weight and credibility to be given the evidence contained in the record on appeal.
>
> The judge's consideration of the above factors contained in G.S. 50–13.4(c) is not guided by any magic formula. Computing the amount of child support is normally an exercise of sound judicial discretion, requiring the judge to review all of the evidence before him. Absent a clear abuse of discretion, a judge's determination of what is a proper amount of support will not be disturbed on appeal.

Id. at 68-69, 326 S.E.2d at 867-68 (citations omitted).

Even in a case falling outside the child support guidelines, the trial court may consider using a formula to guide its determination of child support, and if the court uses a formula, the calculations should be mathematically correct. *See id.* at 79, 326 S.E.2d at 873 ("Although the use of such a formula does serve as a convenient guideline in assisting the trial judge in fairly calculating child support awards, the formula used cannot be applied without some degree of mathematical accuracy."). Father contends the trial court used a "formula," of sorts, but did not do the math accurately. He argues the 2018 Order is "incoherent" and "that a child support award that is almost 110% of the child's total reasonable needs is demonstrably unsupportable." *If* the trial court were required to use a precise mathematical formula to establish child support, Father may be right. But the trial court's findings demonstrate that instead of using a formula to set the exact amount of support, it considered the parties' incomes and expenses but also gave "due regard to the estates, earnings, conditions, accustomed standard of living of

the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." N.C. Gen. Stat. § 50-13.4(c); *see also* N.C. Child Support Guidelines, at 2. The trial court's findings emphasized its consideration of the parties "estates, earnings, conditions, [and] accustomed standard of living of the child and the parties." N.C. Gen. Stat. § 50-13.4(c).

Here, the trial court found

> 19. [Mother's] expenses for herself and the minor child are skewed by a number of factors. For example, [Mother] currently drives a vehicle which is 10 years old and which has over 172,000 miles on it. It is not reasonable to assume that [Mother] will be able to continue to drive this vehicle without purchasing a new vehicle in the near future. [Mother] previously owned a 2014 Toyota Highlander she purchased new which had monthly payments of $570. [Mother] sold this vehicle after owning it for several years to alleviate herself of the car expense in order to fit her budget. [Father] on the other hand currently lists two automobile expense payments between himself and his wife in the amount of over $1,500 per month. The Plaintiff's vehicles were purchased within the last several years.
>
> 20. In a similar fashion [Mother's] vacation expenses are a fraction of what [Father] spends for vacations. For example, [Mother] last year incurred an expense of approximately $4,000 for her and the minor child to visit Costa Rica. This was an atypical vacation for the Defendant and the minor child. Typically [Mother] and [Sarah] go to the North Carolina oceanfront for vacation and incur an expense which is a fraction of the Costa Rica expense. [Father] by comparison within the past year or so has taken the minor child on a ski trip to Utah, a Disney Cruise, a trip to Disney World and a trip to New York City. All of these trips had attendant expenses for air fare, meals, shows, etc. where the vacation expenses for [Father] and the minor child totaled thousands of dollars.
>
> 21. [Mother] had debts for multiple credit cards listed upon her affidavit in 2012. These debts did not appear on her affidavit filed in 2016. [Mother] used a portion of her settlement from the parties' divorce to

> pay these debts off. [Mother] has approximately $9,000 remaining from the divorce settlement. [Mother] also saves for retirement through a 401(k) plan through her employer. She has no significant equity in stocks, brokerage accounts, etc. like [Father] has.
>
> 22. [Mother's] expenses for herself and [Sarah] are a fraction of what [Father] incurs, because [Mother] budgets her funds and only pays for the expenses that she is able to incur for [Sarah]. The standard of living [Mother] is currently maintaining for herself and [Sarah] is significantly less than what the parties and the minor child enjoyed at the time of the parties' separation and what [Father] has historically and currently enjoys after separation. She would incur greater expenses for [Sarah] if she had the means to do so. These increased expenses if incurred would still only be a percentage of the expenses [Father] incurs with respect to [Sarah] each month.
>
> 23. The Court has determined the child's total reasonable needs between the parties to be $7,926.23 per month. Out of the child's reasonable needs, [Father] currently incurs needs of $5,431.18 per month, and [Mother] currently incurs needs of $2,495.05 per month. *The disparity in the parties respective reasonable needs for the minor child is directly related to the amount of respective discretionary income the parties have available for the minor child.*

(Emphasis added.)

These findings are not challenged as unsupported by the evidence, so they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 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."). The trial court's findings focus on the disparity in the parties' estates:

> 9. [Father] also has a brokerage account with Charles Schwab which had an end of year value in 2016 of $655,071. By the end of April, 2017, the value of the brokerage account had grown to $821,606. The growth in [Father's] brokerage account reflects in part the deposit of the RSUs referenced in Finding of Fact #8 above. This growth had occurred despite cash withdrawals that

[Father] occasionally makes from the account to maintain his standard of living.

10. [Father] has been married for several years. His wife does not work outside of the home and does not earn a salary. The Plaintiff and his wife within the past two years purchased a home in Raleigh with an approximate purchase price of $1.2 million.

11. [Father] has no ongoing indebtedness other than the mortgage on his home, the mortgage on another residence he owns in Lee County, and obligations for vehicle purchases. [Father] runs his ongoing expenses primarily through his Citi Advantage credit card. [Father] incurs charges on this credit card anywhere from between $15,000 - $35,000 per month and pays the card off each month. [Father] through the time period from October, 2016 through May, 2017 averaged purchases for wine, trips to vineyards, etc. in the approximate amount of $6,400 per month. He also purchased a birthday present for his wife in the amount of $8,000 and a piece of fine art in the amount of $3,105 during this time period.

. . . .

16. Since the entry of this Court's 2012 Order, [Mother] has purchased a home in the amount of $262,000. [Mother] used a portion of her settlement from the parties' divorce to fund the down purchase for this house.

. . . .

21. [Mother] had debts for multiple credit cards listed upon her affidavit in 2012. These debts did not appear on her affidavit filed in 2016. [Mother] used a portion of her settlement from the parties' divorce to pay these debts off. [Mother] has approximately $9,000 remaining from the divorce settlement. [Mother] also saves for retirement through a 401(k) plan through her employer. She has no significant equity in stocks, brokerage accounts, etc. like [Father] has.

22. [Mother's] expenses for herself and [Sarah] are a fraction of what [Father] incurs, because [Mother] budgets her funds and only pays for the expenses that she is able to incur for [Sarah]. The standard of living [Mother]

> is currently maintaining for herself and [Sarah] is significantly less than what the parties and the minor child enjoyed at the time of the parties' separation and what [Father] has historically and currently enjoys after separation. She would incur greater expenses for [Sarah] if she had the means to do so. These increased expenses if incurred would still only be a percentage of the expenses [Father] incurs with respect to [Sarah] each month.

The weight assigned to each factor mentioned in North Carolina General Statute § 50-13.4(c) is in the trial court's discretion. *Plott v. Plott*, 313 N.C. at 69, 326 S.E.2d at 867-68. The trial court set forth specific findings and gave due regard to the factors required by North Carolina General Statute § 50-13.4(c). *Kleoudis v. Kleoudis*, 271 N.C. App. 35, 42, 843 S.E.2d 277, 283 (2020) ("Giving 'due regard' to the estates of the parties does not require detailed findings as to the value of each individual asset but requires only that the trial court consider the evidence and make sufficient findings addressing its determination regarding the estates to allow appellate review."). Based upon those findings, we discern no abuse of discretion.

IV. Post-trial Motions

Because we have concluded the trial court did not err in modifying Father's child support obligation, we also conclude the trial court did not err by denying Father's post-trial motions. This argument is overruled.

V. Conclusion

We affirm the trial court's 2018 Order and the order denying the posttrial motions.

AFFIRMED.

Judge COLLINS concurs.

Judge BERGER dissents with separate opinion.

BERGER, Judge, dissenting in separate opinion.

"The determination of child support must be done in such way to result in fairness to all parties." *Walker v. Walker*, 38 N.C. App. 226, 228, 247 S.E.2d 615, 616 (1978) (citation omitted). Because the trial court's child support order is more than 100% of the minor child's reasonable needs, I respectfully dissent.

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c) (2019).

The statute is clear and unambiguous: child support payments "shall be in such amount as to meet the reasonable needs of the child[.]" N.C. Gen. Stat. § 50-13.4(c). Here, the trial court determined that the "total reasonable needs" of the minor child was $7,926.23 per month based upon a finding that "Plaintiff currently incurs needs of $5,431.18 per month, and [ ] Defendant currently incurs needs of $2,495.05 per month." The trial court also found as fact that "[Defendant] would incur greater expenses for [the minor child] if she had the means to do so."

The trial court then concluded as a matter of law that increases in the parties' incomes and "an increase in the minor child's reasonable needs" constituted a substantial change in circumstances justifying modification of the prior support order. In ordering Plaintiff to pay $3,289.00 per month in child support, the trial court imposed a child support obligation on Plaintiff that was 110% of "the total reasonable needs" of the minor child.

There is no support in the record for the amount awarded by the trial court. The majority is correct, "[m]ath is important," and parties should have some assurance that a child support order is based on objective criteria; not guesswork, flawed processes, or even a judge's implicit bias against wealth and wealth creators. However, the majority opinion allows trial courts to impose random, arbitrary child support obligations that it deems subjectively fair, thus, taxing parents of means in an effort to create emotional equality.

Child support payments are not intended, as the trial court found in finding of fact 24, to meet Defendant's needs. Child support is not spousal support. However, the trial court appears to have considered a new car as one of the expenses Defendant would incur "if she had the means to do so." The trial court addressed the age and mileage of Defendant's vehicle, and determined that "[i]t is not reasonable to assume that [ ] Defendant will be able to continue to drive this vehicle without purchasing a new vehicle in the future." Even if we assume that Plaintiff should be solely responsible for purchasing Defendant's new car as part

of his child support obligation, the trial court improperly considered this unsubstantiated future expense. *See Witherow v. Witherow*, 99 N.C. App 61, 65, 392 S.E.2d 627, 630 (1990) ("[A]n award which takes into consideration an unsubstantiated expense rather than a current expense is an abuse of the court's discretion."). *See generally Thomas v. Burgett*, 265 N.C. App. 364 (2019).[1]

I would remand this matter to the trial court for entry of an order that limits Plaintiff's child support obligation to the minor child's reasonable needs in accordance with N.C. Gen. Stat. § 50-13.4(c).

FUND HOLDER REPORTS, LLC, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF STATE TREASURER, RESPONDENT

No. COA20-94

Filed 31 December 2020

Administrative Law—final agency decision—interpretation of N.C.G.S. § 116B-78(d)—appealed to superior court—reasonable basis

The superior court properly affirmed the declaratory ruling issued by the North Carolina Department of State Treasurer, in which the agency interpreted N.C.G.S. § 116B-78(d) as prohibiting petitioner, a property finder that helped residents collect escheated funds pursuant to the Unclaimed Property Act (Chapter 116B), from depositing into its trust account checks that it collected from the agency on behalf of its clients, even if it held a valid power of attorney to act on behalf of a client. The agency's interpretation was reasonable in light of the statute's plain language and legislative history.

Judge TYSON dissenting.

Appeal by Petitioner from Order entered 26 November 2019 by Judge Vinston Rozier in Wake County Superior Court. Heard in the Court of Appeals 26 August 2020.

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1. Because the South Eastern Reporter incorrectly lists *Thomas v. Burgett* as an unpublished case, we only include a citation to the North Carolina Appellate Reporter.

Stam Law Firm, PLLC, by R. Daniel Gibson, for petitioner.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc X. Sneed, for respondent.

HAMPSON, Judge.

Factual and Procedural Background

Fund Holder Reports, LLC (FHR) appeals from an Order of the Wake County Superior Court affirming a Declaratory Ruling by the North Carolina Department of State Treasurer (the Department) interpreting N.C. Gen. Stat. § 116B-78(d) and its application to FHR's business practices. The Record before us reflects the following:

FHR is a multi-state company that assists its clients in locating and processing escheated fund claims. FHR began assisting North Carolina residents in collecting their escheated funds in 2015. FHR typically enters into a written agreement with a client stating FHR will advance the expenses related to finding and collecting the escheated funds and will receive a percentage of the escheated funds as a finder's fee. FHR, as part of the agreement, also obtains a power of attorney to collect the funds and "to perform all acts necessary to protect and recover [the funds]." Once FHR has located and negotiated recovery of the escheated funds on a client's behalf, the State sends FHR a check payable to the client in the "care of" FHR. FHR endorses the check for deposit only and deposits the check into its client trust account. Then, FHR sends its client a check from the client trust account for the value of the escheated funds minus FHR's finder's fee. FHR then transfers the value of the finder's fee into its operating account after the client deposits the check from FHR.

The Department is the North Carolina state agency responsible for administering the Unclaimed Property Act as codified in Chapter 116B of the North Carolina General Statutes. On 24 October 2018, FHR received a letter from the Department notifying FHR it was in violation of N.C. Gen. Stat. § 116B-78(d). Specifically, the letter stated the Department's Unclaimed Property Division learned FHR was "endorsing and depositing checks from the Division made payable to claimants" and that the Department would "cease processing any pending or submitted claims from [FHR] until it receives assurances that [FHR] is no longer in violation of [Section 116B-78(d)]."

Section 116B-78(d) states:

> Any person who enters into an agreement covered by this section with an owner shall be allowed to receive cash property, but not tangible property or securities, on behalf of the owner but shall not be authorized to negotiate the check made payable to the owner. Tangible property shall be delivered to the owner by the Treasurer, and securities will be registered into the owner's name.

N.C. Gen. Stat. § 116B-78(d) (2019). On 7 December 2018, FHR's counsel sent the Department a response to its 24 October letter requesting the Department issue a Declaratory Ruling pursuant to N.C. Gen. Stat. § 150B-4[1] as to whether: (1) FHR, with a valid power of attorney, may deposit a check made payable to the owner; (2) the Department is authorized to issue a check payable to the owner and a separate check payable to FHR for its finder's fee; and (3) the Department interpreted Section 116B-78 to permit FHR to receive cash but not negotiate a check. On 22 February 2019, the Department issued its Declaratory Ruling concluding: (1) FHR may not deposit a check made payable to the owner using a valid power of attorney; (2) the Department may only issue checks to the legal owner and may not issue separate checks to FHR for its finder's fee; and (3) under Section 116B-78(d), FHR may receive cash property in the form of checks, but may not negotiate those checks.

On 29 March 2019, FHR filed a Petition for Judicial Review of the Department's Declaratory Ruling in Wake County Superior Court.[2] Before the Superior Court, FHR argued the Department's Ruling misinterpreted and misapplied North Carolina law by: (1) reading Section 116B-78(d) as superseding the North Carolina Power of Attorney Act; (2) reading Section 116B-78(d) as preventing FHR from negotiating or depositing checks made payable to its clients when it had a valid power of attorney; and (3) reading Section 116B-78(d) as preventing the Department from issuing separate checks to FHR.

On 26 November 2019, the Wake County Superior Court entered an Order affirming the Department's Declaratory Ruling. In its Order, the Superior Court first determined the applicable standard of review of

1. "On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency." N.C. Gen. Stat. § 150B-4(a).

2. N.C. Gen. Stat. § 150B-4(a1)(3) (2019) provides: "A declaratory ruling is subject to judicial review in accordance with Article 4 of this Chapter." Article 4 of Chapter 150B provides authorization and procedures for seeking judicial review of final administrative decisions in contested cases. N.C. Gen. Stat. § 150B-43, *et seq*. (2019).

the Department's Declaratory Ruling under N.C. Gen. Stat. § 150B-51(c) was de novo. Applying this de novo standard of review, the Superior Court concluded the "plain language," of Section 116B-78(d): (1) allows a property finder to receive cash property, but not to negotiate a check even if the property finder possesses a valid power of attorney; (2) does not allow the issuance of a separate payment to a property finder for its finder's fee; and (3) the Department, thus, did not err in its Declaratory Ruling. FHR filed a written Notice of Appeal from the Superior Court's Order on 23 December 2019.

Issue

The dispositive issue on appeal is whether the Superior Court properly affirmed the Department's conclusion that Section 116B-78(d) does not permit FHR, even with a valid power of attorney, to endorse and deposit checks made payable to an owner in its client trust accounts.[3]

Standard of Review

Under North Carolina's Administrative Procedure Act the role of a superior court reviewing a final agency decision is as follows:

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners *may* have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2019) (emphasis added).

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3. FHR also argues the Superior Court erred by employing "an initial determination as to whether [FHR] has been prejudiced by the [the Department's] ruling" and in concluding FHR was not prejudiced by the Declaratory Ruling. Because, however, the Superior Court did not end its analysis there and addressed the merits of FHR's arguments on judicial review and based on our disposition of this case on these merits, we do not reach the question of whether the Superior Court erred in its analysis of whether FHR suffered any prejudice from the Department's ruling.

"A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in G.S. 7A-27." N.C. Gen. Stat. § 150B-52 (2019). Our scope of review under § 150B-52 is "the same as it is for other civil cases." *Id.* When this Court reviews an order from a superior court examining a final agency decision, we examine the order for errors of law. *Shackleford-Moten v. Lenoir Cnty. Dep't of Soc. Servs.*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002) (citations omitted). This process is a "twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Nat. Res.*, 361 N.C. 531, 535, 648 S.E.2d 830, 834 (2007) (citation and quotation marks omitted).

Thus, as an initial matter, when a superior court reviews a final agency decision, the standard of review "depends upon the particular issues presented on appeal." *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citation and quotation marks omitted). Questions of law receive de novo review. N.C. Gen. Stat. § 150B-51(c) (2019); *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (citation and quotation marks omitted). Here, FHR petitioned the Superior Court to review the Department's Declaratory Ruling arguing the Declaratory Ruling "misinterpret[ed] and misappl[ied]" North Carolina law. As FHR raised questions of law, the Superior Court accordingly correctly applied a de novo standard of review. *Id.*

FHR contends, however, the Superior Court erred in its de novo review by affirming the Department's interpretation that N.C. Gen. Stat. § 116B-78(d)'s prohibition on property finders negotiating checks bars FHR from depositing its clients' checks. Although the Superior Court did not expressly conclude Section 116B-78(d) prohibited FHR from depositing checks, it did conclude the law prevented FHR from negotiating checks and affirmed the Department's Declaratory Ruling, which itself concluded FHR could not deposit its clients' checks.

We review an agency's alleged error of law de novo. *Carroll*, 358 N.C. at 666, 599 S.E.2d at 898. Our courts give "great weight to an agency's interpretation of a statute it is charged with administering; however, an agency's interpretation is not binding." *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam'rs*, 371 N.C. 697, 700, 821 S.E.2d 376, 379 (2018) (citation and quotation marks omitted); *see also Carpenter v. N.C. Dep't of Human Res.*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992) ("the court should defer to the agency's

interpretation of the statute . . . as long as the agency's interpretation is reasonable and based on a permissible construction of the statute."). Our "primary task in construing a statute is to effectuate the intent of the legislature" and the "best indicia of . . . legislative purpose [is] the language of the statute[.]" *N.C. Acupuncture Licensing Bd.*, 371 N.C. at 701, 821 S.E.2d at 380 (citations and quotation marks omitted).

Analysis

N.C. Gen. Stat. § 116B-78 is a statute of limited application. It governs contracts to locate unclaimed property within the scope of Chapter 116B. Specifically, it only governs an agreement "if its primary purpose is to locate, deliver, recover, or assist in the recovery of property that is distributable to the owner or presumed abandoned." N.C. Gen. Stat. § 116B-78(a1) (2019).

It is in this specific context the Department issued its Declaratory Ruling responding to a very general question posed by FHR. FHR asked whether the Department believed FHR, as a property finder[4], "may (as the owners' power of attorney) deposit a check [made] payable to a property owner." In response, the Department issued a very general ruling, expressly noting: "the Department's response is not to be construed as anything other than a general ruling." The Department responded, given Section 116B-78(d)'s prohibition on property finders negotiating checks: "as a property finder, if FHR possesses a valid power of attorney to act on behalf of an owner, it would nevertheless be unable to deposit a check that is payable to the owner."

Thus, the Declaratory Ruling simply determined FHR, where it was acting in its capacity as a property finder governed by Section 116B-78(d), was not authorized to deposit checks made out to its clients by the Department, even with a purported power of attorney. Notably, as the Department pointed out, it was not provided with any power of attorney to review. The Department's ruling is clearly limited only to persons or entities acting as property finders under an agreement governed by Section 116B-78(d). The Department's ruling does not address instances where a person or entity with power of attorney is acting other than as a property finder—for example a family member holding a general power of attorney, a guardian, or even a more general

4. We adopt the this use of the term "property finder" by the parties and refer to "property finder" to denote a person or entity that enters into an agreement with a property owner when the agreement's "primary purpose is to locate, deliver, recover, or assist in the recovery of property that is distributable to the owner or presumed abandoned" under the Unclaimed Property Act. In this context, FHR is a property finder.

attorney-client relationship. Moreover, the ruling does not address instances in which the Department might issue payment to an owner other than by check—for instance, electronic funds transfer, although it does acknowledge Section 116B-78(d) does permit a property finder "to receive cash property."

Having received this general Declaratory Ruling, upon judicial review and appeal to this Court, FHR makes a more nuanced argument. FHR contends the Department's ruling was erroneous because Section 116B-78(d)'s prohibition on property finders negotiating client checks should not bar *all* deposits by a property finder. FHR submits that because its agreements with its clients contain a clause purportedly granting FHR power of attorney and FHR, on behalf of its clients, endorses and deposits client checks into a trust account for its clients, these deposits do not constitute a negotiation.

Here, as both the Department and Superior Court recognized, the plain language of Section 116B-78(d) clearly provides a property finder is not authorized to negotiate a check payable to its client (the property owner):

> Any person who enters into an agreement covered by this section with an owner shall be allowed to receive cash property, but not tangible property or securities, on behalf of the owner but shall not be authorized to negotiate the check made payable to the owner. Tangible property shall be delivered to the owner by the Treasurer, and securities will be registered into the owner's name.

N.C. Gen. Stat. § 116B-78(d) (2019). FHR, however, contends the Department interpreted the term "negotiate" too broadly to include any deposit by a property finder of a check made payable to an owner. We disagree and conclude the Department's interpretation of the statute is reasonable in light of the statute's language and purpose.

"Negotiation" is not a defined term under Chapter 116B. Rather, as FHR notes, North Carolina's Uniform Commercial Code (UCC) defines "negotiation" as "a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." N.C. Gen. Stat. § 25-3-201(a) (2019).[5] A "holder" is defined under the UCC as the "person in possession of a

5. Black's Law Dictionary likewise defines "negotiate," in relevant part, "to transfer (an instrument) by delivery or endorsement . . . for value, in good faith, without notice of conflicting title claims . . . ." *Negotiate*, *Black's Law Dictionary* (11th ed. 2019).

negotiable instrument that is payable to . . . an identified person that is the person in possession[.]" N.C. Gen. Stat. § 25-1-201(21) (2019).

Here, the Department issues a check to the property owner in care of FHR. *See* N.C. Gen. Stat. § 25-3-105(c) (2019) ("Issuer" means a "maker or drawer of an instrument"). FHR, as an agent of the owner, endorses client checks payable specifically to its bank and deposits the checks in its trust account. *See Summerlin v. Nat'l Serv. Indus., Inc.*, 72 N.C. App. 476, 478, 325 S.E.2d 12, 14 (1985). In so doing, FHR transfers possession of the checks to FHR's depositary bank by endorsing and depositing the checks. Again, applying the UCC, under N.C. Gen. Stat. § 25-4-205: "The depositary bank becomes a holder of the item at the time it receives the item for collection if the customer at the time of delivery was a holder of the item, whether or not the customer indorses the item[.]" N.C. Gen. Stat. § 25-4-205 (2019). Therefore, by these plain terms, the Department's interpretation of Section 116B-78(d)—that FHR's deposits of its client's checks are unauthorized negotiations—is reasonable and consistent with the plain language of the statute.[6]

For its part, FHR nevertheless contends because its agreements with the property owners require the property owner to provide FHR power of attorney, FHR is the "legal representative" of its clients and, thus, tantamount to being a property owner. *See* N.C. Gen. Stat. § 116B-52(9) (2019) (" 'Owner' means a person who has a legal or equitable interest in property subject to this Chapter or the person's legal representative."). This contention ignores the fact that—at least on the Record before

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6. FHR argues banks do not always become "holders in due course" under the UCC citing N.C. Gen. Stat. §§ 25-4-208 and 209. Thus, FHR contends because not every deposit makes a bank a holder in due course, the bank may not become a holder, and, thus, no negotiation occurs. FHR's argument overlooks the fact under the UCC the terms "holder" and "holder in due course" are not synonymous. N.C. Gen. Stat. § 25-3-302 (2019) provides:

> "holder in due course" means the holder of an instrument if:
>
> (1) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and
>
> (2) The holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in G.S. 25-3-306, and (vi) without notice that any party has a defense or claim in recoupment described in G.S. 25-3-305(a).

N.C. Gen. Stat. § 25-3-302 (2019).

us—any purported power of attorney between FHR and its clients is a term of the agreement which is expressly governed by N.C. Gen. Stat. § 116B-78. *See* N.C. Gen. Stat. § 116B-78(a1) (2019) ("An agreement by an owner is covered by this section if its primary purpose is to locate, deliver, recover, or assist in the recovery of property that is distributable to the owner or presumed abandoned.").

Moreover, as the Department recognized, North Carolina's Uniform Power of Attorney Act, found in Chapter 32C of the General Statutes, "does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with the provisions of this Chapter." N.C. Gen. Stat. § 32C-1-122 (2019). Thus, in interpreting Section 116B-78(d), the Department determined the plain language of the statute meant that even if a property finder possesses a valid power of attorney, it cannot, while acting as a property finder governed by N.C. Gen. Stat. § 116B-78(d), under its agreement with its client negotiate a check payable to the client. This interpretation is entirely reasonable. Indeed, under FHR's position, allowing a property finder to rely on a purported power of attorney in an agreement governed by Section 116B-78 for the purpose of circumventing the express prohibition on property finders negotiating their clients' checks would appear to run directly contrary of the plain language of subsection 116B-78(d) as intended by the General Assembly.

The Department's interpretation of Section 116B-78 is further consistent with the purpose of the statute as demonstrated in its legislative history. The statute was enacted as part of the Unclaimed Property Act in 1999. An Act to Enact the North Carolina Unclaimed Property Act, 1999 N.C. Sess. Laws 1904, 1923-24. In 2009, the General Assembly made sweeping amendments to the statute's language including enacting Section 116B-78(d); the law stands today as amended in 2009. An Act to Protect Property Owners of Abandoned Property by Regulating Property Finders, 2009 N.C. Sess. Laws 509, 510-11. These 2009 amendments demonstrate a clear legislative intent to protect property owners. These provisions added specific criteria for such agreements between property finders and owners, including express limits on the amount of compensation a finder could receive. *Id*. The General Assembly also added a subsection providing any violation of Section 116B-78 "constitutes an unfair or deceptive trade practice under G.S. 75-1.1." *Id*. These changes, coupled with the 2009 Act's title, clearly evince the General Assembly's intent to protect property owners and regulate property finders—by strictly defining the methods for compensation and limiting exactly what a property finder could do with property.

Whether or not the blanket prohibition in Section 116B-78 on property finders negotiating checks does or does not constitute good policy or has a chilling effect on an otherwise sound business model is a question for the General Assembly, and we are not free to ignore its plain language. *Orange County ex rel. Byrd v. Byrd*¸ 129 N.C. App. 818, 822, 501 S.E.2d 109, 112 ("[W]e are not free to either ignore or amend legislative enactments because when the language of a statute is clear and unambiguous, the courts must give it its plain meaning." (citing *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977))). FHR's recourse is with the General Assembly as "the judiciary should avoid ingrafting upon a law something that has been omitted, which it believes ought to have been embraced." *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008) (alterations, citations, and quotation marks omitted).

Thus, the Department's Declaratory Ruling interpreting Section 116B-78(d) as precluding FHR from negotiating checks payable to its clients by depositing those checks in FHR's client trust accounts, even with a valid power of attorney, is reasonable and consistent with the plain language and purpose of the statute. Therefore, the Department did not err in its Declaratory Ruling. Consequently, in turn, the Superior Court did not err in affirming the Department's Declaratory Ruling.

Conclusion

Accordingly, we affirm the Superior Court's Order affirming the Department's Declaratory Ruling.

AFFIRMED.

Judge BROOK concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The specific issue before this Court on appeal from the superior court and State Treasurer is whether a principal's legal representative's sole act of receiving a check, issued to the principal, and depositing that check into a trust account for the benefit of the principal is a "deposit" or a "negotiation" of that check. The superior court's order is properly reversed and remanded. I respectfully dissent.

The Treasurer asserted FHR was "endorsing and depositing checks from the Division made payable to claimants." The Treasurer threatened to "cease processing any pending or submitted claims from [FHR] until it receives written assurances that [FHR] is no longer in violation of [N.C. Gen. Stat. § 116B-78(d)]."

N.C. Gen. Stat. § 116B-78(d) states:

> Any person who enters into an agreement covered by this section with an owner shall be allowed to receive cash property, but not tangible property or securities, on behalf of the owner but shall not be authorized to negotiate the check made payable to the owner. Tangible property shall be delivered to the owner by the Treasurer, and securities will be registered into the owner's name.

N.C. Gen. Stat. § 116B-78(d) (2019).

N.C. Gen. Stat. § 116B's definition of "owner" includes "the [owner's] legal representative." N.C. Gen. Stat. § 116B-52(9) (2019). After FHR locates the principal's funds held by the Treasurer in the unclaimed property fund and provides the required proof of principal's ownership, the State issues a check payable to the principal and delivers the check in the "care of" FHR.

The common law of agency has recognized for centuries "the acts of an agent are the acts of the principal." *Young & McQueen Grading Co. v. Mar-Comm & Assocs.*, 221 N.C. App. 178, 183, 728 S.E.2d 1, 4 (2012) (citation omitted). "Payment by an agent is payment by the principal" and payment to an agent is payment to the principal. Joseph Story, Commentaries on the Law of Agency 528 (8th ed. 1874). Under the North Carolina power of attorney statute ("UPA"), unless otherwise restricted, the agent's act is the act of its principal. N.C. Gen. Stat § 32C-1-114 (2019).

These funds at issue are not State funds. The escheated funds belong to and remain the property of the principal. The Treasurer is merely holding these funds until the true owner is identified and provides proof to support its claims for delivery. Once the Treasurer complies with the statute to identify and deliver the unclaimed funds to the owner or the owner's legal representative, it has no further role or oversight in the principal's subsequent disposition of its funds. If the principal directs its agent to bet the funds on a gamble or to purchase an exotic automobile for the principal, it is the principal's money and their sole prerogative on when, where, how, and to whom they are spent. N.C. Gen. Stat. § 32C-1-114(a).

As the principal's legal representative, unless otherwise limited or restricted, the agent is empowered to act in the stead of, as and for, the principal, subject to the fiduciary duties of, among others, loyalty, honesty, to avoid self-dealing, and to account for all its actions on behalf of the principal. N.C. Gen. Stat. § 32C-1-114(b).

I. Interpretation

FHR argues the superior court erred in its *de novo* review by affirming the Treasurer's interpretation asserting N.C. Gen. Stat. § 116B-78(d)'s prohibition on property finders-agents negotiating checks and also bars FHR from depositing its principal's checks. The Treasurer also asserted even if FHR possesses a valid power of attorney to act on behalf of an owner, it would nevertheless be unable to deposit a check that is payable to the owner.

As correctly noted by the majority's opinion, the superior court did not expressly conclude the statutory language in Section 116B-78(d) prohibits FHR from "depositing" checks issued and payable to the principal. *See* N.C. Gen. Stat. § 116B-78(d) ("but shall not be authorized to negotiate the check made payable to the owner").

Deposit is defined as "the act of placing money in a bank for safety and convenience." *Deposit*, Black's Law Dictionary (11th ed. 2019). As previously noted, the statutory definition of an "owner" includes, "the [owner's] legal representative." N.C. Gen. Stat. § 116B-52(9).

N.C. Gen. Stat. § 116B does not define either "deposit" or "negotiate." "Negotiate" is defined as "to transfer (an instrument) by delivery or [e]ndorsement." *Negotiate*, Black's Law Dictionary (11th ed. 2019). Under N.C. Gen. Stat. § 25-3-201 (2019), the Uniform Commercial Code defines "negotiation" as "a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." The UCC itself is confusing on this issue as a depository bank is merely "a collecting agent" for the principal's check on one hand and, on the other hand, the bank becomes a "holder" upon receiving the instrument for collection. N.C. Gen. Stat. §§ 25-4-208, 25-1-201(21) (2019). In either event, the depository bank acts as the agent of the principal, who is the owner of the funds.

II. The UPA and Common Law Agency

Under the UPA, FHR, as agent and the holder of a valid power of attorney, possesses the broad authority and powers of the principal. Agents may claim, receive, obtain, and disburse money of which the principal is entitled. N.C. Gen. Stat § 32C-2-203 (2019). Agents, under

the UPA, can also demand or obtain money the principal is due through an estate or trust. *See* N.C. Gen. Stat. § 32C-1-114(b) (2019). Estates and trust or escrow accounts are common sources of escheated funds. *See* N.C. Gen. Stat. §§ 116B-2.2, 116B-3 (2019).

Once the agent has received the principal's funds, the agent can deposit, use, disburse, or invest those funds on behalf of the principal, as is consistent with the principal's instructions. Unless a power of attorney expressly provides otherwise, the agent may lawfully exercise these broad powers to act on behalf of its principal. Basically, the agent can perform any act the principal can lawfully perform for itself. *Young & McQueen Grading Co.*, 221 N.C. App. at 183, 728 S.E.2d at 4 (citation omitted).

The principal hires FHR for the express purpose of locating and receiving their funds, held by the Treasurer on their behalf, and then to deliver these funds. It is undisputed the common law of agency, the UPA, and N.C. Gen. Stat. § 116B empower FHR to do this on behalf of its principal.

The Treasurer reads UPA exclusion provisions applicable to banks and financial institutions to purportedly exempt N.C. Gen. Stat. § 116B-78(d) from the general applicability of the UPA or the common law of agency. The UPA "does not supersede" other laws applicable to "financial institutions or other entities." N.C. Gen. Stat. § 32C-1-122 (2019). As correctly noted in the majority's opinion, this overly broad interpretation of the statute is untenable.

The official comments to this section of the UPA "addresses concerns" from banking and insurance industries governing banking and insurance regulations which may conflict with the UPA. *See* N.C. Gen. Stat. § 32C-1-122.

> The primary rule of construction . . . is to ascertain the intent of the legislature and to carry out such intention to the fullest extent. To effectuate that intent, statutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each. It is a fundamental rule of statutory construction that sections and acts *in pari materia*, and all parts thereof, should be construed together and compared with each other. Words and phrases of a statute are to be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the statute permits.

In re Hayes, 199 N.C. App. 69, 78-79, 681 S.E.2d 395, 401 (2009) (alterations omitted) (citations and internal quotation marks omitted). When harmonized, N.C. Gen. Stat. § 116B, the UCC, and the UPA authorizes FHR, as the owner's representative and under a valid power of attorney, to receive and deposit checks on behalf of its principal, but not "negotiate" these checks.

If the Court reads these two statutes to be in conflict, this interpretation unnecessarily abrogates the common law and the UPA. As noted, in the common law of agency, "payment by an agent is payment by the principal" and payment to an agent is payment to the principal. Joseph Story, Commentaries on the Law of Agency 528 (8th ed. 1874).

Unless a statute specifically abrogates the common law, the common law continues in full force and effect. N.C. Gen. Stat. § 4-1 (2019). It must "affirmatively appear[]"a statute abrogates the common law. *Price v. Edwards*, 178 N.C. 493, 500, 101 S.E. 33, 37 (1919).

N.C. Gen. Stat. § 116B does not clearly abrogate the common law nor the UPA or UCC. *In re Hayes*, 199 N.C. App. at 78-79, 681 S.E.2d at 401 ("It is a fundamental rule of statutory construction that sections and acts *in pari materia*, and all parts thereof, should be construed together and compared with each other").

IV. N.C. Gen. Stat. § 116B

To read N.C. Gen. Stat. § 116B to preclude FHR, or any other similar agent, from depositing the check it receives from the Treasurer issued to its principal would write words into and broaden the meaning of the statute, which the General Assembly did not enact. The statute only precludes FHR from negotiating the checks, not receiving and depositing the cash funds or a cash equivalent check it is enabled to lawfully acquire under the statute, as an "[owners'] legal representative," and an agent of the principal under common law and the UPA. N.C. Gen. Stat. § 116B-52(d).

N.C. Gen. Stat. § 116B expressly allows and does not restrict a property finder-agent like FHR from receiving and depositing, but not to negotiate a check, made payable to its principal. Those two are separate functions, as their definitions clearly indicate. After admittedly lawful receipt by FHR from the Treasurer, there is no change in possession since the funds are always held by the principals' agents in trust for its use and benefit and are disbursed according to the principal's express instructions. "The acts of an agent are the acts of the principal." *Young & McQueen Grading Co.*, 221 N.C. App. at 183, 728 S.E.2d at 4 (citation omitted).

In other words, FHR may lawfully receive and deposit a check into a trust account for the benefit of its principal, but it may not negotiate the check to anyone other than the principal or for its benefit, its account, or to another of the principal's agents.

A natural reading of the statute suggests FHR, or any agent of the principal may receive checks directly from the Treasurer and then deposit these checks as instructed by its principal as any other agent is empowered to do, *e.g.* parents, employees, attorneys, securities or real estate brokers, accountants, administrators, guardians, trustees, or executors. If FHR does not negotiate or convert the checks to its own use or transfer to an unauthorized third party, it has merely deposited the check for the principal's benefit and has not violated the statute.

If FHR is "the owner" of escheated funds as is defined in the statute, via their being a legal representative of the principal, FHR has the power, as attorney in fact, to deposit escheated funds. This power continues so long as FHR is acting within the scope of its agency. Distinguishing depositing from negotiating allows the remainder of N.C. Gen. Stat. § 116B to function and harmonizes the statute with common law principles of agency, the UPA, and the UCC.

The Treasurer argues FHR merely depositing a check requires an "[e]ndorsement" by the depositor, which then makes the deposit a "negotiation," is wholly subsumed by N.C. Gen. Stat. § 116B itself. As the "owner," which definition includes the owner's legal representative, FHR's act of "depositing" the check is not a negotiation, because the deposit does not transfer ownership of the funds. The funds were received as and remain the property of the principal, held in a trust account for the benefit of the principal and eventually disbursed per its instructions.

FHR does not "endorse" the check, separate from being an act of the principal, to deposit nor incur endorser's liability. *See Young & McQueen Grading Co.*, 221 N.C. App. at 183, 728 S.E.2d at 4 (citation and quotation marks omitted).

Only after the principal has received and cashed the trust account check for the balance due does the agent receive their agreed-upon compensation.

V. Conclusion

A principal's authority to appoint FHR as its agent to find and recover escheated funds on their behalf is evidenced not only by the principal hiring FHR, but also providing FHR with valid power of attorney.

Depositing the principal's check by FHR is not a negotiation, either by definition or under the statute, because FHR is the owner's legal representative in the transaction and ownership of the funds remains with the principal or its agents. This situation is entirely contemplated by the General Assembly's enactment of N.C. Gen. Stat. § 116B, as is evidenced by the definitions in the statute.

Common law agency principals, the UPA, UCC, and N.C. Gen. Stat. § 116B can be harmonized to recognize FHR's authority, as agent to deposit the principal's formerly escheated funds, and to prevent FHR from negotiating the check for other than the principal's benefit or account. If FHR were "endorsing" the check and keeping the funds for themselves or transferring the funds other than for the principal's benefit, then the fiduciary duty inherent in the agency relationship and protected by the statute and UPA would be broken. FHR would have then "negotiated" the check, which is disallowed under N.C. Gen. Stat. § 116B.

This is not the case here. FHR lawfully deposited the principal's check into a trust account, sent the agreed amount due to its principal and, only after the principal cashes the trust check as ratification of the transaction, remits its earned compensation. The trial court's order is properly reversed. I respectfully dissent.

JERRY A. HAILEY, JR., PLAINTIFF
v.
TROPIC LEISURE CORP., MAGENS POINT RESORT, INC. D/B/A MAGENS POINT RESORT, RESORT RECOVERY, LLC, AND JOHN JUREIDINI, DEFENDANTS

No. COA19-908

Filed 31 December 2020

1. Constitutional Law—42 U.S.C. § 1983—under color of law—state action—small claims court—active engagement with magistrates

In a 42 U.S.C. § 1983 action, in which plaintiff alleged defendants deprived him of his constitutional right to due process, equal protection, and trial by jury by availing themselves of the U.S. Virgin Islands' Small Claims Court, which did not allow plaintiff to be represented by counsel, the trial court properly granted summary judgment to plaintiff where evidence established that defendants operated under color of law when they deprived plaintiff of his constitutional rights. The small claims' court magistrates' active

coaching of defendants through the filing and default judgment process conferred upon defendants the status of a state actor.

2. Discovery—sanctions award—Rule 37—no argument of unjust expenses

The trial court did not abuse its discretion by awarding plaintiff discovery sanctions pursuant to Civil Procedure Rule 37 in a 42 U.S.C. § 1983 action after granting several of plaintiff's motions to compel discovery. Defendants did not argue that the award was unjust, they failed to show that they were justified in opposing plaintiff's motions to compel, and the award was limited to reasonable expenses incurred.

3. Judgments—entry of default—motion to set aside—denial proper

In a 42 U.S.C. § 1983 action, the trial court did not abuse its discretion by denying one defendant's motion to set aside entry of default. Defendants did not support their arguments on this issue with any authority, and there was no indication the court failed to apply the proper good cause standard.

4. Damages and Remedies—compensatory damages—requested jury instructions—intervening causes

In a 42 U.S.C. § 1983 action, the trial court's instructions to the jury on proximate cause were not in error where, although the court declined to give the specific instructions requested by defendants regarding intervening causes, the charge in its entirety explained proximate cause and foreseeability, and defendants failed to state how the instructions as given were prejudicial.

5. Evidence—expert testimony—video deposition—decision to exclude—trial court's discretion

In an appeal in a 42 U.S.C. § 1983 action, the Court of Appeals found no abuse of discretion in a trial court's decision to exclude defendants' proffered video deposition of the president of the U.S. Virgin Islands Bar Association—regarding the issues of proximate cause and foreseeability in the compensatory damages phase—where defendants failed to articulate why the decision, which the trial court stated was based on lack of foundation, speculation, and irrelevance, constituted an abuse of discretion.

6. Evidence—expert testimony—Rule 702—appellate law expert—former justice

In a 42 U.S.C. § 1983 action, there was no abuse of discretion in the trial court's decision to allow an expert on appellate practice

and procedure (a former North Carolina Supreme Court justice) to testify regarding the reasonableness of plaintiff's attorney's fees. Defendants failed to articulate how the admission was an abuse of discretion, since Evidence Rule 702 allows an expert to give an opinion without having firsthand knowledge of a matter, and the opinion given here was within the expert's field of expertise.

7. Constitutional Law—42 U.S.C. § 1983 claim—proximate cause —JNOV

In a 42 U.S.C. § 1983 action, sufficient evidence was presented from which a jury could conclude that defendants were the proximate cause of plaintiff's injury—stemming from defendants' use of the U.S. Virgin Islands' Small Claims Court to deprive plaintiff of his constitutional right to due process, equal protection, and trial by jury, which caused plaintiff to incur attorney fees and costs in subsequent litigation. Where defendants failed to show that any of the intervening causes they cited as breaking the causal chain superseded their actions, the trial court properly denied their motion for judgment notwithstanding the verdict.

8. Attorney Fees—jurisdiction to award—notice of appeal filed while motion pending—trial court divested of jurisdiction

In a 42 U.S.C. § 1983 action, the trial court lacked jurisdiction to award attorney fees to plaintiff after defendants filed their first notice of appeal challenging the underlying judgments. Since the award was based on plaintiff's status as a prevailing party, the exception to the rule that notice of appeal removes jurisdiction to the appellate court, found in N.C.G.S. § 1-294, was inapplicable. The fee order was vacated and the matter remanded for reconsideration.

Appeal by Defendants from Orders entered 23 March 2018, 3 May 2018, 12 June 2018, 13 June 2018, 19 June 2018, 16 August 2018, and 20 November 2018, Judgment entered 28 June 2018, and Amended Judgment entered 16 August 2018, by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 12 August 2020.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, and L. Lamar Armstrong, Jr., for plaintiff-appellee.

Martin & Gifford, PLLC, by John L. Wait, for defendants-appellants.

HAMPSON, Judge.

Factual and Procedural Background

Tropic Leisure Corp. (Tropic Leisure), Magens Point Resort, Inc. d/b/a Magens Point Resort (Magens Point), Resort Recovery, LLC (Resort Recovery), and John Jureidini (Jureidini) (collectively, Defendants) appeal from a Judgment and subsequent Amended Judgment entered upon a jury verdict in favor of Jerry A. Hailey, Jr. (Plaintiff). In addition, Defendants also appeal from a number of interlocutory orders entered during the pendency of this litigation including the: Order on Cross Motions for Summary Judgment granting in part Plaintiff's Motion for Summary Judgment and denying in whole Defendants' Motion for Summary Judgment (Summary Judgment Order); Order Denying Defendants' JNOV Motion and Motion to Alter or Amend Judgment (JNOV Order); Order on Defendants' Pre-Trial Motions (Pretrial Order); and Orders Granting Plaintiff's Motion to Compel. Further, in a separate Notice of Appeal, Defendants also appeal the trial court's post-judgment Order Granting Plaintiff's Motion to Tax Attorney's Fees and Costs and Denying Defendants' Motion to Tax Attorney's Fees and Costs (Fees Order).

Following briefing and oral argument in this Court, Tropic Leisure and Magens Point filed a Motion to Withdraw Appeal in light of the Supreme Court of the Virgin Islands issuing its decision in *In re Hailey*, 2020 VI 14 (2020). In their Motion to Withdraw, Tropic Leisure and Magens Point request this Court allow their Motion because *In re Hailey*, "accomplishes what Defendants have requested from this Court on appeal . . . ." Whether or not this is an accurate assertion is a matter of some dispute between the parties. Nevertheless, in our discretion, we grant Tropic Leisure and Magens Point their requested relief and allow their Motion to withdraw from this appeal. N.C. R. App. P. 37(e)(2) (2020). However, Resort Recovery and Jureidini (the Appealing Defendants) remain parties to the appeal and continue to assert the same arguments raised by all Defendants. Accordingly, as a practical matter, our review of the Judgment and Orders entered against Defendants is substantively unchanged.

For purposes of this appeal, the parties agree there are no disputes of material fact. Accordingly, the Record reflects the following relevant facts:

In February of 2015, Tropic Leisure and Magens Point sought to enforce a Default Judgment obtained against Plaintiff in North Carolina. *See Tropic Leisure Corp. v. Hailey*, 251 N.C. App. 915, 916, 796 S.E.2d 129, 130, *disc. rev. denied*, 369 N.C. 754, 799 S.E.2d 871, *cert. denied*, 138 S. Ct. 505, 199 L. Ed. 2d 385 (2017) (*Tropic Leisure I*). Plaintiff appealed

enforcement of the Default Judgment in North Carolina, and this Court concluded the foreign Default Judgment was not entitled to full faith and credit in North Carolina "because the [Default] Judgment was obtained in a manner that denied [Plaintiff] his right to due process[.]" *Id.* at 924, 796 S.E.2d at 135. Specifically, this Court concluded the U.S. Virgin Islands' Small Claims Court, which did not allow a litigant to be represented by counsel under its No Attorney Rule, denied Plaintiff " 'the opportunity to be heard at a meaningful time and in a meaningful manner.' " *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d. 18, 32 (1976)). After this Court issued its opinion in *Tropic Leisure I*, Defendants petitioned for review at the North Carolina Supreme Court, 369 N.C. 754, 799 S.E.2d 871, and the United States Supreme Court, 138 S. Ct. 505, 199 L. Ed. 2d 385, both of which were denied.

The present appeal arises out of the same operative facts as *Tropic Leisure I*. Here, however, the underlying litigation began on 4 May 2015, several months after Defendants sought enforcement of their Default Judgment in North Carolina. This time, Plaintiff filed his Complaint alleging Defendants violated 42 U.S.C. § 1983 by depriving him of his constitutional rights "to due process and equal protection, and to his right to trial by jury[.]" Plaintiff alleged "[b]y acting jointly and participating with the USVI judicial authorities and using the USVI small claims system, defendants were acting under color of law" and, therefore, "defendants' conduct as private parties using unconstitutional state law constitutes 'state action.' "

The subsequent litigation involved extensive discovery resulting in several motions to compel and related sanctions. Plaintiff and Defendants both filed Motions for Summary Judgment. On 3 May 2018, the trial court, after taking the parties' briefs, supporting documents, and arguments under advisement, entered its written Summary Judgment Order denying Defendants' Motion for Summary Judgment and granting in part and denying in part Plaintiff's Motion for Partial Summary Judgment. The trial court took judicial notice of this Court's prior opinion in *Tropic Leisure I* and concluded "there [we]re no genuine issues of material fact concerning defendants' violation of plaintiff's constitutional right to due process and, further, that such violation was accomplished under color of law." The trial court further concluded, "as a matter of law, plaintiff is entitled to judgment against defendants on his 42 U.S.C. § 1983 claim for at least nominal damages of $1.00." However, "genuine issues of material fact exist[ed] as to plaintiff's actual damages and as to punitive damages"; therefore, Plaintiff's claims for actual and punitive damages remained for jury trial.

Consistent with the Summary Judgment Order, Plaintiff's claims for actual and punitive damages proceeded in two parts, with the compensatory damage phase beginning on 11 June 2018. On 15 June 2018, the jury returned a verdict finding Defendants, "under the color of law, subject[ed] [Plaintiff] to a deprivation of a right secured by the United States Constitution." The jury found Plaintiff was entitled to $29,311.00 in compensatory damages. The trial court proceeded to the punitive phase and on 19 June 2018, the jury returned a verdict finding Plaintiff was not entitled to punitive damages. The trial court entered written Judgment on both jury verdicts on 28 June 2018, and ordered interest on the compensatory award of $29,311.00 to be taxed at "the legal rate of eight percent (8%) from the date the complaint was filed on 4 May 2015 until this sum and accrued interest is paid in full."

On 29 June 2018, Plaintiff filed a Motion to Tax Costs and Attorney's Fees pursuant to 42 U.S.C. § 1988. On 12 July 2018, Defendants filed a competing Motion for Attorney's Fees and Court Costs. The same day, Defendants also filed a Motion for JNOV and Motion to Alter or Amend Judgment. Defendants first argued under Rule 50(b) of the North Carolina Rules of Civil Procedure the trial court should set aside the jury verdict in favor of Plaintiff and enter judgment in favor of Defendants, reducing compensatory damages from $29,311.00 to $0.00. In the alternative, under Rule 59(e) Defendants requested the trial court alter or amend the Summary Judgment Order and the Judgment on the Jury Verdict to reflect judgment was entered in favor of Defendants' claims. Defendants also requested Judgment on the Jury Verdict be amended to disallow prejudgment interest.

On 14 August 2018, the trial court held a hearing on Defendants' Motion for JNOV and Motion to Alter or Amend the Judgment, and on 16 August 2018, the trial court entered its JNOV Order denying Defendants' Motion for JNOV and Motion to Alter or Amend the Judgment. However, the trial court did enter an Amended Judgment, with Plaintiff's consent, to reflect the proper post-judgment interest rate. Plaintiff's and Defendants' competing motions for attorney's fees also came on for hearing on 14 August 2018. On 20 November 2018, the trial court entered its written Fees Order granting Plaintiff's motion for attorney's fees and court costs pursuant to 42 U.S.C. § 1988 and denying Defendants' request for fees and costs.

Defendants filed two separate Notices of Appeal, first on 12 September 2018, and a second from the Fees Order on 19 December 2018.[1]

1. In their 12 September 2018 Notice of Appeal, Defendants noticed their intent to appeal from twenty-eight different Orders. We, however, only address the Orders and

Issues

The Appealing Defendants assert six issues on appeal. The primary issue is (I) whether the trial court erred in granting partial Summary Judgment and concluding under 42 U.S.C. § 1983 that Defendants acted under color of law in depriving Plaintiff of his right to due process. The Appealing Defendants also raise the additional issues of whether: (II) the trial court abused its discretion in awarding Plaintiff attorney's fees pursuant to N.C. R. Civ. P. 37 upon a Motion to Compel; (III) the trial court abused its discretion in denying Resort Recovery's Motion to Set Aside the Entry of Default; (IV) the trial court erred during the compensatory phase of the trial (A) when it instructed the jury on proximate cause and (B) abused its discretion when it excluded proffered deposition testimony and admitted expert testimony regarding reasonableness of fees; (V) there was sufficient evidence of proximate cause presented at trial for the trial court to deny Defendants' Motion for JNOV and to Alter or Amend the Judgment; (VI) the trial court's Fees Order was based on an abuse of discretion.

Analysis

I. Summary Judgment

[1] The Appealing Defendants argue the trial court erred in denying its Motion for Summary Judgment and in granting, in part, Plaintiff's Motion for Summary Judgment on the issue of Defendants' liability under Section 1983. We review the trial court's ruling on these cross motions for summary judgment de novo. *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007). When conducting 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).

The parties agree the issue before this Court is a question of law arising under 42 U.S.C. § 1983. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

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arguments actually raised by Defendants in briefing and deem the remainder abandoned on appeal. N.C. R. App. P. 28(a) (2020).

> shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2019).

Under Section 1983, there are

> two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." This second element requires that the plaintiff show that the defendant acted "under color of law."

Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 26 L. Ed. 2d 142, 150 (1970) (citations omitted). "In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." *United States v. Price*, 383 U.S. 787, 794 n.7, 16 L. Ed. 2d 267, 272 n.7 (1966); *see Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 935, 73 L. Ed. 2d 482, 494 (1982) ("If the challenged conduct of respondents constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983."); *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 n.2, 148 L. Ed. 2d 807, 817 n.2 (2001).

In *Tropic Leisure I*, this Court held: "because the [Default] Judgment was obtained in a manner that denied [Plaintiff] his right to due process, it is not entitled to full faith and credit in North Carolina." *Tropic Leisure I*, 251 N.C. App. at 924, 796 S.E.2d at 135. Accordingly, the crux of the issue before this Court is based upon the second element—whether Defendants acted under color of law.

> [T]o act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions.

Dennis v. Sparks, 449 U.S. 24, 27-28, 66 L. Ed. 2d 185, 189-90 (1980) (citations omitted). However, the Supreme Court in *Dennis* cautioned, "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the

judge." *Id.* at 28, 66 L. Ed. 2d at 189-90. Instead, there must be an additional level of engagement between the private party and the state officials for the acts of the private party to arise to state action or action "under color of law."

In his complaint, Plaintiff alleged Defendants' "unconstitutional deprivation of [Plaintiff's] rights to due process and equal protection, and to his right to trial by jury," violated 42 U.S.C. § 1983. Plaintiff specifically alleged Defendants acted under color of law by "acting jointly and participating with USVI judicial authorities and using the USVI small claims system[.]" And, therefore, Defendants' conduct amounted to state action because it relied upon "unconstitutional state law[.]" Plaintiff filed his Motion for Summary Judgment on this basis and argued under the Supreme Court's opinion in *Lugar v. Edmonson Oil Co.*, Defendants' actions were under color of law. In their cross Motion for Summary Judgment, Defendants contended Plaintiff had not sufficiently demonstrated Defendants acted "under color of law" and, therefore, Defendants were entitled to summary judgment. The trial court concluded, in Plaintiff's favor, "there [were] no genuine issues of material fact concerning [Defendants]' violation of [Plaintiff's] constitutional right to due process and, further, that such violation was accomplished under color of law."

On appeal, Plaintiff and Defendants argue competing standards for what qualifies as action "under color of law." Defendants argue the correct standard is articulated in *Adickes* and requires Plaintiff show Defendants " 'somehow reached an understanding' or engaged in 'joint action' with a state authority in order to deny plaintiff's constitutional rights." Defendants further contend Plaintiff has not sufficiently demonstrated Defendants' and the USVI court system "somehow reached an understanding" to deprive Plaintiff of his right to counsel. *Adickes*, 398 U.S. at 152, 26 L. Ed. 2d at 151. Defendants also argue Plaintiff's reliance on *Lugar* was misplaced because *Lugar* was expressly limited to prejudgment attachments.

Indeed, as Defendants assert, the *Lugar* Court expressly stated: "[W]e do not hold today that 'a private party's mere invocation of state legal procedures constitutes "joint participation" or "conspiracy" with state officials satisfying the § 1983 requirement of action "under color of law." ' The holding today . . . is limited to the particular context of prejudgment attachment." *Lugar*, 457 U.S. at 939 n.21, 73 L. Ed. 2d at 497 n.21 (citations omitted). The Supreme Court has not, however, limited its subsequent discussions of *Lugar*'s holding on state action solely to cases involving prejudgment attachments. *See Manhattan Cmty. Access*

Corp. v. Halleck, 139 S. Ct. 1921, 1928, 204 L. Ed. 2d 405, 413 (2019) ("Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, . . . (iii) when the government acts jointly with the private entity[.]" (citing *Lugar* 457 U.S. at 941-942, 73 L. Ed. 2d at 497-98)); *Brentwood Acad.*, 531 U.S. at 296, 148 L. Ed. 2d at 817; *Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179, 199, 102 L. Ed. 2d 469, 489 (1988); *see also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622, 114 L. Ed. 2d 660, 674 (1991) ("[O]ur cases have found state action when private parties make extensive use of state procedures with 'the overt, significant assistance of state officials.' " (quoting *Tulsa Professional Collection Servs. Inc. v. Pope*, 485 U.S. 478, 486, 99 L. Ed. 2d 565, 576) (citing, *inter alia*, *Lugar*, 457 U.S. at 922, 73 L. Ed. 2d at 482)). Thus, although as Defendants argue *Lugar* itself is expressly limited to cases involving prejudgment attachments, the Supreme Court has not so limited its subsequent reasoning; *Lugar*'s discussion of state action remains instructive.

In *Lugar*, the Supreme Court considered whether Edmonson Oil Co. acted "under color of law" for purposes of Section 1983 liability when it attached Lugar's property pursuant to a Virginia statute authorizing prejudgment attachments. 457 U.S. at 924-25, 73 L. Ed. 2d at 487. *Lugar* outlined a two-part, fair-attribution test for determining whether "state action" may be fairly attributed to a private party:

> Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of 'fair attribution.' First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. at 937, 73 L. Ed. 2d at 495 (citations omitted). The Court discussed its various tests for "state action" as articulated through its jurisprudence:

> [T]he Court has articulated a number of different factors or tests in different contexts: e. g., the "public function" test, see Terry v. Adams, 345 U.S. 461, [ ] 97 L. Ed. 1152

> (1953); Marsh v. Alabama, 326 U.S. 501 [ ] 90 L. Ed. 265 (1946); the "state compulsion" test, see Adickes v. S. H. Kress & Co., 398 U.S., at 170, 26 L. Ed. 2d 142; the "nexus" test, see Jackson v. Metropolitan Edison Co., 419 U.S. 345 [ ] 42 L. Ed. 2d 477 (1974); Burton v. Wilmington Parking Authority, 365 U.S. 715 [ ] 6 L. Ed. 2d 45 (1961); and, in the case of prejudgment attachments, a "joint action test," Flagg Brothers, 436 U.S., at 157 [ ] 56 L. Ed. 2d 185.

Id. at 939, 73 L. Ed. 2d at 496-97. The Court continued to note, however, that regardless of the exact context, the state-action inquiry is a "necessarily fact-bound inquiry that confronts the Court . . . ." *Id.* at 939, 73 L. Ed. 2d at 497 (citations omitted).

More recently, the Supreme Court opined upon the state-action issue as it relates to Section 1983:

> In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and *the question is whether the State was sufficiently involved to treat that decisive conduct as state action*. This may occur if the State creates the legal framework governing the conduct, if it delegates its authority to the private actor, or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior. Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.

Nat'l Collegiate Ath. Ass'n, 488 U.S at 192, 102 L. Ed. 2d at 484-85 (emphasis added) (citations omitted).

Accordingly, under the framework articulated by our Supreme Court, this Court must engage in a fact-bound inquiry into whether Defendants were acting "under color of law" sufficient to confer upon them status as state actors. Here, Plaintiff contended the U.S. Virgin Island's small claims court system—a state actor—coached Defendants—private parties—via Jureidini through the small claims process, and in doing so was acting jointly with the private entity sufficient to confer upon Defendants the status of state actor. Thus, the ultimate question is whether Defendants were "jointly engaged with state officials in the challenged action," *Dennis*, 449 U.S. at 27-28, 66 L. Ed. 2d at 189, considering "whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor." *Nat'l Collegiate Ath. Ass'n*, 488 U.S. at 192, 102 L. Ed. 2d at 485 (footnote omitted).

Jureidini's deposition testimony is instructive to our analysis. Specifically, Jureidini testified:

> [Plaintiff's counsel]. So you're collecting dues under the arrogance of saying the six year statute of limitations applies and you have no clue when it even starts.
>
> [Jureidini]. *I went with what the magistrates told me.* . . . And it wouldn't be arrogance, it would have been -- listen, this is what we are submitting, is it correct and they would say "Well, you can collect this or you can't collect that." And they asked me to back up everything that -- that I was claiming for a fee.
>
> . . . .
>
> The judges -- the magistrates let me go back six years and collect six years. If it was past six years, I couldn't collect on it.
>
> Now I wanted to bring over another point, too. When I started filing these, they got two magistrates like within a month. . . . So, you know, they were -- well, I'll say, probably figuring out the rules, too, going into it. But, you know, along the way, *we came up with what was fair* and what I could collect and what I could not collect.
>
> . . . .
>
> [Plaintiff's counsel]. . . . . So you can just file whatever you want and, hey, if it ain't right, the magistrate is going to say, "We're not going to let you do that, John?"
>
> [Jureidini]. Yeah. That's pretty much how --
>
> . . . .
>
> In the very beginning we were sitting down with or appearing before a magistrate court, a magistrate themself, you know. We went through a lot of stuff and discussed a lot of different things and, you know, at the end of the day, I wanted to be fair. And so I was like, what can I charge. I mean, they said, you know, partial rental credits, they said you can only go back six years. Well, okay, so that's what it was.

Then again, when Plaintiff's counsel questioned Jureidini regarding the six-year statute of limitations, Jureidini replied, "That's the way the

magistrates explained it to me." "They explained it to you?" Jureidini: "Correct." On the topic of collection fees, Plaintiff's counsel questioned, "then you've got five hundred dollars ($500) collection . . ." And Jureidini acknowledged: "Yeah, I thought -- I thought at the beginning that I was able to charge that, *but the magistrate set me straight that I couldn't. They -- they would not accept that.*" (emphasis added).

The process Jureidini described is not the "mere invocation of state legal procedures" cautioned against in *Lugar* and *Dennis*. *Lugar*, 457 U.S. at 939 n. 21, 73 L. Ed. 2d at 497; *Dennis*, 449 U.S. at 28, 66 L. Ed. 2d at 190. Nor does Jureidini's testimony simply describe friendly reminders by court officials that actions in small claims court must not exceed ten thousand dollars. Instead, Jureidini describes repeated instances by U.S. Virgin Islands small claims court officials not only directing Jureidini in *how* to file collection actions on behalf of Defendants, but further coaching Jureidini on *what* to include in the contents of his filings. The magistrates advised Jureidini regarding the statute of limitations and directed what claims would or would not be barred. "*They*"—meaning the USVI small claims magistrates—instructed Jureidini to charge partial rental credits and "set [Jureidini] straight" by advising him he could not charge a collection fee.

Thus, even setting aside *Lugar*'s "fair attribution test" as Defendants contend we must, Jureidini's testimony establishes, under the standards set forth in *Adickes*, *Dennis*, and more recently *Nat'l Collegiate Ath. Ass'n*, that Defendants were acting under color of law. Not only did the U.S. Virgin Island's small claims court system "create[] the legal framework governing the conduct," *Nat'l Collegiate Ath. Ass'n*, 488 U.S at 192, 102 L. Ed. 2d at 485, it actively participated in counseling Jureidini through the filing and default judgment process. This is sufficiently state action. The trial court properly granted Summary Judgment in favor of Plaintiff on this issue. Because we affirm the trial court's Summary Judgment Order, we turn to Appealing Defendants' remaining arguments.

II. Discovery Sanctions

[2] Appealing Defendants contend the trial court abused its discretion in awarding Plaintiff discovery sanctions on 23 March 2018, and 12 June 2018, pursuant to Plaintiff's motions to compel under N.C. R. Civ. P. 37. We review a trial court's award of sanctions pursuant to a motion to compel discovery for abuse of discretion. *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 292 (1996).

> Once a motion to compel is granted, the court *shall* require the party or deponent whose conduct necessitated the

> motion to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that party's opposition to the motion was substantially justified or if circumstances make an award of expenses unjust.

Id. (emphasis added) (citing N.C. R. Civ. P. 37(a)(4)).

In the present case, the trial court issued several motions to compel discovery. In two separate orders, one Order Granting Plaintiff's Motion to Compel, entered 23 March 2018, and one Order Granting Plaintiff's Motion for Sanctions, entered 12 June 2018, the trial court granted Plaintiff's requests for costs and attorney's fees related to the respective motions to compel. On appeal, Defendants do not argue the award of expenses was unjust. Instead, Defendants contend paralegal costs in the amount of $4,750.00 from the 23 March Order were an abuse of discretion because "Plaintiff's counsel never mentioned that he would attempt to seek such costs." Defendants contend the additional discovery sanction in the amount of $9,735.00, awarded in the 12 June Order, entered after Plaintiff filed a fourth motion to compel, "was another example of Plaintiff's counsel's overbilling." Defendants' arguments ignore the requirements of Rule 37, which directs, upon the grant of a motion to compel,

> the court *shall*, after opportunity for hearing, *require* the party or deponent whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, *unless* the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

N.C. Gen. Stat. § 1-1A, Rule 37 (2019) (emphasis added). Defendants make no argument they were justified in their opposition to the motions to compel. Accordingly, the trial court's award of monetary sanctions, limited to the reasonable expenses incurred, was not an abuse of discretion.

III. Entry of Default

[3] The Appealing Defendants also contend the trial court abused its discretion in denying Resort Recovery's Motion to Set Aside the Entry of Default. "The decision of whether to set aside an entry of default . . . is within the sound discretion of the trial court [and] therefore will not be disturbed on appeal absent a showing of abuse of that discretion." *Swan Beach Corolla, L.L.C. v. Cty. of Currituck*, 255 N.C. App. 837, 841, 805

S.E.2d 743, 746 (2017), *aff'd per curiam*, 371 N.C. 110, 813 S.E.2d 217 (2018) (citations and quotation marks omitted). "A trial court abuses its discretion when the party appealing the denial of its motion to set aside the entry of default demonstrates that the trial court did not apply the proper 'good cause' standard in its determination." *Id.* at 842, 805 S.E.2d at 747 (citation omitted).

Here, Defendants summarily argue the trial court abused its discretion because Plaintiff would not be prejudiced by setting aside the default, Resort Recovery could not afford to hire counsel, and due to the law's general preference for hearing a case on the merits. Defendants provide no authority to support their argument. Furthermore, Defendants do not argue, let alone demonstrate, the trial court failed to apply a proper good cause standard in denying Resort Recovery's Motion to Set Aside Default. *See id.* Accordingly, the trial court's Pretrial Order denying Defendants' Motion to Set Aside Default as to Resort Recovery, LLC, is affirmed.

IV. Compensatory Damage Phase

Next, Appealing Defendants contend the trial court "committed numerous prejudicial errors during the compensatory phase of the trial" thereby entitling Defendants to a new trial. Defendants first assert the trial court erred in failing to instruct the jury in accordance with Defendants' proposed instructions on intervening causes. Defendants also argue the trial court abused its discretion when it excluded Defendants' proffered video deposition and when it admitted the testimony of Robert Orr, a former Justice of the Supreme Court of North Carolina.

A. Jury Instructions

[4] "On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed." *Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (citations and quotation marks omitted). "[W]hile not obliged to adopt the precise language of the prayer, [the trial court] is nevertheless required to give the instruction, in substance at least[.]" *Erie Ins. Exch. v. Bledsoe*, 141 N.C. App. 331, 335, 540 S.E.2d 57, 60 (2000) (citations omitted). "Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission." *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (citations omitted).

In the present case, Defendants contend the trial court erred when it did not instruct the jury, as follows, on intervening causes:

> To find that Defendants' act [or omission] caused plaintiff's injury, you need not find that Defendants' act [or omission] was the nearest cause, either in time or space. However, if plaintiff's injury was caused by a later, independent event that intervened between Defendants' act [or omission] and plaintiff's injury, Defendants are not liable unless the injury was reasonably foreseeable by the Defendants.

During the charge conference, counsel for Defendants contended there were three intervening causes that warranted instruction to the jury: Hailey himself, "by his failing to consult with a Virgin Islands attorney before deciding to take the actions he did in North Carolina"; this Court in *Tropic Leisure I*; and the U.S. Virgin Islands court system. The trial court declined to instruct the jury in accordance with Defendants' proposed instructions; however, the trial court instructed the jury on proximate cause as follows:

> A proximate cause is a cause which in a natural and continuous sequence produces a person's damage and is a cause which a reasonable and prudent person could have foreseen would probably produce such damage or some similar injurious result. There may be more than one proximate cause of damage; therefore, the plaintiff need not prove that the defendants' conduct was the sole proximate cause of the damage. The plaintiff must prove by the greater weight of the evidence only that the defendants' conduct was a proximate cause.

Defendants contend the trial court's instruction is error because "the issue of whether Mr. Hailey, this Court, or the USVI court system were intervening causes in this case was litigated throughout the trial and supported by the evidence." However, Defendants fail to articulate both how the trial court's actual instruction did not incorporate, in substance, their request on intervening causes and further, how they were prejudiced as a result of the trial court's omission. *See Outlaw*, 190 N.C. App. at 243, 660 S.E.2d at 559. Indeed, the trial court stated: "There may be more than one proximate cause of damage . . . plaintiff must prove by the greater weight of the evidence only that the defendants' conduct was *a* proximate cause." (emphasis added). The trial court's actual instruction also included the element of foreseeability, as did

Defendants' proposed instruction. Accordingly, the trial court did not err in its instructions to the jury.

B. Admission and Exclusion of Evidence

[5] Appealing Defendants further contend the trial court abused its discretion in excluding Defendants' proffered video deposition of Russell Pate and by allowing Plaintiff's expert in North Carolina appellate practice and procedure, former-Justice Robert Orr, to testify regarding the reasonableness of Plaintiff's counsel's attorney's fees.

"We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008). Similarly, a trial court "is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony" and will only be reversed upon abuse of discretion. *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984).

Defendants proffered a video deposition of Russell Pate, 2016 president of the U.S. Virgin Islands Bar Association, arguing it was relevant because it addressed proximate cause and foreseeability. Pursuant to a pretrial motion in limine filed by Plaintiff, the trial court excluded the deposition testimony, concluding it lacked adequate foundation, was speculative, and ultimately "irrelevant in light of the [trial court's] granting of partial summary judgment on the issue of liability." The trial court also concluded, pursuant to Rule 403, even "if any of Pate's testimony is relevant, it's [sic] probative value is substantially outweighed by its unfair prejudice, confusion of issues, and probable misleading the jury." Defendants again attempted to introduce Pate's testimony during trial; again, the trial court denied Defendants' request.

Although Defendants argue the trial court's decision was an abuse of discretion, Defendants do not provide any arguments explaining why. Instead, Defendants simply assert the testimony was "relevant and critical to Defendants' case on the issue of compensatory damages." Accordingly, the trial court did not abuse its discretion in excluding Pate's testimony.

[6] Defendants also assert the trial court abused its discretion in admitting former-Justice Orr's testimony regarding the reasonableness of Plaintiff's counsel's attorney's fees, contending it was "not relevant and highly prejudicial" because former-Justice Orr "had no first hand knowledge about Mr. Hailey's legal costs in *Tropic Leisure I*." Former-Justice Orr was tendered and accepted without objection as an expert in "appellate practice and procedure in North Carolina." Former-Justice

Orr testified after reviewing the Record, filings, *Tropic Leisure I*, and the various rates of Plaintiff's counsel's for work done by attorneys and paralegals, that the amount of attorney's fees Plaintiff requested was reasonable. Defendants, however, objected on the basis that as an expert in appellate practice, former-Justice Orr could not give an opinion on the reasonableness of trial fees, which the trial court overruled.

Again, Defendants do not explain how the trial court's ruling was an abuse of discretion. Rule 702, which governs expert testimony, provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2019). Rule 702 does not require an expert have firsthand knowledge before providing his or her opinion; moreover, former-Justice Orr's testimony concerning the reasonableness of Plaintiff's attorney's fees is within the purview of his expertise as an appellate practitioner. We discern no abuse of discretion on behalf of the trial court.

V. JNOV

[7] "On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God, Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000).

> In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn

> therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke University, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989 (citation omitted).

The Appealing Defendants argue the trial court erred in denying Defendants' Motion for Directed Verdict, Motion for JNOV, and Motion to Alter or Amend the Judgment. Defendants contend there is not sufficient evidence they proximately caused Plaintiff's alleged damages as required for anything more than nominal damages under Section 1983.

"[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306, 91 L. Ed. 2d 249, 258 (1986) (citations omitted). "[T]he causal link in § 1983 cases is analogous to proximate cause." *Shaw v. Stroud*, 13 F.3d 791, 800 (4th Cir. 1994). "Proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979) (alterations, citations, and quotation marks omitted). Moreover, "[i]n most cases involving private defendants, there is no proximate cause issue at all. . . . The issue is whether the particular conduct is purely private, and thus immune from section 1983 liability, or is state action." *Arnold v. Intern. Business Machine*, 637 F.2d 1350, 1356 (9th Cir. 1981).

Here, considering all evidence in the light most favorable to Plaintiff, there is sufficient evidence to reach the jury on the question of whether Defendants were the proximate cause of Plaintiff's alleged damages—the attorney's fees and costs stemming from the litigation in *Tropic Leisure I*. Defendants obtained a Default Judgment against Plaintiff and subsequently sought to enforce the Default Judgment in North Carolina, initiating the action in *Tropic Leisure I*. Defendants argue intervening causes—Plaintiff's own actions, our decision in *Tropic Leisure I*, and the USVI Small Claims Court—effectively broke the casual chain. However, "[a]n efficient intervening cause is a new proximate cause. It must be an independent force which *entirely supersedes* the original action and renders its effect in the chain of causation remote." *Adams v. Mills*, 312 N.C. 181, 194, 322 S.E.2d 164, 173 (1984) (emphasis added) (citations omitted). Defendants do not demonstrate that any of the alleged intervening causes were sufficient to *supersede* Defendants' actions. Therefore, there was sufficient evidence

to reach the jury on the issue of proximate cause; the trial court's JNOV Order is affirmed.

VI. Attorney's Fees

[8] In the present case, the trial court entered its Amended Judgment on the jury verdicts and JNOV Order on 16 August 2018, and Defendants timely filed Notice of Appeal on 12 September 2018. The parties' cross motions for attorney's fees remained pending, and the trial court entered its written Fees Order on 20 November 2018, which granted Plaintiff's attorney's fees on the basis Plaintiff was the "prevailing party" under 42 U.S.C. § 1983 as required by 42 U.S.C. § 1988. 42 U.S.C. § 1988(b) (2019) ("the court, in its discretion, may allow the *prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs" (emphasis added)).

Although not an argument raised by the parties, we conclude the trial court lacked jurisdiction to enter its award of attorney's fees once Defendants filed their first Notice of Appeal from the underlying judgments. "Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction[,]" therefore, "[t]he question of subject matter jurisdiction may be raised at any time[.]" *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986).

Generally, "timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court." *McClure v. County of Jackson*, 185 N.C. App. 462, 469, 648 S.E.2d 546, 550 (2007) (citation and quotation marks omitted). N.C. Gen. Stat. § 1-294 provides an exception for matters "not affected by the judgment appealed from." N.C. Gen. Stat. § 1-294 (2019). However, "[w]hen, as in the instant case, the award of attorney's fees was based upon the plaintiff being the 'prevailing party' in the proceedings, the exception set forth in N.C. Gen. Stat. § 1-294 is not applicable." *McClure*, 185 N.C. App. at 471, 648 S.E.2d at 551.

Accordingly, the trial court was divested of jurisdiction to enter the Fees Order when Defendants filed their first Notice of Appeal. This Court has expressly held the exception provided by N.C. Gen. Stat. § 1-294 is inapplicable in cases like the present where the decision to grant or deny awards of attorney's fees is based on a party's status as the "prevailing party." *See id.* Because it was entered without jurisdiction, we

vacate the Fees Order and remand the matter to the trial court to reconsider the award, including any fees and costs incurred on appeal claimed by Plaintiff. *C.f. Fungaroli v. Fungaroli*, 53 N.C. App. 270, 273, 280 S.E.2d 787, 790 (1981) (affirming a trial court's award of appellate attorney's fees, noting "an award of attorney's fees for services performed on appeal should ordinarily be granted, provided the general statutory requirements for such an award are duly met"); *Vasquez v. Fleming*, 617 F.2d 334, 336 (3d Cir. 1980) ("[A]ttorney fees may be awarded to the prevailing party under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, by a court of appeals for a successful appeal.").

Conclusion

Accordingly, for the foregoing reasons, the trial court's Summary Judgment Order, 23 March Order Granting Plaintiff's Motion to Compel, 12 June Order Granting Plaintiff's Motion for Sanctions, Pretrial Order, and JNOV Order are affirmed. Further, we conclude there was no error in the entry of the Amended Judgment (amending the prior Judgment) upon the jury verdict against Defendants. We vacate the Fees Order and remand this matter to the trial court for reconsideration.

AFFIRMED IN PART; NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judges STROUD and YOUNG concur.

IN RE A.S.

[275 N.C. App. 506 (2020)]

IN THE MATTER OF A.S. & A.C.

No. COA20-69

Filed 31 December 2020

Child Abuse, Dependency, and Neglect—permanency planning order—findings of fact—unsupported by competent evidence

In a permanency planning order involving two children, in which the trial court eliminated reunification from one child's permanent plan, the Court of Appeals vacated the order after determining that several findings of fact—regarding respondent-mother's delay, compliance with her case plan, and availability to the department of social services—were not supported by competent evidence or were contradicted by record evidence and the trial court's other permanency planning orders. The conclusions of law, including that respondent was unfit and had acted inconsistent with her constitutional right to parent, were also in error where they rested upon the unsupported findings.

Appeal by Respondent-Mother from an Order entered 11 October 2019, by Judge Tiffany M. Whitfield in Cumberland County District Court. Heard in the Court of Appeals 3 November 2020.

James D. Dill for petitioner-appellee Cumberland County Department of Social Services.

Forrest Firm, P.C., by Patrick S. Lineberry, for respondent-appellant mother.

K&L Gates, LLP, by Sophie Goodman, for guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Mother (Respondent-Mother) appeals from a "Subsequent Permanency Planning Order & Order to Close Juvenile File" (Order) ceasing reunification efforts with her minor child A.C. (Antoinette).[1] The Record reflects the following:

1. Pseudonyms are used pursuant to N.C. R. App. P. 42 to protect the identity of the minor children.

Respondent-Mother is the mother of two minor children—A.S. (Alexis), born March 2011, and A.C. (Antoinette), born December 2009. The Cumberland County Department of Social Services (DSS) became involved in the present case beginning on 22 February 2018, after receiving a Child Protective Services Report regarding the safety of Alexis and Antoinette in October and December of 2017. DSS alleged Alexis and Antoinette were abused, neglected, and dependent. The Petition incorporated the results of child medical examinations performed on both children. During Antoinette's exam, she disclosed Respondent-Mother's then-boyfriend had touched her inappropriately and had made her touch his penis. Alexis's exam revealed markings on her buttocks consistent with a belt mark. Both children informed the medical examiners of behavior that was consistent with their injuries. The same day, DSS obtained nonsecure custody of Alexis and Antoinette, and the sisters were placed with Antoinette's paternal grandparents.

After a hearing on 30 May 2018, the trial court entered its written Adjudication Order on 25 June 2018, formally adjudicating Alexis and Antoinette neglected pursuant to N.C. Gen. Stat. § 7B-101(15) and dismissing the allegations of abuse and dependency. The trial court ordered Alexis and Antoinette remain at their out-of-home placement with Antoinette's paternal grandparents and ordered Respondent-Mother have supervised visitation weekly. The trial court accordingly entered its Disposition Order on 12 September 2018, which continued Alexis and Antoinette's physical and legal custody with DSS and their placement with Antoinette's paternal grandparents. The Disposition Order continued Respondent-Mother's weekly supervised visitation and granted DSS the authority to expand Respondent-Mother's visitation. The trial court ordered Respondent-Mother: "(a) Continue to engage in mental health counseling; (b) Continue to engage in medication management; (c) Complete age-appropriate parenting classes; (d) Obtain and maintain stable and suitable housing; and (e) obtain and maintain stable employment."

In accordance with N.C. Gen. Stat. § 7B-906.1, the trial court held an initial permanency planning hearing on 5 September 2018, and the trial court entered its written Review and Initial Permanency Planning Order (Initial Order) on 28 January 2019. The Initial Order set the primary permanent plan for both Alexis and Antoinette as reunification with Respondent-Mother with a secondary permanent plan of guardianship. After the initial permanency planning hearing but before the filing of the Initial Order, on 27 December 2018, Respondent-Mother filed for a Domestic Violence Protective Order against her former boyfriend

for "threatening to shoot [her] house and kill [her,]" which was granted on 4 January 2019.

The trial court held another permanency planning hearing on 29 January 2019, where the sisters' out-of-home placement with Antoinette's paternal grandparents was continued; however, on 11 February 2019, DSS met with the paternal grandparents and they indicated they could no longer serve as Alexis's placement. Accordingly, on 19 February 2019, DSS filed a Motion for Review requesting a hearing on the placement of the juveniles. The trial court granted the request to move Alexis to a new placement while Antoinette stayed with her paternal grandparents.

In preparation for a 16 July 2019 subsequent permanency planning hearing, DSS prepared its court report and recommended no changes to either child's permanent plan of reunification. DSS reported Respondent-Mother was actively participating in her recommended services and made herself available to DSS. DSS also noted it had no concerns with Respondent-Mother's ability to provide for the health and safety of her children. The Guardian ad litem report echoed DSS's and recommended the sisters' respective placements remain the same, while Respondent-Mother "should have increased overnight visits that lead up to a trial home visit with both girls."

The trial court held the subsequent permanency planning hearing on 16 July 2019, and entered its written Order on 26 September 2019, which it re-filed on 11 October 2019. At the hearing, both the Guardian ad litem and DSS reports were submitted to the trial court. Social Worker Ebony Alford testified before the trial court and reiterated Respondent-Mother had stable housing, was employed, and was still engaging in counseling and medication management and working with DSS. Alford described Respondent-Mother's visitation and noted "she's only getting one overnight visit due to her work schedule"; however, Alford also testified Respondent-Mother indicated her employer was willing to switch her shifts if her children were returned to her. Alford recommended the permanent plan remain reunification with Respondent-Mother for both Alexis and Antoinette.

After counsel provided their respective closing arguments, the trial court inquired: "Let me hear from the social worker [DSS]'s position on why the Court should not just proceed with custody in [Antoinette's] matter on today's date." Counsel for Respondent-Mother objected; however, the trial court continued and granted legal and physical custody of Antoinette to her paternal grandparents, eliminating reunification with Respondent-Mother from Antoinette's permanent plan.

In its written Order, the trial court entered Findings of Fact and ordered Alexis's permanent plan should remain reunification with Respondent-Mother; however, consistent with its Order as orally rendered at the hearing, the trial court eliminated reunification from Antoinette's permanent plan, updating it to custody with other suitable persons—her paternal grandparents. The trial court also eliminated Antoinette's secondary plan on the basis "the primary plan of custody with other suitable persons has been achieved[.]" Antoinette's visitation with Respondent-Mother remained unchanged with the option for expansion. Respondent-Mother timely appealed the trial court's Order.

Issue

On appeal, the issue before this Court is whether the trial court's findings of fact are supported by competent evidence and whether those findings, in turn, support the trial court's conclusions of law.

Analysis

I. Standard of Review

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and [if] the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *In re N.B.*, 240 N.C. App. 353, 358, 771 S.E.2d 562, 566 (2015) (citation and quotation marks omitted). We review the trial court's conclusions of law de novo. *In re K.L.*, 254 N.C. App. 269, 272-73, 802 S.E.2d 588, 591 (2017).

II. Permanency Planning Order

A. Findings of Fact

On appeal, Respondent-Mother challenges a multitude of the trial court's Findings of Fact as unsupported by competent evidence. First, Respondent-Mother contends Finding of Fact 14 is "too vague to shed any meaningful insight into any of the trial court's other findings or conclusions of law." In Finding of Fact 14, the trial court found, citing testimony from the hearing, "[Antoinette] has behaviors when she comes back from a visit with the Respondent Mother and that this behavior is being addressed in therapy." Indeed, Respondent-Father and the paternal grandfather both testified at the permanency planning hearing regarding Antoinette's behavior when she returned from visitations, including specific examples of her being defiant with her grandparents and Antoinette questioning why Respondent-Father "didn't want her."

The Finding is supported by competent evidence reflecting Antoinette has a change in behavior when returning from visitations.

In Finding 22 the trial court found Respondent-Mother "is not [a] fit or proper person for the continued care, custody, or control of the juvenile. She has not remained available to the Court, [DSS], and the Guardian ad litem for the juvenile." The same statement—that Respondent-Mother has not "remained available" to the trial court—is set forth again in Finding 54:

> Based upon the facts herein, the court finds that return of the juveniles to the custody of the Respondents would be contrary to the welfare and best interest of the juvenile. The Respondents are not fit or proper persons for the continued care of the, custody or control of the juveniles. *The Respondents have not remained available to the Court, [DSS], and the Guardian ad Litem for the juvenile.*"

(emphasis added).

Respondent-Mother challenges these Findings and correctly highlights they are contradicted by the trial court's other Findings and the Record. Indeed, immediately preceding Finding 22, in Finding 21, the trial court found Respondent-Mother "is actively participating or cooperating with the permanent plan, [DSS], and the Guardian ad Litem for the juveniles."[2] The Record similarly reflects Respondent-Mother did, in fact, "remain available" to the trial court, DSS, and the Guardian ad litem. Respondent-Mother was present at all the hearings in the underlying case except for the very first, where she was represented by counsel. DSS included in its most recent report prepared for the subsequent permanency planning hearing, that Respondent-Mother "makes herself available to the agency" and was "engaging in her services." Furthermore, there is no evidence in the Record of attempts to contact Respondent-Mother by the trial court, DSS, or the Guardian ad litem that were unsuccessful.

In brief DSS concedes the portion of the Findings repeating Respondent-Mother "has not remained available" is "most likely [ ] a

2. Respondent-Mother also highlights the inconsistency contained within Finding 21 alone: "The Court finds that [Respondent-Mother] is not making adequate progress within a reasonable period of time to achieve the permanent plan. She is actively participating or cooperating with the permanent plan, [DSS], and the Guardian ad Litem for the juveniles." As discussed *infra*, the trial court's finding Respondent-Mother is "not making adequate progress within a reasonable period of time" is not supported by competent evidence in the Record.

clerical error and should not include [Respondent-Mother] as her availability has not been questioned, only the timeliness of her compliance with her case plan and alleviating the conditions that led to the removal of the juveniles." However, "[a] clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *In re R.S.M*, 257 N.C. App. 21, 23, 809 S.E.2d 134, 136 (2017) (alterations, citations, and quotation marks omitted). The inclusion of the word *not* changes the entire meaning of the trial court's Finding. It is not clear that the trial court's inclusion of the word *not* is merely a clerical error especially as it is included in more than one of the trial court's Findings. Accordingly, Finding 22 and the portion of Finding 54 repeating that Respondent-Mother did not "remain available" is not supported by competent evidence.

Respondent-Mother next challenges Findings 16, 17, 20, and 38 as they relate to the timeliness and purported delay in addressing her case plan:

> 16. The Court finds that at the time of the filling of the Court Report submitted by [DSS] on July 5, 2019, the juvenile had been in the care of [DSS] in excess of 481 days. That is beyond the time frame for creating and finalizing some form of permanency for the juveniles. . . .
>
> 17. The Court finds that with regard to the juveniles, the failure of the Respondents to address issues which gave rise to removal of the juveniles from the home *within a timely manner* and in a reasonable manner, constituted waiver of their constitutional right of paramount custody . . . .
>
> . . . .
>
> 20. The Court finds that [Respondent-Mother] has been compliant with continuing her therapy services and psychoeducation. She has completed a mental health assessment, a psychiatric assessment and parent psychoeducational classes. She continues to engage in other services as well . . . . She is employed and has stable housing. She has completed parenting classes and in regard to her case plan only needs to remain compliant with ongoing counseling and medication management. However, the Court finds that Respondent Mother's *delay* in fully engaging in this matter has caused the juveniles to remain in

> foster care for an unreasonable amount of time without showing to the satisfaction of this court a reasonable answer for not completely satisfying to [sic] objectives laid out at the Disposition in order to reunify with the juveniles . . . .
>
> . . . .
>
> 38. . . . On today's date, over 481 days into the case, neither the Respondent Mother or the Respondent Father have completely to the satisfaction of this Court alleviated those issues which led to the removal of [Antoinette] from the home and placed into the custody of [DSS]. . . .

Respondent-Mother contends the Record "does not indicate [Respondent-Mother] delayed in engaging with her case plan in any way that would underwrite the trial court's concerns." Indeed, the Record, including DSS's own reports, reflects the Petition was filed 22 February 2018, and by 1 May 2018, Respondent-Mother was enrolled in treatment and had "participated in a comprehensive clinical assessment." Respondent-Mother had attended her therapy sessions and also enrolled in parenting classes.

On 27 June 2018, DSS prepared its dispositional report and reported Respondent-Mother had housing and employment, yet needed parenting classes, transportation, and to continue with mental health treatment. In an 8 August 2018 report, DSS again reported Respondent-Mother was engaging in her services and made herself available to the agency. DSS noted concerns regarding Respondent-Mother's contact with her former boyfriend at that time but requested Respondent-Mother consent to random home visits to show he was not present in the home. In letters dated 30 August 2018, and 28 January 2019, Respondent-Mother's Parent Child Interaction Therapist stated Respondent-Mother continued to attend her psychiatric appointments and was "fully compliant with services and treatment recommendations." In multiple reports prepared for subsequent permanency planning hearings, DSS reported Respondent-Mother was engaging in her services and made herself available to DSS. Moreover, in the trial court's subsequent permanency planning order filed 14 April 2019, the trial court found Respondent-Mother "has been fully compliant with therapy and other services that have been recommended[,]" "is employed[,]" and "has engaged in her case plan." The trial court noted it "still ha[d] concerns about [Respondent-Mother's] ability to keep the juveniles safe if placed back in her custody at this time given her contact with [her former boyfriend]. . . ." However, in a subsequent permanency planning order filed 28 May 2019, the trial court

made no findings regarding further contact with him. Instead, the trial court found "there are no remaining services for Respondent-Mother to complete on her case plan other than to remain compliant with ongoing counseling and medication management."

Thus, the Record—including DSS's own filings and reports and the trial court's past subsequent permanency planning orders—reflects Respondent-Mother was engaged and compliant in her case plan and made herself available to the trial court, DSS, and the Guardian ad litem. The trial court's Order does not include any specific findings of fact that support its finding Respondent-Mother delayed in meaningfully engaging with her case plan or referred services. Instead, it appears from the Record within almost two-months of the filing of the Petition and *prior* to the trial court's adjudication of neglect, Respondent-Mother began engaging with her recommended services. There are no reports of Respondent-Mother missing appointments or court hearings or of any additional behavior that would support the trial court's Finding of Respondent-Mother's delay. Accordingly, the portions of the trial court's Findings that purport to find Respondent-Mother delayed in engaging with her case plan and services recommended by DSS are not supported by competent evidence.

Respondent-Mother also contends the portion of Finding 17 stating her failure "to address issues which gave rise to the removal of the juveniles from the home within a timely manner and in a reasonable manner, constituted a waiver of [her] constitutional right of paramount custody" and was "inconsistent with [her] constitutionally protected status as [a] parent[,]" is more appropriately a conclusion of law. We agree and address it *infra*. *See In re A.C.*, 247 N.C. App. 528, 535, 786 S.E.2d 728, 735 (2016).

Respondent-Mother also challenges portions of Findings 35, and 36 as unsupported by competent evidence and contends several portions, in addition to Finding 37, are also more appropriately conclusions of law:

> 35. The Court finds that it is not possible for the juveniles to return home immediately, or within the next six (6) months, inasmuch as the Respondent Parents have not yet fully alleviate[d] the conditions which led to the removal of the juveniles. . . . Finally, as to [Respondent-Mother], the Court notes that she has been complaint [sic] in obtaining and following through with services at this time; however, her compliance with the case plan and fully engagement [sic] in the services previously ordered has

> reached beyond a reasonable [time] to complete the services that were aimed at alleviating the conditions that led to the juveniles being removed from her care. As such, the juveniles have remained placed outside of the home for an extensive period of time. . . .
>
> 36. . . . At the last hearing the Court informed the Respondent Parents that if they did not substantially comply with their case plan to alleviate the issues that led to the removal of the juveniles from the home that [DSS] may possibly be relieved of reunification efforts. [DSS] has made referrals for services for Respondent Mother and Respondent Mother has not taken full advantage of those referrals. . . .
>
> 37. The Court finds that inasmuch as the juvenile's placement with a parent is unlikely within six months, a legal guardianship should be established with the Respondents still maintaining the ability to have visitation with the juveniles . . . .

Respondent-Mother contends the trial court's Finding she had "not yet fully alleviate[d] the conditions which led to the removal of the juveniles" is not supported by competent evidence. To the extent this is a finding of fact, we agree with Respondent-Mother. The trial court found, in Finding 18, "Respondent-Mother was ordered to complete the following services at the time of the disposition order *to alleviate the behaviors or conditions which led to the removal of the juveniles*: Mental Health Counseling, Medication Management, Age Appropriate Parenting classes, obtain and maintain stable housing; and to obtain and maintain stable employment." (emphasis added). Then in Finding 20, the trial court found Respondent-Mother "has been compliant with continuing her therapy services and psychoeducation. . . . She is employed and has stable housing. She has completed parenting classes and in regard to her case plan *only* needs to remain compliant with ongoing counseling and medication management." (emphasis added). Therefore, the trial court's Finding Respondent-Mother "ha[s] not yet fully alleviate[d] the conditions which led to the removal of the juveniles" is not supported by competent evidence. By the terms of the trial court's own Order it appears Respondent-Mother alleviated the conditions that led to the removal of the juveniles—"Mental Health Counseling, Medication Management, Age Appropriate Parenting classes, obtain and maintain stable housing; and to obtain and maintain stable employment."

Instead, it seems the trial court bases Finding 35 on Respondent-Mother's purported delay in "fully alleviat[ing] the conditions which led to the removal of the juveniles." The Finding continued: "her compliance with the case plan and fully engagement [sic] in the services previously order[ed] has reached beyond a reasonable [time] to complete the services . . . ." However, as discussed, the trial court did not make sufficient factual findings regarding Respondent-Mother's delay in engaging with her case plan or offered services. Therefore, this Finding is also not supported by competent evidence in the Record.

Finding 36 contains the conclusory statement that DSS "made referrals for services for Respondent Mother and Respondent Mother has not taken full advantage of those referrals"; however, the Order contains no additional findings elaborating on what services DSS referred Respondent-Mother complete. The Record similarly does not include evidence of any referrals of which Respondent-Mother did not take full advantage of or that remained incomplete. DSS contends this Finding is supported because Respondent-Mother "did not have a viable plan to allow for Antoinette to be placed back in her home nor was she even able to fully exercise overnight weekend visitation . . . ." Although there was no exact plan for altering Respondent-Mother's work schedule presented at the hearing, Alford testified regarding her conversation with Respondent-Mother where Respondent-Mother indicated that she spoke with her employer about altering her schedule should she have custody of her children. Regardless, the trial court made no factual findings to this point. Accordingly, the trial court's conclusory Finding Respondent-Mother did not take full advantage of DSS's referrals is not supported by any competent evidence in the Record.

B. Conclusions of Law

Ultimately, Respondent-Mother contends the trial court erred in its Conclusions of Law eliminating reunification from Antoinette's permanent plan.[3] The trial court concluded in mixed Findings of Fact and its express conclusions of law: Respondent-Mother is "not [a] fit or proper person[ ] for the continued care, custody and control of the juveniles"; "Return of the juveniles to the custody of the Respondent Parents would be contrary to the welfare and best interests of the juveniles"; "The primary permanent plan of custody with other suitable persons for

3. In addition to the portions of the above Findings of Fact that operate more as ultimate findings or conclusions of law, Respondent-Mother challenges Conclusions of Law 3, 4, 5, 6, 8, and 11.

[Antoinette] is in her best interest"; and Respondent-Mother's failure "to address issues which gave rise to the removal of the juveniles from the home within a timely manner and in a reasonable manner, constituted waiver of [her] constitutional right of paramount custody" and was "inconsistent with [her] constitutionally protected status as [a] parent." Based upon these conclusions, the trial court eliminated reunification with Respondent-Mother from Antoinette's permanent plan and granted physical and legal custody to her paternal grandparents.

We review the trial court's conclusions of law de novo. *See In re A.C.*, 247 N.C. App. at 535, 786 S.E.2d at 735. We also review "a trial court's determination as to the best interest of the child for an abuse of discretion." *Id.* at 532-33, 786 S.E.2d at 733 (citation and quotation marks omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.H.*, 266 N.C. App. 41, 44, 832 S.E.2d 162, 164 (2019) (citations and quotation marks omitted). However, when a trial court concludes a parent acted inconsistent with his or her constitutionally protected status, "[t]he trial court must clearly 'address whether respondent is unfit as a parent or if her conduct has been inconsistent with her constitutionally protected status as a parent, should the trial court . . . consider granting custody or guardianship to a nonparent.' " *In re K.L.*, 254 N.C. App. at 283, 802 S.E.2d at 597 (citation omitted) (second alternation in original). Such findings must be supported by clear and convincing evidence, which is "more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters." *Id.* (citations and quotation marks omitted).

Here, the trial court's conclusions, including that Respondent-Mother was unfit and acting inconsistent with her constitutionally protected status, rests upon the purported findings she did not alleviate the conditions that led to the removal of the juveniles and that she delayed in engaging with her case plan. As discussed *supra*, such findings are unsupported by competent evidence or, in some instances, contradicted by the Record. Accordingly, under our de novo review, the trial court's conclusions of law are error. *See id.* ("No findings of fact in the trial court's order addresses, whether Respondent-mother was unfit or how she was acting inconsistently with her protected status as a parent at the time of the hearing. The trial court's conclusion is unsupported by findings of fact."). If, indeed, the trial court's concerns regarding Respondent-Mother's delay or noncompliance with her case plan are founded, the trial court should make appropriate findings of fact

supported by competent evidence in the Record. Accordingly, the trial court's Order is vacated and this matter is remanded for reconsideration in light of this opinion.

Conclusion

Accordingly, for the foregoing reasons, the trial court's Order eliminating reunification from Antoinette's permanent plan is vacated and the matter is remanded to the trial court for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges TYSON and MURPHY concur.

IN THE MATTER OF J.M., MINOR CHILD

No. COA20-153

Filed 31 December 2020

1. Judges—substitute judge—scope of authority—order on remand

After a case was returned to the district court on remand in a juvenile neglect matter for reconsideration of a conclusion of law, the substitute trial judge did not exceed her authority by making findings of fact without taking new evidence and instead relying on a transcript of a previous hearing. The substitute judge, who took over the case after the original judge left office when his term expired, acted in accordance with Civil Procedure Rule 63 (authorizing a substitute judge to take over court duties when the original judge is unable to perform those duties) and with the appellate court's mandate on remand.

2. Child Abuse, Dependency, and Neglect—neglect—order on remand—different judge—new findings

In a juvenile case that was returned to the district court on remand for reconsideration of a neglect adjudication, the substitute trial judge did not improperly resolve an evidentiary conflict in the original evidence when she made findings regarding allegations and recantations of the child's mother about respondent-father's misconduct. The Court of Appeals affirmed the adjudication order where

the substitute judge's findings were consistent with those made by the original judge (whose findings were largely upheld on appeal) and supported the adjudication of neglect.

Appeal by respondent-father from orders entered 1 November 2019 by Judge Shamieka L. Rhinehart in Durham County District Court. Heard in the Court of Appeals 17 November 2020.

The Law Office of Derrick J. Hensley, PLLC, by Derrick J. Hensley, for petitioner-appellee Durham County Department of Social Services.

Matthew D. Wunsche for guardian ad litem.

Richard Croutharmel for respondent-appellant father.

ZACHARY, Judge.

Respondent, the father of "Jazmin,"[1] appeals from adjudication and disposition orders entered on remand, in which the trial court concluded that Jazmin was a neglected juvenile and ordered that she remain in the custody of the Durham County Department of Social Services. After careful review, we affirm.

Background

This case arises out of a hearing and orders entered on remand following this Court's decision in *In re J.M.*, 255 N.C. App. 483, 804 S.E.2d 830 (2017), *disc. review improvidently allowed*, 371 N.C. 132, 813 S.E.2d 847 (2018) (per curiam). A complete recitation of the underlying facts in this case can be found in that prior opinion. We recite here those facts necessary for our disposition of this appeal.

On 11 September 2015, the Durham County Department of Social Services ("DSS") filed a juvenile petition alleging that Jazmin and her younger brother were abused, neglected, and dependent juveniles. On 12 July 2016, the matter came on for hearing in Durham County District Court before the Honorable William A. Marsh, III. Judge Marsh rendered his findings of fact and conclusions of law in open court, and entered his written order on 21 November 2016. Judge Marsh concluded that Jazmin was a "seriously neglected child" and that her brother was

1. The pseudonym adopted by the parties is used for ease of reading and to protect the juvenile's identity.

an abused child. Judge Marsh further concluded that "[r]eunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile[s'] health or safety." Judge Marsh suspended the parents' visitation with their children, and set guardianship with the children's maternal grandparents as the primary permanent plan, with adoption as the secondary plan.

Respondent appealed to this Court.[2] Respondent challenged eight of the trial court's findings of fact; this Court determined that all but one finding and portions of two other findings were supported by competent evidence. *Id.* at 486–95, 804 S.E.2d at 833–38. On 19 September 2017, this Court affirmed in part, vacated in part, and reversed in part and remanded the trial court's order. *Id.* at 500, 804 S.E.2d at 841. This Court affirmed the trial court's adjudication of Jazmin's brother as an abused juvenile, *id.* at 495–96, 804 S.E.2d at 838–39, and vacated the "portion of the trial court's order that released DSS from further reunification efforts," *id.* at 500, 804 S.E.2d at 841. However, we reversed the adjudication of Jazmin as "seriously neglected" because "the trial court was acting under a misapprehension of the law—the trial court used the definition of 'serious neglect' in N.C.G.S. § 7B-101(19a), pertaining to the responsible individuals' list, as opposed to the definition of 'neglect' in N.C.G.S. § 7B-101(15), pertaining to an adjudication of neglect." *Id.* at 497, 804 S.E.2d at 839. This Court remanded that adjudication "for the trial court's consideration of neglect within the proper statutory framework." *Id.*

On 8 June 2018, after hearing oral arguments, our Supreme Court determined that it had improvidently allowed discretionary review of this Court's opinion. *In re J.M.*, 371 N.C. 132, 813 S.E.2d 847 (2018) (per curiam). By the time this matter returned to the district court on remand, Judge Marsh's term had ended and he was no longer a district court judge.[3] On 14 November 2018, following the recusal of another judge, this matter was assigned to the Honorable Shamieka L. Rhinehart.

On 17 June 2019, following a pretrial hearing, Judge Rhinehart determined, over Respondent's objection, that the transcript of the 12 July 2016 hearing before Judge Marsh, as well as "[a]ll exhibits previously

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2. The children's mother did not join in Respondent's appeal of the trial court's order. *Id.* at 486 n.1, 804 S.E.2d at 833 n.1.

3. Judge Marsh was defeated in the 2016 general election. N.C. State Bd. of Elections, 11/08/2016 Official General Election Results – Durham, https://er.ncsbe.gov/?election_dt=11/08/2016&county_id=32&office=JUD&contest=1283 (last visited Dec. 1, 2020).

accepted by the Court in the prior hearing[,]" constituted "competent, relevant and admissible evidence and [would] be allowed admitted." Judge Rhinehart similarly determined that she was "bound by any and all orders, rulings and findings of the Court of Appeals and [would] not disturb those," and that she would "take judicial notice of any Findings of Fact and decretal portions of the order of Judge Marsh which [were] not challenged or disturbed by the Court of Appeal's opinion referenced above and [would] therefore adopt those findings."

On 8 August 2019, this matter came on for hearing on remand before Judge Rhinehart. Consistent with her pretrial ruling, Judge Rhinehart admitted the 2016 hearing transcript into evidence, over Respondent's renewed objection. Judge Rhinehart then admitted into evidence several other exhibits—including Jazmin's September 2015 Complete Medical Examination ("CME") and her brother's medical records—that had been accepted by Judge Marsh at the 2016 hearing. Judge Rhinehart also took judicial notice of Judge Marsh's findings of fact "that were undisturbed [by] the Court of Appeals" as well as his adjudication of Jazmin's brother as abused.

Neither DSS, nor the guardian *ad litem*, nor Respondent offered any new testimony or other evidence at the adjudication phase. After hearing the arguments of counsel, Judge Rhinehart rendered her findings of fact and conclusions of law in open court, determining, *inter alia*, that Jazmin was a neglected juvenile. Following a disposition hearing at which Respondent testified, Judge Rhinehart ordered, *inter alia*, that (1) Jazmin remain in the temporary legal custody of DSS and the physical custody of her maternal grandparents; and (2) Respondent's visitation with Jazmin be suspended, with the provision that Respondent could send Jazmin cards through her social worker. Judge Rhinehart also set adoption as the permanent primary plan, with reunification or guardianship as secondary plans.

On 1 November 2019, Judge Rhinehart entered separate written adjudication and disposition orders, documenting the rulings announced in open court. Respondent timely appealed.

Standard of Review

"The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2019).

> The role of this Court in reviewing a trial court's adjudication of neglect . . . is to determine (1) whether the findings

> of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact. If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary.

In re T.N.G., 244 N.C. App. 398, 405–06, 781 S.E.2d 93, 99 (2015) (citation and internal quotation marks omitted). "Unchallenged findings are binding on appeal." *In re V.B.*, 239 N.C. App. 340, 341, 768 S.E.2d 867, 868 (2015). The trial court's conclusion that a juvenile is neglected is subject to de novo review on appeal. *Id.*

Discussion

Respondent argues on appeal that the trial court "reversibly erred in concluding that Jazmin was a neglected juvenile at the remand adjudication hearing" because Judge Rhinehart "resolved an evidentiary conflict, that the initial adjudication hearing judge had not resolved, without hearing any sworn testimony." We disagree.

On appeal, Respondent asserts:

> The issue here is whether a judge acting in a substitute capacity (Judge Rhinehart) had the authority to resolve an evidentiary conflict (the mother's conflicting statements about Respondent-Father's care of the children) when the substitute judge heard no sworn testimony and relied solely on a written transcript of the hearing where the testimony was received by another judge (Judge Marsh).

Respondent's argument is premised on the oft-stated axiom that "when acting as the finder of fact, the trial court has the opportunity to observe the demeanor of the witnesses and determine their credibility, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Balawejder v. Balawejder*, 216 N.C. App. 301, 318, 721 S.E.2d 679, 689 (2011) (citation omitted). Respondent essentially contends that because Judge Rhinehart relied on a transcript of a previous hearing, which denied her the opportunity to observe the demeanor of the witnesses, Judge Rhinehart lacked the authority to make findings of fact that resolved any conflicts in the evidence beyond those findings Judge Marsh made in the original order.

I. Role of Judge on Remand

[1] We first address Respondent's assertion that at the hearing on remand, Judge Rhinehart resolved an evidentiary conflict, and thereby

violated her "ministerial duty [as a substitute judge] of carrying out the mandate of this Court[.]"

Respondent cites *State v. Bartlett*, 368 N.C. 309, 776 S.E.2d 672 (2015), a criminal case, in support of his assertion that Judge Rhinehart exceeded her authority as a substitute judge by acting in more than a ministerial manner. In *Bartlett*, after noting that "a trial court is in no better position than an appellate court to make findings of fact if it reviews only the cold, written record," *id.* at 313, 776 S.E.2d at 674, our Supreme Court interpreted N.C. Gen. Stat. § 15A-977(d) (2013)—part of our Criminal Procedure Act—as "requir[ing] *the judge who presides* at [a] suppression hearing to make the findings of fact necessary to decide" a motion to suppress evidence in a criminal case, *id.* at 314, 776 S.E.2d at 675 (emphasis added). This holding, however, is not relevant to the instant juvenile case.

Respondent candidly admits that there is no similar requirement for adjudicatory orders in our Juvenile Code. *See* N.C. Gen. Stat. § 7B-807(b) (2019) ("The adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law."). However, Respondent asserts that this Court's holding in *In re Whisnant*, 71 N.C. App. 439, 322 S.E.2d 434 (1984), lends additional support for his contention that Judge Rhinehart exceeded her authority as a substitute judge. In *Whisnant*, one judge presided over the hearing, but another judge signed the adjudication and disposition orders. *Id.* at 440, 322 S.E.2d at 434–35. This Court held that the judge presiding over the hearing must sign the order from that hearing, or the hearing must be conducted de novo before another judge. *Id.* at 442, 322 S.E.2d at 436.

Significantly, Rule 63 of our Rules of Civil Procedure was not applicable to the situation presented in *Whisnant*. *Id.* at 441, 322 S.E.2d at 435. Rule 63 permits expanded authority for a substitute judge in limited circumstances:

> If by reason of death, sickness or other disability, resignation, retirement, expiration of term, removal from office, or other reason, a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed [by an appropriate substitute judge].

N.C. Gen. Stat. § 1A-1, Rule 63. The judge who presided over the hearing in *Whisnant* "was neither disabled nor did he ever make findings of fact." *Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435.

In contrast, it is evident that Rule 63 applies to the case at bar. Unlike the original judge in *Whisnant*, Judge Marsh *was in fact* "*unable* to perform the duties to be performed by the court" on remand "by reason of . . . expiration of term," because during the pendency of the appeal, his term ended and he was not re-elected. N.C. Gen. Stat. § 1A-1, Rule 63 (emphasis added). Rule 63 thus authorized Judge Rhinehart "to perform the duties to be performed by the court" when the case returned to the district court on remand. *Id.* Accordingly, Respondent's reliance on *Whisnant* is misplaced.

Indeed, "[t]his Court has interpreted the language of Rule 63 to statutorily authorize a substitute judge to reconsider [on remand] an order entered by a judge who has since" left the bench. *Springs v. City of Charlotte*, 222 N.C. App. 132, 135, 730 S.E.2d 803, 805 (2012) (citing *In re Expungement for Kearney*, 174 N.C. App. 213, 214–15, 620 S.E.2d 276, 277 (2005)), *disc. review denied*, 366 N.C. 428, 736 S.E.2d 756 (2013). In *Springs*, the original trial court failed to enter a written opinion stating "its reasons for upholding or disturbing the finding or award" of punitive damages as required by N.C. Gen. Stat. § 1D-50, and thus this Court remanded the case to the trial court with instructions to reconsider, *inter alia*, the award of punitive damages. *Id.* at 134, 730 S.E.2d at 804–05. Because the original trial court judge had retired, on remand a substitute judge entered the section 1D-50 punitive damages opinion. *Id.* at 134, 730 S.E.2d at 805. On appeal, this Court rejected the argument that "only [the retired judge] had jurisdiction to enter the [s]ection 1D-50 opinion," *id.*, and held that the substitute judge had the authority on remand under Rule 63 to enter the requisite section 1D-50 opinion that the original judge failed to enter, *id.* at 135, 730 S.E.2d at 805.

As DSS observes in its brief, Respondent's argument "might fare differently if the trial court's prior adjudication had been vacated, rather than essentially affirmed except for the remand" for reconsideration of the conclusion of law that Jazmin was "seriously neglected." The nature of our mandate on remand was limited and precise, and quite the opposite in effect from that of a vacatur. "When an order of a lower court is vacated, those portions that are vacated become void and of no effect." *In re D.S.*, 260 N.C. App. 194, 198, 817 S.E.2d 901, 905 (2018). On remand, however, "the general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure." *In re S.R.G.*, 200 N.C. App. 594, 597, 684 S.E.2d 902, 904 (2009) (citation and internal quotation marks omitted), *disc. review and cert. denied*, 363 N.C. 804, 691 S.E.2d 19 (2010). "Remand is not intended to be an opportunity for either respondent or petitioner to retry its case." *In re J.M.D.*, 210 N.C. App. 420, 429, 708 S.E.2d 167, 173 (2011).

Here, Judge Rhinehart complied with this Court's mandate on remand, which was that the trial court reconsider Jazmin's adjudication "within the proper statutory framework." *J.M.*, 255 N.C. App. at 497, 804 S.E.2d at 839. We find no error in Judge Rhinehart's execution of her duty in presiding over the hearing on remand.

II. Evidentiary Conflict

[2] We are also unconvinced that Judge Rhinehart resolved an evidentiary conflict at the hearing on remand. As both Judge Marsh's and Judge Rhinehart's adjudication orders recite, Jazmin's mother made allegations concerning Respondent's mistreatment of Jazmin and her brother, and then recanted those allegations. Respondent contends that "Judge Marsh did not resolve this conflict regarding the mother's statements" and that Judge Rhinehart did resolve it by finding that "the mother's statements to others were more believable than the mother's recantation of those statements." Our careful review of the two adjudication orders finds little difference between Judge Rhinehart's consideration of the mother's recantation and Judge Marsh's.

The findings of fact in Judge Rhinehart's adjudication order to which Respondent appears to object on appeal are:

> 33. Notwithstanding [Jazmin's mother's] low cognitive functioning and mental health diagnoses and her failure to protect these children, [the mother] still sought medical attention for [Jazmin's brother] despite her expressions of fearfulness at the UNC ED. *The court finds that* [*the mother*] *did recant her statements made to the social worker, medical personnel and her own mother, in that she subsequently denied that there was domestic violence between her and* [*Respondent*] *and denied that* [*Respondent*] *abused the children. People recant for various reasons, and the court does not know why* [*the mother*] *recanted her statement. But this court gives great weight to her statements made to medical professionals while she was seeking medical attention for* [*Jazmin's brother*].
>
> 34. Beth Herold of CANMEC testified as an expert in child maltreatment in the original hearing, and stated the opinion that the injuries observed in [Jazmin's brother] were consistent with the instances described by [the mother] in her statements to the medical staff at UNC. *The Court gives great weight to this consistency, in determining*

> *whether* [*the mother's*] *original statements are more credible than her subsequent recantation.*

(Emphases added).

Contrary to Respondent's assertions, at no point did Judge Rhinehart explicitly conclude that "the mother's statements to others were *more believable* than the mother's recantation of those statements."[4] (Emphasis added). Respondent reads between the lines and finds an explicit conclusion that does not exist regarding the weight afforded to the mother's various conflicting statements. Rather than resolving any conflicts in the findings of fact that Judge Marsh had not resolved, our careful review suggests that Judge Rhinehart's order is in accord with the implications of Judge Marsh's order.

The vast majority of Judge Marsh's findings of fact were either unchallenged by Respondent on appeal or survived that challenge. In either circumstance, those findings "are binding on appeal." *V.B.*, 239 N.C. App. at 341, 768 S.E.2d at 868. Judge Rhinehart was thus bound by the following relevant findings of fact from Judge Marsh's order:

> 7. The family received in-home services beginning in March 2015, due to a finding of improper care *based upon the mother disclosing that* [*Respondent*] *hit the child*, [*Jazmin*].
>
> 8. *The mother subsequently denied the hitting* and a CME in February 2015 was inconclusive.
>
> . . . .
>
> 12. During the week prior to Labor Day [2015], *the mother contacted her mother . . . in New York, several times a day by phone and text to attempt to tell her something. Finally, the mother called her mother, informing her that* [*Respondent*] *was treating the children too rough; it was serious; she didn't know how to handle it and he was abusing them. . . .*
>
> 13. On September 8, 2015, *the mother brought* [*Jazmin's brother*] *to a well-baby check-up and expressed her*

4. Respondent also asserts that, in the oral rendition of her findings of fact following the adjudication hearing, "Judge Rhinehart openly stated that she was crediting the mother's allegations of mistreatment to others over the mother's subsequent recantation." In fact, Judge Rhinehart's spoken rendition at the hearing was substantively identical to the written findings of fact 33 and 34 in the adjudication order, quoted above.

> *concerns to the doctor that* [*Respondent*] *was too rough with the child*. Marks on [the child]'s neck and conjunctival hemorrhages (bloodshot eyes) were observed by the medical provider. [The child] was two (2) months old at the time. The child was sent to UNC Hospital Emergency Department for further testing.
>
> 14. *The mother disclosed the same information to the Emergency Department doctor*. A consult was requested from the Beacon Program which reviews cases of suspected child maltreatment. [*The mother*] *repeated the same information to Holly Warner from the Beacon Program*, specifically that on separate occasions she had witnessed [Respondent] flicking the child . . . under the chin, holding him upside down by his ankles, and punching him in the stomach. [The] mother failed to take steps to adequately protect [the child].
>
> 15. A skeletal survey showed that [Jazmin's brother] had healing right tibia and fibula fractures. The child also had ear bruising, sub conjunctival hemorrhages, excoriation under the chin and tongue bruising. There was no history of falls, accidents or injuries to explain the injuries. . . . [*The child*]*'s injuries were consistent with the instances described by the mother.*[5]
>
> . . . .
>
> 20. [*The mother*] *was not forthcoming during the prior CPS investigation in February 2015, and continued to mislead the in-home services social worker about the circumstances in the home during bi-weekly home visits.*
>
> . . . .
>
> 22. [The mother] subsequently recanted her statements and moved out of the family home.

(Emphases added).

These findings evince a pattern of the mother making and recanting allegations—Judge Marsh went so far as to describe the mother as "not forthcoming" and "mislead[ing]"—and acknowledge that the

5. Although Respondent successfully challenged a portion—which we have omitted—of this finding of fact in his prior appeal, this Court "reject[ed] [his] argument as to finding of fact 15 in all other respects." *J.M.*, 255 N.C. App. at 494, 804 S.E.2d at 838.

physical evidence and the testimony of others corroborated the mother's recanted allegations. While Judge Marsh's order does not explicitly state that he afforded more weight to the mother's original statements than to her recantation, that is the clear implication. In this respect, rather than resolving any unresolved evidentiary conflict, Judge Rhinehart's findings are consistent with Judge Marsh's original findings of fact. We are thus unconvinced by Respondent's assertion that Judge Rhinehart resolved any "evidentiary conflict" that Judge Marsh had not.

Finally, we note that Respondent's argument is centered not on the substance of Judge Rhinehart's adjudication of Jazmin as neglected, but rather on a dispute over the credibility of Jazmin's mother. Respondent is arguing less that the trial court erred in concluding that Jazmin was neglected, and more that it erred in finding that the mother's allegations against him were more credible than her recantations of those allegations. This focus is misguided.

"In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Q.A.*, 245 N.C. App. 71, 74, 781 S.E.2d 862, 864 (2016) (citation omitted).

> The purpose of the adjudication and disposition proceedings should not be morphed on appeal into a question of culpability regarding the conduct of an individual parent. The question this Court must look at on review is whether the court made the proper determination in making findings and conclusions as to the status of the juvenile.

In re J.S., 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007).

After careful review of both adjudication orders in this case, and in light of our mandate on remand that the trial court reconsider the adjudication of Jazmin "within the proper statutory framework," *J.M.*, 255 N.C. App. at 497, 804 S.E.2d at 839, we conclude that the trial court made the proper determination regarding Jazmin's status. Respondent's argument is overruled.

Conclusion

For the foregoing reasons, the trial court's adjudication and disposition orders on remand are affirmed.

AFFIRMED.

Judges DIETZ and COLLINS concur.

M.E. v. T.J.

[275 N.C. App. 528 (2020)]

M.E., Plaintiff-Appellant
v.
T.J., Defendant-Appellee

No. COA18-1045

Filed 31 December 2020

1. Constitutional Law—North Carolina—as-applied challenge—domestic violence statute—protection denied to same-sex partners—no State interest

The application of N.C.G.S. § 50B-1(b)(6) to plaintiff, who was denied a domestic violence protective order against her same-sex partner because their relationship did not meet the statutory definition of "personal relationship," violated plaintiff's constitutional rights to equal protection and due process under Art. I of the North Carolina Constitution. There was no legitimate State interest which would allow the statute as applied to plaintiff and similarly situated persons to survive even the lowest level of scrutiny.

2. Constitutional Law—Fourteenth Amendment—due process—as-applied challenge—domestic violence statute—protection denied to same-sex partners—fundamental rights violated

Adopting the reasoning in *United States v. Windsor*, 570 U.S. 744 (2013), the Court of Appeals held that the application of N.C.G.S. § 50B-1(b)(6) to plaintiff, who was denied a domestic violence protective order because her same-sex relationship did not meet the statutory definition of "personal relationship," violated plaintiff's fundamental liberty rights to personal security, dignity, and autonomy, and therefore violated plaintiff's due process rights under the Fourteenth Amendment of the U.S. Constitution.

3. Constitutional Law—Fourteenth Amendment—equal protection—as-applied challenge—domestic violence statute—protection denied to same-sex partners—strict scrutiny

In an as-applied constitutional challenge to N.C.G.S. § 50B-1(b)(6), the statute's application to plaintiff, which served to prevent her from obtaining a domestic violence protective order against her same-sex partner, could not survive strict scrutiny—the heightened standard of review appropriate given the fundamental liberty at stake—where the denial was based on plaintiff's LGBTQ+ status. Plaintiff's right to equal protection under the Fourteenth Amendment of the U.S. Constitution was violated where the statute's protection of opposite-sex couples only was based on an

arbitrary classification that bore no reasonable relation to the statute's purpose.

4. Constitutional Law—as-applied challenge—domestic violence statute—rational basis review—intermediate scrutiny

In an as-applied constitutional challenge to N.C.G.S. § 50B-1(b)(6), under which plaintiff was denied a domestic violence protective order against her same-sex partner, although the Court of Appeals determined strict scrutiny was the appropriate level of review, the court also held that the statute's application to plaintiff and to others similarly situated could not withstand rational basis review, much less intermediate scrutiny, because there was no government interest to support the statute's distinction between opposite-sex and same-sex couples.

5. Constitutional Law—Fourteenth Amendment—hybrid review—denial of rights based on LGBTQ+ status—balancing test

In an as-applied constitutional challenge to N.C.G.S. § 50B-1(b)(6), under which plaintiff was denied a domestic violence protective order against her same-sex partner, the Court of Appeals reviewed federal constitutional decisions regarding state action against persons based on their LGBTQ+ status and determined that those decisions, culminating in *Obergefell v. Hodges*, 576 U.S. 644 (2015), require certain factors to be considered when evaluating a state action that denies rights to LGBTQ+ persons, including the actual intent of the state in enacting the law and the particular harms suffered by the targeted group. Using this review, the Court of Appeals determined section 50B-1(b)(6) was unconstitutional.

6. Constitutional Law—Fourteenth Amendment—equal protection—discrimination based on LGBTQ+ status also based on sex or gender

In an as-applied constitutional challenge to N.C.G.S. § 50B-1(b)(6), under which plaintiff was denied a domestic violence protective order against her same-sex partner, the Court of Appeals determined that the U.S. Supreme Court's definition of "sex" or gender in *Bostock v. Clayton County*, 590 U.S. __ (2020), was relevant to the Fourteenth Amendment equal protection issue of whether section 50B-1(b)(6) discriminated against plaintiff based on her LGBTQ+ status. Where the statute's distinction between opposite-sex and same-sex couples constituted discrimination based on sex, the statute could not survive intermediate scrutiny.

7. Appeal and Error—court-appointed amicus curiae—Appellate Rule 28(i)—scope of amicus arguments—limited to issues raised by the record

In an as-applied constitutional challenge to N.C.G.S. § 50B-1(b)(6) in which defendant did not file an appellate brief and the State's amicus brief did not defend the statute's constitutionality, where the Court of Appeals on its own motion appointed amicus curiae to brief a response to plaintiff's arguments on appeal, issues raised by amicus on appeal that were outside the record on appeal were not properly before the appellate court. Amicus curiae was without standing to file a motion to dismiss and motion to amend the record on appeal, made according to its argument that jurisdictional defects prevented appellate review. Since the trial court's jurisdiction was never challenged and no jurisdictional defect appeared on the record, the motions were dismissed as a nullity.

Judge TYSON dissenting.

Appeal by Plaintiff from order entered 7 June 2018 by Judge Anna Worley in District Court, Wake County. Heard in the Court of Appeals 17 September 2019.

Sharff Law Firm, PLLC, by Amily McCool, and ACLU of North Carolina Legal Foundation, Inc., by Emily E. Seawell and Irena Como, for Plaintiff-Appellant.

Lorin J. Lapidus, court appointed amicus curiae.

Governor Roy A. Cooper, III, and Attorney General Joshua H. Stein, by Deputy Solicitor General Ryan Y. Park, for North Carolina Department of Justice, amicus curiae.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Sarah M. Saint and Eric M. David, and Equality NC, by Ames B. Simmons, for North Carolina LGBTQ+ Non-Profit Organizations, amici curiae.

Womble Bond Dickinson, by Amalia Manolagas, Kevin Hall, pro hac vice, and Allen O'Rourke, Legal Aid of North Carolina, by Celia Pistolis, Amy Vukovich, and Elyisa Prendergast-Jones, and North Carolina Coalition Against Domestic Violence, by Sherry Honeycutt Everett, for Legal Aid of North Carolina, North

Carolina Coalition Against Domestic Violence, and several local domestic violence support organizations, amici curiae.

McGEE, Chief Judge.

I. Factual and Procedural Background

A. *Introduction*

M.E. ("Plaintiff") and T.J. ("Defendant") were in a dating relationship that did not last. Plaintiff decided the relationship had reached its end and, on 29 May 2018, Plaintiff undertook the difficult task of informing Defendant that their relationship was over. According to Plaintiff, Defendant did not accept Plaintiff's decision, and responded in a manner that ultimately led Plaintiff to visit the Wake County Clerk of Court's office on the morning of 31 May 2018, seeking the protections of a Domestic Violence Protective Order ("DVPO"), as well as an *ex parte* temporary "Domestic Violence Order of Protection" ("*ex parte* DVPO"), pursuant to Chapter 50B of the North Carolina General Statutes: "An Act to Provide Remedies for Domestic Violence" (the "Act" or "Chapter 50B"). 1979 North Carolina Laws Ch. 561, §§ 1–8. At the time of the enactment of Chapter 50B, same-sex marriage was not legal, and the General Assembly specifically limited the protections of Chapter 50B to unmarried couples comprising "persons of the opposite sex." *Id.*

Although the trial court determined Plaintiff's "allegations [we]re significant," and "[P]laintiff ha[d] suffered unlawful conduct by [D]efendant," the trial court denied Plaintiff's request for an *ex parte* DVPO. The order denying Plaintiff's request for an *ex parte* DVPO states that the "only reason [P]laintiff [is] not receiving [an *ex parte*] 50B DVPO today" is because Plaintiff and Defendant had been in a "same sex relationship and [had] not live[d] together[.]" Plaintiff received the same result at a 7 June 2018 hearing on her request for a permanent DVPO. The trial court denied Plaintiff the protections of a Chapter 50B DVPO in a 7 June 2018 order that stated: "A civil no-contact (50C) order was granted contemporaneously on the same allegations and had the parties been of opposite genders, those facts would have supported the entry of a [DVPO] (50B)." As the trial court note, it contemporaneously entered a "No-Contact Order for Stalking" granting Plaintiff the lesser protections afforded by Chapter 50C.

On appeal, Plaintiff argues that the denial of her requests for *ex parte* and permanent DVPOs under Chapter 50B violated her Fourteenth Amendment and state constitutional rights to due process and equal

protection of the laws. We set forth additional relevant facts and address Plaintiff's arguments below.

B. *Additional Facts*

Plaintiff went to the Clerk's office on 31 May 2018 and explained her situation to the staff members, who gave Plaintiff the appropriate forms to file a Chapter 50B "Complaint and Motion for Domestic Violence Protective Order" ("AOC-CV-303"), which also includes a section to request a temporary "Ex Parte Domestic Violence Order of Protection." *See* N.C.G.S. § 50B-2(d) (2017) ("The clerk of superior court of each county shall provide to pro se complainants all forms that are necessary or appropriate to enable them to proceed pro se pursuant to this section. The clerk shall, whenever feasible, provide a private area for complainants to fill out forms and make inquiries.").

Plaintiff filled out AOC-CV-303 and additional forms she had been given, alleging Defendant had committed physical and otherwise threatening actions against her, and stating her concern that Defendant had "access to [Defendant's] father's gun collection." Plaintiff requested "emergency relief" by way of "an Ex Parte Order," based upon her belief that "there [wa]s a danger of [further] acts of domestic violence against [her]" before a formal DVPO hearing could be set. Plaintiff stated: "I want [] [D]efendant ordered not to assault, threaten, abuse, follow, harass or interfere with me[;]" "I want [] [D]efendant to be ordered to have no contact with me." Plaintiff also asked the trial court to order Defendant "not to come on or about" Plaintiff's residence or her place of work; to take anger management classes; and "to prohibit [] [D]efendant from possessing or purchasing a firearm."

Form AOC-CV-303 is based on the requirements for a DVPO as set forth in Chapter 50B, including the definition of "domestic violence" found in N.C.G.S. § 50B-1. The definition of "domestic violence" in N.C.G.S. § 50B-1 includes acts by a defendant "[a]ttempting to cause bodily injury, [] intentionally causing bodily injury[, or] [p]lacing the aggrieved party . . . in fear of imminent serious bodily injury or continued harassment . . . that rises to such a level as to inflict substantial emotional distress" when the defendant's acts were against a "person," the plaintiff, with whom the defendant was in a "personal relationship." N.C.G.S. §§ 50B-1(a)(1)-(2). Relevant to Plaintiff's appeal, the definition of "personal relationship" required that Plaintiff and Defendant were either "in a dating relationship or had been in a dating relationship." N.C.G.S. §§ 50B-1 (b)(6). Therefore, pursuant to the definitions in N.C.G.S. § 50B-1, violence against a person with whom the perpetrator either is, or has been, in a "dating relationship" is not "domestic

violence," no matter how severe the abuse, *unless* the perpetrator of the violence and the victim of the violence "[a]re persons of the opposite sex[.]" N.C.G.S. § 50B-1(b)(6). The only box on AOC-CV-303 relevant to the "dating" nature of Plaintiff's relationship with Defendant was the one that stated: "The defendant and I . . . are persons of the opposite sex who are in or have been in a dating relationship." Having no other option, Plaintiff checked that box and filed her complaint.

Plaintiff first spoke with the trial judge concerning her "request for Ex Parte Order" during the morning family court session on 31 May 2018, but was informed that because both she and Defendant were women, and only in a "dating" type relationship, N.C.G.S. § 50B-1(b)(6) did not allow the trial court to grant her an *ex parte* DVPO or any other protections afforded by Chapter 50B. Plaintiff was informed that she could seek a civil *ex parte* temporary no-contact order and a permanent civil no-contact order, pursuant to Chapter 50C. *See* N.C.G.S. § 50C-2 (2017). Chapter 50C expressly states that its protections are for "person[s] against whom an act of unlawful conduct has been committed by another person *not involved in a personal relationship* with the person *as defined in G.S. 50B-1(b)*." N.C.G.S. § 50C-1(8) (2017) (emphasis added).

Plaintiff returned to the Clerk's office, obtained the forms for Chapter 50C protections, including Form AOC-CV-520, "Complaint for No-Contact Order for Stalking," filled them out, and filed them. Plaintiff's motions for both civil *ex parte* and permanent no-contact orders were filed under a new case file number. Plaintiff decided to argue for both an *ex parte* DVPO and a permanent DVPO under Chapter 50B and, should these Chapter 50B requests be denied, for Chapter 50C *ex parte* and permanent civil "Temporary No-Contact Order[s] for Stalking."

Plaintiff's actions were heard at the afternoon session that same day, 31 May 2018, and the trial court entered its " 'Amended' Ex Parte Domestic Violence Order of Protection," which denied Plaintiff's request for an *ex parte* DVPO, but set a hearing date of 7 June 2018 for a hearing on Plaintiff's request for a permanent DVPO.[1] In the "Relationship to Petitioner" section of this order, the box checked by the trial court to define Plaintiff's relationship to Defendant was "of opposite sex, currently or formerly in dating relationship[.]" The trial court also checked Box 8, which states that "[P]laintiff has failed to prove grounds for

1. This order had "Amended" handwritten at the top of the order, likely because the original date set for the hearing of Plaintiff's "Complaint and Motion for Domestic Violence Protective Order," 12 June 2018, was changed by hand on the order to 7 June 2018.

ex parte relief[;]" Box 14, stating "the request for Ex Parte Order is denied[;]" and Box 15, "Other: (*specify*)[,]" writing: "HEARING ONLY – set for hearing on [7 June 2018] . . .; allegations are significant but parties are in same sex relationship and have never lived together, therefore do not have relationship required in [N.C.G.S. § 50B-1(b)]."

The trial court granted Plaintiff's *ex parte* request pursuant to Chapter 50C by entering a "Temporary No-Contact Order for Stalking or Nonconsensual Sexual Conduct" (the "*ex parte* 50C Order"), also on 31 May 2018. *See* N.C.G.S. § 50C-6(a) (2017). In the *ex parte* 50C Order, the trial court found as fact that "[P]laintiff has suffered unlawful conduct by [] [D]efendant in that:" "On 5/29/18, [D]efendant got physically aggressive and was screaming in [Plaintiff's] face; [D]efendant then left after LEO [law enforcement officers] were called; after LEO left," Defendant "attempted to re-enter [Plaintiff's] house; LEO returned to remove [Defendant] from [Plaintiff's] house; since that date, [D]efendant has repeated[ly] called [Plaintiff], texted [P]laintiff from multiple numbers, and contacted [P]laintiff's friends and family[.]" The trial court found that Defendant "continues to harass [P]laintiff[,]" and that "[D]efendant committed acts of unlawful conduct against [] [P]laintiff." The trial court concluded that the "*only reason [P]laintiff [is] not receiving [a] 50B DVPO today" is because Plaintiff and Defendant had been "in [a] same sex relationship and do not live together*[,]" and that N.C.G.S. § 50B-1(b), as plainly written, requires the dating relationship involved to have consisted of people of the " 'opposite sex[.]' " (Emphasis added).

The "HEARING ON [Plaintiff's] 50B and 50C MOTIONS" was conducted on 7 June 2018. At this hearing, the trial court considered Plaintiff's "Complaint for No-Contact Order for Stalking or Nonconsensual Sexual Conduct" under N.C.G.S. §§ 50C-2 and 50C-5, and her "Complaint and Motion for Domestic Violence Protective Order" under N.C.G.S. §§ 50B-2 and 50B-3. Defendant appeared *pro se*, but Plaintiff was represented at this hearing, and her attorney informed the trial court:

> [Plaintiff] came in on May 31st and filed a complaint for that [DVPO]. She – that was what she was intending in getting the relief for, for a [DVPO] against [Defendant]. As I'm sure this court knows, that [DVPO] gives [Plaintiff] more protection than a 50C.
>
> [Plaintiff was] in an intimate relationship with [Defendant]. However, when [Plaintiff] went to file for that [DVPO] and looked at the boxes that describe the allowable personal

> relationships, that – unfortunately, there was not a personal relationship box that fit her relationship with [Defendant] because they [we]re in a same-sex dating relationship and have never lived together.
>
> Because of that, [Plaintiff] did go ahead and proceed with filing that complaint for a [DVPO] and chose the box that was the closest that fit her relationship [with Defendant] and checked the opposite-sex dating partners.

Defendant consented to an amendment to the order to indicate her relationship with Plaintiff was one "of same sex currently or formerly in dating relationship."[2] The trial court questioned the necessity of amending the Form AOC-CV-306, which is the AOC form used by trial courts to grant or deny a petitioner's request for a DVPO—thereupon becoming the trial court's order. The trial court stated: "I do not have a complaint that . . . would survive a Rule 12 motion" because the plain language of N.C.G.S. § 50B-1(b)(6) limits relief to only those victims who suffer violence from dating or ex-dating partners that are of the "opposite sex." Plaintiff's attorney argued:

> [Plaintiff] should be allowed to proceed with the [DVPO], that . . . the statute, . . . 50B, is unconstitutional as it's written post the same-sex marriage equality case from the Supreme Court in *Obergefell* and that there's no rational basis at this point to have a statute that limits dating relationships to folks of opposite sex. So we would ask that Your Honor consider allowing [Plaintiff] to proceed with her [DVPO] case.

(Emphasis added). The trial court, by order entered 7 June 2018 (the "50B Order"), dismissed Plaintiff's complaint under Chapter 50B based upon a finding that Plaintiff had "failed to prove grounds for issuance of a" DVPO. On the 50B Order, the trial court checked Box 8, "Other," and wrote in the space included for Box 8:

> [P]laintiff has failed to state a claim upon which relief can be granted pursuant to the statute, due to the lack of statutorily defined personal relationship. A civil no-contact (50C) order was granted contemporaneously on the same allegations *and had the parties been of opposite genders*,

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2. On the Form AOC-CV-306, the word "opposite" was stricken and the word "same" was written just above.

> *those facts would have supported the entry of a Domestic Violence Protective Order (50B).*

(Emphasis added). The trial court continued, noting:

> N.C.G.S. 50B was last amended by the legislature in 2017 without amending the definition of "personal relationship" to include persons of the same sex who are in or have been in a dating relationship. This recent amendment in 2017 was made subsequent to the United States Supreme Court decision in *Obergefell v. Hodges*[] and yet the legislature did not amend the definition of personal relationship to include dating partners of the same sex.

(Emphasis added). The trial court also attached "Exhibit A"—a separate document titled "Order Denying Plaintiff's Motion for a DVPO," which the trial court "fully incorporated" into the 50B Order. Exhibit A states in relevant part:

> 2. [ ] Plaintiff, through her counsel, argued that she should be allowed to proceed on her request for a [DVPO] because the current North Carolina General Statute 50B-1(b) is unconstitutional after the United States Supreme Court decision in *Obergefell v. Hodges* and that there is no rational basis for denying protection to victims in same-sex dating relationships who are not spouses, ex-spouses, or current or former household members.
>
> 3. North Carolina General Statute 50B was passed by the North Carolina General Assembly in 1979 and later amended on several occasions. It states that an aggrieved party with whom they have a personal relationship may sue for a [DVPO] in order to prevent further acts of domestic violence. The question for the Court is how a personal relationship is defined. North Carolina General Statute 50B-1 states: "for purposes of this section, the term 'personal relationship' means wherein the parties involved: (1) are current or former spouses; (2) are persons of opposite sex who live together or have lived together; (3) are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren. For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16; (4) have a child in common; (5) are current or former household members; (6) are persons

of the opposite sex who are in a dating relationship or have been in a dating relationship." . . . .

4. *This definition prohibits victims of domestic violence in same sex dating relationships that are not spouses, ex-spouses, or current of former household members from seeking relief against a batterer under Chapter 50B.*

5. *[This court] must consider whether it has jurisdiction to create a cause of action that does not exist and to enter an order under this statute when the statute specifically excludes it. The difficult answer to this question is no, it does not.* The General Assembly has the sole authority to pass legislation that allows for the existence of any domestic violence protective order. The legislature has not extended this cause of action to several other important family relationships including siblings, aunts, uncles, "step" relatives, or in-laws.

6. In this context, *the Courts only have subject matter jurisdiction* and *the authority to act* and enjoin a defendant *when the legislature allows it.* On numerous occasions the Court of Appeals has stricken orders entered by the District Court that do no[t] include proper findings of fact or conclusions of law that are necessary to meet the statute. [ ] Defendant must be on notice that a cause of action exists under this section when the act of domestic violence is committed. *[This court] cannot enter a [DVPO] against a [d]efendant when there is no statutory basis to do so.* . . . .

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

1. [ ] Plaintiff has failed to prove grounds for issuance of a [DVPO] as Plaintiff *does not have a required "personal relationship" with [ ] Defendant as required by [Chapter] 50B.*

(Emphasis added). Plaintiff appeals.

This Court granted motions to file *amicus curiae* briefs, in support of Plaintiff, from two separate groups consisting of non-profit organizations involved in domestic violence and LGBTQ+ issues: "North Carolina Coalition Against Domestic Violence" and "North Carolina LGBTQ+ Non-Profit Organizations." Notably, the Attorney General of the State

of North Carolina also filed a motion to brief the matter as an *amicus curiae*, which was granted. This motion stated "the Attorney General, on behalf of the State, seeks to file a brief as *amicus curiae* in this case to vindicate the State's powerful interests in safeguarding all members of the public from domestic violence." The State argued that its interest, including the "State's law-enforcement community," is in "ensuring that law enforcement has robust tools at its disposal to prevent and punish domestic violence" and "in ensuring that all its people are treated equally under the law"—particularly "where certain groups are being denied equal legal protections from private violence[,]" because "[t]he State and its law-enforcement community have an obligation to ensure the safety and security of all North Carolinians, without regard to their sexual orientation." Defendant did not file an appellee brief, and no *amici* sought to file briefs contesting Plaintiff's arguments on appeal. There were also no motions filed by any entity of the State to submit an *amicus* brief, or otherwise intervene in this action, for the purpose of arguing in favor of the constitutionality of the Act. Therefore, this Court, on its own motion and by order entered 3 May 2019, appointed an *amicus curiae* ("*Amicus*"), to brief an argument in response to Plaintiff's arguments on appeal.

II. Plaintiff's Arguments on Appeal

Plaintiff argues that the trial court's denial of her request for a DVPO violated constitutional rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as the associated provisions of the North Carolina Constitution. *See* U.S. Const. amend. V; U.S. Const. amend. IX; U.S. Const. amend. XIV, § 1; N.C. Const. art. I, Declaration of Rights; N.C. Const. art. I, §§ 1, 2, 18, 19, 35, 36, 37. Therefore, as discussed below, our analysis is limited to a *de novo* review of whether Plaintiff was unconstitutionally denied a DVPO under N.C.G.S. § 50B-1(b)(6) *solely based on the fact that Plaintiff is a woman* and *Defendant is also a woman*. "Defendant's appeal raises questions of public policy as well as of law. We are concerned with the law, of course, but matters of public policy . . . cannot be disregarded in their interpretation." *State v. Harris*, 216 N.C. 746, 751, 6 S.E.2d 854, 858 (1940).

Plaintiff also states that her challenge to N.C.G.S. § 50B-1(b)(6) is an "as-applied" challenge, not a facial challenge. There is no dispute that, in general, *if* the "parties involved" in a "personal relationship" "[a]re persons of the opposite sex[,]" as defined by N.C.G.S. § 50B-1(b)(6), one of those "parties involved" may seek the protections of a DVPO against the other. Therefore, the application of N.C.G.S. § 50B-1(b)(6) does *not* violate the constitutional rights of "parties involved." N.C.G.S. § 50B-1(b)(6);

see also Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 247 N.C. App. 444, 460, 786 S.E.2d 335, 347 (2016), *aff'd*, 369 N.C. 722, 799 S.E.2d 611 (2017). There are important applications of N.C.G.S. § 50B-1(b)(6), such as protecting people in "opposite-sex" relationships from domestic violence through the issuance of DVPOs, that clearly do not violate the constitutional rights of those applicants; therefore, based upon the facts before us, Plaintiff's challenge to N.C.G.S. § 50B-1(b)(6) is as-applied. *Genesis Wildlife*, 247 N.C. App. at 460, 786 S.E.2d at 347 (citation omitted) (" 'an as-applied challenge represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a plaintiff's contention that a statute is incapable of constitutional application in any context' "); *see also Doe v. State*, 421 S.C. 490, 504, 808 S.E.2d 807, 814 (2017) (in which the Supreme Court of South Carolina found a statute similar to N.C.G.S. § 50B-1(b)(6) facially constitutional, but unconstitutional as applied to the petitioner).

Although Plaintiff is making an as-applied challenge to N.C.G.S. § 50B-1(b)(6) in this action, as in *Doe*, if we decide in favor of Plaintiff's as-applied challenge, our holdings will also prevent the unconstitutional denial of DVPOs to other persons "in similar same-sex relationships[.]" *Doe*, 421 S.C. at 509–10, 808 S.E.2d at 817 (citation omitted) ("[W]e declare sections [of the relevant statutes] unconstitutional as applied to Doe. Therefore, the family court may not utilize these statutory provisions to prevent Doe or those in similar same-sex relationships from seeking an Order of Protection."). In other words, if this Court decides that N.C.G.S. § 50B-1(b)(6) was unconstitutionally applied to Plaintiff in denying her request for a DVPO, based solely or in part on her gender or gender-identity, denial of the protections of Chapter 50B to any similarly situated plaintiff would also be prohibited as an unconstitutional application of the statute to that plaintiff.

We note that the trial court found as fact: "A civil no-contact (50C) order was granted contemporaneously *on the same allegations* [contained in Plaintiff's complaint and motion for a DVPO] and *had the parties been of opposite genders, those facts would have supported the entry of a Domestic Violence Protective Order (50B)*." (Emphasis added). This finding of fact is not challenged on appeal, and is therefore binding.[3] *Matter of M.C.*, 374 N.C. 882, 886, 844 S.E.2d 564, 567 (2020).

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3. Had the trial court granted Plaintiff a Chapter 50B DVPO, that decision would be a matter of law that we would review *de novo*, but the unchallenged statement that the trial court *would have* granted the DVPO, had Plaintiff been a man, is a finding of fact that is conclusive on appeal.

III. *N.C.G.S. § 50B-1*

The trial court concluded that "had [Plaintiff and Defendant] been of opposite genders, th[e] facts [found] would have supported the entry of a" DVPO, but it denied Plaintiff's request for a DVPO because the "definition [in N.C.G.S. § 50B-1(b)(6)] prohibits victims of domestic violence in same sex dating relationships that are not spouses, ex-spouses, or current or former household members from seeking relief against a batterer under Chapter 50B." Issuance of a DVPO pursuant to both N.C.G.S. §§ 50B-2 and 3 requires a proper allegation of "domestic violence" as defined by N.C.G.S. § 50B-1, which states in relevant part:

> (a) *Domestic violence means the commission of one or more of the following acts upon an aggrieved party* or upon a minor child residing with or in the custody of the aggrieved party *by a person with whom the aggrieved party has or has had a personal relationship*, but does not include acts of self-defense:
>
> > (1) *Attempting to cause bodily injury*, or intentionally causing bodily injury; *or*
> >
> > (2) *Placing the aggrieved party* or a member of the aggrieved party's family or household *in fear of imminent serious bodily injury or continued harassment*, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress[.]
> >
> > . . . .
>
> (b) For purposes of this section, *the term "personal relationship" means a relationship wherein the parties involved*:
>
> > (1) Are current or former spouses;
> >
> > (2) Are persons of *opposite sex* who live together or have lived together;
> >
> > (3) Are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren. For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16;
> >
> > (4) Have a child in common;

> (5) Are current or former household members;
>
> (6) *Are persons of the opposite sex who are in a dating relationship or have been in a dating relationship*. . . . .

N.C.G.S. § 50B-1 (emphasis added).

The clear intent of this definition of "domestic violence" is to exclude victims of domestic violence from the protection of the Act if they and their abusive partners are of the same "sex"—though both men and women can seek the protections of a DVPO, so long as their alleged abusers are of the "opposite sex." Although the Act has been amended multiple times, including after the United States Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644, 192 L. Ed. 2d 609 (2015), N.C.G.S. § 50B-1 has not been amended to retract the language limiting the protections of a DVPO in certain circumstances to persons in "opposite-sex" relationships.

IV. Legal Background and Review

Plaintiff's arguments are challenges based upon the due process and equal protection clauses of both our state and federal constitutions. Below, we will review Plaintiff's challenge under the Constitution of North Carolina, then review Plaintiff's Fourteenth Amendment arguments.

In the recent opinions involving Fourteenth Amendment challenges to state action directed at people of "same-sex" status, the analyses of the United States Supreme Court have been based upon the Due Process Clause, the Equal Protection Clause, and a hybrid application of both—incorporating both the due process concept of fundamental "liberty" and equal protection "disparate treatment" review. The review in these cases does not appear to fit neatly within the traditional "rational basis," "intermediate scrutiny," or "strict scrutiny" review of challenges under the Fourteenth Amendment. We will hereafter refer to this "hybrid" review as "full Fourteenth Amendment" review.

In addition, the Supreme Court recently decided *Bostock v. Clayton County*, 590 U.S. __, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020), in which Justice Gorsuch's majority opinion held, in a federal employment discrimination action, that when an employer takes discriminatory action against an employee based on the employee's "status" as gay, lesbian, or transgender, the employer is necessarily discriminating against the employee based upon that employee's "sex." *Id.* at __, 140 S. Ct. at 1746, 207 L. Ed. 2d at __. Although this opinion was not decided under the Fourteenth Amendment, we consider Justice Gorsuch's analysis in order

to determine if the definitional holdings related to discrimination "based upon" "sex" should, or must, be applied to Fourteenth Amendment challenges alleging discrimination based on LGBTQ+ status. If so, then allegations of discrimination based on the LGBTQ+ status of an individual are also allegations of discrimination based on the "sex" or "gender" of that person for Fourteenth Amendment purposes, and would require at least "intermediate scrutiny" review, as required in all actions alleging "sex" or "gender" discrimination.

In light of the ambiguity surrounding the appropriate test to apply in LGBTQ+ based Fourteenth Amendment cases, we will conduct alternative reviews—pursuant to due process, equal protection, and the full Fourteenth Amendment review we discern from the line of opinions culminating in *Obergefell*.

> " '[A]n alternative holding is not dicta but instead is binding precedent. *See, e.g.*, *Massachusetts v. United States*, 333 U.S. 611, 623 (1948) (explaining that where a case has "been decided on either of two independent grounds" and "rested as much upon the one determination as the other," the "adjudication is effective for both")' "

Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255–56 (11th Cir. 2017) (citations omitted)). We believe these alternative holdings under the state and federal constitutions are both appropriate and necessary because it is ultimately our Supreme Court that has the authority to definitively decide these issues under the Constitution of North Carolina, *State v. Berger*, 368 N.C. 633, 638–39, 781 S.E.2d 248, 252 (2016), and it is axiomatic that the United States Supreme Court is the ultimate arbiter of issues raised under the Constitution of the United States. Further, the Supreme Court has regularly rendered opinions basing its holdings finding Fourteenth Amendment violations on *both* the Due Process Clause *and* the Equal Protection Clause.

A. *North Carolina Constitution*

1. General Principles

The immutable fact when deciding a statutory challenge under the North Carolina Constitution is: "[W]e cannot construe the provisions of the North Carolina Constitution to accord the citizens of North Carolina any lesser rights than those which they are guaranteed by parallel federal provisions in the federal Constitution." *Libertarian Party of N. C. v. State*, 200 N.C. App. 323, 332, 688 S.E.2d 700, 707 (2009) (citation omitted), *aff'd as modified*, 365 N.C. 41, 707 S.E.2d 199 (2011). However,

while "the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, [] the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution." *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998).

The sections of the North Carolina Constitution relevant to this case are found in Article I:

> Article I, Section 1 establishes that all persons are afforded the "inalienable rights [of] . . . life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." N.C. Const. art. I, § 1. Article I, Section 19 provides, "[n]o person shall be . . . deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. "The law of the land, like due process of law, serves to limit the state's police power to actions which have a real or substantial relation to the public health, morals, order, safety or general welfare."

Hope – A Women's Cancer Ctr., *P.A. v. State*, 203 N.C. App. 593, 602–03, 693 S.E.2d 673, 680 (2010) (citation omitted); *see also State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949) (citations omitted) ("The term 'law of the land' is synonymous with 'due process of law,' a phrase appearing in the Federal Constitution and the organic law of many states."). The protections of the "law of the land" or "due process," requirements are " 'intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' " *Gunter v. Town of Sanford*, 186 N.C. 452, 456, 120 S.E. 41, 43 (1923) (citations omitted).

> These fundamental guaranties are very broad in scope, and are intended to secure to each person subject to the jurisdiction of the State extensive individual rights, including that of personal liberty. The term "liberty," as used in these constitutional provisions, does not consist simply of the right to be free from arbitrary physical restraint or servitude, but is "deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. . . . It includes the right of the citizen to be free to use his faculties in all lawful ways[.]"
>
> . . . .

> An exertion of the police power inevitably results in a limitation of personal liberty, and legislation in this field "is justified only on the theory that the social interest is paramount." In exercising this power, the legislature must have in view the good of the citizens as a whole rather than the interests of a particular class.

Ballance, 229 N.C. at 769, 51 S.E.2d at 734-35 (citations omitted).

Concerning the equal protection clause of section 19:

> [Our Supreme] Court has said that the principle of the equal protection of the law, made explicit in the Fourteenth Amendment to the Constitution of the United States, was also inherent in the Constitution of this State even prior to the revision thereof at the General Election of 1970. . . . .
>
> . . . .
>
> [Even when "]the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with . . . an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

S.S. Kresge Co. v. Davis, 277 N.C. 654, 660–61, 178 S.E.2d 382, 385–86 (1971) (emphasis added) (citations omitted).

It is a fundamental obligation of the courts of this state to protect the people from unconstitutional laws, as well as the unconstitutional *application* of the laws. *Id.* at 660–61, 178 S.E.2d at 385–86 (emphasis added) (citations omitted) (the "constitutional protection against unreasonable discrimination under color of law" "*extends also to the administration and the execution of laws* valid on their face"). Article I is construed liberally in this regard:

> In *Trustees of the University of North Carolina v. Foy*, 5 N.C. 57 (1805), the Court recognized the supremacy of rights protected in Article I [of the North Carolina Constitution] and indicated that it would only apply the rules of decision derived from the common law and such acts of the legislature that are consistent with the Constitution. . . . .

> It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State. Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens. . . . . *We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to* both *person* and property.

Corum v. Univ. of N.C. Through Bd. of Governors, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) (emphasis added) (citations omitted).

The police powers of the State, though broad, are limited by constitutional guarantees.

> "In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment *has for its object the prevention of some offence or manifest evil, or the preservation of the public health, safety*, morals, *or general welfare*, and that there is some *clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof*, and that *the latter do, in some plain, appreciable, and appropriate manner, tend towards the accomplishment of the object* for which the power is exercised."

State v. Williams, 146 N.C. 618, 627, 61 S.E. 61, 64 (1908) (emphasis added) (citations omitted).

When no fundamental rights or protected classes of people are involved, the courts apply the following test:

> *If a statute is to be sustained* as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare. In brief, *it must be reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm.*

Ballance, 229 N.C. at 769–70, 51 S.E.2d at 735 (emphasis added) (citations omitted).

Certain restrictions on constitutional rights, such as ones based on "sex" or gender, require "intermediate scrutiny": "Articulations of intermediate scrutiny vary depending on context, but tend to require an important or substantial government interest, a direct relationship between the regulation and the interest, and regulation no more restrictive than necessary to achieve that interest." *State v. Packingham*, 368 N.C. 380, 387, 777 S.E.2d 738, 745 (2015) (citation omitted), *rev'd on other grounds*, *North Carolina v. Packingham*, ___ U.S. ___, 198 L. Ed. 2d 273 (2017). However: " '[A] law which burdens certain explicit or implied fundamental rights must be strictly scrutinized. It may be justified only by a compelling state interest, and must be narrowly drawn to express only the legitimate interests at stake.' " *Libertarian Party*, 200 N.C. App. at 332, 688 S.E.2d at 707 (citation omitted).

As our Supreme Court has recognized, the "liberty" protected by our constitution includes the right to live as one chooses, within the law,[4] unmolested by unnecessary State intrusion into one's privacy, or attacks upon one's dignity. *Tully v. City of Wilmington*, 370 N.C. 527, 534, 810 S.E.2d 208, 214 (2018) (citation omitted) ("The basic constitutional principle of personal liberty and freedom embraces the right of the individual to be free to enjoy the faculties with which he has been endowed[.] This precept emphasizes the dignity, integrity and liberty of the individual, the primary concern of our democracy.").

2. Application to Plaintiff's Appeal

[1] After *Obergefell*, and other precedent of the Supreme Court, there is no longer any doubt that *any* two consenting adults have a fundamental right to marry each other—absent fraud impacting a legitimate government interest. As far as romantic relationships are concerned, any member of the LGBTQ+ community has the same rights and freedoms to make personal decisions about dating, intimacy, and marriage as any non-LGBTQ+ individual. Therefore, there can be *no* State interest in interfering with Plaintiff's liberty to date whomever she wants to date, or to interfere with Plaintiff's private and intimate choices related to dating another consenting adult. Under the North Carolina Constitution, Plaintiff is similarly situated with every other adult in this regard.

The minimum level of review for Plaintiff's state constitutional challenges is that required by the Constitution of the United States, which we hold below is at least intermediate scrutiny. Therefore, N.C.G.S. § 50B-1(b)(6) can only survive Plaintiff's as-applied challenge if the State

4. Meaning valid, constitutional laws.

proves, at a minimum, (1) that the statute protects an "important or substantial government interest," (2) that the statute's requirements have a "direct relationship between the regulation and the interest [the State seeks to protect]," and (3) that the "regulation [is] no more restrictive than necessary to achieve that interest." *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 298, 749 S.E.2d 429, 436 (2012) (citation omitted). The State cannot meet its burden in this case.

" 'The best indicia of [legislative] intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.' " *State v. Byrd*, 185 N.C. App. 597, 603, 649 S.E.2d 444, 449 (2007) (citation omitted), *rev'd on other grounds*, 363 N.C. 214, 675 S.E.2d 323 (2009). "It is without question that the language of the statute, the spirit of Section 50B, and what [it] seeks to accomplish is to protect individuals from domestic violence through, inter alia, the imposition of an enhanced sentencing to serve as a deterrent against those who perpetrate the violence." *Id.* We can conceive of no scenario in which denying the protections of a DVPO to victims of domestic violence perpetrated by a same-sex partner furthers the "intent" of Chapter 50B, nor "what [it] seeks to accomplish"—reduction in domestic violence. *Id.* The requirement in N.C.G.S. § 50B-1(b)(6) that Plaintiff's complaint for a DVPO be denied solely based upon the "same-sex" nature of her relationship serves no government interest, much less any "important or substantial government interest." *Hest Techs.*, 366 N.C. at 298, 749 S.E.2d at 436. As applied to Plaintiff, the "regulation" involved, N.C.G.S. § 50B-1(b)(6), is in direct conflict with the purposes of the Act. Also, the "regulation," along with serving *no* "important," "substantial," or even legitimate government interest, is highly restrictive—it constitutes a *total and complete ban* on Plaintiff, and those similarly situated, obtaining DVPO protections against those who desire to do them harm. There is no question but that, as applied to Plaintiff, N.C.G.S. § 50B-1(b)(6) fails strict scrutiny, and violates both the due process clause—substantive and procedural, and the equal protection clause, of art. I, § 19, and the State, in its *amicus* brief, does not make any such argument—it argues the Act was unconstitutional as applied to Plaintiff and those similarly situated.

Even had the State desired to make such an argument, N.C.G.S. § 50B-1(b)(6) cannot survive even the lowest level of scrutiny. Absent any legitimate State interest, the statute is not "a legitimate exercise of the police power"; there is no "rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare"; and there is no scenario where it could be considered "reasonably necessary

to promote the accomplishment of a public good, or to prevent the infliction of a public harm." *Ballance*, 229 N.C. at 769–70, 51 S.E.2d at 735 (citations omitted). Instead, N.C.G.S. § 50B-1(b)(6), by denying Plaintiff and similarly situated people the protections it provides victims of domestic violence in "opposite-sex" dating relationships, runs directly counter to the promotion of the public good, welfare, morals, safety, and any other legitimate public interests of the State.

We hold, pursuant to the North Carolina Constitution, that N.C.G.S. § 50B-1(b)(6) is unconstitutional as-applied to Plaintiff and those similarly situated. *See Dunn v. Pate*, 334 N.C. 115, 123, 431 S.E.2d 178, 183 (1993) ("Plaintiffs have offered no argument as to what significant governmental interests, if any, were served by this gender-based distinction . . . and we will not speculate as to what those interests may have been. Since the . . . statutes at issue required unequal application of the law while serving no clearly discernable important governmental interest, they were unconstitutional . . . and will not [] be enforced by this Court.").

B. *The Fourteenth Amendment*

1. Text and Purpose

The first clause, the Privileges and Immunities Clause, prohibits differential treatment of any citizen of the United States based upon their present or former *state* citizenship. It also lays the foundational principle upon which the Due Process Clause and the Equal Protection Clause are premised—United States citizenship stands as a guarantee against the abridgement, by state action, of certain "privileges and immunities" that are fundamental rights of every United States citizen. *Id.*

It is the duty of this Court, like every court, to ensure the "privileges and immunities" referenced in the Fourteenth Amendment—which include the guarantee that all individual rights recognized in the Bill of Rights, as well as all other "fundamental rights" recognized as such in the Constitution and common law—are available to every citizen of our nation, and that all such persons, regardless of any other "statuses" that might be applied to them, receive equal privilege and protection under the law as those similarly situated.

The Supreme Court's recent decisions involving laws discriminating against "same-sex" individuals rely, in part, on the dissent from the *Civil Rights Cases*, decided shortly after ratification of the Fourteenth Amendment. The dissenting opinion recognized that the particular "status" of an individual, or "classifications" of particular groups of people

to which an individual may be deemed a member, were generally irrelevant when considering the individual's rights under the Fourteenth Amendment, and whether any of these rights had been violated. *Civil Rights Cases*, 109 U.S. 3, 29–30, 27 L. Ed. 835, 845 (1883) (Harlan, J., dissenting). The *only* status generally relevant to an individual's right to the full panoply of privileges, immunities, and protections guaranteed by the Constitution is that of *citizen*.[5]

2. Due Process

"[T]he Due Process Clause, like its forebear in the Magna Carta, was intended to secure the individual from the arbitrary exercise of the powers of government[,]" *Daniels v. Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 668 (1986) (citations and quotation marks omitted), and it "furnishes a guaranty against *any* encroachment by the State on the fundamental rights belonging to *every* citizen." *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 617, 89 S.E.2d 290, 295 (1955) (emphasis added) (citation omitted). Of course, the State can pass and enforce laws that impact the fundamental rights of certain groups of people, when done constitutionally:

> The police power of the State extends to all the compelling needs of the public health, safety, morals and general welfare. Likewise, the liberty protected by the Due Process . . . Clause[] of the Federal . . . Constitution[] extends to all fundamental rights of the individual. It is the function of the courts to establish the location of the dividing line between the two by the process of locating many separate points on either side of the line.

State v. Dobbins, 277 N.C. 484, 497, 178 S.E.2d 449, 457 (1971).

There are two interests protected by the Due Process Clause:

> Due process has come to provide two types of protection for individuals against improper governmental action, substantive and procedural due process. *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998). Substantive due process ensures that the government does not engage in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952), or hinder rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). In the event that

5. When a citizen is similarly situated to others to whom a particular law applies.

> the legislation in question meets the requirements of substantive due process, procedural due process "ensures that when government action deprive[s] a person of life, liberty, or property . . . that action is implemented in a fair manner." *Thompson*, 349 N.C. at 491, 508 S.E.2d at 282.

State v. Bryant, 359 N.C. 554, 563–64, 614 S.E.2d 479, 485 (2005) (citations omitted). Certain violations of substantive due process are so substantial that no procedure is sufficient to remedy the violation and, therefore, procedural due process analysis is not required to find the state action in question unconstitutional. Lesser violations of substantive due process require procedural due process analysis to determine whether the interests of the state advanced by its action, along with the procedural safeguards included in the state action, are sufficient to survive due process analysis. As recognized by our Supreme Court:

> That there is a limit to the police power which the courts must, when called upon in a judicial proceeding, ascertain and declare is as well settled as the existence of the power itself. . . . . "It does not at all follow that every statute enacted ostensibly for the promotion of [the public good] is to be accepted as a legitimate exercise of the police power of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. . . . . If, therefore, *a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge and thereby give effect to the Constitution.*"

Williams, 146 N.C. at 627, 61 S.E. at 64 (emphasis added) (citations omitted). We review substantive and procedural due process in turn.

a. Substantive Due Process

" 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.' " *Lawrence v. Texas*, 539 U.S. 558, 578, 156 L. Ed. 2d 508, 526 (2003) (citation omitted). The Due Process Clause "furnishes a guaranty against any encroachment by the State on the *fundamental rights* belonging to *every* citizen." *Sale*, 242 N.C. at 617, 89 S.E.2d at 295 (emphasis added) (citation omitted). When state action is alleged to abridge recognized personal rights fundamental to every individual, or when it is alleged to intrude upon constitutionally recognized liberty interests by targeting certain "categories" or "classes"

of individuals, substantive due process review is required. If state action unduly encroaches on "fundamental personal rights," whether of an individual or a "class" of people, then strict scrutiny review applies. *Clayton v. Branson*, 170 N.C. App. 438, 455, 613 S.E.2d 259, 271 (2005) (citations omitted); *Lawrence*, 539 U.S. at 577–79, 156 L. Ed. 2d at 525–26 (substantive due process prohibits state proscription of the liberty rights of members of a particular group—a "suspect class"—based on animus or historical acceptance of discrimination against the class). Under strict scrutiny review, " '*the party seeking to apply the law* must demonstrate that it serves *a compelling state interest*.' " *State v. Fowler*, 197 N.C. App. 1, 21, 676 S.E.2d 523, 540–41 (2009) (emphasis added) (citation omitted); *Clayton*, 170 N.C. App. at 455, 613 S.E.2d at 271.

However, " '[i]f the right infringed upon is not fundamental in the constitutional sense, the party seeking to apply it need only meet the traditional test of establishing that *the law is rationally related to a legitimate state interest*.' " *Fowler*, 197 N.C. App. at 21, 676 S.E.2d at 540–41 (emphasis added) (citation omitted); *Clayton*, 170 N.C. App. at 455, 613 S.E.2d at 271 (citations and quotation marks omitted) (explaining that, "[u]nless legislation involves a suspect classification or impinges upon fundamental personal rights, . . . the mere rationality standard applies and the law in question will be upheld if it has any conceivable rational basis").

When fundamental rights are abridged by state action, the state's interest must be weighed against the intrusion into those rights—factoring the nature of the fundamental right as well as the extent of the "intrusion." *See, e.g.*, *Dobbins*, 277 N.C. at 499, 178 S.E.2d at 457–58 ("the right to travel on the public streets is a fundamental segment of liberty and, of course, the absolute prohibition of such travel requires substantially more justification than the regulation of it by traffic lights and rules of the road"); *Lawrence*, 539 U.S. at 574, 156 L. Ed. 2d at 523 (citing *Romer v. Evans*, 517 U.S. 620, 624, 634, 134 L. Ed. 2d 855, 861(2003)) ("*Romer* invalidated an amendment to Colorado's Constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by 'orientation, conduct, practices or relationships,' and deprived them of protection under state antidiscrimination laws. We concluded that the provision was 'born of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate governmental purpose." (citing *Romer v. Evans*, 517 U.S. 620, 624, 634, 134 L. Ed. 2d 855, 861(2003))). Pursuant to precedent set by the Supreme Court, substantive due process prohibits state proscription of the liberty rights of members of a particular group—a suspect class—when

it is based on animus towards the class, or historical acceptance of discrimination against the class. *Lawrence*, 539 U.S. at 575–79, 156 L. Ed. 2d at 523–26 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

Substantive due process therefore prohibits a state from arbitrarily deciding which "classes" of people may enjoy the constitutional protections of recognized fundamental rights and which "classes" may be excluded. For example:

> [In *United States v. Windsor*, 570 U.S. 744, 186 L. Ed. 2d 808 (2013), the Supreme Court's] concern sprung from [the] creation of two classes of married couples within states that had legalized same-sex marriage: opposite-sex couples, whose marriages the federal government recognized, and same-sex couples, whose marriages the federal government ignored. The resulting injury to same-sex couples served as the foundation for the Court's conclusion that [the Defense of Marriage Act] violated the Fifth Amendment's Due Process Clause."

Bostic v. Schaefer, 760 F.3d 352, 378 (4th Cir. 2014). This Court, like the Supreme Court in *Lawrence*, 539 U.S. at 574, 156 L. Ed. 2d at 523, considers the Court's equal protection analysis in *Romer* in our substantive due process analysis. The Court in *Romer* noted:

> [The challenged law] identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for [the law] is itself instructive; '[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' "

Romer, 517 U.S. at 633, 134 L. Ed. 2d at 866 (citation omitted).

b. Procedural Due Process

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' . . . interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 31 (1976). "The

fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Id.* at 333, 47 L. Ed. 2d at 32 (citation omitted).

> " '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334–35, 47 L. Ed. 2d at 33 (citations omitted).

c. Application to Plaintiff's Appeal

[2] We first determine whether, by denying Plaintiff a DVPO based upon the nature of the relationship she had with the Defendant, any fundamental rights of Plaintiff's were abridged. Plaintiff, like everyone, enjoys a fundamental right to personal safety:

> The liberty preserved from deprivation without due process include[s] the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Among the historic liberties so protected was a right to be *free from*, and to *obtain judicial relief for*, unjustified *intrusions on personal security*.

Ingraham v. Wright, 430 U.S. 651, 673, 51 L. Ed. 2d 711, 731 (1977) (emphasis added) (citations omitted). "The State may not, of course, *selectively deny its protective services to certain disfavored minorities* without violating the Equal Protection Clause." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 n.3, 103 L. Ed. 2d 249, 259 n.3

(1989) (emphasis added) (citation omitted); *see also Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006) ("It is well established that the Constitution protects a citizen's liberty interest in her own bodily security. It is also well established that, although the state's failure to protect an individual against private violence does not generally violate the guarantee of due process, it can where the state action 'affirmatively place[s] the plaintiff in a position of danger,' that is, where state action creates or exposes an individual to a danger which he or she would not have otherwise faced." (citations omitted)).

Plaintiff had the same constitutional right under the Fourteenth Amendment to seek love or companionship with another woman as she would have had to seek such a relationship with a man. Her liberty rights were identical to those of any other woman seeking a dating relationship with a man. Plaintiff's constitutional rights to liberty, privacy, and intimacy in her relationship with Defendant were identical in every way to those of any other woman in an "opposite sex" relationship. Plaintiff would have had the fundamental right to marry Defendant; just as she had the fundamental liberty right to decide to end her relationship with Defendant. However, pursuant to N.C.G.S. § 50B-1(b)(6), Plaintiff, and those similarly situated, are intentionally denied, *by the State*, the same protections against the domestic violence that may occur after a "break-up," or for any other "reason" one person decides to intentionally injure another.

The State, through its legislation, has subjected Plaintiff to a heightened potential of harassment, or physical abuse, by denying her the more stringent and immediately accessible remedies and protections provided to "opposite sex" victims of domestic violence in situations similar to hers.[6] By its plain language, N.C.G.S. § 50B-1(b)(6) creates a class of persons *singled out* for exposure to a heightened risk of "fear of imminent serious bodily injury or continued harassment," as well as "intentionally caus[ed] bodily injury." N.C.G.S. §§ 50B-1(a)(1)-(2).

The class of excluded, or potentially excluded, persons is that class of people who are identified as members of the LGBTQ+ community, whether by self-identification or by statutory definition. The factors most commonly used in identifying members of the LGBTQ+ class are sexual orientation and gender identity—though we do not mean to suggest

6. We again note that the State, through the executive branch, argues in favor of Plaintiff, and a ruling requiring all persons, including those in the LGBTQ+ community, equal access to the full protections offered in Chapter 50B. However, only the General Assembly can amend the statutes.

these two classifications, which are themselves made up of people whose "sexual" and "gender" "identities" express great diversity, are meant to approach a full definition of the LGBTQ+ "class," or its "members." However, because the courts are required to classify people based upon the plain language of the statute, the Act requires the courts to intrude into the private lives of petitioners in order to know whether it must tell an abused person that Chapter 50B protections cannot be provided—because the State has determined they are not entitled to the same protections granted to similarly situated "opposite-sex" petitioners. A judicial inquiry and experience that may be, for many, an unwanted intrusion into their private lives that could lead to harmful consequences. N.C.G.S. § 50B-1(b)(6) imposes a *statutory requirement* that the trial court conduct this invasive inquiry, and the inquiry itself can result in emotional and psychological harm to the petitioners—and under the Act the outcome must always result in denial of the requested DVPO.

In this case, based on her allegations, Plaintiff, after having been physically assaulted, having been accosted on her property, having had the sanctity of her home invaded, and having been harassed, was seeking protections the State affords solely to a single class of people—one comprised of those whose personal identity includes romantic attraction to people of the opposite sex.[7] Further, Plaintiff could have obtained a DVPO if she and Defendant had cohabitated, if they were married, or had joint custody of a child.

Plaintiff's right of personal security, like everyone's, is fundamental, yet the State has denied her protective services it affords others based entirely on her LGBTQ+ status. It is solely this status that led the trial court to believe it lacked the jurisdiction to grant Plaintiff a DVPO. The Act's denial of Plaintiff's right to security placed her in a position that "expose[d] [her] to a danger which . . . she would not have otherwise faced." *Kennedy*, 439 F.3d at 1061 (citation omitted).

The Supreme Court has also recognized a general fundamental liberty right to personal "autonomy," "identity," and "dignity": "The fundamental liberties protected by [the Due Process] Clause include most of the rights enumerated in the Bill of Rights. In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell*, 576 U.S. at 663, 192 L. Ed. 2d at 623 (citations

7. And whose requests for protection under the act are based on alleged injury resulting from an "opposite sex" "dating relationship."

omitted). The Supreme Court recognizes that some of the most important and fundamental choices involving protected "liberties" are those involving personal and intimate unions with others. *Id*. at 665–66, 192 L. Ed. 2d at 624. Though these choices may lead to marriage, it is not necessary that they reach that point before they become constitutionally fundamental. *Id*. (emphasis added) (citation omitted) ("Like choices concerning contraception, family relationships, procreation, and childrearing, *all of which are protected by the Constitution*, decisions concerning marriage are among the most intimate that an individual can make."). The Court has stated:

> In explaining the respect the Constitution demands for the autonomy of the person in making these [very personal] choices, we stated as follows:
>
> > "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are *central to the liberty protected by the Fourteenth Amendment.* At the *heart of liberty* is the *right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.*"
>
> Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.

Lawrence, 539 U.S. at 574, 156 L. Ed. 2d at 523 (emphasis added) (citation omitted).

Plaintiff has a right to the liberty to pursue her "own concept of existence" and the other "myster[ies] of human life" with the same autonomy, dignity and security as any other person in her situation. This pursuit will undeniably be impacted by the choices she makes regarding romantic or intimate partners. This right, "central to personal dignity and autonomy," is fundamental, and should not be interfered with by the State. By telling Plaintiff that her existence is not as valuable as that of individuals who engage in "opposite-sex" relationships, the State is not just needlessly endangering Plaintiff, it is expressing State-sanctioned animus toward her. Adopting the reasoning and analysis of the Court in *Windsor*, we hold:

> [T]hough [the General Assembly] has great authority to design laws to fit its own conception of sound . . .

> policy, it cannot deny the liberty protected by the Due Process Clause[.]
>
> What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of [N.C.G.S. § 50B-1(b)(6) is] to demean those persons who are in a lawful [dating relationship that turns violent]. This requires the Court to hold, as it now does, that [N.C.G.S. § 50B-1(b)(6), as applied,] is unconstitutional as a deprivation of the liberty of the person protected by the [Fourteenth] Amendment of the Constitution.

Windsor, 570 U.S. at 774, 186 L. Ed. 2d at 829–30.

3. Equal Protection

a. General Principles

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 320 (1985) (citation omitted).

> The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, *if* a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Romer, 517 U.S. at 631, 134 L. Ed. 2d at 865 (emphasis added) (citations omitted). Further, the State must respect "the principle that government and each of its parts remain open on impartial terms to all who seek its assistance:

> " 'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.' " Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall

> be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' "

Romer, 517 U.S. at 633–34, 134 L. Ed. 2d at 866–67 (citations omitted).

At a minimum, the state cannot make a statutory classification of people in order "to make them unequal to everyone else. . . . . A State cannot so deem a class of persons a stranger to its laws." *Romer*, 517 U.S. at 635, 134 L. Ed. 2d at 868. " '[A] classification cannot be made arbitrarily[.]' . . . . '[A]rbitrary selection can never be justified by calling it classification.' " *McLaughlin v. Florida*, 379 U.S. 184, 190, 13 L. Ed. 2d 222, 227 (1964) (citations omitted). Finally, "[j]udicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose[.]" *Id*. at 191, 13 L. Ed. 2d at 228.

Pursuant to the generally applied approach:

> Our analysis of the Opponents' Fourteenth Amendment claims has two components. First, we ascertain what level of constitutional scrutiny applies: either rational basis review or some form of heightened scrutiny, such as strict scrutiny. Second, we apply the appropriate level of scrutiny to determine whether the . . . [l]aws pass constitutional muster.
>
> Under both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny. *Glucksberg*, 521 U.S. 702, 719–20; *Zablocki*, 434 U.S. 374, 383. We therefore begin by assessing whether the . . . [l]aws infringe on a fundamental right. Fundamental rights spring from the Fourteenth Amendment's protection of individual liberty, which the Supreme Court has described as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. 833, 851.

Bostic, 760 F.3d at 375 (citations omitted). Strict scrutiny also applies "when a regulation classifies persons on the basis of certain designated suspect characteristics[.]" *Dep't of Transp. v. Rowe*, 353 N.C. 671,

675, 549 S.E.2d 203, 207 (2001) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16–17, 36 L. Ed. 2d 16, 33 (1973); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980)).

> If a regulation receives strict scrutiny, then the state must prove that the classification is necessary to advance a compelling government interest; otherwise, the statute is invalid. *San Antonio*, 411 U.S. at 16–17. Other classifications, including gender and illegitimacy, trigger intermediate scrutiny, which requires the state to prove that the regulation is substantially related to an important government interest. *Clark v. Jeter*, 486 U.S. 456 (1988); *Craig v. Boren*, 429 U.S. 190 (1976), 429 U.S. 190407 (1976). If a regulation draws any other classification, it receives only rational-basis scrutiny, and the party challenging the regulation must show that it bears no rational relationship to any legitimate government interest. If the party cannot so prove, the regulation is valid. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *Texfi*, 301 N.C. at 11.

Rowe, 353 N.C. at 675, 549 S.E.2d at 207 (citations omitted).

b. Application to Plaintiff's Appeal

[3] The *core* of the Equal Protection Clause is the principle that "all persons similarly circumstanced shall be treated alike." *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37, 72 L. Ed. 770, 774 (1928) (citations and quotation marks omitted). As noted, "generally [ ] the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, and that it applies to the exercise of all the powers of the state which can affect the individual[.]" *Id.* "[C]lassifications affecting fundamental rights are given the most exacting scrutiny." *Clark*, 486 U.S. at 461, 100 L. Ed. 2d at 471 (citations omitted). We have held above that Plaintiff has a fundamental right to liberty, which includes the right to personal security, dignity and " 'the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.' *Casey*, 505 U.S. 833, 851." *Bostic*, 760 F.3d at 375 (citation omitted). Therefore, we hold Plaintiff's as-applied challenge to the Act must be reviewed under strict scrutiny.

The *only* thing preventing Plaintiff from being similarly situated to an "opposite-sex" person in a former "dating relationship" is *the statute* itself—N.C.G.S. § 50B-1(b)(6). Plaintiff's LGBTQ+ status is a "mere difference" between her and a woman in an "opposite-sex" "dating relationship," and this status "is not enough" to justify the injury the State is

perpetrating on Plaintiff. *Coleman*, 277 U.S. at 37, 72 L. Ed. at 774 (citations omitted). The statute only serves to promote both the frequency and severity of domestic violence, in a targeted group that is, pursuant to the Constitution of the United States, in no legally cognizable or relevant manner different from the group identified by N.C.G.S. § 50B-1 as persons who are, or have been, in a "dating relationship" with a person of the "opposite-sex" and, therefore, permitted the protections of a DVPO by N.C.G.S. § 50B-1(b)(6). The "opposite-sex" distinction limiting the protections of N.C.G.S. § 50B-1(b)(6) was "made arbitrarily," and so remains, and N.C.G.S. § 50B-1(b)(6) bears no "reasonable" nor "just relation to [Chapter 50B] in respect to which the classification is proposed[.]" *Coleman*, 277 U.S. at 37, 72 L. Ed. at 774 (citations and quotation marks omitted). N.C.G.S. § 50B-1(b)(6) "is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Romer*, 517 U.S. at 635, 134 L. Ed. 2d at 868. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government *is itself* a denial of equal protection of the laws in the most literal sense." *Id.* at 633, 134 L. Ed. 2d at 867 (emphasis added) (citations omitted). Because the State has provided Chapter 50B protections to the "majority" of persons in "dating relationships," it cannot deny them to a "minority" without surviving strict scrutiny review—which it cannot do. *DeShaney*, 489 U.S. at 197 n.3, 103 L. Ed. 2d at 259 n.3 (citation omitted) ("The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.").

[4] We further hold that N.C.G.S. § 50B-1(b)(6), as applied to Plaintiff and those similarly situated, cannot withstand even "rational basis" review and, therefore, it would also fail "intermediate scrutiny." There is simply no rational basis that could support this law, in part because there is no cognizable government interest that N.C.G.S. § 50B-1(b)(6) could serve to protect as applied in Plaintiff's case.

4. Review in Cases Alleging State Action Targeted at LGBTQ+ Status

[5] Seventeen years after the Supreme Court upheld a Georgia statute outlawing certain sex acts associated with same-sex relationships in *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140 (1986), the Court overruled *Bowers* in *Lawrence*, later noting that "*Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation." *Obergefell*, 576 U.S. at 678, 192 L. Ed. 2d at 633. *Lawrence* relied heavily on two cases the Court had decided after

Bowers, one based on due process grounds and the other on equal protection grounds:

> Two principal cases decided after *Bowers* cast its holding into . . . doubt. In *Planned Parenthood [] v. Casey*, [] the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:
>
> > "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."
>
> Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.
>
> The second post-*Bowers* case of principal relevance is *Romer v. Evans*. There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. *Romer* invalidated an amendment to Colorado's Constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose.

Lawrence, 539 U.S. at 573–74, 156 L. Ed. 2d at 522–23 (citations omitted). In *Casey*, the Supreme Court stated in plain terms that the "liberties" protected by the Fourteenth Amendment have, and will continue to, evolve as society evolves:

> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. As Justice Harlan observed:
>
> > "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound."

Casey, 505 U.S. at 849–50, 120 L. Ed. 2d at 697 (citations omitted).

In *Romer*, the Supreme Court considered of the Colorado amendment, and decided: "Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." It was this specific targeting of people of LGBTQ+ status for discriminatory treatment by the state that the Court found unacceptable and in direct contradiction to the guarantees of the Fourteenth Amendment:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. " 'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.' " Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare.

> A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' "

Romer, 517 U.S. at 633–34, 134 L. Ed. 2d at 866–67 (citations omitted). The Court recognized the *particular* harm that is done when state discrimination is directed against a classification of people who are, and have historically been, subjected to societal animus. "[L]aws of the kind now before us raise the *inevitable inference* that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634, 134 L. Ed. 2d at 867 (emphasis added) (citation omitted).

The Supreme Court recognized, in *Lawrence*, that its test for determining the constitutionality of allegedly discriminatory state action against a minority group included, *as justification for upholding the challenged action*, the fact that discrimination and animus directed at the targeted minority group had been considered acceptable and appropriate by the "majority" for some historically "significant" period of time. *Lawrence*, 539 U.S. at 567, 156 L. Ed. 2d at 518. The Court held this kind of judicial review—one that considered *as the basis* for upholding discriminatory state action the fact that such discrimination not only *existed* in reality, but *was approved of* by a majority of the populace, based upon "historical" and ongoing animus toward the group targeted by the state action—was violative of both the spirit and the constitutional requirements of the Fourteenth Amendment. *Id.*; *see also Obergefell*, 576 U.S. at 671–72, 192 L. Ed. 2d at 628. This truth was further recognized by the Court in *Windsor*, as well as that the fundamental right of "liberty" includes personal "dignity" and "integrity"—the right to make intimate decisions and live one's life in a manner that is true to oneself without unwarranted interference or judgment backed by the laws of the state:

> By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's

> considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

Windsor, 570 U.S. at 769, 186 L. Ed. 2d at 826–27 (citation omitted).

In considering a Fourth Amendment challenge to the Defense of Marriage Act ("DOMA"), the Court in *Windsor*, following *Romer*, conducted a review that was, in large part, "animus"-based review:

> DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. In determining whether a law is motived by an improper animus or purpose, " '[d]iscriminations of an unusual character' " especially require careful consideration. *Supra*, at 2692 (quoting *Romer*, *supra*, at 633). DOMA cannot survive *under these principles*.

Id. at 769–70, 186 L. Ed. 2d at 827 (emphasis added) (citations omitted); *see also id*. at 772, 186 L. Ed. 2d at 828 (citations omitted) ("By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. . . . . The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship [New York] State has sought to dignify."). "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality[.]" *Windsor*, 570 U.S. at 772, 186 L. Ed. 2d at 828. "Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways." *Id*. "[T]hough Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment"—"the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved." *Id*. at 774, 186 L. Ed. 2d at 829, 830. "What has been explained to this point should more than suffice to establish that *the principal purpose and*

the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution." *Id.* at 774, 186 L. Ed. 2d at 829–30 (emphasis added).

In *Obergefell*, the Court finally held what its opinions in *Romer*, *Lawrence*, and *Windsor* had been trending toward—that the fundamental right to marry attaches to all people, and it is a violation of the Fourteenth Amendment for the state to deprive a person of this fundamental right based *solely* on who they love and choose to marry. The state cannot deny someone in the LGBTQ+ community the benefit of a constitutionally protected right based *solely* on that person's LGBTQ+ status.[8] The Court, building on *Romer*, *Lawrence*, and *Windsor*, recognized what, in retrospect, was obvious—discrimination, whether newly minted or historically accepted, cannot be the very justification for upholding the law challenged as discriminatory. *Obergefell*, 576 U.S. at 665, 192 L. Ed. 2d at 624–25; *id.* at 671–72, 192 L. Ed. 2d at 628.

> The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." . . . . History and tradition guide and discipline this inquiry but do not set its outer boundaries. *That method respects our history and learns from it without allowing the past alone to rule the present.*
>
> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we *learn* its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Id. at 663–64, 192 L. Ed. 2d at 623–24 (emphasis added) (citations omitted).

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8. And though there may be some particular set of facts that could survive Fifth or Fourteenth Amendment review for such a law, we do not doubt that such a law, and set of facts, would be the rare exception.

> *If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.* This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. *See Loving*, 388 U.S. 1, 12; *Lawrence*, 539 U.S. at 566–67.
>
> The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. . . . . [W]hen [a] sincere, personal opposition [to same-sex marriage based on "religious or philosophical premises,"] becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

Id. at 671–72, 192 L. Ed. 2d at 628–29 (emphasis added) (citations omitted).

The Court's opinion in *Obergefell* establishes that legislation targeting the rights of those in the LGBTQ+ community is subject to something greater than "rational basis" review.[9] The Court in *Obergefell* highlighted the interconnected role of the Due Process Clause's "liberty" guarantees and the right to "equal protection under the law" guaranteed by the Equal Protection Clause, held that the protections of the Fourteenth Amendment apply equally to LGBTQ+ and non-LGBTQ+ persons, and gave particular attention to the *injuries inflicted* by laws targeting LGBTQ+ persons for unequal treatment. *Obergefell*, 576 U.S. at 671–76, 192 L. Ed. 2d at 628–31. The Court concluded:

> It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in

9. The words "rational basis," "intermediate scrutiny," "strict scrutiny," "test," and "review" do not occur in the opinion within any context related to the review conducted by the Court based on the facts before it.

> essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.

Id. at 675, 192 L. Ed. 2d at 631 (citations omitted). The Court then held "that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." *Id.* at 675–76, 192 L. Ed. 2d at 631. The Court in *Obergefell*, as it did in *Romer*, *Lawrence*, and *Windsor*, was clearly operating pursuant to this principle as it labored to determine the correct standards to apply in the face of government action that had a discriminatory effect on members of the LGBTQ+ community. *Id.* at 675, 192 L. Ed. 2d at 631 (citation omitted) ("*Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State 'cannot demean their existence or control their destiny by making their private sexual conduct a crime.' "); *id.*, at 675, 192 L. Ed. 2d at 631.

The resulting standard, which must be applied in light of the particular facts of the case under review, is based upon both the Due Process and Equal Protection Clauses, incorporating both the due process concept of fundamental "liberty" and the equal protection "disparate treatment" review—what we, above, have called "full Fourteenth Amendment" review.[10] *See Lawrence*, 539 U.S. at 575, 156 L. Ed. 2d at 523 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."). "In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our

10. We recognize that these cases were neither brought nor decided pursuant to the first clause of section 1 of the Fourteenth Amendment, the Privileges and Immunities Clause.

understanding of what freedom is and must become." *Obergefell*, 576 U.S. at 672, 192 L. Ed. 2d at 629 (citations omitted). The Court noted that review based upon the interrelationship between both clauses was not a novel proposition. *Id.* at 674, 192 L. Ed. 2d at 630–31. This full Fourteenth Amendment review clearly requires the government to prove more than is required by the "rational basis" test, though the Court has not named or defined the appropriate "test" that should be applied in cases of this nature. We believe this omission was intentional, and that, in the cases culminating in *Obergefell*, the full Fourteenth Amendment review applied by the Court is a more comprehensive review that does not readily fit within the "rational basis," "intermediate scrutiny," or "strict scrutiny" triad.

Instead, the Court has focused on (1) the clear intent of the government in passing challenged laws as part of its review, as the clear intent may "belie any legitimate justifications that may be claimed for" the laws, *Romer*, 517 U.S. at 635, 134 L. Ed. 2d at 867; *id.* at 634–35, 134 L. Ed. 2d at 867 (citation omitted) (" '[I]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.' "); (2) the additional impact when majority "opposition becomes enacted law and public policy" and "the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied[,]" *Obergefell*, 576 U.S. at 672, 192 L. Ed. 2d at 629; and (3) the particular harms the laws inflicted on same-sex individuals, couples, and families: "Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them[,]" *id.* at 675, 192 L. Ed. 2d at 631; *id.* at 668, 192 L. Ed. 2d at 627 (explaining "children suffer the stigma of knowing their families are somehow lesser" as a result of such laws).

Pursuant to *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, this Court must "dr[a]w upon principles of liberty and equality to define and protect the rights of gays and lesbians," and insure "the State '[does not] demean their existence or control their destiny' " through legislation that "impos[es] . . . disabilit[ies] on gays and lesbians serv[ing] to disrespect and subordinate them[,]" *id.* at 675, 192 L. Ed. 2d at 631; "impose[s] stigma and injury of the kind prohibited by our basic charter[,]" *id.* at 670–71, 192 L. Ed. 2d at 628; or constitutes an "unjustified infringement [upon their] fundamental right[s,]" *id.* at 675, 192 L. Ed. 2d at 631 (citations omitted).

From our review, we hold that *Obergefell* counsels, in relevant part, the following: (1) Laws that serve to deny members of the LGBTQ+ community rights afforded to non-LGBTQ+ individuals are highly suspect, and a reviewing court *must* consider a number of factors that will weigh against the constitutionality of such a law; among these factors (2) the reviewing court must consider the *actual* intent of the state in enacting the law, if possible—whether indicated by its plain language, consideration of the law's real-world impact, through historical and legislative review including the failure to amend a law that is unnecessarily discriminatory in fact;[11] (3) the court must consider the *particular* harms suffered by LGBTQ+ persons when the State denies them equal rights to liberty and access to the law based on their LGBTQ+ status; (4) the court must factor that the particular harms suffered are based in part on "a long history of disapproval of the[] relationships" between LGBTQ+ persons, *id.* at 675, 192 L. Ed. 2d at 631; (5) the court must assess the injury that occurs when official State action, which singles out members of the LGBTQ+ community for the denial of rights afforded non-LGBTQ+ persons—including that such action imposes a state-sanctioned "stigma" upon LGBTQ+ individuals which "diminishes" them, "demeans their existence," interferes with their "autonomy" and "control of their destiny," impugns their "dignity," and serves to unfairly call into question their rightful place as equal members of society—as equal "citizens," *id.* at 670–71, 675, 192 L. Ed. 2d at 628, 631 (citations omitted).

These factors must be weighed against whatever legitimate interest is advanced by the challenged action, considering the context and particular facts involved. The Court in *Obergefell* emphasized the importance of the principle that " '[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power[,]" *id.* at 677, 192 L. Ed. 2d at 632 (alteration in original) (citation omitted), and held "the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of [a] fundamental right" denied based upon a person's LGBTQ+ status, *id.* at 675, 192 L. Ed. 2d at 631.

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11. Neither the government's stated intent—unless determined to be the same as its actual intent, nor any *hypothetically conceivable* legitimate purpose, shall serve to mitigate the weight given to the harm that results when "the imprimatur of the State itself on an exclusion[ary law] . . . demeans or stigmatizes those whose own liberty is then denied." *Obergefell*, 576 U.S. at 672, 192 L. Ed. 2d at 629; *see also Lawrence*, 539 U.S. at 580, 156 L. Ed. 2d at 526–27 (citations omitted) ("We have consistently held . . . that some objectives, such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

We hold in this case that N.C.G.S. § 50B-1(b)(6) does not survive this balancing test. "A State cannot so deem a class of persons a stranger to its laws." *Romer*, 517 U.S. at 635, 134 L. Ed. 2d at 868. Plaintiff has asked this Court "for equal dignity in the eyes of the law. The Constitution grants [Plaintiff] that right." *Obergefell*, 576 U.S. at 681, 192 L. Ed. 2d at 635. The Act fails to survive the review required pursuant to our analyses of *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, and we so hold.

D. *Bostock v. Clayton County*

1. The Decision

The United States Supreme Court recently decided *Bostock*, 590 U.S. __, 140 S. Ct. 1731, 207 L. Ed. 2d 218, which this Court finds relevant to our review. Writing for the majority, Justice Gorsuch noted: "Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status." *Id.* at ___, 140 S. Ct. at 1737, 207 L. Ed. 2d at ___. The Court was deciding a statutory challenge to part of Title VII—42 U.S.C. § 2000e-2(a)(1): "This Court normally interprets a statute in accord with the *ordinary public meaning* of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President"—42 U.S.C. § 2000e-2 was enacted in 1964. *Bostock*, 590 U.S. at ___, 140 S. Ct. at 1738, 207 L. Ed. 2d at ___ (emphasis added) (citation omitted). Further, the Court added, "we must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally." *Id.* at ___, 140 S. Ct. at 1750, 207 L. Ed. 2d at ___. The Court stated in relevant part: "With this in mind, our task is clear. We must determine the *ordinary public meaning* of Title VII's command that it is 'unlawful . . . for an employer to . . . discriminate against any individual . . . *because of* such individual's . . . *sex*[.]' § 2000e–2(a)(1)." *Id.* at ___, 140 S. Ct. at 1738, 207 L. Ed. 2d at ___ (emphasis added) (citation omitted).

In *Bostock*, "The only statutorily protected characteristic at issue . . . [was] 'sex[.]' " *Id.* at ___, 140 S. Ct. at 1739, 207 L. Ed. 2d at ___. "Appealing to roughly contemporaneous dictionaries, the employers [argued] that, as used here, the term 'sex' in 1964 referred to 'status as either male or female [as] determined by reproductive biology.' " *Id.* The Court stated that it would "proceed on the *assumption* that 'sex' signified what the employers suggest, referring only to biological distinctions

between male and female[,]" "because nothing in our approach to these cases turns on the outcome of the parties' debate [concerning the definition of 'sex'], and because the employees concede the point *for argument's sake*[.]" *Id.* (emphasis added). Therefore, the Court focused on whether, pursuant to a plain language reading, discrimination "because of" an employee's "sex"—even when narrowly defined as limited to reproductive biology—included discrimination based upon a person's status as gay, lesbian, or transgender. The Court noted that, applying the restricted definition of "sex" argued by the employers, and the "ordinary meaning" of "because of," the statute required at a minimum proof of "but-for" causation:

> [T]he statute prohibits employers from taking certain actions "because of " sex. And, as this Court has previously explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.' " In the language of law, this means that Title VII's "because of" test incorporates the " 'simple' " and "traditional" standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

Id. (citations omitted). The Court held:

> It doesn't matter if other factors besides the plaintiff's sex contributed to the decision [to fire the employee]. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.

Id. at ___, 140 S. Ct. at 1741, 207 L. Ed. 2d at ___. The Court gives plenary examples to demonstrate the principles and logic behind this holding, which are instructive. *See Id.* at ___, 140 S. Ct. at 1741–49, 207 L. Ed. 2d at ___. Although in *Bostock* the Court was construing a statute, its definitions and analysis are relevant to due process and equal protection claims, in that it holds the definition of "sex," absent any qualifying language, includes "homosexuals" or "transgender" people when the issue is discrimination or disparate treatment based, at least in part, on the

status of a person as "homosexual" and "transgender"—*i.e.*, based on a person's sexual orientation or gender identity.

Therefore, the majority held that discrimination against someone because that person is "homosexual" or "transgender"—*i.e.*, based on who that person chooses to have intimate relations with, or the gender identity with which the person identifies—constitutes discrimination against that person, at least in part, based on their gender, or "sex;"

> Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender *fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision[.]*

Id. at ___, 140 S. Ct. at 1737, 207 L. Ed. 2d at ___ (emphasis added); *id.* at ___, 140 S. Ct. at 1742, 207 L. Ed. 2d at ___ ("an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person"). The Court reasoned:

> [H]omosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because *to discriminate on these grounds requires [the] . . . intentiona[l] treat[ment of] individual[s] . . . differently because of their sex.*

Id. at ___, 140 S. Ct. at 1742, 207 L. Ed. 2d at ___ (emphasis added).

Neither does it affect the analysis if an employer "is equally happy to fire male *and* female employees who are homosexual or transgender." *Id.* Further, "the plaintiff's sex need not be the sole or primary cause of the employer's adverse action. . . . . [The analysis does not change i]f another factor—*such as the sex the plaintiff is attracted to or presents as*—might also be at work, or even play a more important role in the employer's decision." *Id.* at ___, 140 S. Ct. at 1744, 207 L. Ed. 2d at ___ (emphasis added). The Court held: "We do not hesitate to recognize today . . .: An employer who fires an individual merely for being gay or transgender" is discriminating against that person because of that individual's "sex." *Id.* at ___, 140 S. Ct. at 1754, 207 L. Ed. 2d at ___. "The

fact that [it is the combination of] female sex *and* attraction to women [that] can . . . get an employee fired does no more than show the same outcome can be achieved through the combination of different factors. In either case . . . sex plays an essential but-for role." *Id.* at ___, 140 S. Ct. at 1748, 207 L. Ed. 2d at ___ (emphasis added). The context surrounding the discriminatory act must be factored into the analysis, and that includes the "sex" of a complainant's partner, or the "sex" of the complainant at birth, as determined by biology. *Id.*

2. Relevance to Plaintiff's Appeal

[6] We first note that the Supreme Court has held that "because of" language used to determine a "discriminatory purpose" when required for an Equal Protection Clause challenge "applies to the 'class-based, invidiously discriminatory animus' requirement of" federal statutes. Therefore, the Court's analysis of Title VII in *Bostock* is also relevant to similar requirements imposed by the Fourteenth Amendment in the case before us. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 272, 122 L. Ed. 2d 34, 48 (1993) (citations omitted). Though *Bostock* was decided by statutory interpretation of certain language in Title VII, the reasoning in *Bostock* in support of its determination, that "*it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex*[,]" includes a common, plain language definition of "sex" in the context of discrimination that, absent some exclusionary language, must logically include sexual-orientation and gender identity. *Bostock*, 590 U.S. at ___, 140 S. Ct. at 1741, 207 L. Ed. 2d at ___ (emphasis added). Therefore, the definition of "sex" in *Bostock* should apply equally to any law denying protections or benefits to people based upon sexual orientation or gender identity—disparate treatment based on these "statuses" is disparate treatment based, at least in part, upon "sex" or gender. *See id.*

This Court has conducted an analysis similar to that in *Bostock* concerning the meaning of "racial animus" in a statute increasing punishment for certain crimes committed "with racial animus," and reached an analogous conclusion. *See* N.C.G.S. § 14-3 (2019); *State v. Brown*, 202 N.C. App. 499, 503, 689 S.E.2d 210, 213, *disc. review denied*, 364 N.C. 243, 698 S.E.2d 657 (2010). In *Brown*, the defendant "argue[d] that because both he and Peterson[, the victim,] [we]re of the same race, . . . the ethnic animosity statute, [could]not apply." *Brown*, 202 N.C. App. at 503, 689 S.E.2d at 213. N.C.G.S. § 14-3(c) mandates increased sentences when certain misdemeanors are "committed because of the victim's race, color, religion, nationality, or country of origin[.]" N.C.G.S.

§ 14-3(c). This Court looked in part to Title VII opinions for guidance and noted: "There is nothing in either the language of [the statute], or the title of the bill, to suggest the General Assembly intended a narrow construction of what constituted 'ethnic animosity' or acts 'committed because of the victim's race or color.' " *Brown*, 202 N.C. App. at 508, 689 S.E.2d at 215. We held that a white man who assaults another white man based, in part, on the defendant's objection to the victim's romantic relationship with an African-American woman, has committed the assault " 'because of the victim's race or color' ":

> Had Peterson been an African–American, Defendant might not have shot at Peterson. Therefore, the jury could reasonably find that Defendant[, a white man,] only shot at Peterson *because Peterson was white*, and Defendant was acting out his disgust with, or anger towards, Peterson because of Peterson's relationship with a woman of a different race or color.

Id. at 508, 689 S.E.2d at 215–16 (emphasis added).

When an equal protection challenge is raised: "Our decisions . . . establish that the party seeking to uphold a statute that classifies individuals on the basis of their *gender* must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 73 L. Ed. 2d 1090, 1098 (1982) (emphasis added) (citations omitted). Therefore, the Supreme Court's definition of "sex," or gender, in *Bostock* is relevant in this Court's review of Plaintiff's Fourteenth Amendment challenge before us.

In this case, N.C.G.S. § 50B-1(b)(6) limits the protections of DVPOs to "persons of the opposite sex who are in a dating relationship or have been in a dating relationship." N.C.G.S. § 50B-1(b)(6). The plain language of the statute specifically denies the protections of DVPOs to similarly situated "persons of the [same] sex who are in a dating relationship or have been in a dating relationship." N.C.G.S. § 50B-1(b)(6) (alteration in bracket). Pursuant to well-established precedent, cited above, and the reasoning in *Bostock*, N.C.G.S. § 50B-1(b)(6), on its face, treats similarly situated people differently based upon their "sex" or gender. Pursuant to *Bostock*, "An individual's homosexuality or transgender status is not relevant [to the review]. That's because *it is impossible* to discriminate against a person for being homosexual or transgender *without discriminating against that individual based on sex*." *Bostock*, 590 U.S. at ___, 140 S. Ct. at 1741, 207 L. Ed. 2d at ___ (emphasis added). As we have already held above, N.C.G.S. § 50B-1(b)(6) does not survive "intermediate scrutiny," which applies in cases where the alleged government

discrimination is based on "sex" or gender and, therefore, the statute does not survive application to Plaintiff pursuant to the review demanded by *Bostock*.

VI. Amicus Curiae

We must now address certain issues involving this Court's appointment of an *amicus curiae* to brief counterarguments to Plaintiff's appeal. The trial court entered two final judgments on 7 June 2018, the 50B Order that denied Plaintiff's request for a DVPO, and the 50C Order that granted Plaintiff a "permanent" civil no-contact order. In both of these orders, the trial court indicated that it would have granted Plaintiff's request for a DVPO had Plaintiff been a man—a person of the opposite "sex" from Defendant. Plaintiff gave notice of appeal from the 50B Order. Approximately three months after Plaintiff's request for a DVPO was denied, Defendant informed the trial court by a letter, dated 8 September 2018, that she did not "want [to] be involved."

This appeal involves issues of great public interest, the decision of which will affect the protections available to individuals of LGBTQ+ status who suffer domestic violence. Therefore, this Court's decision will have an impact far beyond the immediate impact it will have on Plaintiff and Defendant. The public interest in the resolution of Plaintiff's appeal is in part demonstrated by the fact that, on appeal, Plaintiff is represented by attorneys representing ACLU of North Carolina Legal Foundation along with Plaintiff's trial attorney.

Notably, the State of North Carolina, in its *amicus* brief, does *not* defend the constitutionality of N.C.G.S. § 50B-1(b)(6), noting that "the State maintains a variety of programs to assist victims of domestic violence" and "the State also has a related interest in ensuring that all its people are treated equally under the law. This interest is particularly [strong] . . . where certain groups are being denied equal legal protections from private violence[,]" because "[t]he State and its law-enforcement community have an obligation to ensure the safety and security of all North Carolinians, without regard to their sexual orientation." The Governor moved to join the State's *amicus* brief, noting "[t]his case concerns whether persons in same-sex relationships should be afforded equal legal rights and protections from domestic violence" and stating the "Governor shares the State's strong interest in ensuring that law enforcement has robust tools at its disposal to prevent and punish all forms of domestic violence." The Governor "also shares the State's overlapping interest in ensuring that all North Carolinians are treated equally under the law."

Additionally, an *amicus* brief was filed by

> North Carolina Coalition Against Domestic Violence [("NCCADV")]; Legal Aid of North Carolina [("LANC")]; and several local domestic violence support organizations, including Albemarle Hopeline, serving Camden, Chowan, Currituck, Gates, Pasquotank, and Perquimans Counties; Center for Family Violence Prevention, serving Pitt, Martin, and Washington Counties; Cleveland County Abuse Prevention Council, Inc., serving Cleveland County; Compass Center for Women and Families, serving Orange County; Domestic Violence Shelter and Services, Inc., serving New Hanover County; Durham Crisis Response Center, serving Durham County; Families First, serving Bladen and Columbus Counties; Family Service of the Piedmont, serving Guilford County and the Central Hub of the LGBTQ Capacity Building Grant serving 25 counties; Helpmate Domestic Violence Services, serving Buncombe County; Hoke County Domestic Violence and Sexual Assault Center, serving Hoke County; Outer Banks Hotline, Inc., serving Dare County; InterAct, serving Wake County; A Safe Home for Everyone, serving Ashe County; and Southeastern Family Violence Center, serving Robeson County.

NCCADV states that it "strives to empower all North Carolina communities to build a society that prevents and eliminates domestic violence" as "a nonprofit agency that leads the state's movement to end domestic violence and to enhance work with survivors through collaborations, innovative trainings, prevention, technical assistance, state policy development and legal advocacy." LANC "is a statewide, nonprofit law firm that provides free legal services in civil matters to low-income people in order to ensure equal access to justice."

Another *amicus* brief was filed by " 'North Carolina LGBTQ+ Non-Profit Organizations' " ("NCLNPO"), comprised of statewide and southeastern regional divisions of Equality N.C., Campaign for Southern Equality, Safe Schools NC, Inc., four organizations based in the law schools of North Carolina Central University, the University of North Carolina, Wake Forest University, and Duke University, as well as an additional ten non-profit organizations providing support for the LGBTQ+ community in North Carolina. NCLNPO is "interested in ensuring that victims of same-sex domestic violence receive the same state protections as victims of opposite-sex domestic violence."

However, no appellee brief was filed by, or on behalf of, Defendant, nor did any *amici* request to file briefs in support of the constitutionality of N.C.G.S. § 50B-1(b)(6). Therefore, this Court was left to decide the important matter before us without the benefit of competing appellate arguments. In light of this deficit, this Court, by order entered 3 May 2019 (the "Appointing Order"), appointed *Amicus* "to defend the ruling of the trial court"; because the parties and the public interest would be best served by the addition of a brief setting forth a well-considered argument for the constitutionality of N.C.G.S. § 50B-1(b)(6).

Amicus was directed to argue the *correctness* of the trial court's ruling, *including* its reasoning, and to contest Plaintiff's arguments, in order to provide this Court with an independent source of legal argument addressing the fundamental issues of important public interest raised by Plaintiff's appeal—whether the trial court's refusal to grant Plaintiff a Chapter 50B DVPO constituted an as-applied violation of Plaintiff's constitutional rights. This was the issue of broad public interest raised by the trial court's ruling in the 50B Order and the issue that motivated this Court to appoint *Amicus*.

The Appointing Order states in part:

> In the absence of a brief on behalf of appellee, the Court appoints [*Amicus*] to appear as court assigned amicus curiae in the above-captioned appeal to defend the ruling of the trial court.
>
> [*Amicus*] shall file an amicus curiae brief not exceeding 8,750 words in length within thirty days of the date of this order. The appellant may file a reply brief not exceeding 3,750 words in length in response to the brief of amicus curiae[.]

A. *Role of Assigned* Amici Curiae

"As a general matter, appointing an amicus is reserved for rare and unusual cases that involve questions of general or public interest[.]" 4 Am. Jur. 2d Amicus Curiae § 3 (citations omitted). We review, below, the responsibilities of *amici curiae*, as well as the legal limits of the powers that may be conferred upon *amici curiae*, and clarify the non-litigating status of *amici curiae*, whether appointed by the Court acting *sua sponte* or in response to motions duly filed.

> *Amicus curiae* is a Latin phrase for "friend of the court" *as distinguished from an advocate* before the court. It serves only for the benefit of the court, assisting the court

> in cases of general public interest, by making suggestions to the court, . . . and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision.
>
> An *amicus curiae* is *not a party to the litigation* and therefore does not necessarily represent the views or interests of either party. Since an *amicus does not represent the parties* but participates only for the benefit of the court, *it is solely within the discretion of the court to determine the fact, extent, and manner of participation* by the *amicus*.

Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974) (emphasis added) (citations omitted) (*see also* omitted citations). However, the powers a court may grant *amici* are limited by the law. Some additional general powers granted, and limitations attached, to an *amicus curiae* follow:

> An amicus curiae is not a party and generally cannot assume the functions of a party, or an attorney for a party. . . . . When amicus status is granted, *the named parties should always remain in control, with the amicus merely responding to the issues presented by the parties*.
>
> . . . .
>
> An amicus curiae has *no control over the litigation* and *no right to institute any proceedings* in it. An amicus curiae is not vested with the management of the case. He or she is not bound by the judgment of the court, nor can he or she appeal it, except in rare circumstances. Moreover, an amicus curiae ordinarily cannot conduct discovery or *file* pleadings or *motions in the cause* but is restricted to suggestions relative to matters apparent *on the record* or to matters of practice. *It is not the proper role of an amicus to comment on the existence of allegedly newly discovered evidence*.

4 Am. Jur. 2d Amicus Curiae § 6 (emphasis added) (citations omitted); *see also* 3B C.J.S. Amicus Curiae § 3; *Knetsch v. United States*, 364 U.S. 361, 370, 5 L. Ed. 2d 128, 134 (1960) (refusing to consider an argument "made in an amicus curiae brief," the Supreme Court held: "This argument has never been advanced by petitioners in this case. Accordingly, we have no reason to pass upon it."); *Evans v. Georgia Reg'l Hosp.*,

850 F.3d 1248, 1257–58 (11th Cir. 2017) (citations omitted) ("Moreover, without 'exceptional circumstances, *amici curiae* may not expand the scope of an appeal to implicate issues not presented by the parties to the district court.' "); *Richardson v. Ala. State Bd. of Educ.*, 935 F.2d 1240, 1247 (11th Cir. 1991) (citation omitted) ("Although this court granted amici's motion for leave to file a brief, the arguments raised only by amici may not be considered. This court has recently held that an appellate court will not consider issues not presented to the trial court[.] We will not consider on appeal . . . defenses that were neither raised in the district court nor argued by appellants on appeal."); *United States v. State of Mich.*, 940 F.2d 143, 165 (6th Cir. 1991) (emphasis added) (citations omitted) ("amicus has been *consistently precluded from* initiating legal proceedings, filing pleadings, or otherwise *participating and assuming control of the controversy* in a totally adversarial fashion"); *Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) (citations omitted) ("[T]he classic role of *amicus curiae* [consists of] assisting in a case of general public interest . . . and drawing the court's attention to law that escaped consideration. Courts have rarely given party prerogatives to those not formal parties. A petition to intervene and its express or tacit grant are prerequisites to this treatment."); *Common Cause v. Bolger*, 512 F. Supp. 26, 35 (D.D.C. 1980) (citations omitted) (finding the notion "that amicus curiae has standing to raise arguments not pressed by the parties" a "dubious assumption" only found in "rare extraordinary cases").

North Carolina has adopted federal law regarding the powers and limitations of *amici curiae*. *See McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 484 n.3, 687 S.E.2d 690, 693 n.3 (2009) ("As the issue is raised only in the *amici curiae's* brief, we decline to address the issue in the absence of exceptional circumstances. *See Artichoke Joe's Ca[l.] Grand Casino v. Norton*, 353 F.3d 712, 719 n.10 (9th Cir.[ ]2003) (citation omitted) (declining to address whether a tribe was necessary party to challenge the validity of tribal-state gaming compacts because the issue was 'raised only in an amicus brief'), *cert. denied*, 543 U.S. 815 (2004).").
Further, as discussed by our Supreme Court:

> A judgment *regular upon the face of the record* is presumed to be valid until the contrary is shown *in a proper proceeding*.
>
> Moreover, it is to be noted that an *amicus curiae* may *not assume the place of a party* in a legal action. Nor may he *take over the management of a suit*. And he has *no right to institute proceedings* therein. He *takes the case*

> *as he finds it*. 3 C.J.S. Amicus Curiae § 3, p. 1049. It follows that the *amicus curiae* was *not a competent person . . . to make the jurisdictional affidavit*[.] The affidavit made by [*amicus*] is a *nullity*. . . . .
>
> We have given consideration to the argument made by the *amicus curiae* to the effect that the facts of this case take it out of the general rule which requires that a direct attack on a voidable judgment may be made only by a party or privy. . . . . The *amicus curiae* says in his brief that "The integrity of the judicial process and the public welfare demand that there be a hearing of this matter on the merits[.]" . . . . We cannot accept the premise or the arguments based thereon. If this judgment . . . is subject to attack by the *amicus curiae* appointed for that purpose, then other judgments, and any number of them, are subject to be attacked the same way. If we approve the appointment of this *amicus curiae* for the performance of the duties assigned him by the court, then other *amici curiae*, and any number of them, may be appointed . . . to work over any . . . other judgments . . . in which it is suspected that fraud was perpetrated on the court. *The practice could lead to a serious weakening of the rule that a motion in the cause directly attacking a judgment may be made only by a party to the action* or by one in privity with a party. Moreover, *to approve the unprecedented procedure adopted below would be a step toward undermining the integrity of personal and property rights acquired on the faith of judicial proceedings, as well as the public interests involved in the finality and conclusiveness of judgments*.

Shaver v. Shaver, 248 N.C. 113, 119–20, 102 S.E.2d 791, 796–97 (1958) (emphasis added); *see also Cape Hatteras Elec. Membership Corp. v. Stevenson*, 249 N.C. App. 11, 16, 790 S.E.2d 675, 679 (2016) (*citing Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931)) ("Amicus contends that these bylaws are 'common' among electric cooperatives and guidance is needed. But the parties have not briefed this issue, and we are unwilling to delve into this sort of advisory dicta without an appropriate record and argument from the parties."); *Crockett v. First Fed. Sav. & Loan Ass'n of Charlotte*, 289 N.C. 620, 632, 224 S.E.2d 580, 588 (1976) (refusing to consider argument in *amicus curiae* brief that federal law preempted the field covering the plaintiff's action, *thereby*

depriving the trial court of subject matter jurisdiction, because "[a]t no time have the parties in this action addressed themselves to the question of the applicability of federal law").

Opinions limiting the standing of *amici curiae* to the record and arguments *as developed by the parties* are plenary:

> The critical point is that an impartial friend of the court steps out of the role of amicus when it essentially assumes the role of being not just adversarial but a "party in interest to the litigation." There has, therefore, "been a bright-line distinction between amicus curiae and named parties/real parties in interest."

Wyatt By & Through Rawlins v. Hanan, 868 F. Supp. 1356, 1358 (M.D. Ala. 1994) (citations omitted). The Sixth Circuit has held that court appointed *amici curiae* are "without standing to compel the disclosure of . . . [new evidence], or to exercise any litigating rights equal to a named party/real party in interest[.]" *State of Mich.*, 940 F.2d at 166.

Our Supreme Court has treated the powers of *amici curiae* similarly:

> The amicus curiae brief, in addition to presenting an argument under state law similar to that of defendant, asserts that federal law preempts the field insofar as "due-on-sale" clauses in loan instruments of federal savings and loan associations are concerned. The amicus curiae then argues that under federal law the due-on-sale clause involved in this case is valid. At no time have the parties in this action addressed themselves to the question of the applicability of federal law or incorporated by reference the amicus curiae brief. Under Rule 28, N.C. Rules of Appellate Procedure, appellate review is limited to the arguments upon which the parties rely in their briefs.

Crockett, 289 N.C. at 632, 224 S.E.2d at 588 (citation omitted); N.C. R. App. P. 28. Allowing an appointed *amicus* to act as a party in interest "is not proper because it injects an element of unfairness into the proceedings[.] The [appellants] in this case are entitled to have their contentions and arguments" considered as presented on appeal. *Leigh v. Engle*, 535 F. Supp. 418, 422 (N.D. Ill. 1982). Therefore, " '[i]n view of the rule that an amicus curiae must accept the case before the court with issues as made by the parties, a new question raised only in a brief filed by an amicus curiae, by leave of court, will not be considered.' " *United States v. Barnett*, 330 F.2d 369, 423 n.6 (5th Cir. 1963) (citations omitted),

certified question answered, 376 U.S. 681, 12 L. Ed. 2d 23 (1964). Further, *amici curiae* are limited to questions of law, not fact. If an *amicus curiae* discovers new or additional facts that are not included in the record on appeal, it may not argue these extra-record facts in support of its legal arguments. *See United States v. F.M. Jabara & Bros.*, 19 C.C.P.A. 76, 79 (1931). This rule is in place to avoid prejudice to the appellant's appeal, which is reliant on the settled record on appeal.

In this matter, Defendant prevailed in the Chapter 50B action, entered into a consent order with Plaintiff in the Chapter 50C action, and did not cross-appeal or file an appellee brief. The purpose of the Appointing Order was to obtain briefing from *Amicus* on any potentially meritorious arguments contradicting Plaintiff's appellate arguments and those of the supporting *amici*. As a service to this Court and the citizens of North Carolina, *Amicus* agreed to undertake this role. *Amicus* apparently wanted to alert this Court to possible *alternative* options for affirming the 50B Order, believing this Court had the power to confer that authority, and that we had in fact conferred upon *Amicus* that duty and the authority to undertake it. *Amicus*' participation in this appeal is as though *Amicus* was Defendant's counsel, and the *amicus curiae* brief was Defendant's appellee brief. *Amicus* also filed certain motions that *Amicus* lacked the standing to file—meaning this Court lacks subject matter jurisdiction over those motions and cannot consider them. This Court is also without the authority to consider any arguments made by Amicus that are not responsive to Plaintiff's appellate arguments and limited to the record as settled by the parties to Plaintiff's action. In light of the apparent uncertainty in this area, we seek to provide clear guidance on the expectations, definitions, powers, and limitations of *amici curiae*.[12]

B. *The Mandate of This Court's "Assigned* Amicus Curiae"

In this case, the trial court clearly articulated the reasoning in support of its ruling: that it believed it lacked the authority or jurisdiction to grant a DVPO to Plaintiff because Plaintiff and Defendant were not of the "opposite sex" and, therefore, not in a "dating relationship" constituting a "personal relationship" as defined by N.C.G.S. § 50B-1(b)(6). According to the trial court's orders, it determined it could not grant

12. This Court expresses its appreciation to *Amicus* in this case for accepting the challenge presented, and for the zealous and thorough attention given. Although the wording in the Appointing Order is similar to that commonly used in similar situations, this Court will endeavor in the future to more clearly set the parameters of its appointing mandates, including the limits of appointed *amici curiae's* standing and authority to act in an appeal to avoid unnecessary confusion.

Plaintiff a DVPO under N.C.G.S. § 50B-1(b)(6) because acts perpetrating or threatening to perpetrate "bodily injury" against another, or "[p]lacing the aggrieved party . . . in fear of imminent serious bodily injury or continued harassment[,]" are only considered acts of "domestic violence" if the abuser and the victim are "of opposite sex." N.C.G.S. §§ 50B-1(a), (b)(6). The trial court found and concluded that *had* Plaintiff and Defendant been "of opposite sex," Plaintiff's complaint for a DVPO would have been granted. In so ruling, the trial court rejected Plaintiff's argument that the trial court should grant her request for a DVPO, stating, before Plaintiff made her constitutional argument, that Plaintiff's "complaint . . . would [not] survive a Rule 12 motion."

Plaintiff's counsel responded to the trial court:

> I understand . . . that you don't believe it would survive a motion to dismiss. However . . . we do feel that at this point [Plaintiff] should be allowed to proceed with the [DVPO], that . . . the statute, that 50B, is unconstitutional as it's written post the same-sex marriage equality case from the Supreme Court in *Obergefell* and that there's no rational basis at this point to have a statute that limits dating relationships to folks of opposite sex.

The trial court asked about the legislative history of N.C.G.S. § 50B-1, and Plaintiff's attorney informed the trial court that "our legislature has amended 50B for different reasons, but they have not amended the personal relationship categories any time in the recent past[.]" The trial court rejected Plaintiff's argument and stated that it would not consider whether Plaintiff's constitutional rights were violated, supporting its ruling, in part, based on the following:

> N.C.G.S. 50B was last amended by the legislature in 2017 without amending the definition of "personal relationship" to include persons of the same sex who are in or have been in a dating relationship. This recent amendment in 2017 was made subsequent to the United States Supreme Court decision in *Obergefell v. Hodges*, . . . and *yet the legislature did not amend the definition of personal relationship to include dating partners of the same sex.*

(Emphasis added.) The trial court continued:

> 4. Th[e] definition [in N.C.G.S. § 50B-1(b)(6)] prohibits victims of domestic violence in same sex dating relationships that are not spouses, ex-spouses, or current or

> former household members from seeking relief against a batterer under Chapter 50B.
>
> 5. [This court] must consider *whether it has jurisdiction to create a cause of action that does not exist and to enter an order under this statute when the statute specifically excludes it.* The *difficult answer to this question is no*, it does not. The General Assembly has the sole authority to pass legislation that allows for the existence of any [DVPO]. The legislature has not extended this cause of action to several other important family relationships including siblings, aunts, uncles, "step" relatives, or in-laws.
>
> 6. In this context, *the Courts only have subject matter jurisdiction and the authority to act and enjoin a defendant when the legislature allows it.* On numerous occasions the Court of Appeals has stricken orders entered by the District Court that do no[t] include proper findings of fact or conclusions of law that are necessary to meet the statute. . . . *[This court] cannot enter a domestic violence protective order against a [d]efendant when there is no statutory basis to do so.*
>
> . . . .
>
> Plaintiff has failed to prove grounds for issuance of a [DVPO] as Plaintiff does not have a required "personal relationship" with [ ] Defendant as required by [Chapter] 50B.

(Emphasis added).

The trial court further found: "A civil no-contact (50C) order was granted contemporaneously on the same allegations *and had the parties been of opposite genders, those facts would have supported the entry of a [DVPO] (50B).*" (Emphasis added). The trial court concluded: "The General Assembly has the sole authority to pass legislation that allows for the existence of any [DVPO]"; the trial court "only ha[d] subject matter jurisdiction and the authority to act and enjoin a defendant when the legislature allows it"; and, in this case, "[t]he legislature has not extended this cause of action to several other important family relationships" including same-sex dating relationships as defined by N.C.G.S. § 50B-1(b)(6).

Amicus was also free to make any non-frivolous arguments sufficiently related to the issues of public interest that prompted appointment

of *Amicus* in the first instance. This Court was not seeking new issues to decide; we were requesting well-briefed counterarguments to the issues already presented to us in Plaintiff's appellate brief. *See Newark Branch, N.A.A.C.P. v. Town of Harrison*, 940 F.2d 792, 808–09 (3d Cir. 1991) (including the following partial citation: "*Berry v. Doles*, 438 U.S. 190, 202 (1978) (Rehnquist, J., dissenting) (*amicus curiae* has no standing to request relief not requested by the parties")). Further, *Amicus'* counterarguments are limited, by law, to the evidence and posture of the case *as set forth in the settled record.*

> [*Amicus curiae*] is allowed to file an amicus brief, within the page limits set by local rules, regarding any objections to the Report and Recommendation which are filed by the parties to this suit; however, *because it is not a party* to this suit, *it will not be permitted to file an Objection itself* and will be *limited to briefing only those issues raised by the parties pursuant to their Objections*. Further [*amicus*] may not submit evidence and *may not attach documents* to its amicus brief. [*Amicus'*] sole status in this proceeding is to assist the court with regard to the *issues raised by the parties* to the suit *based on the evidence submitted by them* in the suit. To permit further participation would be, in effect, to grant [*amicus*] intervenor status, which will not be done[.]

Parm v. Shumate, No. CIV.A. 3-01-2624, 2006 WL 1228846, at *1 (W.D. La. May 1, 2006) (emphasis added) (unreported opinion citing opinions from the Second Circuit, Fifth Circuit, Ninth Circuit, and orders from several federal district courts).

C. *Jurisdictional Issues Regarding* Amicus' *Filings*

[7] *Amicus* was appointed "to defend the ruling of the trial court." This Court ordered that *Amicus* "shall file an amicus curiae brief not exceeding 8,750 words in length within thirty days of the date of this order." This Court granted Amicus' motion to extend time to file the *amicus curiae* brief until 3 July 2019. *Amicus* filed three documents on 3 July 2019, the *amicus curiae* brief, a motion to dismiss Plaintiff's appeal, and a "Motion to Seal Rule 9(b)(5) Supplement." *Amicus* filed a supplement to the record on 8 July 2019.

Amicus argues in the motion to dismiss that Plaintiff had voluntarily dismissed her Chapter 50B action on 31 May 2018, thereby divesting the trial court of jurisdiction to hear Plaintiff's claim and enter the 50B Order. However, this Court is without jurisdiction to consider *Amicus'*

purported motion to dismiss Plaintiff's appeal, or the document *Amicus* requested be added to the record. As set out above, only parties to an action, personally or through their attorneys, have standing to participate in the litigation of an action.

Our appellate rules governing *amici curiae* are found in Rule 28(i): "Amicus Curiae Briefs." N.C. R. App. P. 28(i). "An amicus curiae may file a brief with the permission of the appellate court in which the appeal is docketed." *Id.* "*A party to the appeal* may file and serve a reply brief that responds to an amicus curiae brief no later than thirty days after having been served with the amicus curiae brief. . . . . The court *will not accept* a reply brief from an amicus curiae." N.C. R. App. P. 28(i)(6). "The court will allow a motion of an amicus curiae requesting permission to participate in oral argument only for extraordinary reasons." N.C. R. App. P. 28(i)(7). "An *appellee* may supplement the record with any materials pertinent to the issues presented on appeal, as provided in Rule 9(b)(5)." N.C. R. App. P. 28(c) (emphasis added). "Additional authorities discovered by *a party* after filing its brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court[.]" N.C. R. App. P. 28(g) (emphasis added). The Rules of Appellate Procedure (the "Rules") are, in the main, directed to the parties in the matter on appeal. The rights granted to *amici curiae* are limited to submitting briefs on pre-identified "issues of law to be addressed[,]" N.C. R. App. P. 28(i)(1), and, in extraordinary circumstances, participation in oral arguments, N.C. R. App. P. 28(i)(7). "Because the North Carolina Rules of Appellate Procedure generally speak in terms of actions which a 'party' to a proceeding must take on appeal, it is implicit that any appellate brief must be filed on behalf of one of those parties." *In re Estate of Tucci*, 104 N.C. App. 142, 148, 408 S.E.2d 859, 863 (1991). We hold that it is also implicit in the Rules that *amici curiae* are generally limited to the authority granted by N.C. R. App. P. 28(i), which does not include the authority to file motions substantively impacting the parties to the appeal, or otherwise acting on appeal with the powers solely granted to the parties. *Id.*; *see also Johnson v. Schultz*, 195 N.C. App. 161, 164, 671 S.E.2d 559, 562 (2009) (and cases cited), *aff'd and remanded*, 364 N.C. 90, 691 S.E.2d 701 (2010).

In the present case, neither Defendant, the State nor any *amicus curiae* was defending the constitutionality of N.C.G.S. § 50B-1(b)(6) by contesting Plaintiff's state constitution and Fourteenth Amendment arguments. *Amicus* did not have the authority or the standing to act as Defendant's attorney, present new arguments not raised by either party, or file any motions in the action beyond those related to the Rule 28(i)

requirements for *amici curiae*. Neither the mandate of this Court, nor the law, permitted *Amicus* to look outside the record settled by the parties for support of its briefed arguments, to make novel arguments, or to take any action reserved for party litigants. Only a party had standing to move this Court to amend the record or dismiss Plaintiff's appeal. To allow otherwise would be to place Plaintiff at a disadvantage not imposed on similarly situated appellants. *Leigh*, 535 F. Supp. at 422; *see also State of Mich.*, 940 F.2d at 164; *Hanan*, 868 F. Supp. at 1360 (this Court's decision on whether to appoint an *amicus curiae* depends in part on "whether participation by the amicus will be . . . helpful to the court and will not prejudice the parties").

This Court does not have the authority to give to an *amicus curiae* powers reserved to the parties. Appointment as an *amicus curiae* does not, and cannot, confer standing on the *amicus* to move this Court to dismiss an appeal, nor to alter the record, settled by the parties on appeal, in order to support that motion. In short, "*amicus curiae* has no standing to request relief not requested by the parties." *Newark Branch, N.A.A.C.P.*, 940 F.2d at 808-09 (citation omitted). Our Supreme Court has held: "A judgment *regular upon the face of the record, though irregular in fact*, requires evidence *aliunde* for impeachment. Such a judgment is voidable and not void, and may be opened or vacated after the end of the term only by *due proceedings instituted by a proper person*." *Shaver*, 248 N.C. at 119, 102 S.E.2d at 795 (emphasis added) (citations omitted). As the Court in *Shaver* determined, the judgment on review was

> regular upon its face. We conclude that the Superior Court . . . was without power to initiate on its own motion proceedings to vacate the judgment. Rather, it was the duty of the court to indulge *the legal presumption* that the *judgment [wa]s valid*. A judgment regular upon the face of the record is presumed to be valid until the contrary is shown in a *proper* proceeding.
>
> Moreover, it is to be noted that *an amicus curiae may not assume the place of a party in a legal action. Nor may he take over the management of a suit*. And he has *no right to institute proceedings therein*. He *takes the case as he finds it*.

Id. at 119–20, 102 S.E.2d at 796 (emphasis added) (citations omitted). Our Supreme Court has recently reaffirmed this rule:

> "In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the

> verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to [Rule 9 of the North Carolina Rules of Appellate Procedure]." N.C. R. App. P. 9(a). "Although the question of subject matter jurisdiction may be raised at any time . . . where the trial court has acted in a matter, 'every presumption not inconsistent with the record will be indulged in favor of jurisdiction. . . .' " *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 557, 359 S.E.2d 792, 797 (1987) (internal citations omitted) (quoting *Dellinger v. Clark*, 234 N.C. 419, 424, 67 S.E.2d 448, 452 (1951)). Nothing else appearing, we apply "the *prima facie* presumption of rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter." *Williamson v. Spivey*, 224 N.C. 311, 313, 30 S.E.2d 46, 47 (1944) (citations omitted). As a result, "[t]he burden is on the *party* asserting want of jurisdiction to show such want."[13] *Dellinger*, 234 N.C. at 424, 67 S.E.2d at 452.

In re N.T., 368 N.C. 705, 707, 782 S.E.2d 502, 503–04 (2016) (emphasis added); *see also Matter of S.E.*, 373 N.C. 360, 363–64, 838 S.E.2d 328, 331 (2020).

The 50B Order in this case is regular on its face. The trial court's jurisdiction to decide the matter was never challenged, and the record on appeal reveals no jurisdictional deficiency. Because *Amicus* is not a party to the action *Amicus* does not step into Defendant's shoes as appellee, and cannot litigate any matter in Plaintiff's action. Therefore, *Amicus* was without standing to take on the burden of proving a lack of jurisdiction. *Town of Midland v. Morris*, 209 N.C. App. 208, 224–25, 704 S.E.2d 329, 341 (2011) (citation and quotation marks omitted) ("Standing typically refers to the question of whether a particular litigant is a proper party to assert a legal position[,] and whether the party before the court [is] the appropriate one to assert the right in question."). If a person participates in an action without standing, the "Court does not have subject matter jurisdiction to hear the argument." *Id.* at 225, 704 S.E.2d at 341; *see also Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002) (citing *Friends of Earth v. Laidlaw Env. S.*, 528 U.S. 167, 185, 145 L.Ed.2d 610, 629 (2000) ("a plaintiff must demonstrate standing separately for each form of relief

13. In that *Amicus* is not a "party," *Amicus* cannot act as "the party asserting want of jurisdiction[.]" *Dellinger*, 234 N.C. at 424, 67 S.E.2d at 452 (citation omitted).

sought")); *Estate of Apple v. Com. Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005) (citation omitted) ("If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.").

Because *Amicus* was without standing to file the motion to dismiss and the motion to amend the record on appeal, these motions are a "nullity" and must be dismissed as such. *Shaver*, 248 N.C. at 120, 102 S.E.2d at 796; *Morris*, 209 N.C. App. at 224–25, 704 S.E.2d at 341. Allowing the motions would also be improper because they would "inject[] an element of unfairness into the proceedings[.] [Plaintiff] in this case [is] entitled to have [her] contentions and arguments" considered as presented on appeal. *Leigh*, 535 F. Supp. at 422. Therefore, the motion to dismiss and motion to supplement the record are dismissed for lack of standing and subject matter jurisdiction—they are a nullity, and this Court has conducted our review under the presumption that the trial court's orders are correct. Further, because they were in reply to a nullity, and there is no authority to file a reply to a motion that does not exist, Plaintiff's responses to *Amicus'* motion to dismiss are also dismissed. The record includes only the settled record on appeal and any supplementation properly sought by Plaintiff. Therefore, this Court's review has been limited to the record as settled by the parties, Plaintiff's arguments on appeal, the arguments of the *amici curiae* whose motions to file *amicus* briefs were granted by this Court, and the briefed arguments of *Amicus* that are responsive to Plaintiff's briefed arguments.

VII. Conclusion

Because this opinion is subject to review by our Supreme Court, and there is always the potential for review of federal constitutional questions by the United States Supreme Court, we have decided to include alternative holdings. Further reason for this decision is that the Supreme Court's decisions in *Romer*, *Windsor*, *Lawrence*, and *Obergefell* strongly suggest the kind of statutory challenge before us, one based on Plaintiff's "minority" status, is subject to a particular kind of review—one that does not seek to apply the "rational basis," "intermediate scrutiny," "strict scrutiny" framework. Finally, the recently decided Supreme Court opinion of *Bostock* includes a thorough analysis resulting in the conclusion that discrimination based upon a person's "homosexuality" or "transgender status" is *always* also discrimination based on "sex," or gender. Therefore, applying *Bostock*, we conclude that equal protection challenges of a law based upon LGBTQ+ status are also challenges based upon "sex" or gender and, therefore, require at least "intermediate scrutiny." As it is unsettled which review is appropriate, or if there are

multiple permissible reviews that may be applied, we have conducted review pursuant to all potentially applicable tests, and include alternative holdings for each. No matter the review applied, N.C.G.S. § 50B-1(b)(6) does not survive Plaintiff's due process and equal protection challenges under either the North Carolina Constitution or the Constitution of the United States.

We therefore reverse the trial court's denial of Plaintiff's complaint for a Chapter 50B DVPO, and remand for entry of an appropriate order under Chapter 50B. The trial court shall apply N.C.G.S. § 50B-1(b)(6) as stating: "Are persons who are in a dating relationship or have been in a dating relationship." The holdings in this opinion shall apply to all those similarly situated with Plaintiff who are seeking a DVPO pursuant to Chapter 50B; that is, the "same-sex" or "opposite-sex" nature of their "dating relationships" shall not be a factor in the decision to grant or deny a petitioner's DVPO claim under the Act.

REVERSED AND REMANDED.

Judge BRYANT concurs.

Judge TYSON dissents with separate opinion.

TYSON, Judge, dissenting.

The trial court was without and this Court possesses no jurisdiction to consider any issues on the merits of this appeal. Plaintiff's purported appeal is not properly before this Court because of: (1) Plaintiff's filing of a voluntary dismissal of the N.C. Gen. Stat. § 50B complaint, *see* N.C. Gen. Stat. § 50B-1(b)(6) (2019); (2) Plaintiff's failure to file a post-dismissal Rule 60 motion, *see* N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2019); (3) Plaintiff's failure to argue and preserve any constitutional issue for appellate review; (4) Plaintiff's failure to join necessary parties, *see* N.C. Gen. Stat. § 1A-1, Rule 19(d) (2019); and, (5) Plaintiff's failure to comply with Rule 3 to invoke appellate review, *see* N.C. R. App. P. 3.

In addition to these five undisputed and unaddressed failures, no petition for writ of certiorari was filed to invoke appellate jurisdiction. *See* N.C. R. App. P. 21. Presuming jurisdiction does exist, Rule 2 is not requested nor invoked to suspend the appellate rules to review any merits. N.C. R. App. P. 2. There is no subject matter jurisdiction nor any other issues that are properly before this Court. This matter is properly dismissed. I respectfully dissent.

I. Background

On 31 May 2018 at 9:10 a.m., Plaintiff filed a complaint and motion for a domestic violence protective order ("DVPO") under N.C. Gen. Stat. § 50B-1(b)(6), using an AOC-CV-303 form which was assigned docket number 18 CV 600733 by a clerk of superior court. Plaintiff asserted, "There is not another court proceeding pending in this or any other state." At 3:04 p.m. the same day, Plaintiff filed an additional complaint for a no-contact order under N.C. Gen. Stat. § 50C, using an AOC-CV-520 form, which was assigned docket number 18 CV 005088 by a clerk of superior court. The allegations in these two complaints were the same, but Plaintiff asserted and attested in her § 50C complaint that the parties were "co-workers." Eight minutes after filing her N.C. Gen. Stat. § 50C complaint, Plaintiff signed, dated, and filed an AOC-CV-405 form notice of voluntary dismissal of her prior § 50B complaint without prejudice under docket number 18 CV 600733.

While her complaint for a no-contact order under N.C. Gen. Stat. § 50C remained pending and without any explanation of the intervening circumstances or basis, Plaintiff or someone acting on her behalf filed a purported withdrawal of the completed dismissal of the § 50B complaint. The signed, dated, and file-stamped AOC-CV-405 notice of voluntary dismissal form was struck through diagonally, the handwritten word "Amended" was added to the top right-hand corner, and handwritten text was included: "I strike through this voluntary dismissal. I do not want to dismiss this action." None of these handwritten additions were signed, initialed, or dated. This paper was then filed with the clerk of superior court, and contains two separate file stamps. No new docket number was assigned upon the purported withdrawal of the dismissed complaint. Plaintiff was issued a no-contact order for stalking against Defendant under N.C. Gen. Stat. § 50C on 7 June 2018 by the same trial judge.

II. Plaintiff's Voluntary Dismissal

A. Standard of Review

"The issue of jurisdiction over the subject matter of an action may be raised at any time during the proceedings, *including on appeal*. This Court is required to dismiss an appeal *ex mero motu* when it determines the lower court was without jurisdiction to decide the issues." *McClure v. County of Jackson*, 185 N.C. App. 462, 469, 648 S.E.2d 546, 550 (2007) (emphasis supplied).

"Subject matter jurisdiction cannot be conferred upon a court by consent, waiver, or estoppel, and therefore failure to . . . object to the

jurisdiction is immaterial." *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (citations and internal quotation marks omitted). A court's subject matter jurisdiction is not invoked *sua sponte*, and is "never dependent upon the conduct of the parties" or inaction by the Court. *Feldman v. Feldman*, 236 N.C. 731, 734, 73 S.E.2d 865, 867 (1953).

B. Effect of Dismissal

When Plaintiff signed and filed her voluntary dismissal of the N.C. Gen. Stat. § 50B-1(b)(6) complaint, the dismissal was complete and the court's jurisdiction over that action was extinguished upon filing. When a plaintiff filed a voluntary dismissal, she "terminate[s] the action, leaving nothing in dispute[.]" *Teague v. Randolph Surgical Assoc.*, 129 N.C. App. 766, 773, 501 S.E.2d 382, 387 (1988). Plaintiff's signed and filed dismissal divested the district court of subject matter jurisdiction to proceed on that dismissed action. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) provides: "Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case[.]" N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2019).

After Plaintiff's voluntary dismissal is filed, Plaintiff must file a new complaint for relief under N.C. Gen. Stat. § 50B-1(b)(6), to re-invoke the district court's jurisdiction under that statute, with a new complaint and docket number assigned, instead of filing an unsigned and undated purported "Amended" withdrawal of the properly signed, dated, and previously filed notice of dismissal form. *See id.*

III. No Rule 60(b) Motion

As an alternative, to filing a new complaint, Plaintiff's counsel could have filed a Rule 60(b) motion to seek to revive the dismissed complaint. No Rule 60(b) motion was filed and the deadline for filing has expired. N.C. Gen. Stat. § 1A-1, Rule 60(b) (motion must be filed not later than one year after the order or proceeding was entered or taken). "[T]he one-year period for filing a Rule 60(b) motion is not tolled by the taking of an appeal from the original judgment." *Talbert v. Mauney*, 80 N.C. App. 477, 479, 343 S.E.2d 5, 7 (1986). The dismissed action was not revived under this rule.

IV. Commencement of Action

Plaintiff's filing of a purported withdrawal of her previously signed and filed notice of dismissal is not a refiling, commencement, or revival of the allegations of the original § 50B dismissed complaint. An "action

is commenced by filing a complaint with the court." *See* N.C. Gen. Stat. § 1A-1, Rule 3 (2019).

The refiling of the purported amended dismissal, failed to comply with N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (2019) ("An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefore, and shall set for the relief or order sought.").

Plaintiff could have remedied the jurisdictional default by filing a new § 50B complaint, within the filing parameters of Rule 41, or a Rule 60(b) motion in the district court within one year of the filing of the voluntary dismissal. N.C. Gen. Stat. § 1A-1, Rule 41, Rule 60(b). She failed to do either.

The trial court and, consequently, this Court acquired no jurisdiction. Plaintiff's purported appeal is properly dismissed. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) ("A jurisdictional default, therefore, precludes the appellate court from acting in any manner other than to dismiss the appeal.").

V. Failure to Preserve

During the purported N.C. Gen. Stat. § 50B-1(b)(6) hearing, Plaintiff's counsel argued:

> [Plaintiff] should be allowed to proceed with the Domestic Violence Protective Order . . . the statute, that 50B, is unconstitutional as its written post the same-sex marriage equality case from the Supreme Court in *Obergefell* and that there's no rational basis at this point to have a statute that limits dating relationships to folks of opposite sex.

The above quote is the total extent of Plaintiff's constitutional argument before the trial court.

The trial court responded: "Without a more expansive argument on constitutionality, I won't do it. I think there is room for that argument. I think that with some more presentation that maybe we could get there, but I don't think on the simple motion I'm ready to do that." The trial court sought to elicit more specific and additional arguments on constitutionality of the statute beyond a cryptic reference, which Plaintiff's counsel failed to argue or advance further. The trial court did not declare N.C. Gen. Stat. § 50B-1(b)(6) to be unconstitutional, which Plaintiff now purports to assert upon appeal.

For the first time on appeal, Plaintiff now seeks to invalidate the order on additional theories beyond her single reference to *Obergefell*. *Obergefell v. Hodges*, 576 U.S. 644, 192 L. Ed. 2d 609 (2015). These additional arguments were not raised nor argued before the trial court. Our Rules of Appellate Procedure require: "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a). Plaintiff's new arguments demonstrate her cryptic argument quoted above was "not apparent from the context." *Id*.

Until now, our Supreme Court and this Court have consistently applied the appellate rules and binding precedents to dismiss unpreserved and unargued constitutional issues sought to be asserted for the first time on appeal: "A constitutional issue not raised at trial will generally not be considered for the first time on appeal." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002). *See In re Cline*, 230 N.C. App. 11, 27, 749 S.E.2d 91, 102 (2013) ("Since this argument was not raised before the trial court, it is not properly before us on appeal."); *Fields v. McMahan*, 218 N.C. App. 417, 417, 722 S.E.2d 793, 793 (2012) ("Because plaintiff raises on appeal a constitutional argument which has not been presented and ruled upon by the trial court, we dismiss the appeal."); *Powell v. N.C. Dep't of Transp.*, 209 N.C. App. 284, 296, 704 S.E.2d 547, 555 (2011) ("Thus petitioner did not give the superior court the opportunity to consider and rule on the specific constitutional argument he now attempts to bring before this court.").

Plaintiff's cryptic reference to *Obergefell* failed to raise any facial or as-applied constitutional issue before the trial court or to preserve any issue for appellate review. The trial court requested counsel to assert and argue additional constitutional arguments. Plaintiff's counsel failed to provide any further arguments or authority. The district court correctly ruled Plaintiff had failed to assert any proper constitutional argument, had failed to carry her burden, and the § 50B statute was not unconstitutional.

The transcript and record on appeal is utterly devoid of any other constitutional argument. Plaintiff's arguments on purported additional constitutional grounds, asserted for the first time on appeal, were not raised before the trial court and are not preserved before this Court. N.C. R. App. P. 10(a). "A constitutional issue not raised at trial will generally not be considered for the first time on appeal." *Anderson*, 356 N.C. at 416, 572 S.E.2d at 102. This matter is properly dismissed.

VI. Failure to Join Necessary Parties

Our General Statutes mandate:

> The Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, *must be joined* as defendants in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law.

N.C. Gen. Stat. § 1A-1, Rule 19(d) (emphasis supplied).

Plaintiff challenges the constitutionality of N.C. Gen. Stat. § 50B-1(b)(6). Both the President *Pro Tempore* of the Senate and the Speaker of the House of Representatives are necessary parties and "must be joined as defendants" in the civil action. *Id.* The record shows no service upon nor mandatory joinder of these necessary parties.

Our Supreme Court held neither the district court, nor this Court, can address the underlying merits of Plaintiff's assertions until this mandatory joinder defect is cured. *See Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978) ("Where, as here, a fatal defect of the parties is disclosed, the court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the court. Absence of necessary parties does not merit a nonsuit, instead, the court should order a continuance so as to provide a reasonable time for them to be brought in and plead.") (internal citations omitted).

The Speaker of the House of Representatives and the President *Pro Tempore* of the Senate "must be joined" as necessary parties. N.C. Gen. Stat. § 1A-1, Rule 19(d). *See also* N.C. Gen. Stat. § 1-72.2(b) (2019) ("The Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of their choice, including private counsel, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution."). Separate from and in addition to the lack of subject matter jurisdiction, no further action or review is proper until this statutory and mandatory defect is cured. *Booker*, 294 N.C. at 158, 240 S.E.2d at 367.

VII. No Valid Notice of Appeal

Our Rules of Appellate Procedure provide: "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." N.C. R. App. P. 3(d) (emphasis supplied).

Our Rules of Appellate Procedure further provide:

> The body of the document *shall* at its close bear the printed name, post office address, telephone number, State Bar number, and e-mail address of counsel of record, and in addition and in the appropriate place, *the manuscript signature of counsel of record*. If the document has been filed electronically by use of the electronic filing site . . . the manuscript signature of counsel of record is not required.

N.C. R. App. P. 26(g)(3) (emphasis supplied).

Plaintiff's trial counsel's hard copy of the purported notice of appeal was filed with the clerk of superior court and bears no "manuscript signature." The signature line is left blank. An effective notice of appeal can only be filed with the clerk of superior court in traditional hard copy with a "manuscript signature of counsel of record." *Id.* Counsel's lack of compliance with the mandatory signature requirement on the notice of appeal is no different from another Rule of Appellate Procedure requiring any counsel arguing before this Court must have signed the hard copy brief, or otherwise be barred from arguing. N.C. R. App. P. 33(a).

The subsequent electronic filing exceptions to this rule are not applicable to this case, nor do any of the Emergency Directives and Orders of the North Carolina Chief Justice for court operations during the COVID-19 pandemic waive or set aside this mandatory requirement. N.C. R. App. P. 26(g)(3).

Our Supreme Court has held a jurisdictional default occurs when the record fails "to contain a notice of appeal in compliance with Rule 3[.]" *Crowell Constructors, Inc. v. State ex rel. Cohen*, 328 N.C. 563, 563, 402 S.E.2d 407, 408 (1991). Plaintiff's counsel's mandatory "manuscript signature" is lacking and not contained on the filed notice of appeal. The purported notice fails to satisfy the express criteria that our appellate rules mandate to invoke appellate jurisdiction. N.C. R. App. P. 3(d); 26(g)(3). Our Supreme Court's and this Court's binding precedents mandate dismissal of the purported appeal for counsel's failure to sign and file an effective and compliant notice of appeal to invoke this Court's

jurisdiction. *Dogwood*, 362 N.C. at 192, 657 S.E.2d at 365. This matter is properly dismissed.

VI. *Amicus Curiae*

The majority's opinion fails to review and entirely dismisses the arguments regarding subject matter jurisdiction raised by *amicus curiae* in its brief. This Court's appointed *amicus curiae* cited and advanced these determinative statutes, rules, and precedents in its brief, and during oral arguments before this Court.

Black's Law Dictionary defines *amicus curiae* as "[Latin 'friend of the court'] (17c) *Someone who* is not a party to a lawsuit but who petitions the court or *is requested by the court to file a brief in the action* because that person has a strong interest in the subject matter." *amicus curiae*, Black's Law Dictionary (11th ed. 2019) (emphasis supplied). The *amicus curiae* in this case was both invited and appointed by this Court by order entered 3 May 2019 to specifically "appear as court appointed *amicus curiae*," "defend the ruling of the trial court," "file a brief," and attended oral arguments. Appointed *amicus curiae* did not petition this Court for leave to submit a brief.

In the absence of any motion to strike by Plaintiff, the majority's opinion inexplicitly treats the specifically approved supplement containing the omitted notice of dismissal from the record on appeal as a nullity. This Court's order allowing and sealing of *amicus curiae's* filed Rule 9(b)(5) Supplement, is signed by a judge who joins the majority's opinion.

The sole contents of the *amicus curiae's* filed Rule 9(b)(5) Supplement is a document raising jurisdictional defects before the trial court in an *ex parte* proceeding. This document in the Wake County Clerk of Court's file was unexplainedly and inextricably omitted from the Plaintiff's record on appeal. "In an *ex parte* proceeding, a *lawyer shall inform the tribunal of all material facts known* to the lawyer that will enable the tribunal to make an informed decision, *whether or not the facts are adverse*." N.C. R. Prof. Conduct 3.3(d) (emphasis supplied). Citing Supreme Court precedents, this Court stated: "It is well-settled that an attorney's responsibilities extend not only to his client but also to the court[s]." *N.C. State Bar v. Key*, 189 N.C. App. 80, 85, 658 S.E.2d 493, 497 (2008) (citation omitted); *see also Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 306 (1965).

"The record on appeal and other testimonial and material evidence is the only 'evidence' this Court has to review the rulings of lower

courts." *Hackos v. Smith*, 194 N.C. App. 532, 537, 669 S.E.2d 761, 764 (2008). *Amicus Curiae* was specifically appointed because this *ex parte* proceeding lacks the adversarial nature of typical court proceedings and the Defendant was neither being represented before the trial court nor on appeal. This Court shall insist upon the filing of a complete record on appeal, and certainly any document which is the basis of the purported appeal and which calls into question the Court's subject matter jurisdiction over the matter. *Id.* *Amicus curiae's* supplemental filing is vital and should have been included in the record on appeal. *Id.*

Presuming *amicus curiae* cannot move to dismiss the action, these reasoned arguments by this Court's designated appointee puts this Court on actual notice of the lack of subject matter jurisdiction, to reject Plaintiff's unasserted and unpreserved constitutional arguments, and to dismiss this wholly baseless appeal.

The absence of subject matter jurisdiction cannot be waived and can and should be raised for the first time on appeal, whether by opposing counsel or *sua sponte*. This Court must dismiss a purported action and appeal, *sua sponte*, upon the lack of subject matter jurisdiction. *See McClure*, 185 N.C. App. at 469, 648 S.E.2d at 550.

All cases cited by the majority's opinion to challenge this Court's issued order, involve an *amicus* who moved and sought leave to file a brief and are inapposite. The majority's opinion cites *Shaver v. Shaver*, 248 N.C. 113, 102 S.E.2d 791 (1958) wherein a trial court appointed an *amicus curiae* to re-open divorce proceedings closed ten years previously, because the trial court had learned the parties had not lived apart for the required two years prior to the filing. The block quote from *Shaver* refers to an *amicus curiae* challenging a ten year old judgment by motion to re-initiate the proceedings. *Id.* at 115, 102 S.E.2d at 793.

Here, the case was purportedly appealed to this Court by Plaintiff. The party before the trial court, the Defendant who received the benefit of the trial court's ruling, did not participate nor was represented by counsel. This Court appointed the *amicus curiae* for a specific purpose: "to defend the ruling of the trial court." An inherent part of that appointment, to file a brief and appear at oral argument, would be to challenge and argue whether jurisdiction and preservation was present for the appellate court to hear or review a matter.

Unlike *amicus curiae* in *Shaver*, this Court's appointed *amicus* does not attempt to re-open long-settled litigation. The purported appeal was pending before this Court upon Plaintiff's unsigned, and ineffective attempt at withdrawal of her signed and filed notice of

dismissal and her counsel's unsigned and ineffective notice of appeal prior to *amicus*' appointment.

Beyond asserting *amicus curiae* does not have the power to submit a motion to dismiss, the majority's opinion also asserts this Court's appointed *amicus curiae* does not have standing. In support of this notion, the majority's opinion cites *Town of Midland v. Morris*, 209 N.C. App. 208, 224-25, 704 S.E.2d 329, 341 (2011). *Town of Midland* involved a wholly inapposite condemnation action wherein the statutory provision utilized only provided a cause of action to a county, not to a landowner.

Neither *Town of Midland* nor any of the cases listed in the string citation involve the standing of an *amicus curiae*, who was specifically appointed to "file a brief" and appear at oral argument by order of this Court "to defend the ruling of the trial court['s]" presumed to be correct judgment and order. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002); *Friends of Earth v. Laidlaw Env. S.*, 528 U.S. 167, 185, 145 L. Ed. 2d 610, 629 (2000); and *Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005).

The appointed *amicus*, a sworn officer of the court and experienced appellate counsel, who was expressly appointed by order of this Court on 3 May 2019, to specifically "defend the ruling of the trial court," served with dignity and exceptional knowledge, and has fulfilled his assigned duties *pro bono*. He earned and is due recognition and gratitude for his able service to this Court and to the Bar.

VII. Conclusion

The trial court was divested of subject matter jurisdiction when Plaintiff signed, entered, and filed her voluntary notice of dismissal of the N.C. Gen. Stat. § 50B-1(b)(6) complaint. Plaintiff's counsel's attempt to re-file an unsigned, undated, and purported hand-notated withdrawal of her properly filed and entered dismissal form did not revive that complaint and failed to commence or allege any basis of relief required in a new complaint under Rule 3 and Rule 41. No new action was commenced, nor new docket number assigned. No Rule 60 motion was filed and the time for Plaintiff to have filed has elapsed. *See Talbert*, 80 N.C. App. at 479, 343 S.E.2d at 7.

No signed notice of appeal was filed to invoke appellate jurisdiction to allow appellate review of the dismissed complaint. Appellate review of unpreserved, new and non-argued constitutional issues also violates our binding precedents, rules, and procedures. *See Anderson*, 356 N.C.

at 416, 572 S.E.2d at 102; *Fields*, 218 N.C. App. at 417, 722 S.E.2d at 793. The Speaker of the House of Representatives and the President *Pro Tempore* of the Senate were not served and "must be joined" as necessary parties. N.C. Gen. Stat. 1A-1, Rule 19(d).

This Court is also not vested with appellate jurisdiction due to counsel's unsigned and defective notice of appeal filed with the clerk of superior court. N.C. R. App. P. 3; 26(g)(3); *Crowell*, 328 N.C. at 563, 402 S.E.2d at 408.

No petition for writ of certiorari to invoke appellate jurisdiction has been filed under Rule 21, and, presuming jurisdiction exists, no motion to invoke Rule 2 to suspend the appellate rules was argued. These jurisdictional defaults and waivers preclude any appellate review. *Crowell*, 328 N.C. at 563, 402 S.E.2d at 408.

No appeal is pending before this Court. Any attempt at analysis beyond examining jurisdiction, preservation, proper joinder and compliance with the Rules of Civil and Rules of Appellate Procedure is *ultra vires*, a notion, and a nullity. I respectfully dissent.

VERED MADAR, PLAINTIFF
v.
GIL MADAR, DEFENDANT

No. COA20-28

Filed 31 December 2020

1. Divorce—alimony—dependency—findings of fact

In an alimony action, the trial court's findings of fact supported its conclusion that plaintiff wife was a dependent spouse as defined by N.C.G.S. § 50-16.1A(2) where its findings established that plaintiff's reasonable monthly expenses exceeded her income and that her periods of unemployment were not due to bad faith. The findings were supported by record evidence, along with a narrative provided by defendant describing a portion of plaintiff's testimony that was missing from the verbatim transcript and that appeared to support the challenged findings.

2. Divorce—alimony—supporting spouse

In an alimony action, the trial court's findings of fact supported its conclusion that defendant husband was a supporting spouse as

defined in N.C.G.S. § 50-16.3A(5) where the findings established that defendant's monthly income exceeded his monthly expenses. Although defendant provided an affidavit detailing higher expenses, those included expenses related to the couple's youngest son, and absent those expenses, the evidence supported the court's findings.

3. Divorce—alimony—amount of award—discretionary decision

In an alimony action, the specific amount of alimony awarded to plaintiff wife was not an abuse of discretion where the trial court considered all of the relevant factors, including both parties' earning capacity, needs, expenses, and accustomed standard of living during the marriage—as well as defendant husband's ability to pay the amount awarded.

4. Child Custody and Support—child support—calculation—extraordinary expenses—residential treatment program

In determining child support obligations, the trial court did not abuse its discretion by ordering both parties to contribute to the extraordinary expenses, as defined by the N.C. Child Support Guidelines, incurred by their youngest son for in-patient treatment and associated costs for transportation and psychological evaluations. The court's unchallenged findings supported its conclusion that defendant father had the ability to pay his portion of the expenses, and the court was not required to make specific findings before making a discretionary adjustment regarding the extraordinary expenses, which was not a deviation from the guidelines.

5. Child Custody and Support—child support—calculation—unreimbursed and uninsured medical expenses

In determining child support obligations, the trial court did not abuse its discretion by ordering defendant father to pay all of the minor child's unreimbursed/uninsured medical expenses given evidence of the large disparity between the parties' respective incomes, which supported the court's determination that defendant had the ability to pay for those expenses.

6. Child Custody and Support—child support—reimbursement of expenses—not addressed by trial court—remanded for additional findings

In a child support action, the trial court's order was reversed and remanded for additional findings on defendant father's contention that plaintiff mother should reimburse him for forty percent of the cost of enrolling the parties' youngest son in a residential treatment program. Although the court had determined that the parties should

both contribute to the program's costs, there was no indication in the record that the court addressed defendant's claim despite submission of evidence that defendant paid the full cost of enrollment.

Appeal by defendant from judgment entered 13 August 2019 by Judge Sherri T. Murrell in Orange County District Court. Heard in the Court of Appeals 8 September 2020.

Chapel Hill Family Law, by Brian C. Johnston, for plaintiff-appellee.

Tharrington Smith, LLP, by Steve Mansbery and Jeffrey R. Russell, for defendant-appellant.

BRYANT, Judge.

Defendant Gil Madar appeals from a trial court's order for child support and alimony ("2019 Order") wherein the trial court awarded alimony to plaintiff Vered Madar and the parties were ordered to share responsibilities related to their son's treatment. Where the trial court correctly determined that plaintiff was a dependent spouse and thus entitled to alimony, we affirm the trial court's ruling. Where the trial court provided no explanation to support the amount and duration of its alimony award, we remand this matter for further findings on the amount and duration of its alimony award. Where the trial court correctly determined the parties' child support obligations, we affirm the trial court's rulings. Where the trial court failed to address defendant's claim for reimbursement of residential treatment enrollment costs associated with the parties' minor child, we reverse and remand for additional findings.

On 16 September 1994, plaintiff and defendant married in Israel and had three children—all sons—over the course of their marriage. Each of the children suffered severe emotional issues at various times since 2013. Mental health issues and treatment regarding the youngest child (hereinafter "the minor child") became the central part of the parties' litigation and court orders, including the 2019 Order at issue on appeal. When the 2019 Order was entered, the two oldest children had reached the age of majority.

In August 2008, the parties and their three children relocated to the United States and purchased a home in Chapel Hill. They resided in the home together until they separated on 10 September 2016. During the marriage, the parties acquired an E-Trade investment account, which had a date-of-separation balance of $273,505; a 401(k) retirement account in defendant's name, which had a date-of-separation balance

of $214,109.96; and a money market account, which had a date-of-separation balance of $95,254.24.

On 30 September 2016, plaintiff filed a complaint seeking child custody, child support, postseparation support, alimony, attorney's fees, and equitable distribution. Defendant filed an answer and counterclaims for child custody and equitable distribution. Pursuant to a resolution of the parties' claims for equitable distribution, plaintiff received the home in Chapel Hill, and defendant received the E-Trade Investment account. The parties equally divided the sale proceeds of a condominium they shared in Israel, the money from defendant's 401(k) retirement account, and the money market account.

In 2016, the minor child began having severe emotional issues. Plaintiff, who was last employed full-time in 2013, was his primary caregiver.

On 8 February 2017, the trial court entered an order for temporary child support and postseparation support. The order established defendant's temporary child support obligation at $2,014.00 per month and his postseparation support obligation at $2,220.00 per month, based upon his monthly income at that time of $12,706.00. Defendant was ordered to pay all unreimbursed medical expenses for the minor child.

In March 2017, the minor child was hospitalized for inpatient care at UNC School of Medicine due to his mental health issues. Approximately a year later, on 20 March 2018, the trial court ordered psychological evaluations of plaintiff and defendant to determine their fitness as custodial parents. Plaintiff was ordered to participate in reunification therapy and personal therapy.

On 27 August 2018, the parties attended a hearing to determine temporary placement for the minor child, and the trial court ordered the parties to enroll him in an intensive therapeutic program at New Vision Wilderness Therapy in Wisconsin (hereinafter referred to as "New Vision Wisconsin"). The trial court also ordered the parties to equally divide the program treatment costs. On 29 November 2018, the minor child was transferred to another treatment facility in Utah: Telos Residential Treatment Program (hereinafter referred to as "Telos"). The parties were ordered to comply with the treatment requirements at Telos, which included following a visitation schedule and participating in family therapy. The parties incurred expenses related to the minor child's enrollment at Telos. The minor child was still residing at Telos when the trial court entered the 2019 Order.

In 2019, the parties appeared for a hearing on the matter of child support and alimony before the Honorable Sherri T. Murrell, District Court Judge presiding. Following the hearing, the trial court entered the 2019 Order. Defendant appeals.

On appeal, defendant argues the trial court erred by (I) finding that plaintiff was entitled to an award of alimony and determining the amount defendant should pay, (II) concluding both parties have a duty to provide child support for the minor child's needs and failing to apply the proper guidelines for its child support determination, (III) ordering defendant to pay all of the minor child's unreimbursed medical expenses, and (IV) failing to address defendant's claim for reimbursement of the minor child's cost of enrollment at Telos.

I

Defendant first appeals from the portion of the order awarding plaintiff alimony. Specifically, defendant contends the trial court erred in its findings of fact that plaintiff was a dependent spouse and defendant a supporting spouse and concluding plaintiff was entitled to receive alimony. Additionally, defendant argues the trial court abused its discretion by ordering defendant to pay alimony without making the necessary findings to support the award.

"As our statutes outline, alimony is comprised of two separate inquiries." *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000). The trial court's first determination as to whether a party is *entitled* to alimony is reviewed *de novo*. *Id.* If the trial court determines that a party is entitled to alimony, then a second determination is made as to the amount of alimony to be awarded, which we review for abuse of discretion. *Id.*

> Entitlement to alimony is governed by N.C. Gen. Stat. § 50-16.3A(a) . . . . [A] party is entitled to alimony if three requirements are satisfied: (1) [] [the] party [seeking alimony] is a dependent spouse; (2) the other party is a supporting spouse; and (3) an award of alimony would be equitable under all the relevant factors.

Id. We address each argument in order.

Dependent Spouse

[1] By statute, a "dependent spouse" is one "who is actually substantially dependent upon the other spouse for his or her maintenance and

support or is substantially in need of maintenance and support from the other spouse." N.C. Gen. Stat. § 50-16.1A(2) (2019).

> A spouse is 'actually substantially dependent' if he or she is currently unable to meet his or her own maintenance and support. A spouse is 'substantially in need of maintenance' if he or she will be unable to meet his or her needs in the future, even if he or she is currently meeting those needs.

Barrett, 140 N.C. App. at 371, 536 S.E.2d at 644–45 (internal citation omitted). "[T]o properly find a spouse dependent[,] the court need only find that the spouse's reasonable monthly expenses exceed her monthly income and that the party has no other means with which to meet those expenses." *Beaman v. Beaman*, 77 N.C. App. 717, 723, 336 S.E.2d 129, 132 (1985).

In the instant case, the trial court made the following findings of fact:

> 46. Throughout their time as a married couple living in Israel, [p]laintiff earned substantially less than [d]efendant, receiving only a modest stipend during the approximately nine years while she was working on her Masters and Ph.D.
>
> . . . .
>
> 48. Throughout their lives, [p]laintiff was the primary caretaker of the parties' three sons, maintaining primary responsibility for overseeing the boys' health, development, education, and general welfare.
>
> . . . .
>
> 52. In August 2008, [p]laintiff and [d]efendant and their three boys relocated to the United States for [p]laintiff's post-doc position. . . .
>
> . . . .
>
> 58. Plaintiff's post-doc position . . . ended in 2009.
>
> 59. Following the end of her post-doc position . . . in 2009, [p]laintiff was unable to work for a period of approximately eighteen months due to work restrictions with her H4B visa.
>
> 60. In 2010, [p]laintiff began working at UNC in a grant-funded position.

> 61. The grant funding for [p]laintiff's position at UNC ended in 2013, and [p]laintiff's position at UNC was terminated at this time.[1]
>
> . . . .
>
> 68. Plaintiff assumed primary responsibility for managing the boys' emotional issues and mental health needs, by, for example, transporting the boys to and from their many therapy appointments.
>
> . . . .
>
> 71. As of the Hearing Dates, [p]laintiff's unemployment has not been willful or the product of bad faith.
>
> . . . .
>
> 78. Plaintiff earned $0 in 2018; $0 in 2017; $4,800 in 2016; $0 in 2015; $6,750 in 2014; and $40,500 in 2013.
>
> . . . .
>
> 91. As of the Hearing Dates, [p]laintiff's reasonable fixed monthly expenses totaled $2,012, and [p]laintiff's reasonable individual monthly expenses totaled $1,866, for total reasonable monthly expenses of $3,878.

Here, the trial court's findings of fact demonstrate that prior to the parties' separation and at the time of the hearing, plaintiff was unable to earn sufficient income to support her reasonable needs. As defendant does not except to most of the findings of fact, those findings are presumed to be supported by competent evidence and are binding on appeal. *Hall v. Hall*, 65 N.C. App. 797, 799, 310 S.E.2d 378, 380 (1984). Plaintiff's reasonable monthly expenses, which totaled $3,878, contributed to a deficit because she did not have monthly income due to her unemployment. Moreover, no evidence was presented as to any bad faith on plaintiff's part. Thus, the findings of fact were sufficient to support the trial court's order that plaintiff was a dependent spouse.

Conversely, defendant does challenge some of the trial court's findings of fact––also addressing plaintiff's dependency––arguing the findings were not supported by competent evidence:

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1. Although defendant contends on appeal that finding of fact 61 is not supported by the evidence, defendant concedes in his brief that plaintiff was terminated from her position at UNC and does not dispute that plaintiff had been unemployed since her termination. Plaintiff also concedes that her year of termination was in 2014, rather than 2013.

> 63. With the loss of her job at UNC, [p]laintiff turned much of her attention towards tending to [childcare] needs.
>
> . . . .
>
> 70. Plaintiff has been diagnosed with Post Traumatic Stress Disorder.
>
> . . . .
>
> 81. Plaintiff was unable to set aside any funds for her retirement during the parties' separation.
>
> . . . .
>
> 85. As of November 5, 2018, [p]laintiff had $45.40 remaining from her aforementioned one-half share of the parties' money market account.
>
> . . . .
>
> 87. As of November 20, 2018, [p]laintiff had . . . approximately $30,000, remaining from her aforementioned share of the proceeds from the sale of the [condo in Israel].

We note that defendant's challenge to findings of fact 63, 70, and 81 appear to reference plaintiff's testimony at trial which was not included in the record.[2]

"The unavailability of a verbatim transcript does not automatically constitute error. . . . [A] party must demonstrate that the missing recorded evidence resulted in prejudice." *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006).

> [O]ur Supreme Court has held that the lack of a transcript does not prejudice the defendant when alternatives–such as a narrative of testimonial evidence compiled pursuant to Rule 9(c)(1) of the North Carolina Rules of Appellate Procedure–"are available that would fulfill the same functions as a transcript and provide the defendant with a meaningful appeal."

State v. Hobbs, 190 N.C. App. 183, 186, 660 S.E.2d 168, 170 (2008) (quoting *State v. Lawrence*, 352 N.C. 1, 16, 530 S.E.2d 807, 817 (2000)). "Any dispute regarding the accuracy of a submitted narration of the

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2. Part of the transcript from the hearing is unavailable due to no fault of either party.

evidence can be resolved by the trial court settling the record on appeal. . . . Overall, a record must have the evidence necessary for an understanding of all errors assigned." *Quick*, 179 N.C. App. at 651, 634 S.E.2d at 918.

Here, the trial court made the requisite findings of fact addressing plaintiff's mental health condition, her work history, and her financial status based upon the testimony presented at trial. The proposed record on appeal, submitted by counsel for defendant, included a narration of the missing evidence stating the following:

> Plaintiff was called to testify. . . [and] [] was the only witness who testified that day. Plaintiff's testimony consisted largely of background information about the parties and their children. Plaintiff testified about the parties' date of marriage, date of separation, the children's names and dates of birth, her education and work history, her mental health condition, [d]efendant's work background, the parties' living arrangements in Israel, their ability to save money while living in Israel, and the children's medical, emotional, and mental health issues.

The narration of evidence clearly referenced the missing testimony, and we find the narration was an adequate alternative to a verbatim transcript. *See In re Shackleford*, 248 N.C. App. 357, 362, 789 S.E.2d 15, 19 (2016) ("[I]n virtually all of the cases in which we have held that an adequate alternative to a verbatim transcript existed, the transcript of the proceeding at issue was only *partially* incomplete, and any gaps therein were capable of being filled."); *see also Hobbs*, 190 N.C. App. at 187–88, 660 S.E.2d at 171 ("Although our Courts have declined to find prejudice in cases in which a transcript is unavailable for only a portion of the trial proceedings, [an] appeal [can be] hindered by the total unavailability of either a transcript or an acceptable alternative for a *majority* of defendant's trial.").

Defendant has not demonstrated nor does he assert an argument that he was prejudiced by the missing verbatim transcript. Based on the narration of evidence provided by defendant, the excepted findings of fact appear to be supported by plaintiff's testimony at trial. Absent evidence to the contrary, there is a presumption of regularity in the proceedings of a lower court. *See R & L Const. of Mt. Airy, LLC v. Diaz*, 240 N.C. App. 194, 197–98, 770 S.E.2d 698, 701 (2015); *State v. Bass*, 133 N.C. App. 646, 649, 516 S.E.2d 156, 158 (1999). Here, where the unavailability of the transcript is due to no fault of either party, there is no basis for this Court to set aside the presumption of regularity and strike the

trial court's findings of fact. According, defendant's argument on these points is overruled.

Additionally, having reviewed the record, we conclude the trial court's findings of fact, including 85 and 87, were supported by competent evidence, and thus, support the trial court's determination that plaintiff is a dependent spouse under N.C.G.S. § 50-16.1A(2).

Supporting Spouse

[2] N.C. Gen. Stat. § 50-16.1A(5) provides that " '[s]upporting spouse' means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent for maintenance and support or from whom such spouse is substantially in need of maintenance and support." N.C.G.S. § 50-16.3A(5). While "evidence one spouse is dependent does not necessarily infer the other spouse is supporting," *Williams v. Williams*, 299 N.C. 174, 186, 261 S.E.2d 849, 857 (1980), this Court has stated, "[a] surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification." *Barrett*, 140 N.C. App. at 373, 536 S.E.2d at 645.

Here, the trial court found that defendant's net monthly income was $5,910.00 per month, which net monthly income included a monthly 401(k) contribution of $960.69, and his total reasonable monthly expenses were $3,729; yielding a monthly surplus of $2,181. However, defendant challenges the trial court's finding of fact regarding his monthly expenses, arguing the finding was not supported by the evidence. We disagree.

Prior to the hearing, defendant submitted an affidavit of financial standing indicating his fixed monthly expenses and individual monthly expenses; stating that his fixed monthly expenses were $3,922, which included expenses for a parenting coordinator and education planner for the minor child totaling $1,556. Defendant also stated that his individual monthly expenses were $9,613, which included $8,250 for expenses related to the minor child's enrollment at Telos. The trial court, using defendant's affidavit, did not include in its calculation, expenses related to the minor child's enrollment at Telos, the parenting coordinator, or the education planner. Similarly, the trial court also did not include those expenses in plaintiff's monthly expenses when finding plaintiff to be a dependent spouse. Absent consideration of the expenses associated with Telos, the evidence supports the trial court's finding that defendant's "reasonable fixed monthly expenses totaled $2,366," and his "reasonable individual monthly expenses totaled $1,363, for total reasonable monthly expenses of $3,729."

Moreover, the trial court also made several unchallenged findings of facts as to defendant's income and expenses:

> 72. Defendant lost his job at Qualcomm in August 2018 as a result of corporate restructuring.
>
> 73. In August 2018, [d]efendant received a gross vacation payout in the amount of $21,414.75 in his final paycheck from Qualcomm.
>
> 74. Defendant earned a total of $131,025.81 from Qualcomm in 2018 through August 24.
>
> 75. Additionally, in September 2018, [d]efendant received a one-time gross severance payment from Qualcomm in the amount of $83,556.94
>
> 76. Defendant earned an additional $24,326 from his employment with Channel One in 2018, for total earnings of $238,907 in 2018.
>
> 77. Defendant earned $196,176 in 2017; $178,100 in 2016; $173,302 in 2015; $341,883 in 2014; and $208,805 in 2013.
>
> . . . .
>
> 79. Plaintiff and [d]efendant were able to save for retirement during their marriage; specifically, in 2013, [d]efendant contributed $13,125 to his 401(k); in 2014, [d]efendant contributed $13,125 to his 401(k); in 2015, [d]efendant contributed $13,533.08 to his 401(k) and $4,466.92 to his Roth 401(k); and, in 2016, [d]efendant contributed $13,594.56 to his 401(k) and $5,151.80 to his Roth 401(k).
>
> 80. Following the parties' separation, [d]efendant continued to save for retirement; specifically, in 2017, [d]efendant contributed $15,869.84 to his 401(k) and $1,639.44 to his Roth 401(k); and, in 2018, [d]efendant contributed $11,679.06 to his Qualcomm 401(k) and $1,769.24 to his Channel One 401(k).

Based on these findings, defendant's income-expenses surplus adequately supports the trial court's determination that defendant is a supporting spouse.

Alimony Award

[3] The amount of alimony to be awarded is within the trial judge's sound discretion and is not reviewable on appeal absent a manifest abuse of discretion. *Id*. at 371, 536 S.E.2d at 644.

N.C. Gen. Stat. § 50-16.3A, which governs alimony awards, states, in pertinent part:

> The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors. . .

N.C.G.S. § 50-16.3A(a).

> [I]n determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors including, *inter alia*, the following: marital misconduct of either spouse; the relative earnings and earning capacities of the spouses; the ages of the spouses; the amount and sources of earned and unearned income of both spouses; the duration of the marriage; the extent to which the earning power, expenses, or financial obligations of a spouse are affected by the spouse's serving as custodian of a minor child; the standard of living of the spouses during the marriage; the assets, liabilities, and debt service requirements of the spouses, including legal obligations of support; and the relative needs of the spouses.

Hartsell v. Hartsell, 189 N.C. App. 65, 69, 657 S.E.2d 724, 727 (2008). The parties' needs and expenses for purposes of computing alimony should be measured in light of their accustomed standard of living during the marriage. *Barrett*, 140 N.C. App. at 372, 536 S.E.2d at 645. "While the court must consider the needs of the spouse seeking alimony in the context of the family unit's accustomed standard of living, it also must determine that the supporting spouse has the financial capacity to provide the support needed therefor." *Whedon v. Whedon*, 58 N.C. App. 524, 527, 294 S.E.2d 29, 31 (1982).

Here, as discussed *supra*, the trial court considered all the relevant factors and made findings of fact addressing, *inter alia*, each party's earning capacity, respective needs and expenses, and the accustomed standard of living during their marriage. In the order, the trial court found, based on all the evidence presented, that "[d]efendant ha[d] the

present ability to pay monthly alimony to [p]laintiff in the amount of $2,395, beginning February 1, 2019, and continuing for a period of eight years and seven months thereafter." However, defendant argues the trial court failed to make the necessary findings setting forth its reasoning for the amount and duration of the alimony award. We agree.

While the trial court found that defendant had the ability to pay $2,395, the order did not expressly include findings to support its rationale for awarding plaintiff that specific amount. Additionally, the trial court provided no explanation to support the duration of its alimony award. Thus, we must remand this matter to the trial court for further findings on the trial court's rationale for the amount and duration of its alimony award. *See* N.C.G.S. § 50-16.3A(c) (stating that the trial court "*shall* set forth the reasons for its award or denial of alimony and, *if making an award*, *the reasons for its amount*, *duration*, *and manner of payment*." (emphasis added)); *see also Wise v. Wise*, 264 N.C. App. 735, 749, 826 S.E.2d 788, 798 (2019); *Hartsell*, 189 N.C. App. at 76, 657 S.E.2d at 730.

II

[4] Defendant next appeals from the trial court's child support determination. Defendant argues the trial court erred by concluding that both parties have a duty to provide support to their minor child for his expenses relating to Telos. We disagree.

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Mason v. Erwin*, 157 N.C. App. 284, 287, 579 S.E.2d 120, 122 (2003) (citation and quotation marks omitted). "To support such a reversal, an appellant must show that the trial court's actions were manifestly unsupported by reason." *State v. Williams*, 163 N.C. App. 353, 356, 593 S.E.2d 123, 126 (2004).

N.C. Gen. Stat. § 50-13.4(c) authorizes the trial court to order a child support award

> in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C.G.S. § 50-13.4(c) (2019). Generally, both parents have an equal duty to provide support for their children. *See Plott v. Plott*, 313 N.C. 63, 68,

326 S.E.2d 863, 867 (1985) ("Today, the equal duty of both parents to support their children is the rule."); *see also* N.C. Gen. Stat. § 50-13.4(b) ("In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child."). However, while parents have an equal duty to support their children, "the equal duty to support does not necessarily mean the amount of child support is to be automatically divided equally between the parties. Rather, the amount of each parent's obligation varies in accordance with their respective financial resources." *Plott*, 313 N.C. at 68, 326 S.E.2d at 867.

"Child support payments are ordinarily determined based on a party's actual income at the time the award is made." *Williams*, 163 N.C. App. at 356, 593 S.E.2d at 126. "In determining the amount of a child support obligation, [t]he judge must evaluate the circumstances of each family and also consider certain statutory requirements[.]" *Bowers v. Bowers*, 141 N.C. App. 729, 731, 541 S.E.2d 508, 509 (2001) (alterations in original) (citation and quotation marks omitted).

In the instant case, the trial court made the following findings of fact relating to the minor child's reasonable needs and child care:

> 23. Plaintiff and [d]efendant each acknowledged that it was in [the minor child]'s best interest to be enrolled at Telos and that [the minor child] has benefitted substantially from his time at Telos.
>
> 24. The expenses incurred for [the minor child]'s benefit in connection with his enrollment at New Vision and Telos, as well as his transportation expenses incurred with Right Direction, psychological evaluation expenses incurred [], and [p]laintiff's Telos Expenses, are extraordinary expenses, as defined by the North Carolina Child Support Guidelines.
>
> . . . .
>
> 97. Plaintiff has the present ability to pay 40% of the Dr. KKJ [e]xpenses, and [d]efendant has the present ability to pay 60% of the Dr. KKL[']s psychological evaluation e]xpenses.
>
> 98. Plaintiff has the present ability to pay 50% of the Dr. Zeisz [e]xpenses, and [d]efendant has the present ability to pay 50% of the Dr. KKL [e]xpenses.

> 99. Plaintiff has the present ability to pay 40% of the expenses associated with [minor child]'s enrollment at Telos, including expense account expenses, and [d]efendant has the present ability to pay 60% of expenses associated with [minor child]s enrollment at Telos, including expense account expenses.
>
> 100. Plaintiff has the present ability to pay 40% of the Right Direction [e]xpenses for Telos, and [d]efendant has the present ability to pay 60% of the Right Direction [e]xpenses for Telos.
>
> 101. Plaintiff has the present ability to pay 40% of [p]laintiff's Telos [e]xpenses, and [d]efendant has the present ability to pay 60% [p]laintiff's Telos [e]xpenses.

We note defendant does not take exception to the findings made by the trial court regarding his financial status at the time of the hearing in 2019. The trial court found that after the parties had separated, defendant earned $196,176 in 2017, and $238,907 in 2018.[3] In addition to defendant's ability to make substantial contributions to his retirement accounts in 2017 and 2018, the trial court found that defendant had assets in an E-Trade investment account with a date-of-separation balance of $273,505, one-half interest in a Qualcomm 401(k) account with a date-of-separation balance of $214,109.96, and one-half interest in a money market account with a date-of-separation balance of $95,254.24. Additionally, defendant received $238,000 in 2018 from the sale of the parties' condominium in Israel. At the time of the hearing, defendant had not spent any of the proceeds from the condominium sale. Those findings, which are binding on this Court, support the finding of fact and conclusion of law that defendant had the ability to pay child support.

Defendant also contends the trial court deviated from the Child Support Guidelines because the trial court concluded that defendant "ha[d] the ability to pay the child support ordered. The trial court did not make any findings of fact to support this conclusion." We also reject this argument.

Although N.C. Gen. Stat. § 50-13.4 mandates a trial court use the presumptive guidelines when determining the amount of child support payments, the North Carolina Child Support Guidelines (the "Guidelines"), effective 1 January 2019, provide that

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3. The hearing for child support and alimony took place on 2 January, 8 February, and 20 March 2019.

> extraordinary child-related expenses (including (1) expenses related to special or private elementary or secondary schools to meet a child's particular education needs, and (2) expenses for transporting the child between the parent's homes) *may be added to the basic child support obligation and ordered paid by the parents in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest.*

N.C. Child Support Guidelines 2019 Ann. R. N.C. 5 (emphasis added).

> [D]etermination of what constitutes an extraordinary expense is . . . within the discretion of the trial court[.] Based upon the Guideline language above, the court may, in its discretion, make adjustments [in the Guideline amounts] for extraordinary expenses. However, incorporation of such adjustments into a child support award does not constitute deviation from the Guidelines, but rather is deemed a *discretionary adjustment* to the presumptive amounts set forth in the Guidelines. . . . [A]bsent a party's request for deviation, the trial court is not required to set forth findings of fact related to the child's needs and the non-custodial parent's ability to pay extraordinary expenses.

Biggs v. Greer, 136 N.C. App. 294, 298, 524 S.E.2d 577, 581–82 (2000) (alteration in original) (emphasis added) (internal citations and quotation marks omitted).

Here, the trial court's findings of fact regarding expenses related to the minor child's inpatient treatment, which included travel expenses and psychological evaluations, appropriately fall under the definition of extraordinary expenses in the Guidelines. The court properly exercised its discretion and determined that plaintiff had the ability to pay 40% of the minor's expenses and defendant had the ability to pay 60% of the expenses.[4] *Ferguson v. Ferguson*, 238 N.C. App. 257, 265, 768 S.E.2d 30, 36 (2014) ("The trial court is vested with discretion to make adjustments to the guideline amounts for extraordinary expenses, and the determination of what constitutes such an expense is likewise within its sound discretion." (citation and quotation marks omitted)).

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4. Prior to the trial court's order, the parties had already shared the responsibility of the minor child's expenses and made payments towards his treatment.

Contrary to defendant's assertion, the trial court was not required to make specific findings regarding the child's reasonable needs or the parents' ability to provide support as the court's "discretionary adjustment" did not constitute a deviation under the Guidelines. *See Greer*, 136 N.C. App. at 298, 524 S.E.2d at 582. In fact, the trial court's finding—that plaintiff and defendant should be obligated to pay extraordinary child care expenses in varying proportions to meet the minor child's needs—is consistent with the underlying assumption of the Guidelines that "child support is *a shared parental obligation*[.]" N.C. Child Support Guidelines 2019 Ann. R. N.C. 5 (emphasis added). We see nothing in the record to indicate that either party requested a deviation from the Guidelines.

Therefore, we hold the trial court did not abuse its discretion by ordering both parties to provide the above-referenced support to their minor child.

III

[5] Defendant raises another argument regarding his child support obligation, contending the trial court erred by ordering him to pay all the minor child's unreimbursed/uninsured medical expenses. We disagree.

Typically, "uninsured medical and dental expenses are to be apportioned between the parties in the discretion of the trial court. In other words, any decision by the court in this regard must be upheld absent a showing that it is manifestly unsupported by reason." *Lawrence v. Tise*, 107 N.C. App. 140, 150, 419 S.E.2d 176, 183 (1992). The Guidelines include a provision referring to uninsured medical or dental expenses, stating:

> [t]he basic guideline support obligation includes $250 per child for the child's annual uninsured medical and/or dental expenses. . . . [T]he court *may* order that uninsured health care costs in excess of $250 per year (including reasonable and necessary costs related to medical care, dental care, orthodontia, asthma treatments, physical therapy, treatment of chronic health problems, and counseling or psychiatric therapy for diagnosed mental disorders) incurred by a parent *be paid by either parent or both parents in such proportion as the court deems appropriate.*

N.C. Child Support Guidelines 2019 Ann. R. N.C. 5 (emphasis added). We note the Guidelines do not include mandatory language advising the trial court on the allocation of uninsured expenses between the parties. Instead, this Court has stated that the trial court is vested with wide discretion in deciding the allocation of such expenses on a child's behalf:

> [T]he Child Support Guidelines . . . include a generalized, cursory instruction concerning how the court 'may' structure the responsibility for these uninsured expenses [which] does not in any way alter the trial court's discretion to apportion these expenses, described and applied in *Tise*, 107 N.C. App. at 150, 419 S.E.2d at 183. . . . [T]he Child Support Guidelines neither require the trial courts to follow a certain formula nor prescribe what the trial courts 'should' or 'must' do in this regard[.] . . . Given the wide discretion afforded [to] our trial courts in matters concerning the allocation of uninsured medical or dental expenses, then, such decisions cannot be disturbed on appeal absent a manifest abuse of discretion.

Holland v. Holland, 169 N.C. App. 564, 571–72, 610 S.E.2d 231, 236–37 (2005).

Here, considering the disparity between the parties' respective incomes, we find the trial court's order requiring defendant to pay all medical expenses not covered by insurance on behalf of the minor child was not manifestly unsupported by reason so as to constitute an abuse of discretion. *See Roberts v. McAllister*, 174 N.C. App. 369, 381, 621 S.E.2d 191, 199 (2005) ("It is in the discretion of the trial court to determine a fair sharing arrangement for the uninsured medical expenses.").

We reject defendant's contention that there was no competent evidence presented to show what the minor child's expenses were and what they would cost defendant. In defendant's affidavit of financial standing [] submitted to the trial court, he included $433 for the minor child's "medical/dental bills not paid by insurance" in his total individual expense estimate. The court included this expense in its finding of defendant's reasonable individual expenses and determined that defendant had a surplus in income to enable him to afford those expenses if they occur. Accordingly, we affirm the trial court's ruling.

IV

[6] Defendant finally argues the trial court erred by failing to address his claim for reimbursement of the minor's cost of enrollment at Telos. We agree.

Here, defendant submitted evidence that he was charged the full amount of $5,250.00, relating to the minor child's enrollment costs in Telos on 30 October 2018. The trial court found that plaintiff had the ability to pay "40% of the expenses associated with the minor child's enrollment at Telos." Thus, pursuant to the trial court's order, defendant

contends plaintiff was required to reimburse him for 40% of this cost, totaling $2,100.

Given the lack of findings by the trial court on this issue, we are unable to discern from the record how or whether the trial court considered defendant's argument for reimbursement on his Telos's costs. Thus, we reverse and remand for additional findings as to defendant's claim for reimbursement.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judges ZACHARY and ARROWOOD concur.

WILLIAM S. MILLS, AS GUARDIAN AD LITEM FOR ANGELINA DEBLASIO, PLAINTIFF
v.
THE DURHAM BULLS BASEBALL CLUB, INC., DEFENDANT

No. COA19-510

Filed 31 December 2020

Premises Liability—Baseball Rule—injury to spectator from foul ball—duty of care satisfied—summary judgment proper

The trial court properly granted summary judgment in favor of a baseball club in a negligence action in which plaintiff sought damages for injuries sustained when she was hit by a foul ball while sitting in a picnic area of a baseball stadium during a game. The common law Baseball Rule operated to shield the baseball club from liability where the club satisfied its duty to protect spectators by providing a reasonable number of screened seats, there was no evidence that the area where plaintiff was seated was negligently designed, and evidence was presented that plaintiff had sufficient knowledge of the game of baseball to understand the danger foul balls represented to people sitting in the stands.

Appeal by Plaintiff from an order entered 28 December 2018 by Judge Eric C. Morgan in Superior Court, Durham County. Heard in the Court of Appeals 3 December 2019.

Ward & Smith, P.A., by Alexander C. Dale, A. Charles Ellis, and Christopher S. Edwards, for Plaintiff-Appellant.

Fox Rothschild LLP, by D. Erik Albright and Kip David Nelson, for Defendant-Appellee.

McGEE, Chief Judge.

Plaintiff Angelina DeBlasio ("Plaintiff"),[1] who was hit and injured by a foul ball at a baseball game, appeals from an order granting summary judgment in favor of The Durham Bulls Baseball Club, Inc. ("Defendant") and dismissing her complaint. On appeal, Plaintiff contends that the common law "Baseball Rule," which disclaims liability for baseball stadium operators who satisfy their duty to protect patrons from errant balls by providing an adequate number of screened seats, *Bryson v. Coastal Plain League, LLC*, 221 N.C. App. 654, 656–57, 729 S.E.2d 107, 109–10 (2012), does not apply to the facts of this case. Though Plaintiff undoubtedly suffered a painful and unfortunate injury, we hold that the Baseball Rule is applicable and affirm the trial court's order.

I. Factual and Procedural History

Plaintiff was born in 2004 in the Pittsburgh, Pennsylvania area. Plaintiff took up softball while living in Pittsburgh, and attended several Pittsburgh Pirates games in 2014 and 2015 with her family. Plaintiff's younger siblings both play either baseball or softball, and baseball is a popular sport with Plaintiff's parents and siblings; since 2014, Plaintiff's family would get together and watch three or four Major League Baseball playoff games on TV each season. Plaintiff paid attention to the majority of each game she watched on TV or attended in person.

Plaintiff's father worked for Panasonic Avionics ("Panasonic"), a job which led Plaintiff's family to relocate to North Carolina in 2015. To celebrate the move and introduce Plaintiff's family to the other area employees, Panasonic arranged for a picnic meet-and-greet at Durham Bulls Athletic Park during a baseball game hosted by the Durham Bulls on 5 August 2015. Panasonic reserved a publicly accessible picnic area called the Bull Pen Picnic Area ("Picnic Area") for the event.

The Picnic Area is an open-air section of the stadium situated behind the left-field foul line in the corner of the outfield at one of the furthest spots in left field from home plate. Located at about field level and—as of 5 August 2015—separated from the area of play only by a low wall, the Picnic Area is outside the 110 feet of protective netting that runs

1. Though formally represented by her Guardian ad Litem, we refer to Angelina DeBlasio as the singular "Plaintiff" for simplicity and ease of reading.

from behind home plate towards each team's dugout. The portion of the Picnic Area closest to the field includes picnic tables with umbrellas, while the area furthest from the field is open space. Three warning signs are posted along the Picnic Area's field wall, stating "PLEASE BE AWARE OF OBJECTS LEAVING THE PLAYING FIELD," and other similar signs are placed throughout the stadium. Prior to each game, the Durham Bulls play an announcement over the public address system warning visitors that baseballs may "come flying at ya' at a high rate of speed, so please stay alert while you're in the seating bowl."

On the night of the picnic, Plaintiff's family arrived at the ballpark around 6:15 p.m. and learned for the first time that they would be sitting in the Picnic Area. They made their way to the Picnic Area before the game started and took pictures of several players warming up. Plaintiff did not pay attention to the game once it started, later testifying at deposition that she saw "[j]ust a little bit" of the game. Instead, Plaintiff spent most of her time talking to her parents while occasionally getting food from the buffet at the back of the Picnic Area. Plaintiff's father paid closer attention to the game and saw three or four foul balls enter the stands during play. He also spoke to one of the players from the visiting team, who sometimes sat on the low wall separating the Picnic Area from the field. Neither he nor his daughter heard the public announcement about errant balls, nor did they see any of the signs warning attendees about objects leaving the field.

Around 8:00 p.m., as Plaintiff was seated on a bench facing the field and talking to her mother, a foul ball exited the field of play, entered the Picnic Area, and struck Plaintiff in the face. She suffered severe injuries, including multiple dislocated teeth and broken bones in and around her jaw. She was taken from the stadium to Duke University Medical Center's Emergency Department, where she underwent endodontic and orthodontic surgeries later that night. She returned to the Medical Center the following month for additional endodontic and orthodontic surgery.

Plaintiff filed suit against Defendant on 21 December 2016, alleging one count of negligence in connection with the events of 5 August 2015. Defendant filed an answer on 28 February 2017 and, following discovery, moved for summary judgment on 13 November 2018. In its motion, Defendant asserted that "[u]nder long-standing North Carolina precedent known as the 'baseball rule,' . . . Defendant was not negligent as a matter of law." The trial court granted Defendant's motion and entered an order dismissing Plaintiff's complaint on 28 December 2018. Plaintiff appeals.

II. Analysis

Plaintiff's appeal from summary judgment is subject to *de novo* review. *Bryson*, 221 N.C. App. at 656, 729 S.E.2d at 109. The trial court's grant of summary judgment will be affirmed "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). To demonstrate a valid cause of action for negligence at the summary judgment stage, a claimant must forecast evidence showing that: " '(1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered damages as a result of the injury.' " *Hamby v. Thurman Timber Co., LLC*, 260 N.C. App. 357, 363, 818 S.E.2d 318, 323 (2018) (quoting *Wallen v. Riverside Sports Ctr.*, 173 N.C. App. 408, 411, 618 S.E.2d 858, 861 (2005)).

The parties dispute whether the common law Baseball Rule necessarily defeats Plaintiff's claim based on the evidence presented at summary judgment. Under the Rule, baseball field "operators 'are held to have discharged their full duty to spectators in safeguarding them from the danger of being struck by thrown or batted balls by providing adequately screened seats for patrons who desire them, and leaving the patrons to their choice between such screened seats and those unscreened.' " *Bryson*, 221 N.C. App. at 657, 729 S.E.2d at 109 (quoting *Cates v. Cincinnati Exhibition Co.*, 215 N.C. 64, 66, 1 S.E.2d 131, 133 (1939)). That duty is discharged even when there are not enough screened seats to meet the demand for them. *Id.* at 657, 729 S.E.2d at 109–10. In other words:

> Reasonable care is all that is required,—that is, care commensurate with the circumstances of the situation,—in protecting patrons from injuries.
>
> And the duty to exercise reasonable care imposes no obligation to provide protective screening for all seats . . . . Nor is management required, in order to free itself from negligence, to provide protected seats for all who may possibly apply for them. It is enough to provide screened seats, in the areas back of home plate where the danger of sharp foul tips is greatest, in sufficient number to accommodate as many patrons as may reasonably be expected to call for them on ordinary occasions.

Erickson v. Lexington Baseball Club, 233 N.C. 627, 628, 65 S.E.2d 140, 141 (1951) (citations omitted).

In this case, Plaintiff argues that the Baseball Rule should not apply for five reasons: (1) Plaintiff lacked sufficient knowledge of the game of baseball to understand that foul balls could be hit into the stands and cause injury to unprotected spectators; (2) she did not have a choice between sitting in the Picnic Area and the stadium's screened seats; (3) she was not, in fact, a spectator, as she considered herself to be attending a company picnic rather than a baseball game; (4) the Picnic Area was negligently designed and that negligent design caused Plaintiff's injury; and (5) the Baseball Rule, created at a time when baseball was central to and synonymous with American popular culture and sport, should be abandoned as outdated. We address each argument in turn.

In her first argument, Plaintiff maintains that the Baseball Rule applies only to cases in which a spectator of sufficient age and experience with the game of baseball is hit by an errant baseball based on the following language from *Cates*: "[']We believe that as to all who, *with full knowledge of the danger from thrown or batted balls*, attend a baseball game the management cannot be held negligent when it provides a choice between a screened in and an open seat[.][']" *Cates*, 215 N.C. at 66, 1 S.E.2d at 132 (emphasis added) (quoting *Wells v. Minneapolis Baseball & Athletic Assoc.*, 142 N.W. 706, 707 (1913)). Plaintiff asserts that because she was eleven years old at the time of the injury and had never personally witnessed a foul ball enter the stands, she lacked "full knowledge of the danger from thrown or batted balls." *Id.* The contention fails, however, because evidence introduced at the trial level demonstrates Plaintiff had adequate knowledge of the game under North Carolina law to be aware of the danger posed by foul balls regardless of whether she had ever personally witnessed one enter the stands.

Our Supreme Court has held that "*[a]nyone* familiar with the game of baseball knows that balls are frequently fouled into the stands and bleachers. Such are common incidents of the game which necessarily involve dangers to spectators." *Erickson*, 233 N.C. at 629, 65 S.E.2d at 141 (emphasis added). Plaintiff certainly had this "ordinary knowledge of the game of baseball," *id.*, based on the uncontroverted evidence introduced below. She had attended multiple baseball games in person, watched several games on TV, and played softball[2] for several years prior

2. The Baseball Rule applies to both softball and baseball. *See Bryson*, 221 N.C. App. at 657, 729 S.E.2d at 110 (applying the Rule to "[p]ersons familiar with the game of softball or baseball" (citation and quotation marks omitted)).

to attending the game in question. Plaintiff paid close attention to all of the games she attended or saw on TV. At the games she attended, she "watch[ed] . . . for the entire time [she] was there" with the exception of trips to the bathroom and concessions; as for the games she watched on TV, she paid attention to about "85 percent" of each game. We hold that, as stated by our Supreme Court, Plaintiff, like "anyone familiar with the game," *Erickson*, 233 N.C. at 629, 65 S.E.2d at 141, had sufficient knowledge of the sport to comprehend the danger of balls fouled into the stands even if she had never witnessed such an event herself.

Plaintiff's subsequent assertion that she did not have a choice of seats does not preclude application of the Baseball Rule. The "choice" embodied in the Rule is the choice on the part of the spectator to attend a baseball game in an unprotected seat when the ballpark operator has satisfied its duty to protect patrons by offering a reasonable number of protected seats. *Id.* at 628, 65 S.E.2d at 140–41. For example, in *Erickson*, a spectator struck by a ball attempted to sue the stadium operator "on the theory that the defendant was negligent in not providing him with a choice between screened and unscreened seats." *Erickson*, 233 N.C. at 628, 65 S.E.2d at 140. The plaintiff bought a general admission ticket and arrived at the game "about ten minutes before game time" when "[a]ll of the screened seats were then occupied." *Id.* at 628, 65 S.E.2d at 141.

Our Supreme Court held on these facts that "[t]he defendant's failure to provide the plaintiff with a screened seat . . . [did] not support an issue of actionable negligence." *Id.* This was the case because the ballpark operator had provided a reasonable number of screened seats and, even though those seats were unavailable to the plaintiff, he chose to sit in an unprotected seat with knowledge that he could be injured by a batted ball. *Id.* at 628–29, 65 S.E.2d at 141. Plaintiff and her family, in this case, arrived at a baseball game to learn that they would not be seated in a protected area of the stadium and, with adequate knowledge of baseball to recognize the danger posed by foul balls, nonetheless chose to stay and sit in an unprotected area. As in *Erickson*, the Baseball Rule precludes recovery for spectators who make such a choice. *Id.*

Plaintiff's argument that she did not consider herself to be a "spectator" because she was at the stadium to attend a company picnic also does not preclude application of the Baseball Rule. Even though Plaintiff had no plans to watch the game and considered herself to be attending a picnic, there can be no serious dispute from the evidence that she did not know she was at a picnic in a baseball stadium while a baseball game was taking place. Plaintiff's deposition testimony unambiguously shows that she knew she was in a baseball stadium, that she was aware

a baseball game was underway while she was in the Picnic Area, and that the game could be observed from that area; indeed, she testified that she watched players warm-up before the game and even caught "a little bit" of the game while it was underway. Plaintiff was, for all intents and purposes, a "spectator" within the meaning of the Baseball Rule. *Cf. Wheeler v. Central Carolina Scholastic Sports, Inc.*, 253 N.C. App. 240, 798 S.E.2d 438, 2017 WL 1381646, *1 (Unpublished) (applying the Baseball Rule to a plaintiff who was struck by a ball while talking to a friend behind a fence beside the stadium bleachers), *aff'd per curiam*, 370 N.C. 390, 808 S.E.2d 143 (2017). Plaintiff's argument on this point is one of semantics rather than law and does not render the Baseball Rule inapplicable.

Plaintiff's fourth argument states that the Baseball Rule does not apply because Defendant negligently designed the Picnic Area and those negligent design elements were the proximate cause of her injury. *See Cates*, 215 N.C. at 66–67, 1 S.E.2d at 132 (holding the Baseball Rule applied where there was no evidence that the stadium was negligently designed or that the design of the stadium caused the plaintiff's injury). She specifically contends that the Picnic Area was negligently designed in that it "purposefully distracts patrons from the game" in the following ways: (1) patrons in the Picnic Area have to turn their backs to the game to get food from the buffet at the rear of the space; (2) several of the picnic tables allow patrons to sit with their backs to the game while eating or socializing; (3) umbrellas which extend above the picnic tables may obscure lines of sight; and (4) visiting players sometimes sit on the low wall separating the Picnic Area from the field, which could block views of the game. She argues that these elements dangerously "beckon[] patrons to turn their backs to the game and to ignore baseball's dangers," which in turn led Plaintiff and her family to think the Picnic Area was "a safe place" insulated from baseball's inherent risks.

Plaintiff has introduced no evidence demonstrating that the above design elements actually contributed to her injury and thus her argument lacks merit. The record shows that Plaintiff was sitting at a picnic table that was directly adjacent to the low wall and on a side with views of home plate at the time she was struck by a foul ball.[3] No

3. That Plaintiff was speaking to her mother, who was sitting at the same picnic table when Plaintiff was struck, does not show that the Picnic Area was negligently designed; professional baseball games are inherently social events where people congregate to cheer players and teams together. It is both expected and routine for attendees to speak to those around them during the game, no matter where they may be seated. Plaintiff, who was speaking to her mother from a bench next to the field with a view of home plate, was

evidence suggests—and Plaintiff points to none—that the foul ball that hit her was obscured by an umbrella or player from the opposing team. Defendant directly sought to dispel any indication that the Picnic Area was free from the dangers posed by foul balls by placing three signs along the low wall specifically warning attendees to "BE AWARE OF OBJECTS LEAVING THE PLAYING FIELD." In sum, no design elements identified by Plaintiff appear to have interfered with Plaintiff's ability to avoid injury, and neither did they convey that foul balls could not enter the Picnic Area. Because the evidence does not show the design of the Picnic Area caused or contributed to her injury, we hold the Baseball Rule applies to this case. *Cates*, 215 N.C. at 66–67, 1 S.E.2d at 132.

In her final argument, Plaintiff argues that the Baseball Rule should be abandoned as archaic and out-of-step with the sport's arguably diminished place in popular culture compared to its historical primacy in the American sporting landscape. Because the Rule was announced by our Supreme Court, applied by prior panels of this Court, and has not been disclaimed by a higher court, we are without authority to set it aside. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

III. Conclusion

For the foregoing reasons, we affirm the trial court's order granting summary judgment for Defendant and dismissing Plaintiff's complaint.

AFFIRMED.

Judges TYSON and ZACHARY concur.

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thus not engaged in an activity particular to the Picnic Area's design when injured. *Cf. Wheeler*, 2017 WL 1381646 at *1 (applying the rule to a plaintiff who was talking to a friend at the time of his injury).

PONDER v. BEEN

[275 N.C. App. 626 (2020)]

MARK W. PONDER, PLAINTIFF
v.
STEPHEN R. BEEN, DEFENDANT

No. COA19-1021

Filed 31 December 2020

Jurisdiction—personal—alienation of affection—out-of-state defendant—electronic communications

In an alienation of affection action in which plaintiff husband and his wife resided in North Carolina, defendant resided in Florida, and the alleged affair between defendant and the wife occurred in Florida, the allegations and evidence were insufficient to support the trial court's findings made in support of its conclusion that it had specific jurisdiction over defendant. Instead, the evidence would have only supported finding that defendant communicated with a telephone number registered in North Carolina, because no evidence was presented that the number was the wife's.

Judge BROOK concurring in result only.

Judge STROUD dissenting.

Appeal by defendant from order entered 29 October 2019 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 August 2020.

Sodoma Law, P.C., by Amy Elizabeth Simpson, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, and Claire J. Samuels, for defendant-appellant.

BRYANT, Judge.

Where the trial court's findings of fact were insufficient to meet the threshold requirements to exercise personal jurisdiction over defendant Stephen R. Been pursuant to our long-arm statute, General Statutes, section 1-75.4, we reverse the trial court's 29 October 2019 order denying defendant's Rule 12(b)(2) motion to dismiss plaintiff's complaint for lack of personal jurisdiction.

On 14 September 2017, plaintiff Mark W. Ponder filed a complaint against defendant in Mecklenburg County Superior Court seeking

compensatory damages in excess of $10,000.00 on the claim of alienation of affection, as well as punitive damages.

Plaintiff alleged that he met a woman named Mary in 2008, and the couple wed on 26 June 2010. Mary had two children from a previous relationship and worked in the home as a stay-at-home mother. On 13 November 2013, the parties separated following the issuance of a domestic violence restraining order against plaintiff. In his complaint, plaintiff contended that Mary occasionally traveled to his condo in Naples, Florida for recreation and relaxation. In 2013, she met defendant, who was a Florida resident. In November 2013, plaintiff accused Mary of having an affair. Before the separation, while Mary still resided in North Carolina, plaintiff alleged that Mary and defendant engaged in frequent communications by email, text message, and telephone. Plaintiff argued that defendant sent Mary airline tickets and "other things of value." Further, plaintiff argued that after 13 November 2013, defendant paid legal fees for services by an attorney who practiced exclusively in Mecklenburg County.

Following her separation from plaintiff, Mary and her children relocated to Naples, Florida in June 2014. Mary and her children resided in homes owned by defendant. Plaintiff asserted that "[w]ith full knowledge of her marital status, [d]efendant, willfully, maliciously and intentionally engaged in a campaign to alienate [Mary] from [p]laintiff, and to damage if not destroy the bonds of matrimony that existed between them."

On 3 January 2018, defendant filed a motion to dismiss plaintiff's civil action for lack of personal jurisdiction. Defendant noted that this was the second action plaintiff had filed against defendant in a North Carolina court claiming alienation of affection. The first action was commenced 5 November 2015, and plaintiff voluntarily dismissed it on 15 September 2016, after defendant moved to dismiss pursuant to Rule 12(b)(2) ("Lack of jurisdiction over the person"). As to the current action, defendant again challenged the court's exercise of personal jurisdiction over him as a violation of North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4, and the Due Process Clause under the Fourteenth Amendment of the United States Constitution.

In support of his motion to dismiss, defendant filed a brief challenging the exercise of personal jurisdiction as a violation of due process. In response, plaintiff filed "points and authorities in opposition to defendant's motion to dismiss," and he asserted that prior to plaintiff and Mary's separation, Mary and defendant communicated by telephone 476 times between 30 June and 13 November 2013. A hearing on the matter was conducted on 4 March 2019 in Mecklenburg County Superior Court,

before the Honorable William R. Bell, Judge presiding. On 29 October 2019, the trial court entered its order denying defendant's motion to dismiss.

Defendant appeals.

On appeal, defendant argues that the trial court erred by making insufficient findings of fact in support of its ruling to deny defendant's motion to dismiss for lack of personal jurisdiction and concluding that the exercise of personal jurisdiction over defendant could be exercised in compliance with North Carolina's long-arm statute and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Right to Appeal

In *Love v. Moore*, our Supreme Court held that a right of immediate appeal exists from an order finding jurisdiction over the person, made on the basis of "minimum contacts" (the subject matter of Rule 12(b)(2)). 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982); *see also* N.C. Gen. Stat. § 1-277(b) (2019).

Personal Jurisdiction

Defendant argues the trial court erred by denying his motion to dismiss for lack of personal jurisdiction. We agree.

> "The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record[.]" *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140–41, 515 S.E.2d 46, 48 (1999). " '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.' " *Nat'l Util. Review, LLC v. Care Ctrs., Inc.*, 200 N.C. App. 301, 303, 683 S.E.2d 460, 463 (2009) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). We review *de novo* the issue of whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over defendant. *Id.*

Bell v. Mozley, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011).

> To resolve a question of personal jurisdiction, the court must engage in a two step analysis. First, the court must determine if the North Carolina long-arm statute's (N.C.

> Gen. Stat. § 1–75.4) requirements are met. If so, the court must then determine whether such an exercise of jurisdiction comports with due process.

Cooper v. Shealy, 140 N.C. App. 729, 732, 537 S.E.2d 854, 856 (2000) (citation omitted).

Long-Arm Statute

Pursuant to our General Statutes, section 1-75.4 ("Personal jurisdiction, grounds for generally"),

> [a] court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action . . . under any of the following circumstances:
>
> . . . .
>
> (3) **Local Act or Omission.** – In any action claiming injury to person . . . within or without this State arising out of an act or omission within this State by the defendant.
>
> (4) **Local Injury; Foreign Act.** – . . . [I]n any action claiming injury to person . . . within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:
>
> > a. Solicitation . . . w[as] carried on within this State by or on behalf of the defendant[.]

N.C. Gen. Stat. § 1-75.4(3) and (4)a. (2019). "[T]his Court has acknowledged that actions for alienation of affection[] and criminal conversation constitute injury to person or property as denoted by N.C. Gen. Stat. § 1–75.4(3)." *Cooper*, 140 N.C. App. at 733, 537 S.E.2d at 857 (citation and quotation marks omitted); *see also Brown v. Ellis*, 363 N.C. 360, 678 S.E.2d 222 (2009) (per curiam) (upholding the trial court's exercise of personal jurisdiction over a non-resident defendant in a civil action for alienation of affection pursuant to N.C. Gen. Stat. § 1–75.4(4)a.).

"We recognize that [General Statutes, section 1-75.4,] requires only that the action 'claim' injury to person or property within this state in order to establish personal jurisdiction." *Fox v. Gibson*, 176 N.C. App. 554, 558, 626 S.E.2d 841, 843 (2006) (citations and quotations omitted). Moreover, "the failure to plead the particulars of personal jurisdiction is not necessarily fatal, so long as the facts alleged permit the reasonable inference that jurisdiction may be acquired." *Tompkins v. Tompkins*, 98 N.C. App. 299, 304, 390 S.E.2d 766, 769 (1990) (citation omitted).

In his complaint, plaintiff alleged the following:

> 6. Plaintiff and [Mary] . . . were married on June 26, 2010 . . . .
>
> . . . .
>
> 8. Throughout the course of their marriage, Plaintiff and [Mary] enjoyed a true and genuine marital relationship of love and affection.
>
> . . . .
>
> 10. On November 13, 2013, Plaintiff and [Mary] legally separated . . . .
>
> . . . .
>
> 12. Plaintiff owns a condo in Naples, Florida. [Mary] traveled to the condo alone for purposes of recreation and relation and during 2013 she traveled more and more frequently to Naples . . . .
>
> 13. While on those trips [Mary] met Defendant. When [Mary] returned to North Carolina . . . she seemed changed, distant and less affectionate. Plaintiff began to suspect [Mary] was having an affair.
>
> 14. Plaintiff began to search phone records and then caught [Mary] in a lie about her whereabouts and who she was with the weekend of November 8, 2013. Plaintiff confronted [Mary] about the lie and whether she was having an affair on Sunday, November 10, 2013. She denied it.
>
> . . . .
>
> 16. From the day [defendant and Mary] met in 2013 through the date of separation of the parties, Defendant initiated and engaged in regular and frequent communication with [Mary] while she resided and was located in North Carolina by email, text message, and telephone. Defendant knew or at the very least could infer that [Mary] was located in North Carolina during these communications.
>
> . . . .
>
> 18. Prior to November 13, 2013, Defendant delivered communications, airline tickets and other things of value to [Mary] while she was residing in North Carolina.

. . . .

> 21. Defendant has known since the day he met [Mary] that she was a married woman and . . . has at all times acted in conscious disregard of the union.
>
> 22. With full knowledge of her marital status, Defendant . . . engaged in a campaign to alienate [Mary] from Plaintiff, and to damage if not destroy the bonds of matrimony that existed between them.

"Where unverified allegations in the complaint meet [the] plaintiff's initial burden of proving the existence of jurisdiction . . . and [the] defendant[] d[oes] not contradict [the] plaintiff's allegations in [his] sworn affidavit, such allegations are accepted as true and deemed controlling." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 218 (2000) (second alteration in original).

> [But] when a defendant supplements its motion [to dismiss] with affidavits or other supporting evidence, the allegations of the plaintiff's complaint can no longer be taken as true or controlling and [the] plaintiff[ ] cannot rest on the allegations of the complaint, but must respond by affidavit or otherwise . . . set[ting] forth specific facts showing that the court has jurisdiction.

Wyatt v. Walt Disney World Co., 151 N.C. App. 158, 163, 565 S.E.2d 705, 708 (2002) (citations and quotations omitted). Whether the trial court rules on the defendant's challenge to the exercise of personal jurisdiction based on the affidavits or conducts a hearing with witness testimony or depositions, N.C. Gen. Stat. § 1A-1, Rule 43(e), where the defendant challenges the exercise of personal jurisdiction, "the burden is on the plaintiff to prove by a preponderance of the evidence that grounds exist for the exercise of personal jurisdiction over a defendant." *Eluhu v. Rosenhaus*, 159 N.C. App. 355, 359, 583 S.E.2d 707, 710–11 (2003) (citation and quotations omitted), *aff'd*, 358 N.C. 372, 595 S.E.2d 146 (2004).

On 3 January 2018, defendant moved to dismiss plaintiff's lawsuit for lack of personal jurisdiction (including affidavits by defendant and Mary in which both deny having had an affair or a sexual relationship), and on 28 February 2019, defendant further supported his motion to dismiss with a brief challenging the exercise of personal jurisdiction as a violation of due process. In materials provided to the court, defendant acknowledged having spoken with Mary via telephone and emailing her, though he did not indicate that these communications were frequent.

Plaintiff filed points and authorities in which he asserted that defendant provided Mary with a cell phone and between 30 June and 13 November 2013, communicated with Mary 476 times. During the 4 March 2019 hearing on the matter, plaintiff presented phone records listing phone calls made from defendant's phone to a number with a 704 area code but failed to present evidence that the phone number reflected on the records was to a number associated with Mary.

For a moment, let us consider the exercise of personal jurisdiction over defendant as it comports to the Due Process Clause.

2

"[I]f the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Brown*, 363 N.C. at 363, 678 S.E.2d at 223 (citing *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006)).

To satisfy the due process prong of the personal jurisdiction analysis, there must be sufficient 'minimum contacts' between the nonresident defendant and our State 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Skinner*, 361 N.C. at 122, 638 S.E.2d at 210 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945)) (quotation marks omitted).

> The United States Supreme Court has noted two types of long-arm jurisdiction. Where the controversy arises out of the defendant's contacts with the forum state, the state is said to be exercising "specific" jurisdiction. In this situation, the relationship among the defendant, the forum state, and the cause of action is the essential foundation for the exercise of *in personam* jurisdiction. Where the controversy is unrelated to the defendant's activities within the forum, due process may nevertheless be satisfied if there are "sufficient contacts" between the forum and the defendant.

Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 366, 348 S.E.2d 782, 786 (1986) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 411 (1984)).

Specific Jurisdiction

In the exercise of specific jurisdiction, "the relationship among the defendant, the forum state, and the cause of action is the essential

foundation for the exercise of *in personam* jurisdiction." *Id.* "[T]here must be sufficient 'minimum contacts' between the nonresident defendant and our state 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Skinner*, 361 N.C. at 122, 638 S.E.2d at 210 (quoting *Int'l Shoe Co.*, 326 U.S. at 316, 66 S.Ct. at 158, 90 L. Ed. at 102).

Following, our Supreme Court's issuance of its opinion in *Brown*, 363 N.C. 360, 678 S.E.2d 222 (holding that frequent phone calls and email solicitations by the out-of-state defendant regarding the romantic and sexual relationship with the plaintiff's wife were sufficient to satisfy North Carolina's long-arm statute), the matter was remanded to this Court to address whether the defendant had

> "minimum contacts" with the State of North Carolina sufficient to satisfy the requirements of due process.
>
> . . . .
>
> Although a determination of whether the required minimum contacts are present necessarily hinges upon the facts of each case, there are several factors a trial court typically evaluates in determining whether the required level of contacts exists: (1) quantity of the contacts between the defendant and the forum state, (2) quality and nature of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest in the forum state, and (5) convenience of the parties.

Brown v. Ellis, 206 N.C. App. 93, 97, 696 S.E.2d 813, 817 (2010) (citations, quotation marks, and indentation omitted); *see also id.* at 98, 696 S.E.2d at 818 (holding because the "alienation of [the] [plaintiff's] wife's affections occurred within the jurisdiction of North Carolina[,] the factual allegations permit the reasonable inference that personal jurisdiction over [the] defendant could properly be acquired in this case" (second and third alterations in original) (citations and quotations omitted)).

In plaintiff's points and authorities submitted in response to defendant's motion to dismiss and brief, plaintiff asserted that defendant provided Mary with a cell phone that defendant used to communicate with her and that he paid Mary's legal fees in the domestic violence litigation which resulted in a domestic violence protective order being entered against plaintiff. Moreover, plaintiff asserted that the quality of the communications between defendant and Mary controls the minimum contacts question. Plaintiff also contended that his claim would not

be recognized in Florida and that defendant has the means to travel to North Carolina such that it would not be inconvenient for him.

The Trial Court's 29 October 2019 Order

In its 29 October 2019 order denying defendant's motion to dismiss, the court made its ruling after considering "the Motion[s], the court file, the law presented by counsel, [and] the briefs and evidentiary materials submitted by counsel."

> 3. In his Motion, Defendant moved the [c]ourt pursuant to Rule 12(b)(2) for a dismissal with prejudice based on his Florida residency and domicile, and that he had not specifically availed himself to the laws of the State of North Carolina.
>
> 4. With regard to Defendant's Motion pursuant to Rule 12(b)(2), said Motion should be DENIED. The [c]ourt finds the following:
>
> > a. Defendant availed himself to the laws of the State of North Carolina by actively communicating electronically with Mary Ponder on or before the date she and Plaintiff separated on November 13, 2013, while Mary was still living in North Carolina. This finding is supported by *Cooper v. Shealy*, 140 N.C. App. 729, 537 S.E.2d 854 (2000), which held that telephone calls and emails were "solicitations" within the meaning of N.C. Gen. Stat. § 1-75.4(4)a.; and
> >
> > b. This [c]ourt finds that Defendant's electronic contacts with Mary Ponder while Mary Ponder still lives in North Carolina were significant and that he availed himself to the specific jurisdiction of North Carolina with respect to Plaintiff's claims for alienation of affections.

On these findings of fact, the trial court made the following conclusions:

> 1. The [c]ourt has specific jurisdiction over the persons involved in this matter.
>
> 2. The [c]ourt concludes that Defendant had minimum contacts with North Carolina sufficient to establish specific personal jurisdiction within this state regarding Plaintiff's claim for alienation of affections. As a result, [defendant's motion to dismiss] should be denied.

The evidence presented before the trial court may support a finding that defendant communicated with a telephone number registered in North Carolina, but the evidence does not support finding defendant's communications were with Mary or that their communications were significant. *Cf. Brown*, 363 N.C. 360, 678 S.E.2d 222; *Cooper*, 140 N.C. App. 729, 537 S.E.2d 854.

We hold that the allegations presented in plaintiff's complaint, in conjunction with the points and authorities presented in opposition to defendant's motion to dismiss as well as the evidentiary materials presented before the trial court during the 4 March 2019 hearing, are not sufficient to support the trial court's findings that defendant

> availed himself of the laws of the State of North Carolina by actively communicating electronically with Mary . . . on or before the date she and Plaintiff separated, [or that] . . . Defendant's electronic contacts with Mary . . . were significant and that he availed himself of the specific jurisdiction of North Carolina with respect to Plaintiff's claim for alienation of affections.

Thus, the court's findings fail to meet the threshold for the exercise of personal jurisdiction over defendant pursuant to General Statutes, section 1-75.4. Accordingly, the trial court's 29 October 2019 order denying defendant's motion to dismiss plaintiff's action pursuant to Rule 12(b)(2) is

REVERSED.

Judge BROOK concurs in result only.

Judge STROUD dissents by separate opinion.

STROUD, Judge, dissenting.

Because I conclude the trial court's findings of fact support the trial court's determination that it has personal jurisdiction over defendant, I respectfully dissent and would affirm the trial court's order. I would first note that I agree with the majority's summary of the case. Where I diverge from the majority is in their summation and determination of what the findings of fact establish; namely, the majority concludes they are insufficient to establish personal jurisdiction while I deem them sufficient.

I. Standard of Review

The standard of review of the issue of personal jurisdiction depends upon the information presented to the trial court. *See Providence Volunteer Fire Department v. Town of Weddington*, 253 N.C. App. 126, 135, 800 S.E.2d 425, 432 (2017). In this case, both parties submitted voluminous evidence.

> [W]hen the parties submit competing evidence—such as affidavits or an affidavit and a verified complaint—the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions. When the trial court decides the motion on affidavits, *the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror*. Even when the trial court is required to weigh evidence, it is not required to make findings of fact unless requested by a party when deciding a motion to dismiss. When the record contains no findings of fact, it will be presumed that the judge, upon proper evidence, found facts sufficient to support his ruling. Where such presumed findings are supported by competent evidence, they are deemed conclusive on appeal, despite the existence of evidence to the contrary.

Id. (emphasis added) (citations, quotation marks, and footnote omitted).[1]

I begin by emphasizing the proper standard of review because this standard determines whether this Court may substitute its own judgment for that of the trial court. *See generally Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005). While the issue of "jurisdiction" in some contexts presents a legal issue subject to *de novo* review, in actuality "**personal jurisdiction is a question of fact**. *Eluhu v. Rosenhaus*, 159 N.C. App. 355, 357, 583 S.E.2d 707, 710, *aff'd per curiam*, 358 N.C. 372, 595 S.E.2d 146 (2004)." *Bradley v. Bradley*, 256 N.C. App. 1, 5, 806 S.E.2d 58, 62 (2017) (emphasis added) (quotation marks omitted). Indeed, "[t]he determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum *is a question of fact*." *Cooper v. Shealy*, 140 N.C. App. 729, 732, 537 S.E.2d 854, 856 (2000) (emphasis added) (citation and quotation marks omitted). Prior cases have consistently determined

1. Defendant filed an affidavit and plaintiff's complaint was verified. In addition, defendant was deposed, and both parties filed multiple exhibits.

the issue before us is one of fact. *See*, *e.g.*, *Bradley*, 256 N.C. App. at 5, 806 S.E.2d at 62; *Cooper*, 140 N.C. App. at 732, 537 S.E.2d at 856; *Hedden v. Isbell*, 250 N.C. App. 189, 192, 792 S.E.2d 571, 574 (2016); *Hiwassee Stables, Inc. v. Cunningham*, 135 N.C. App. 24, 27, 519 S.E.2d 317, 320 (1999).

Further, and equally important,

> [w]hen this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court. Under Rule 52(a)(2) of the Rules of Civil Procedure, however, the trial court is not required to make specific findings of fact unless requested by a party. When the record contains no findings of fact, it is presumed that the court on proper evidence found facts to support its judgment.

Banc of Am. Sec. LLC, 169 N.C. App. at 694, 611 S.E.2d at 183 (citations, quotation marks, and ellipses omitted). Here too, I emphasize that our cases have consistently determined if the findings of fact are supported by competent evidence, "this Court *must affirm*" the trial court order. *Id.* (emphasis added); *see*, *e.g.*, *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 141, 515 S.E.2d 46, 48 (1999); *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833 (1995). In other words, no matter how I might have viewed the evidence, this Court's standard is to consider "only whether the findings of fact by the trial court are supported by competent evidence in the record[,]" and, if they are, we "must affirm the order of the trial court." *Banc of Am. Sec. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183.

II. Findings of Fact

On appeal, defendant does not challenge finding nos. 1-3, and therefore they are binding on this Court. *See Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011) (noting unchallenged findings of fact are binding on appeal). The trial court found:

> 1. Plaintiff filed this action on September 14, 2017, asserting a claim against Defendant for alienation of affections.
>
> 2. Defendant, who at all times material to this action has resided and been domiciled in Florida, filed his Motion and certain evidentiary materials on January 3, 2018.

> 3. In his Motion, Defendant moved the [c]ourt pursuant to Rule 12(b)(2) for a dismissal with prejudice based on his Florida residency and domicile, and that he had not specifically availed himself to the laws of the State of North Carolina.

A. Classification of Finding of Fact No. 4

Defendant contends "finding of fact" no. 4 is a mixed determination including findings of fact and conclusions of law. "Finding of fact" no. 4 provides,

> 4. With regard to Defendant's Motion pursuant to Rule 12(b)(2), said Motion should be DENIED. The [c]ourt finds the following:
>
> > a. Defendant availed himself to the laws of the State of North Carolina by actively communicating electronically with Mary Ponder on or before the date she and Plaintiff separated on November 13, 2013, while Mary was still living in North Carolina. This finding is supported by *Cooper v. Shealy*, 140 N.C. App. 729, 537 S.E.2d 854 (2000), which held that telephone calls and emails were "solicitations" within the meaning of N.C. Gen. Stat. § 1-75.4(4)a.; and
> >
> > b. This Court finds that Defendant's electronic contacts with Mary Ponder while Mary Ponder still lives in North Carolina were significant and that he availed himself to the specific jurisdiction of North Carolina with respect to Plaintiff's claims for alienation of affections.

Defendant contends "finding of fact" should be categorized as follows:

> **Factual Findings**
>
> - Mr. Ponder and [Mary] separated on 13 November 2013;
> - [Mary] was still living in North Carolina on 13 November 2013;
> - Mr. Been actively communicated electronically with [Mary] on or before 13 November 2013; and

- Mr. Been's electronic contacts with [Mary] while she still was still living in North Carolina were significant.

Legal Conclusions

- Mr. Been availed himself to the laws of North Carolina through his electronic communications with [Mary] on or before 13 November 2013;
- Mr. Been's electronic communications with [Mary] were "solicitations" under the long-arm statute; and
- Mr. Been availed himself to the specific jurisdiction of North Carolina with respect to the claim for alienation of affections through his electronic contacts with [Mary].

Essentially, defendant seeks a more favorable standard of review on appeal as legal conclusions are reviewed *de novo*. *See generally Green v. Howell*, 274 N.C. App. 158, ___, 851 S.E.2d 673, ___ (COA20-204) (3 Nov. 2020). Defendant invites this Court to substitute its judgment for that of the trial court, and the majority accepted this invitation, coming to a different result than the trial court. However, whether evidence establishes contacts sufficient to support personal jurisdiction "is a question of fact[,]" *Bradley*, 256 N.C. App. at 5, 806 S.E.2d at 62, and we review simply for "competent evidence" to support the findings, which if found, requires we "affirm" the order. *See Banc*, 169 N.C. App. at 694, 611 S.E.2d at 183.

B. Sufficiency of Findings of Fact to Permit Appellate Review

Defendant next contends "the aforementioned components of Finding of Fact 4 that actually constitute factual findings are insufficient to permit meaningful appellate review" as the trial court failed to comply with his request for written findings of fact under Rule 52(a)(2). As to the first part of defendant's contention, defendant argues if we remove the portions of the finding of fact he contends are "legal conclusions" then the findings of fact are insufficient. I have already explained why the trial court's findings of fact regarding personal jurisdiction are indeed findings and not legal conclusions. *See Bradley*, 256 N.C. App. at 5, 806 S.E.2d at 62.

As to the second part of defendant's contention:

> Rule 52(a)(2) specifically provides that findings of fact and conclusions of law are necessary on decisions of any motion or order *ex mero motu* only when requested

> by a party and as provided by Rule 41(b). A trial court's compliance with the party's Rule 52(a)(2) motion is mandatory. Once requested, the findings of fact and conclusions of law on a decision of a motion, as in a judgment after a non-jury trial, must be sufficiently detailed to allow meaningful appellate review. When the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence, then the order entered must be vacated and the case remanded.

Agbemavor v. Keteku, 177 N.C. App. 546, 549, 629 S.E.2d 337, 340 (2006) (citations, quotation marks, ellipses, and brackets omitted). Defendant did request findings of fact, and the trial court made finding of fact. Defendant simply hoped for different findings. While the trial court could have made more detailed findings of fact, I would conclude the findings are sufficient to allow for meaningful appellate review. The majority also recognizes the findings are sufficient to allow review, as it engages in appellate review of the question on appeal. *Contrast with Agbemavor* at 549-51, 629 S.E.2d at 340-41 (vacating and remanding because the trial court made "no findings of fact").

C. Competency of the Evidence to Support Findings of Fact

Defendant's third contention as to the findings of fact finally addresses the actual issue of whether the trial court's findings are supported by the evidence. Defendant contends "there is no competent evidence to support various factual findings delineated in Finding of Fact 4." Specifically, defendant claims the evidence does not support the trial court findings of "active" or "substantial" communications with Mary in North Carolina during her marriage to plaintiff. But defendant's arguments actually address the weight of the evidence -- whether it should be deemed "active" or "substantial" -- not its competence. As I have noted, "the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Providence Volunteer Fire Department*, 253 N.C. App. at 135, 800 S.E.2d at 432.

As to issues of actual *competency* of the evidence, defendant contends there is no competent evidence exists (1) linking the phone defendant bought Mary to the 704 number defendant's number was communicating with, and (2) establishing any communication took place while Mary was actually in North Carolina. We first note that plaintiff's complaint was verified, and thus it is a part of the competent evidence, and therefore as to plaintiff's verified complaint and defendant's affidavit, the trial court was to act "as a juror" determining "weight and sufficiency of the evidence." *Id.* Plaintiff's verified complaint contends that

> [f]rom the day they met in 2013 through the date of separation of the parties, Defendant initiated and engaged in regular and frequent communications with [Mary] while she resided and was located in North Carolina by email, text message, and telephone. Defendant knew or at the very least could infer that [Mary] was located in North Carolina during these communications.

Defendant controverted the allegations in the complaint and seems to contend that his assertions somehow cancel out plaintiff's assertion, but again, it was upon the trial court to determine the weight and credibility of each. *See id.*

Defendant seeks to distinguish this case from *Brown v. Ellis*, 363 N.C. 360, 678 S.E.2d 222 (2009), where the Supreme Court determined *per curiam* that the plaintiff's verified complaint and affidavit statements regarding telephone calls and emails to his wife were enough to satisfy the long-arm statute and establish the personal jurisdiction of the defendant. In *Brown*, the only contacts the defendant had in North Carolina were telephone calls and emails to the plaintiff's wife. *See generally id.*, 363 N.C. at 363, 678 S.E.2d at 224. This Court determined the plaintiff failed to show "that defendant solicited plaintiff's wife while she was in North Carolina." *Id.* at 362, 678 S.E.2d at 223 (citation and quotation marks omitted). Specifically, this Court noted the plaintiff's arguments that he had shown personal jurisdiction because he and his wife lived in North Carolina at the relevant time and the defendant had called the wife when she was in plaintiff's presence, although he did not specifically allege they were both in North Carolina at the time:

> Plaintiff offers the following facts in an attempt to show that defendant carried on solicitation activities in the State of North Carolina sufficient to authorize the exercise of personal jurisdiction over defendant: 1) plaintiff is a resident of North Carolina; 2) plaintiff's wife lived with plaintiff; 3) defendant made phone calls to plaintiff's wife in the presence of plaintiff (although there is no allegation regarding where these calls were actually received); and 4) evidence as to defendant's telephonic contacts with plaintiff's wife can be found in North Carolina (although nothing in the record indicates that actual evidence of such contacts was forecast).
>
> After review of the record, we conclude that it contains no evidence to support the trial court's conclusion that the State of North Carolina may exercise personal

> jurisdiction over defendant pursuant to the long-arm statute. Even liberally construed, these facts offer no evidence that defendant solicited plaintiff's wife while she was in North Carolina.

Brown v. Ellis, 184 N.C. App. 547, 549, 646 S.E.2d 408, 410–11 (2007), *rev'd and remanded per curiam*, 363 N.C. 360, 678 S.E.2d 222 (2009).

The Supreme Court reversed this Court and affirmed the trial court's determination that it had personal jurisdiction over the defendant based only upon these telephone and email contacts. *See Brown*, 363 N.C. 360, 678 S.E.2d 222. The Supreme Court agreed with this Court that the plaintiff had not specifically alleged his wife was physically present in North Carolina when defendant called her, but she did live in North Carolina at the time and this Court's reading of the complaint was "overly strict[:]"

> In the instant case, defendant argues the complaint failed to allege that plaintiff's wife was in North Carolina at the time she received defendant's telephone calls and e-mail. The Court of Appeals agreed with defendant, concluding there was "no evidence that defendant solicited plaintiff's wife while she was in North Carolina." *Brown*, 184 N.C. App. at 549, 646 S.E.2d at 411. We believe this reading of plaintiff's complaint to be overly strict. Plaintiff alleged that he resided in Guilford County with his wife and daughter and that defendant "initiat[ed] frequent and inappropriate, and unnecessary telephone and e-mail conversations with [plaintiff's wife] on an almost daily basis." According to the complaint, defendant and plaintiff's wife discussed their "sexual and romantic relationship" in the presence of plaintiff and his minor child. In his supporting affidavit, plaintiff specifically averred that defendant's alienation of his wife's affections "occurred within the jurisdiction of North Carolina." Although the complaint does not specifically state that plaintiff's wife was physically located in North Carolina during the telephonic and e-mail communications, that fact is nevertheless apparent from the complaint. In his own affidavit, defendant never denied that he telephoned or e-mailed plaintiff's spouse in North Carolina; rather, he merely characterized the conversations as work related.

Id. at 363–64, 678 S.E.2d at 223–24.

Here, unlike in *Brown*, plaintiff did specifically assert that his wife was in North Carolina when she received the communications from

defendant encouraging the destruction of her marriage. *Contrast with id.* at 363-64, 678 S.E.2d at 224. Further, defendant admitted in his deposition that he purchased a cell phone for Mary, and the bill for that phone with a North Carolina zip code is in defendant's name.

Defendant attempts to rely upon his refusal or failure to answer questions in his deposition regarding where Mary was when he communicated with her as evidence that she was not in North Carolina. Of course, this argument again asks this Court to re-weigh the credibility of the evidence, but that is not this Court's role. *See generally Banc of Am. Sec. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183. The evidence supports the trial court's findings.

In his deposition, defendant answered very few questions regarding his communications with Mary and claimed to remember almost nothing, repeatedly stating phrases such as "I just don't have any recollection[;]" "I don't know[;]" "I don't have any recollection right now[;]" and "I don't recall." Contrary to defendant's contentions, his failure to answer questions does not constitute an affirmative showing of evidence that Mary was *not* in North Carolina – her home at that time – when he communicated with her over 400 times as shown by plaintiff's summary of the phone records produced by AT&T. Further, plaintiff asserted that defendant contacted Mary on their *home* phone, in North Carolina. Thus, the fact that defendant does not remember the hundreds of phone calls and text messages reflected in the billing statements is in conflict with the forecast and actual presentation of evidence from plaintiff, and here, the trial court resolved that conflict in favor of plaintiff.

D. Summary

As to the findings of fact, they are properly classified as findings of fact and sufficient to support meaningful appellate review. The competent evidence supports the findings of fact. Ultimately, the competent evidence supports the findings of fact, and I would overrule defendant's arguments challenging them.

III. Solicitations

Defendant next contends the trial court erred in concluding he engaged in "solicitations" for purposes of the long-arm statute. Defendant focuses on (1) a lack of evidence that he *initiated* any alleged contact with Mary and (2) his contention that since he denied the allegations of an improper purpose of any alleged communications there was not "evidence sufficient to overcome these sworn denials." Plaintiff asserted in his verified complaint that he and Mary "enjoyed a true and genuine marital relationship of love and affection[,]" and defendant knowingly

destroyed "the bonds of matrimony" by his frequent communication with Mary, whom he knew was married, in North Carolina and sending her things of value such as airline tickets.

North Carolina General Statutes § 1-75.2 defines "solicitation" for purposes of jurisdiction as "a request or appeal of any kind, direct or indirect, by oral, written, visual, electronic, or other communication, whether or not the communication originates from outside the State." N.C. Gen. Stat. § 1-75.2 (2013). Defendant argues the trial court's finding that the communications were "solicitations" is a conclusion of law, not a finding of fact, so this Court should review the trial court's determination *de novo*. Defendant has not provided any authority to support his argument for *de novo* review, and to the extent prior cases do address this issue, it has been treated as a finding of fact, and the same standard of review as discussed above applies. *See Cooper*, 140 N.C. App. at 734, 537 S.E.2d at 857 ("The trial judge *found* that the alleged telephone contacts (including telephone calls and telephone transmitted e-mail) were 'solicitations' within the meaning of N.C. Gen. Stat. § 1–75.4(4) and we agree." (emphasis added)). But whether the "solicitation" issue is a finding of fact or a conclusion of law, the trial court's findings of fact support its conclusion, as does the law.

A. Initiation of Contact

The trial court's findings and the evidence demonstrate that defendant had direct communications with Mary by cell phone and text messages. But defendant argues that the evidence here does not show that *he* "initiated" the phone calls to Mary and that the evidence does not show sufficient frequency of phone calls, citing to the factual allegation of "almost daily" phone calls in *Brown*.

> ➢ The first call of the day emanated from Mr. Been's cell phone only three times during the pertinent 89-day period covered by those records, (Doc. Ex. 44, 49, 58) (reflecting Mr. Been called first on 2 August 2013, 20 August 2013, and 20 September 2013);
>
> ➢ Those three calls lasted a grand total of 0 minutes, 0 seconds, (Doc. Ex. 44, 49, 58) (listing an elapsed time ("ET") of 0:00 for each call);
>
> ➢ The 73 total calls emanating from Mr. Been's cell phone collectively amounted to an ET of just over 68 minutes during the 89-day span. (Doc. Ex. 32-65).

The plain language of North Carolina General Statute § 1-75.2 does not support an assertion that a defendant must initiate the contact within

North Carolina to support a finding of "solicitation." *See* N.C. Gen. Stat. § 1-75.2. North Carolina General Statute § 1-75.2 speaks to "a request or appeal of any kind[,]" it does not state, as defendant contends, that the out-of-state defendant must initiate the phone call, email, text message, or any other form of communication, but rather that once initiated "a request or appeal" is made, and the trial court did not weigh it of critical importance here. *Id.* Whether the calls were "originated" or "initiated" by Mary or defendant, the communications occurred. And in this context, it would be logical for the trial court to surmise that defendant and Mary would have arranged for their conversations to occur when no one, particularly plaintiff, was nearby to overhear them.

B. Sufficiency of Evidence for Solicitation

In *Cooper v. Shealy*, this Court found solicitation and a sufficient basis for personal jurisdiction based on an unspecified number of phone calls and emails made to the plaintiff's husband when he was living in North Carolina:

> The trial judge found that the alleged telephone contacts (including telephone calls and telephone transmitted e-mail) were "solicitations" within the meaning of N.C. Gen. Stat. § 1–75.4(4) and we agree. Plaintiff alleged that defendant telephoned her husband in North Carolina in order to solicit his affections and entice him to leave his family. In addition, plaintiff claimed that she suffered injury, the destruction of her husband's love and affection, as the direct result of defendant's wrongful conduct. *We conclude, therefore, that the North Carolina long-arm statute authorizes personal jurisdiction since the plaintiff's injury allegedly occurred within North Carolina and was allegedly caused by defendant's solicitation of plaintiff's husband's love and affection by telephoning plaintiff's home in North Carolina.*

140 N.C. App. at 734, 537 S.E.2d at 857 (emphasis added). In this case, the trial court had far more evidence regarding the number or frequency of communication than was present in *Cooper* where solicitation was found for purposes of the long-arm statute. *See id.* at 734-35, 537 at 857-58.

Plaintiff alleged in his verified complaint that the defendant had sent plane tickets to North Carolina and once Mary and her children left North Carolina, they lived in homes in Florida owned by defendant. Defendant's deposition confirmed these allegations. Defendant also admitted to loaning plaintiff $85,000. These alleged results of communications, money and plane tickets, between defendant and Mary are

based on circumstantial evidence, but circumstantial evidence is still valid evidence. Unless a plaintiff has managed to obtain direct physical evidence such as recordings of conversations, incriminating photographs or video, or written communications, much of the evidence in cases such as this is normally circumstantial, and this circumstantial evidence may include post-separation conduct. *See Nunn v. Allen*, 154 N.C. App. 523, 534, 574 S.E.2d 35, 42 (2002) ("Under *Pharr*, *supra*, post-separation conduct is admissible and relevant to corroborate evidence of pre-separation conduct, and the evidence of post-separation conduct here provides strong circumstantial evidence explaining and corroborating defendant's pre-separation conduct.").

North Carolina law also does not require any particular type, frequency, or quantity of communications. *See generally Cooper*, 140 N.C. App. at 734–35, 537 S.E.2d at 858. In *Cooper*, this Court noted the number of contacts was not in the record, so the number of calls was not a controlling factor. *See id*. In fact, this Court cited favorably to a federal case in which a single phone call from out of state was held to be a sufficient "minimum contact" with the forum state:

> In the principal case, we have no transcript of the hearing and plaintiff's complaint does not allege the number of contacts defendant had with plaintiff's husband here in North Carolina. Therefore, we do not know how many contacts defendant had with plaintiff and her husband in North Carolina. However, we note that federal courts have found personal jurisdiction when the defendant had only minimal contacts with the forum state. *See Brown v. Flowers Industries*, *Inc.*, 688 F.2d 328 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023, 103 S.Ct. 1275, 75 L.Ed.2d 496 (1983), and *J.E.M. Corporation v. McClellan*, 462 F.Supp. 1246 (D.Kan. 1978) (exercising personal jurisdiction when defendant's sole contact with the forum state was a single phone call from out-of-state).
>
> The quantity of defendant's contacts with North Carolina may not have been extensive. However, we have already determined that the contacts were sufficient for purposes of N.C. Gen. Stat. § 1-75.4[.]

Id.

C. Content of Communications

Defendant also contends that plaintiff did not present sufficient evidence of the content of the communications between himself and Mary.

Defendant argues that he and Mary "acknowledged they communicated electronically, (R pp 59(¶¶11-14), 84(¶15)), but they also vehemently denied that such communications had any improper purpose or content. (R pp 59(¶¶11, 13), 84-85(¶¶15-23), 95(¶5)). Mr. Ponder did not present evidence sufficient to overcome those sworn denials."

Again, for purposes of personal jurisdiction, plaintiff was not required to prove the precise content of the communications between defendant and Mary. *See generally Cooper*, 140 N.C. App. 729, 537 S.E.2d 854. Plaintiff is required only to present evidence of the communications and some evidence, which may be circumstantial, that the communications were for the purpose of alienating the affections of his spouse. *See generally id.* Quite often in cases dealing with alienation of affections, the defendant and the spouse of the plaintiff allege some proper reason for their communications other than encouraging or seeking a romantic relationship or alienation of the affections between the plaintiff and his or her spouse. *See, e.g.*, *Brown*, 363 N.C. at 364, 678 S.E.2d at 224. For example, in *Brown*, our Supreme Court noted that in the defendant's affidavit, he "never denied that he telephoned or e-mailed plaintiff's spouse in North Carolina; rather, he merely characterized the conversations as work related." *Id.* Here, defendant also has not denied that he communicated with Mary by telephone and text, but to the extent that he admits recalling such communications, he claimed he was merely providing information regarding where Mary could seek assistance related to domestic violence.

Other evidence also tends to support plaintiff's claim that the content and purpose of the communications between defendant and Mary was to alienate the affection of the marriage. The evidence before the trial court included defendant's affidavit executed on 1 June 2016, in which he states that "I consider Ms. Ponder a friend and somewhat of a daughter and that is how it has always been." However, on 20 December 2017, defendant testified in a deposition that he and Mary had been dating for "[f]ive years." Defendant filed an Errata Sheet to this deposition, changing his answer from "five years" to "five months." Certainly, defendant may have misspoken -- twice -- by saying "years" instead of "months," but his testimony does raise a credibility issue, particularly in light of the other evidence forecast including defendant's provision of $85,000, plane tickets, and a home for Mary. And if assuming defendant did make a mistake and they had been dating only months, not years, defendant testified in the same deposition that in December 2017, after dating for only five *months*, he and Mary lived together in a house they jointly owned, and he provided for her daily expenses. Defendant's relationship with Mary had progressed since his June 2016 affidavit from

"friend" and "somewhat of a daughter" to husband and wife. In Mary's affidavit executed 2 March 2018, she noted she and defendant had gotten married in December of 2017. This Court cannot determine if plaintiff should ultimately prevail in his claims. But here, while defendant mostly asserts he cannot remember if had communicated with Mary or not, and to what extent, the evidence forecast and presented by plaintiff indicates that he did, and the extent to which that qualifies as a tort is a question for the trial court and/or jury.

D. Summary

In summary, solicitation does not require initiation, and there was sufficient evidence upon which the trial court made its determination that the long-arm statute was satisfied as to solicitation. I need not determine specifically if the communication arose to the level of a tort for which defendant would be liable as that is not the question before us. I would overrule defendant's arguments.

IV. Due Process

Finally, defendant contends the trial court erred in exercising jurisdiction over him because "doing so contravenes the North Carolina long-arm statute and the due process clause of the United States Constitution[.]" (Original in all caps.) I have already noted that the trial court had competent evidence for its finding of fact that defendant solicited plaintiff for purposes of the long-arm statute. *See* N.C. Gen. Stat. § 1-75.4 (2013). Thus, the remaining inquiry is one of due process; returning to *Cooper*,

> Since we have determined that personal jurisdiction is authorized by the long-arm statute, we must now address whether defendant had such minimum contacts with the forum state to comport with due process. *Fraser v. Littlejohn*, 96 N.C. App. 377, 386 S.E.2d 230 (1989). Due process requires that the defendant have "minimum contacts" with the state in order to satisfy " 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278, 283 (1940)). The factors to consider when determining whether defendant's activities are sufficient to establish minimum contacts are: "(1) the quantity of the contacts; (2) the quality and nature of the contacts; (3) the source and connection of the cause of action to the contacts; (4) the interests of

the forum state, and (5) the convenience to the parties." *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 114, 516 S.E.2d 647, 650 (1999).

In the principal case, we have no transcript of the hearing and plaintiff's complaint does not allege the number of contacts defendant had with plaintiff's husband here in North Carolina. Therefore, we do not know how many contacts defendant had with plaintiff and her husband in North Carolina. However, we note that federal courts have found personal jurisdiction when the defendant had only minimal contacts with the forum state. See Brown v. Flowers Industries, Inc., 688 F.2d 328 (5th Cir.1982), cert. denied, 460 U.S. 1023, 103 S.Ct. 1275, 75 L.Ed.2d 496 (1983), and *J.E.M. Corporation v. McClellan*, 462 F.Supp. 1246 (D.Kan.1978) (exercising personal jurisdiction when defendant's sole contact with the forum state was a single phone call from out-of-state).

The quantity of defendant's contacts with North Carolina may not have been extensive. However, we have already determined that the contacts were sufficient for purposes of N.C. Gen. Stat. § 1–75.4, *especially considering that the alleged injury under the claim (ultimately the destruction of plaintiff's marriage) was suffered by plaintiff allegedly within this state.* Plaintiff claims that there is a direct relationship between the contacts and plaintiff's injuries. Furthermore:

> North Carolina has a strong interest in protecting its citizens from local injury caused by the tortious conduct of foreign citizens:
>
> > "In light of the powerful public interest of a forum state in protecting its citizens against out-of-state tortfeasors, the court has more readily found assertions of jurisdiction constitutional in tort cases."

Saxon v. Smith, 125 N.C. App. 163, 173, 479 S.E.2d 788, 794 (1997) (quoting *Ciba–Geigy Corp. v. Barnett*, 76 N.C. App. 605, 608, 334 S.E.2d 91, 93 (1985)). It is important to note that plaintiff cannot bring the claims for alienation of affections and criminal conversation in South Carolina (defendant's resident state) since that state has abolished those causes of actions. *Russo v. Sutton*, 310 S.C. 200, 422 S.E.2d 750 (1992). Therefore, North Carolina's interest in

> providing a forum for plaintiff's cause of action is especially great in light of the circumstances. Furthermore, North Carolina's legislature and courts have repeatedly demonstrated the importance of protecting marriage. N.C. Gen. Stat. § 8–57(c) (spouses may not be compelled to testify against each other if confidential information made by one to the other would be disclosed)[.]
>
> Finally, we must consider the convenience to the parties. As mentioned earlier, plaintiff would be unable to bring her claims in South Carolina (defendant's resident state) since those causes of action are no longer in existence in South Carolina. Furthermore, several possible witnesses and evidence relevant to plaintiff's marriage and the destruction thereof would more than likely be located in North Carolina. In addition, because defendant is a resident of our neighboring state, South Carolina, there is a minimal traveling burden on defendant to defend the claims in North Carolina. For the reasons stated above, we do not believe that allowing plaintiff to bring these claims against defendant in North Carolina in any way "offend[s] 'traditional notions of fair play and substantial justice.' " *International Shoe Co.*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278, 283).

140 N.C. App. at 734–36, 537 S.E.2d at 857–58 (emphasis added) (alterations in original) (citations omitted).

Here, phone records indicate there were more than 400 communications between defendant and Mary. While we do not know the exact nature of these contacts, plaintiff's verified complaint notes defendant provided Mary with airplane tickets and a home in Florida to live in upon leaving North Carolina. Just as in *Cooper*, [p]laintiff claims that there is a direct relationship between the contacts and plaintiff's injuries[;]" namely, "the destruction of plaintiff's marriage[.]" *Id.* at 735, 537 S.E.2d at 858. Also, as in *Cooper*, *id.*, North Carolina's interest in providing a forum to protect marriage law is high, particularly as alienation of affections is no longer a claim under Florida law. *Davis v. Hilton*, 780 So. 2d 974, 975 (Fla. Dist. Ct. App. 2001) ("The clear language of Florida Statutes § 771.01 abolishes the claim of alienation of affections."). As to the convenience of the parties, plaintiff would be unable to bring his claim in Florida. *See id.*; *see also Cooper*, 140 N.C. App. 735-36, 537 S.E.2d at 858. "Furthermore, several possible witnesses and evidence

relevant to plaintiff's marriage and the destruction thereof would more than likely be located in North Carolina." *Id.* at 736, 537 S.E.2d at 858. Ultimately, just as in *Cooper*, I "do not believe that allowing plaintiff to bring these claims against defendant in North Carolina in any way offends traditional notions of fair play and substantial justice." *Id.* (citation, quotation marks, and brackets omitted). Summarizing, just as the trial court determined based on the competent evidence before it, due process standards have been met. I would overrule this argument.

In conclusion, I would affirm the order of the trial, and therefore I respectfully dissent.

MICHAEL BRANDON POYTHRESS, PLAINTIFF
v.
LISSETTE R. POYTHRESS, DEFENDANT

No. COA20-137

Filed 31 December 2020

1. Divorce—premarital agreements—real estate—marital presumption

In a dispute over real property acquired during marriage, where the parties' premarital agreement generally provided that property acquired during the marriage with the husband's separate property would remain his separate property but that the husband could make gifts to the wife and to the marital estate, a holding company for investment real estate and its six properties were joint property because the record evidence failed to rebut the marital presumption. The husband's testimony indicated that he intended the holding company and its properties to be joint assets—among other things, the husband testified that he had wanted the wife to be involved in their real estate investing, the wife was in fact involved, they intended to acquire ten rental properties so that they could give two to each of their children (from different marriages) one day, and several of the properties were acquired using both the husband's and the wife's personal guarantees on the loans.

2. Divorce—premarital agreements—real estate—marital presumption

In a dispute over real property acquired during marriage, where the parties' premarital agreement generally provided that property

acquired during the marriage with the husband's separate property would remain his separate property but that the husband could make gifts to the wife and to the marital estate, on the issue of a beach house that the husband acquired in his own name with his own assets and later re-titled to both himself and the wife as tenants by the entirety, the trial court erroneously relied, in part, on the premarital agreement as evidence to rebut the marital presumption. The issue was remanded to the trial court for further findings on the husband's intent.

3. Divorce—premarital agreement—real estate—findings

In a dispute over real property acquired during marriage, where the parties' premarital agreement generally provided that property acquired during the marriage with the husband's separate property would remain his separate property but that the husband could make gifts to the wife and to the marital estate, the trial court properly exercised jurisdiction over assets in Peru acquired during the marriage. However, because it was unclear from the findings how the properties were titled, the matter was remanded for further findings and determination of ownership of those properties.

4. Attorney Fees—order vacated—dispute over premarital agreement —underlying order reversed in part

Where the trial court erred by concluding that the wife breached her premarital agreement when she refused to execute documents transferring her legal interest in disputed properties to the husband, the award of attorney fees in favor of the husband was vacated.

Judge YOUNG concurring in result only.

Appeal by Defendant from judgment entered 8 August 2019 by the Honorable Ned Magnum in Wake County District Court. Heard in the Court of Appeals 21 October 2020.

Fox Rothschild LLP, by Michelle D. Connell, for Plaintiff-Appellee.

John M. Kirby for Defendant-Appellant.

DILLON, Judge.

Defendant Lissette R. Poythress ("Wife") appeals portions of a judgment in favor of Plaintiff Michael Brandon Poythress ("Husband"), declaring certain real estate to be his sole property based on the terms of their premarital agreement.

I. Background

Husband and Wife were married in 2010 and separated in 2017.

Just prior to getting married, Husband and Wife entered into a premarital agreement (the "Premarital Agreement" or "Agreement").

Husband had recently divorced his first wife, a marriage which produced three children. Though he had significant assets, he lost much of his wealth in the divorce, prompting him to seek the Agreement before marrying again to protect his assets should his second marriage also end in divorce.

Wife was also previously married and had two children of her own. She, however, did not have any significant assets.

During the marriage, the parties acquired several properties which, at the time of their separation, were titled *either* to them jointly *or* to an entity which they purportedly jointly owned. The consideration paid to acquire these properties came from Husband's separate property and from loans guaranteed by both parties.

Husband and Wife now dispute whether, under the terms of their Premarital Agreement, these assets belong to the marriage or to Husband. The Agreement provides, generally, that the property owned by Husband prior to the marriage and all property he acquired during the marriage with his separate property would remain his separate property if the parties separated. The Agreement, however, also provides that Husband could make gifts to Wife and to the marital estate.

Husband brought this action to enforce the Agreement, claiming that the disputed assets are solely his and that Wife is obligated under the Agreement to sign over her legal interest in them. Wife, though, claims that the disputed assets are marital and should be divided equally, as the Agreement provides that all marital property is to be split equally if the marriage ended in divorce.

After a hearing on the matter, the court entered an order declaring Husband as the sole owner of the disputed assets and directing Wife to execute documents to transfer her legal interest therein. The trial court also awarded Husband attorneys' fees, based on its finding that Wife had breached the Agreement by not previously executing the documents. Wife appeals.

II. Disputed Property

The trial court's order covered real estate, interests in the entity the parties set up during the marriage to hold other real estate, and some

personal property. These assets are located either in North Carolina or Peru. Wife's brief on appeal only takes issue with some of these assets. Accordingly, we address the trial court's order, only with respect to those assets. As to the assets about which Wife makes no argument, the order is affirmed.

One of the assets is POGO, LLC, ("POGO"), the entity that they set up during the marriage. The purpose of POGO was to be the holding company for investment real estate. POGO, in fact, owned six investment properties in North Carolina at the parties' date of separation.

Three of these six properties were acquired early in the marriage, all with consideration provided from Husband's sole property, but which were initially titled in their names personally. After they set up POGO, they re-titled these three properties to POGO.

The fourth and fifth properties were acquired directly by POGO, as follows: POGO obtained a line of credit which was secured by the original three properties and guaranteed by both Husband and Wife. POGO purchased two additional rental properties with proceeds from this line and from a mortgage guaranteed by both parties.

The sixth property owned by POGO was contributed to POGO by Husband. Husband came to own this sixth property in his own name in resolution of claims from his first divorce. He re-titled that home to POGO. POGO then obtained a cash-out mortgage loan secured by this property which was guaranteed by both parties.

In addition to the ownership interests in POGO, the parties dispute ownership of a beach house in North Carolina titled to the parties as tenants by the entirety. Husband purchased this property during the marriage, but entirely with his separate assets. Husband, though, later re-titled to him and Wife as tenants by the entirety.

The other assets in this appeal are located in Wife's home country of Peru. They include interests in various businesses and four real estate properties, all acquired during the marriage with Husband's separate property.

III. Analysis

The trial court determined that all the disputed properties are solely Husband's. The trial court based its decision largely on its findings that Husband had provided all the consideration for their acquisitions; that Husband never intended to gift the properties to the marital estate; but that *if* titling the properties jointly or to POGO created a presumption

of a gift, there was clear, cogent, and convincing evidence to rebut this presumption, based on the Agreement and Husband's reliance thereon.

For the reasons stated below, we hold as follows with respect to the North Carolina properties:

- POGO is jointly owned by Husband and Wife in equal shares. POGO was capitalized with joint assets. Husband has failed to produce clear, cogent, and convincing evidence to show otherwise, as a matter of law. And both parties provided consideration, in the form of their personal guarantees, for the purchase of other real estate owned by POGO. We reverse the portion of the trial court order holding otherwise.
- The trial court relied, in part, on its erroneous interpretation of the Agreement to find clear, cogent, and convincing evidence that Husband did not intend to gift the beach house to the marital estate. There is evidence from which the trial court could make this finding. We, therefore, remand this portion of the order so that the trial court can reconsider the matter.
- With respect to the Peru properties, we hold that the trial court did not err in exercising jurisdiction over the parties' dispute concerning these properties. However, we vacate and remand the portion of the trial court order concerning these properties for further proceedings.
- Finally, we vacate the portion of the trial court's order awarding attorneys' fees to Husband.

Gifts

One issue on appeal is whether Husband *intended a gift at all* when he allowed the disputed properties to be titled to the marriage, including the properties that were used to capitalize POGO. That is, did Husband intend a *present* transfer of interest or did he intend to create a resulting trust, whereby he was simply transferring *title* to be held in trust for his benefit?

A second issue on appeal is, if Husband did intend a present gift, whether Husband intended the present gift to be *conditional* in nature. That is, did Husband intend his gifts to be conditioned such that any interest acquired by Wife by the gift would revert to him if the marriage ended in divorce?

A valid gift (whether conditional or unconditional) occurs when there is (1) donative intent and (2) actual or constructive delivery. *Halloway v. Wachovia*, 333 N.C. 94, 100, 423 S.E.2d 752, 755 (1992).

In any event, our Supreme Court has held – as a matter of common law, apart from our equitable distribution statutes – that where a spouse allows his separate assets to be used to acquire property titled to both spouses as tenants by the entirety or to the other spouse, it is presumed that the spouse supplying the consideration has made a gift to the marriage; it is not presumed that the transaction creates a resulting trust in favor of the spouse supplying the consideration. *Mims v. Mims*, 305 N.C. 41, 53-54, 286 S.E.2d 779, 788 (1982). Our Supreme Court further instructs that this gift presumption may only be overcome by "clear, cogent, and convincing" evidence. *Id.* at 57, 286 S.E.2d at 790.[1]

Trial Court's Erroneous Findings

Before discussing the assets at issue specifically, we first discuss findings by the trial court to support its determination that no gift occurred by Husband and our holding that the trial court erred in two key findings in reaching its ultimate finding that Husband did not intend any gifts to the marriage when the assets were acquired.

First, the trial court erroneously relied on the Agreement as evidence to rebut the marital gift presumption, finding that Husband's "procurement of and reliance on the definitions of separate property in the Premarital Agreement is clear, cogent, and convincing evidence sufficient to rebut any such presumption."

Though the Agreement provided that property acquired during the marriage by Husband with his separate assets would be his solely upon separation, the Agreement also provided that Husband could make gifts of his separate property to Wife or to the marriage. Specifically, the Agreement provided as follows:

If Husband and Wife separated, the distribution of their properties would be controlled by the Agreement and not by Chapter 50.[2]

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1. Our equitable distribution statute states that the presumption may be overcome by "the greater weight of the evidence." N.C. Gen. Stat. § 50-20(b)(1) (2017). However, this present case is not governed by that statute but is a contract claim.

2. In her Answer, Wife prayed that the trial court declare the Agreement void, such that Chapter 50 would apply to determining the classification and distribution of their property. However, Wife makes no argument on appeal that the Agreement is void. Rather, her arguments on appeal concern her disagreement as to how the trial court construed the Agreement.

If Husband and Wife divorced, the property owned by Husband prior to marriage and any property he acquired during marriage using his separate property would be his separate property. Wife waived all marital interest in Husband's property, whether the marriage ended in divorce or Husband's death.

Paragraph 21 of the Agreement, though, provided that Husband could make gifts to Wife or to the marital estate during the marriage and bequests to Wife which would take effect upon his death:

> 21. VOLUNTARY TRANSFERS PERMITTED. The purpose of this Agreement is to limit the rights of each party in the assets of his or her spouse in the event of death, separation or divorce, but this Agreement shall not be construed as placing any limitation on the rights of either party to make voluntary *inter vivos* and/or testamentary transfers of his or her assets to his or her spouse.
>
> In the event that [Husband] shall create [ ] tenancies by the entirety, or otherwise so establish assets that upon [his] death[,] it shall be presumed that [Husband] presumed that [he] intended such passage and [that Wife] shall then become the sole and uncontested owner of such asset or assets, anything herein contained to the contrary notwithstanding.
>
> . . . [It is] the wish of each party that any affirmative action taken by either after the signing of this Agreement, whether it be testamentary or in the creation of joint assets, shall override the releases and renunciations herein set forth.
>
> [T]he parties acknowledge that no representation or promises of any kind whatsoever have been made by either of them to the other with respect to any such transfers, gifts, contracts, conveyances, or fiduciary relationships.

The language in this paragraph is unambiguous: The first section recognizes that Husband may make gifts of his separate property during the marriage to Wife or could leave Wife any of his separate property in his last will.

The second and third sections indicate that Husband could transfer property to the marital estate, which would then become "solely" Wife's property upon his death, notwithstanding her waiver of her marital interests in his estate provided by North Carolina law. These sections, however, do *not* state that such transfers to the marital estate by

Husband otherwise were not to be deemed a present gift to the marital estate and that such transfers should not be divided equally as a marital asset should the parties separate. Rather, the third section expressly provides that any affirmative action by Husband to create joint assets during the marriage "shall override [Wife's] releases and renunciations" in the Agreement.

And the fourth section affirms there was no understanding at the time the Agreement was executed between the parties with respect to any transfers that might be made during the marriage.

Second, the trial court erroneously relied on its finding that Husband provided *all* consideration to acquire the properties. This finding was erroneous for two reasons. First, the trial court fails to recognize that Wife provided consideration for many of the assets by personally guaranteeing the loans used to acquire them. Under the Agreement, Wife had no obligation to personally guarantee any loan to help Husband mortgage or acquire his separate property: she was only required to pledge her marital interest in Husband's separate properties whenever Husband sought a loan secured by these properties. Her personal guarantees used to acquire some of the assets are strong evidence that these assets were intended to be marital. And, second, many assets were acquired with the line which was itself secured by the three properties owned by the marriage which was used to initially capitalize POGO.

Having concluded that the trial court erroneously relied upon the Agreement to support its finding that the marital gift presumption had been rebutted, we now turn to address whether there was *other* evidence to support the trial court's finding. It would be appropriate to vacate and remand with respect to such properties where there is other competent evidence.

POGO

[1] The only evidence that Husband did not intend a gift of POGO, including the properties contained therein, was a few lines in Husband's testimony that he did not subjectively intend gifts to Wife when he allowed properties to be titled to POGO. We have held that testimony by a spouse concerning a lack of intent to make a gift when titling separate property to the marriage, without other evidence, is not necessarily insufficient to constitute clear, cogent, and convincing evidence to overcome the marital gift presumption. *Romulus v. Romulus*, 215 N.C. App. 495, 506, 715 S.E.2d 308, 316 (2011) ("Yet, arguably the only evidence which could potentially support findings of fact to rebut the marital presumption is plaintiff's testimony as to her intent. Herein lies the issue which the trial court must resolve on remand.")

Romulus, however, is distinguishable from the present case. In *Romulus*, there was not much in evidence from which it could be determined *either way* whether a wife intended to gift a house to the marriage when she titled it to her and her spouse. Accordingly, in that case, we held that the wife's testimony alone might be enough to constitute evidence sufficient to rebut the marital presumption.

Here, though, there is substantial evidence *from Husband* regarding his words and actions that would indicate that he intended POGO and its properties to be joint assets. Accordingly, we hold that the evidence in the record, as a matter of law, fails to arise to the level of clear, cogent, and convincing evidence to rebut the marital presumption. For instance, Husband testified that he wanted Wife to be involved in real estate investing and that the first property, originally titled to her only, was purchased to get her started. He testified that Wife was active in locating properties, that she participated in managing them, that she helped in negotiating for some of the purchases, and that she found a property and the tenant for one of the properties that they acquired through POGO. He testified that POGO was so named based on a combination of their last names and that their intent was to acquire ten properties total in POGO so that their combined five children would each one day have two rental properties. He testified that he told his accountant on one occasion that the ownership interests in POGO should be reflected as 70% for himself and 30% for Wife rather than equal ownership, though he never followed through with any change. Husband participated with Wife in the acquisition of several properties by POGO with the proceeds from loans guaranteed by both of them, never telling Wife that she was guaranteeing loans to buy property he considered to be his separate property. And we note that there was no evidence that Husband ever indicated to Wife or anyone else that he did *not* intend gifts.

It may be that Husband, otherwise, thought that POGO and the properties therein would revert to him if the marriage ended in divorce. However, this belief would still indicate that he intended gifts, though conditional gifts, rather than the creation of a resulting trust, whereby POGO was merely holding *his sole* property in trust for him. Our Court has held as follows with conditional gifts generally:

> A person has the right to give away his or her property as he or she chooses and may limit a gift to a particular purpose, and render it so conditioned and dependent upon an expected state of facts that, failing that state of facts, the gift should fail with it. . . .

> The intention of the donor to condition the gift must be measured at the time the gift is made, as any undisclosed intention is immaterial in the absence of mistake, fraud, and the like, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expression and excludes all questions in regard to his unexpressed intention.

Courts v. Annie Penn, 111 N.C. App. 134, 139, 431 S.E.2d 864, 866-67 (1993) (quotation marks omitted). The record here, though, does not disclose any evidence regarding Husband's words or actions when the properties were titled to Wife, the marital estate, or POGO that suggested that the properties would revert to him if the marriage ended in divorce.

The Beach House

[2] The beach house was never titled to POGO. Rather, Husband acquired this property in his own name with his own assets and then later re-titled it to both him and Wife as tenants by the entirety. Though the trial court erroneously found that the marital gift presumption was overcome, in part, by the Agreement, the trial court also relied on a conversation that Husband and Wife had when he made the transfer. In this conversation, Wife indicated that she was afraid that Husband's ex-wife would kick her out of the beach house were he to die as the sole owner. The trial court found that Husband, therefore, re-titled the property to the marital estate so that it would become Wife's if he were to die. This conversation is *some* evidence as to what the parties, especially Husband, was thinking when the property was re-titled. This finding could support an ultimate finding that Husband intended only a resulting trust, that the property be held by the marital estate for his benefit, whereby Wife would only acquire any interest when he died. We, therefore, vacate this portion of the order and remand for further findings on this issue.

Peru Properties

[3] Wife identifies interests in four Peruvian companies owned by Husband and several parcels of real estate in Peru.

She argues that the trial court erred by exercising jurisdiction over these Peruvian properties. We disagree. The trial court had *in personam* jurisdiction over the parties, as they were married in North Carolina, entered the Agreement in North Carolina, and subjected themselves to

the jurisdiction of the court. And the trial court had subject matter jurisdiction to resolve the contract claim. Of course, whether Peru will honor a judgment from North Carolina concerning property located in Peru is not before us.

Alternatively, Wife argues that the trial court erred by declaring Husband the sole owner of these Peruvian properties. It is unclear from the findings how these properties are actually titled in Peru or how they came to be so titled. We vacate the portion of the order declaring that these properties are Husband's properties and remand for the trial court to make further findings with respect to these properties and to determine ownership of these properties based on those findings. The trial court, in its discretion, may hear additional evidence concerning these properties and consider legal arguments from the parties, including the effect of Peruvian property law, if any, on our marital gift presumption.

Breach of Contract and Attorneys' Fees

[4] We conclude that the trial court erred by concluding that Wife breached the Agreement when she refused to execute documents transferring her legal interest in the disputed properties to Husband. Accordingly, we vacate the award of attorneys' fees.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judge MURPHY concurs.

Judge YOUNG concurs in result only.

SEMELKA v. UNIV. OF N. CAROLINA

[275 N.C. App. 662 (2020)]

RICHARD C. SEMELKA, M.D., PETITIONER
v.
THE UNIVERSITY OF NORTH CAROLINA, AND THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, RESPONDENTS

No. COA19-1076

Filed 31 December 2020

1. Public Officers and Employees—termination—tenured university faculty member—improper reimbursement requests—tenure policy

A tenured University of North Carolina (UNC) faculty member (petitioner) who was fired for improperly seeking reimbursements for personal expenses from his department's operating fund failed on appeal to overcome the presumption that the UNC Board of Governors' (BOG) decision to discharge him was made in good faith and in accordance with governing law. Contrary to petitioner's argument, the BOG, in its review of petitioner's appeal, did not violate its own tenure policy by considering certain allegations of travel expense reimbursement violations, because those alleged violations had not been rejected by the Faculty Hearings Committee, and even if they had been, the chancellor's adoption of the Faculty Hearings Committee's findings and recommendation did not constitute a final decision removing these allegations from the case.

2. Public Officers and Employees—termination—tenured university faculty member—improper reimbursement requests—applicable code

Where a tenured University of North Carolina (UNC) faculty member (petitioner) was fired for improperly seeking reimbursements for personal expenses from his department's operating fund, the Court of Appeals rejected his argument that he did not commit misconduct sufficiently serious to justify discharge under The Code of the Board of Governors of UNC (The Code). A review of the whole record revealed substantial evidence supporting the conclusion that petitioner misrepresented several reimbursement requests and specifically that he misrepresented his reasons for retaining the law firm whose charges he sought reimbursement for, constituting misconduct "sufficiently serious as to adversely reflect on his honesty, trustworthiness or fitness to be a faculty member" under The Code.

3. Public Officers and Employees—termination—tenured university faculty member—improper reimbursement requests—applicable code

Where a tenured University of North Carolina (UNC) faculty member (petitioner) was fired for improperly seeking reimbursements for personal expenses from his department's operating fund, the Court of Appeals rejected his argument that discharge was an excessive discipline and that UNC should have considered less severe discipline. There was no provision in The Code of the Board of Governors of UNC (The Code) requiring consideration of discipline less severe than discharge, and defendant's conduct merited discharge under The Code.

4. Public Officers and Employees—termination—tenured university faculty member—improper reimbursement requests—not unjust and arbitrary

Where a tenured University of North Carolina (UNC) faculty member (petitioner) was fired for improperly seeking reimbursements for personal expenses from his department's operating fund, the Court of Appeals rejected his argument that the decision to discharge him was unjust and arbitrary because UNC set him up and misrepresented the evidence against him. A review of the whole record showed that petitioner's own actions prompted UNC to investigate him and that he did indeed misrepresent the nature of the legal expenses for which he sought reimbursement.

5. Public Officers and Employees—termination—tenured university faculty member—improper reimbursement requests—cessation of pay

Where a tenured University of North Carolina (UNC) faculty member (petitioner) was fired for improperly seeking reimbursements for personal expenses from his department's operating fund, UNC violated its own policies—which requires faculty members notified of UNC's intent to discharge to be given full pay until a final decision has been reached—when it ceased petitioner's pay at the date of the Board of Trustees' decision, which was prior to the issuance of the Board of Governors' final decision.

Appeal by Petitioner and cross-appeal by Respondents from order entered 25 April 2019 by Judge Allen Baddour in Superior Court, Orange County. Heard in the Court of Appeals 8 September 2020.

Law Office of Barry Nakell, by Barry Nakell, for Petitioner-Appellant/ Cross Appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Vanessa N. Totten, Special Deputy Attorney General Kimberly Potter, and Assistant Attorney General Zachary Padget, for Respondents-Appellees/Cross-Appellants.

McGEE, Chief Judge.

Richard C. Semelka, M.D. ("Petitioner") appeals and the University of North Carolina ("UNC") and the University of North Carolina at Chapel Hill ("UNC-CH") (collectively, "Respondents") cross-appeal from the trial court's order affirming the UNC Board of Governors' ("BOG") decision to discharge Petitioner from his employment and reversing the BOG's decision that UNC-CH could cease payment of Petitioner's salary following the decision of UNC-CH's Board of Trustees ("BOT"). We affirm.

I. Factual and Procedural Background

Petitioner was previously employed as the Director of Quality and Safety of Radiology and a Professor of Radiology within UNC-CH's School of Medicine's Department of Radiology. Between 2011 and 2015, Petitioner sent numerous emails to administrators within the Department of Radiology, the Office of the Dean of UNC-CH's School of Medicine, and UNC-CH's Office of University Counsel ("OUC") regarding safety concerns relating to the conduct of certain colleagues within the Radiology Department. Petitioner learned in January of 2016 that he had not been selected to fill the position that he had applied for – Division Chief of Abdominal Imaging. Petitioner sent UNC-CH Chancellor Carol Folt ("Chancellor Folt") a letter on 8 January 2016 expressing his concerns with how the Department of Radiology's administrators handled the investigations into his complaints and asserting his grievances with Department Chair, Dr. Matthew Mauro ("Dr. Mauro"), as well as certain other colleagues. In addition to alleging a "dereliction of responsibility by [Dr.] Mauro," Petitioner asserted that Dr. Mauro retaliated against him by "not appointing [him] as the [D]ivision [C]hief of Abdominal Imaging, but rather selected the only outside candidate that applied."

In response to Petitioner's letter to Chancellor Folt, the Executive Vice Chancellor and Provost, Dr. James W. Dean, Jr. ("Provost Dean"), sent Petitioner a letter on 21 January 2016 stating that he had read Petitioner's email to Chancellor Folt and spoken with "several people

connected to the events that [Petitioner] describe[d].” Provost Dean informed Petitioner that a “thorough investigation” had been conducted into each of Petitioner’s previously-communicated concerns. The letter rejected Petitioner’s claim that he was retaliated against by Dr. Mauro, explaining that “any personnel decision is open to a number of interpretations, and may have been made based on a number of factors.” Finally, Provost Dean outlined the faculty grievance process for Petitioner “to further pursue [his] concerns.”

Petitioner retained the law firm of Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C. (“Mintz Levin”) in February of 2016. In an engagement letter dated 5 February 2016, Mintz Levin advised Petitioner that “[t]he Firm will represent and advise you with regard to issues concerning the University of North Carolina at Chapel Hill, and related matters.” Petitioner submitted an expense reimbursement request to the Department of Radiology’s Associate Chair for Administration, Bob Collichio (“Mr. Collichio”), on 13 July 2016. Petitioner sought reimbursement from the Radiology Operating Fund[1] for approximately $30,000 in legal fees he had paid to Mintz Levin. As justification for his request for reimbursement of legal fees, Petitioner sent Mr. Collichio a series of four emails explaining the “business-related” reasons he had hired Mintz Levin.

Mr. Collichio sought the assistance of OUC in determining whether any of Petitioner’s legal expenses were reimbursable. In a 25 July 2016 email, Mr. Collichio informed Petitioner that he had not “provide[d] enough detail to make any decision on what can be reimbursed or not,” and asked Petitioner to submit additional documentation in support of his request. In response, Petitioner sent Mr. Collichio the engagement letter from Mintz Levin, a partially redacted Mintz Levin invoice for February in the amount of $14,861.80, a partially redacted Mintz Levin

1. The Radiology Department Operating Fund operates in accordance with the UNC School of Medicine Faculty Affairs Code (“Faculty Affairs Code”) and the Policy on Clinical Department Faculty Providing Expert Legal Services and Testimony (“Expert Legal Services”). Under these policies, every clinical department within the School of Medicine has an established Departmental Operating Fund “to receive collections for professional services” related to patient care, including income generated for expert witness testimony by faculty members within that department. The Faculty Affairs Code expressly provides that funds within a Departmental Operating Fund “may not be used to fund items which would be construed as non-business or personal in nature.” Instead, “[f]unds deposited into Departmental Operating Funds may be expended on approved budgeted items which serve to maintain and/or improve the departmental capabilities in the areas of teaching, research, patient care, and public service[,]” including “expenses incurred as a result of appropriate professional travel, attendance at meetings” and “expenditures for supplies and general operational costs[.]”

invoice for March in the amount of $10,780.60, and an April invoice in the amount of $1,833.60. Petitioner informed Mr. Collichio in a 5 August 2016 email of his intention to terminate Mintz Levin because he had been charged "more money that [he had] derived benefit from." Petitioner also expressed frustration that his reimbursement request had not been approved and offered to personally meet with OUC.

In a 23 August 2016 email, Mr. Collichio informed Petitioner that OUC had provided feedback that was "not good news." The email explained that Petitioner's request for reimbursement of legal fees could not be honored because Petitioner did not get prior approval by OUC and "faculty do not have the authority to bind the University in contract for outside counsel," as "these are the decisions made by the OUC." The email also stated that OUC "looked at the line items in the invoices [Petitioner] provided, and, though vague, they do not appear to align with all of the reasons [Petitioner] provided as the purpose of retaining outside counsel."

At the request of the OUC, in August of 2016, UNC-CH's Director of Internal Audit Department, Phyllis Petree ("Ms. Petree"), commenced an investigation into Petitioner's request for reimbursement of legal fees. Ms. Petree also initiated an audit into Petitioner's prior travel and business reimbursements from the Radiology Operating Fund from July 2010 to September 2016. In a final audit report entered 5 January 2017, Ms. Petree concluded that "the primary purpose of the law firm engagement giving rise to the legal fees in question was for personal matters, though [Petitioner] initially represented that the fees were for consultation related to cybersecurity and to his University duties." Additionally, Ms. Petree concluded that between September 2010 and September 2016, Petitioner "claimed and was reimbursed for costs of nine trips that were primarily personal in nature and were not reimbursable as business travel."

In a letter dated 11 January 2017, Provost Dean informed Petitioner of his intention to discharge him from his employment as a professor at UNC-CH for misconduct under the *Trustee Policies and Regulations Governing Academic Tenure in the University of North Carolina at Chapel Hill* (the "Tenure Policy").[2] Relying on Ms. Petree's audit report, the letter stated that Petitioner submitted to the Radiology Department a request for reimbursement of $30,000 in legal fees, "knowingly representing that these expenses were incurred for legal advice regarding [his] work performed for the University when, instead, these legal services were obtained for primarily personal reasons, including

2. Pursuant to Section 3(a)(1) of the Tenure Policy, discharge is appropriate when a tenured faculty member engages in misconduct "sufficiently serious as to adversely reflect on the individual's honesty, trustworthiness or fitness to be a faculty member."

pursuing legal action against the University." Provost Dean described Petitioner's behavior as "inappropriate and unethical conduct that may also constitute a criminal violation" and found "this significant act alone constitutes misconduct of such a nature to indicate that [Petitioner is] no longer fit to be a member of the faculty[.]" The letter stated that "[f]urther contributing to a pattern of dishonesty and false representations, [Ms. Petree] thereafter discovered that, over the past five years, [Petitioner had] established a practice of improperly seeking full reimbursement from the University for trips that were personal in nature." According to Provost Dean, Petitioner's behavior was "sufficiently serious as to adversely reflect on [his] honesty, trustworthiness and fitness to be a faculty member" and his "actions constitute misconduct of such a nature as to indicate that [Petitioner] is no longer fit to be a member of the faculty[.]" The letter informed Petitioner of his right to appeal the decision and explained that pursuant to Section 3 of the Tenure Policy, Petitioner was suspended "pending [his] discharge or other resolution of [the] matter," but that his suspension would be "with full pay."

On that same day, the Executive Dean of the School of Medicine, Dr. Wesley Burks ("Dr. Burks") sent Petitioner a letter outlining "the specific terms of [his] suspension from employment pursuant to Section 3(b)(9)" of the Tenure Policy. The letter explained that Petitioner would continue to receive his full pay during his suspension, which was "effective immediately and shall continue until a final decision concerning [his] discharge from employment."

Petitioner appealed Provost Dean's decision to the UNC-CH Faculty Hearings Committee (the "Faculty Hearings Committee") on 11 January 2017, in accordance with the Tenure Policy.[3] The matter was heard by a five-member panel over the course of three days. At the hearing, Petitioner argued that he was the victim of retaliation on behalf of UNC-CH based on the safety concerns he had previously raised. The Faculty Hearings Committee submitted a memorandum to Chancellor Folt on 23 May 2017 with its findings and its unanimous recommendation that Chancellor Folt uphold Provost Dean's decision to discharge Petitioner. Finding that UNC-CH's investigations into Petitioner's concerns revealed no evidence of retaliation against Petitioner, the Faculty Hearings Committee rejected Petitioner's retaliation claim. Specifically, the Faculty Hearings Committee concluded:

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3. The Tenure Policy authorized Petitioner to appeal his termination by requesting a hearing before a panel of at least five members of the Faculty Hearings Committee. Following the hearing, the findings and recommendations of the Faculty Hearings Committee are submitted to Chancellor Folt for her adoption or rejection.

> Dr. Semelka's choice to seek reimbursement for $30,000 worth of legal fees and his description of the need for this outside legal consultation as being related to various activities such as writing books or considering new safety procedures was disingenuous and dishonest. Indeed, he eventually admitted to Ms. Petree that a significant portion (40%) of his conversations with Mintz Levin were related to taking legal action against the University. *Such conduct constitutes misconduct of such a nature as to adversely reflect on Dr. Semelka's honesty, trustworthiness and fitness to be a faculty member. Therefore, we find Dr. Semelka's conduct was of such a nature as to indicate that he is unfit to continue as a member of the faculty.* We were not convinced that the travel improprieties noted by Ms. Petree by themselves rose to the level requiring discharge since those requests were clear, did reference at least some University-related meetings, and went through multiple levels of review before being granted.

(Emphasis added).

In a letter dated 9 June 2017, Chancellor Folt notified Petitioner of her decision to accept the "findings and recommendations" of the Faculty Hearings Committee:

> I concur and determine that you engaged in misconduct that was sufficiently serious so as to adversely reflect on your honesty, trustworthiness or fitness to be a faculty member. I further concur and determine that your actions constitute misconduct of such nature as to render you unfit to serve as a member of the faculty at the University. I also concur with the Committee's findings that the University investigated your prior safety concerns and that no evidence indicated that the University took employment action against you for voicing such concerns. Accordingly, I agree that discharge is the appropriate sanction for your misconduct.

The letter also apprised Petitioner of his right to seek review of Chancellor Folt's decision by the BOT under Section 3(b)(8) and Section 8 of the Tenure Policy.[4]

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4. Under Section 8(2) of the Tenure Policy, the BOT may review, *inter alia*, "[a] decision by the Chancellor under 3.b.8. concurring in a [Faculty] [H]earings [Co]mmittee recommendation unfavorable to the faculty member." The BOT's review is limited, however, to "the question of whether the Chancellor or the [Faculty] [H]earings [C]ommittee, as the case may be, committed clear and material error in reaching the decision under review."

Petitioner appealed Chancellor Folt's decision to the BOT on 17 June 2017. The BOT affirmed Chancellor Folt's decision on 1 August 2017, finding that Chancellor Folt "did not commit clear and material error" either (1) "when she concurred with the [Faculty Hearings Committee's] unanimous recommendation and determined [Petitioner] engaged in misconduct that was sufficiently serious so as to adversely reflect on his honesty, trustworthiness or fitness to be a faculty member" or (2) "when she concurred with the [Faculty Hearings Committee's] unanimous recommendation and determined [Petitioner's misconduct] was of such a nature as to render him unfit to serve as a member of the faculty at [UNC-CH]."

Petitioner appealed[5] the BOT's decision to the BOG on 10 August 2017. In addition to his request that the BOG "reverse the improper decision that ha[d] been made about [his] employment at UNC[,]" Petitioner also asked the BOG to bring in an independent investigator to assess the circumstances of his dismissal and "the background misconduct in the School of Medicine." Provost Dean sent Petitioner a letter on 24 August 2017 confirming UNC-CH's final decision to discharge him and explaining that Petitioner's final paycheck would reflect wages paid through 1 August 2017 – the date of the BOT's decision. In a 26 October 2017 position statement to the BOG, Petitioner asserted his salary should not have been terminated "while the appeal process is ongoing."

In a decision entered 12 September 2018, the BOG affirmed UNC-CH's dismissal decision, concluding that "there [was] sufficient evidence in the record to determine that [Petitioner] knowingly misrepresented that multiple reimbursement requests for legal and travel expenses were for university purposes when, in fact, substantial portions of the expenses were for personal purposes, constituting misconduct under Section 603(1) of *The Code*."[6] The BOG rejected Petitioner's retaliation claim, finding "insufficient evidence to support [Petitioner's] claim that UNC-CH selected another candidate for the Division Chief Position or chose to discharge [Petitioner] from employment as acts of retaliation against him for reporting safety concerns about colleagues to UNC-CH administrators." Moreover, the BOG rejected Petitioner's salary claim, finding:

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5. Section 8 of the Tenure Policy enabled Petitioner to appeal the BOT's decision to the BOG "alleging with particularity the specific provisions of *The Code*" which Petitioner "alleges to have been violated."

6. Throughout this opinion, we refer to "*The Code of the Board of Governors of the University of North Carolina*" as "*The Code*."

> The [BOG's] interpretation of its own policy in Section 603(10) is that the final decision concerning discharge from employment at a constituent institution is the decision made by a constituent institution's chancellor. The surrounding language in Section 603(10) supports this interpretation. Section 603(9) states that "the chancellor's decision shall be final." Additionally, Section 603(9) refers to consideration of the chancellor's final decision by a board of trustees or the [BOG] as an "appeal." Because Chancellor Folt made a final decision consistent with Section 603(9) with regard to [Petitioner's] discharge from employment on June 9, 2017, [Petitioner] is not entitled to pay beyond June 9, 2017.

Petitioner filed a petition for judicial review in Superior Court, Orange County. A hearing on the petition was conducted on 18 March 2019. The trial court entered an order on 25 April 2019 affirming the BOG's decision to discharge Petitioner from his employment and reversing the BOG's decision to stop payment of Petitioner's salary as of the date of the BOT's decision. Petitioner appeals and Respondents cross-appeal from the order.

II. Direct Appeal

On appeal, Petitioner argues that: (1) the BOG violated its policy by considering dismissed allegations of travel expense reimbursement violations, (2) Petitioner did not commit misconduct sufficiently serious to justify his discharge, (3) discharge was an excessive discipline and UNC wrongfully failed to consider any discipline less than discharge, and (4) the decision to discharge Petitioner was an unjust and arbitrary application of disciplinary penalties because of the way that UNC-CH officials "set up" Petitioner and misrepresented the evidence of the purpose of his relationship with Mintz Levin.

A. Standard of Review

"The North Carolina Administrative Procedure Act (APA), codified at Chapter 150B of the General Statutes, governs trial and appellate court review of administrative agency decisions." *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994). " 'When a superior court exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court[,]' " *Bernold v. Bd. of Governors of Univ. of N.C.*, 200 N.C. App. 295, 297, 683 S.E.2d 428, 430 (2009) (citation omitted), and " 'the substantive nature of each assignment of error dictates the standard of review[,]' " *Wetherington v. N.C.*

Dep't of Pub. Safety, 368 N.C. 583, 590, 780 S.E.2d 543, 546 (2015) (citations omitted). The scope of a superior court's judicial review is limited as follows:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2019). This Court's review

> under the APA is the same as it is for other civil cases. Thus, our appellate courts have recognized that the proper appellate standard for reviewing a superior court order examining a final agency decision is to examine the order for errors of law. Our appellate courts have further explained that this twofold task involves: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly. As a result, this Court has required that the trial court, when sitting as an appellate court to review an administrative agency's decision, must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.

EnvironmentaLEE v. N.C. Dep't of Env't & Nat. Res., 258 N.C. App. 590, 595, 813 S.E.2d 673, 677 (2018) (internal citations, quotation marks, and brackets omitted).

"Our Supreme Court has observed that the first four grounds enumerated under [N.C. Gen. Stat. § 150B-51(b)] may be characterized as law-based inquiries, whereas the final two grounds may be characterized

as fact-based inquiries." *Sound Rivers, Inc. v. N.C. Dep't of Envtl. Quality, Div. of Water Res.*, 271 N.C. App. 674, 695, 845 S.E.2d 802, 816 (2020). "Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency." *Avant v. Sandhills*, 132 N.C. App. 542, 546, 513 S.E.2d 79, 82 (1999) (citations omitted). For alleged errors under subsections 150B-51(b)(5) and (6)—the fact-based inquiries—we apply the whole record standard of review. *Smith v. N.C. Dep't of Pub. Instruction*, 261 N.C. App. 430, 442, 820 S.E.2d 561, 569 (2018).

In the present case, the trial court applied *de novo* review to Petitioner's first argument and whole record review to Petitioner's remaining three assertions. Petitioner does not contend that the trial court applied the wrong standard of review; as a result, this Court's review is limited to deciding whether the trial court properly exercised the appropriate standard of review. *EnvironmentaLEE*, 258 N.C. App. at 595, 813 S.E.2d at 677.

B. De Novo Review

[1] Petitioner argues that the BOG violated its own policy—under the Tenure Policy and *The Code*—because it considered dismissed allegations of travel expense reimbursement violations in its decision. This assertion presents a law-based inquiry as to whether the BOG's decision was in excess of its statutory authority or jurisdiction, made upon unlawful procedure, and/or affected by other errors of law; therefore, *de novo* review is appropriate. *Avant*, 132 N.C. App. at 546, 513 S.E.2d at 82. Under a *de novo* review,

> [t]he agency's decision is presumed to be made in good faith and in accordance with governing law. Therefore, the burden is on the party asserting otherwise to overcome such presumptions by competent evidence to the contrary when making a claim that the decision was affected by error of law or procedure.

Richardson v. N.C. Dep't of Pub. Instruction Licensure Section, 199 N.C. App. 219, 223–24, 681 S.E.2d 479, 483 (2009) (citation omitted).

The Code § 603(9) provides: "If the chancellor concurs in a recommendation of the committee that is favorable to the faculty member, the chancellor's decision shall be final."[7] Petitioner contends that the

7. The Tenure Policy § 3(b)(8) contains almost identical language to *The Code* § 603(9): "If the Chancellor concurs in a recommendation of the hearing committee that is favorable to the faculty member, his or her decision shall be final."

BOG violated *The Code* § 603(9) because it considered evidence of Petitioner's dishonesty relating to his travel expense reimbursement requests—a ground that had been "rejected" by the Faculty Hearings Committee—in its decision to terminate Petitioner. As support for his assertion, Petitioner notes the following pertinent facts.

When Provost Dean informed Petitioner by letter that he intended to discharge him, he stated that Petitioner's $30,000 reimbursement request for legal fees "alone constitutes misconduct of such a nature as to indicate that [Petitioner is] no longer fit to be a member of the faculty of this University." The letter also stated that "[f]urther contributing to a pattern of dishonesty and false representations, [Ms. Petree] thereafter discovered that, over the past five years, [Petitioner] ha[d] established a practice of improperly seeking full reimbursement from the University for trips that were primarily personal in nature." In its 23 May 2017 memorandum to Chancellor Folt, the Faculty Hearings Committee concluded that Petitioner's reimbursement request for $30,000 in legal fees was "disingenuous and dishonest" and "of such a nature as to indicate that he is unfit to continue as a member of the faculty[;]" however, they "were not convinced that the travel improprieties noted by Ms. Petree by themselves rose to the level requiring discharge since those requests were clear, did reference at least some University-related meetings, and went through multiple levels of review before being granted." Notably, the memorandum contained the Faculty Hearings Committee's recommendation to Chancellor Folt: "The Faculty Hearings Committee unanimously recommends that the Chancellor uphold Provost Dean's decision to discharge [Petitioner] from the faculty of the University. The Committee finds that permissible grounds for discharge under the Tenure Policy exist."

According to Petitioner, when Chancellor Folt "accept[ed] the [Faculty Hearings] Committee's findings and recommendations" on 9 June 2017, the travel reimbursement allegation was resolved in favor of Petitioner and constituted a final decision under *The Code* § 603(9). As a result, Petitioner argues that the BOG's decision improperly referenced "the dismissed allegations of travel expense improprieties" when it found "evidence related to [Petitioner's] reimbursements for travel or a personal nature over a period of several years supports UNC-CH's decision-maker's finding that [Petitioner] engaged in 'a pattern of dishonesty and false representations.' " On judicial review, the trial court concluded:

> 5. After a *de novo* review, the decision to discharge Petitioner from his position at UNC-CH based on his

> misconduct was not in violation of any constitutional provisions, in excess of the statutory authority or jurisdiction of the agency, made upon lawful procedure or affected by another error of law. Moreover, the decision to discharge Petitioner was properly made and was consistent with the requirements of *The Code*.

Petitioner contends that "[b]ecause the BOG did not uphold the discharge decision on the basis of the attorney's fee reimbursement request alone, and violated UNC policy by relying on finally dismissed allegations, the Superior Court could not remedy that Policy violation by deciding in its opinion that the one violation was sufficient to support the BOG decision."

As an initial matter, we reject Petitioner's characterization of the Faculty Hearings Committee's decision as "reject[ing] the allegation with regard to the travel reimbursement request." A review of the memorandum to Chancellor Folt reveals that the travel reimbursement allegation was *not* rejected. Indeed, the Faculty Hearings Committee "found that Ms. Petree's audit revealed that there were multiple instances dating from 2011 in which [Petitioner] was reimbursed by the University for travel that appeared to be primarily personal in nature[.]" The Faculty Hearings Committee further found that Petitioner's "*pattern* is repeated in multiple trips, suggesting that his personal travel was primary in many cases and that brief meetings with colleagues were used to justify multiple days of travel reimbursement requests." (Emphasis added). However, the Faculty Hearings Committee concluded that it was "not convinced that the travel improprieties noted by Ms. Petree *by themselves* rose to the level requiring discharge since those requests were clear, did reference at least some University-related meetings, and went through multiple levels of review before being granted." (Emphasis added). We do not believe that the Faculty Hearings Committee's conclusion—that Petitioner's reimbursement requests for travel expenses, on their own, did not rise to the level of discharge—compels the conclusion that the Faculty Hearings Committee "rejected" the allegation, especially in light of the memorandum's references to Petitioner's "pattern" of justifying reimbursement requests for primarily personal travel with brief meetings with colleagues.

However, assuming *arguendo* that the Faculty Hearings Committee had "rejected" the allegation of travel expense violations, we disagree with Petitioner that Chancellor Folt's adoption of the Faculty Hearings Committee's findings and recommendation constituted a "final" decision in favor of Petitioner that removed the travel reimbursement

issue from the case. The plain language of *The Code* § 603(9) provides that "the chancellor's decision shall be final" if she "concurs *in a recommendation* of the committee that is favorable to the faculty member[.]" (Emphasis added). Although Chancellor Folt's letter to Petitioner stated that she was agreeing with the "findings and recommendations" of the Faculty Hearings Committee, the memorandum to Chancellor Folt provided a *singular* recommendation: "The Faculty Hearings Committee unanimously recommends that the Chancellor uphold Provost Dean's decision to discharge [Petitioner] from the faculty of the University. The Committee finds that permissible on that grounds for discharge under the Tenure Policy exist."

The Faculty Hearings Committee's singular recommendation to Chancellor Folt to "uphold Provost Dean's decision to discharge [Petitioner] from the faculty" was *not* "favorable" to Petitioner. Accordingly, Chancellor Folt's adoption of the Faculty Hearings Committee's recommendation was not "final" under *The Code* § 603(9). As a result, we hold that Petitioner has not overcome the presumption that the BOG's decision to discharge Petitioner from his employment was made "in good faith and in accordance with governing law." *Richardson*, 199 N.C. App. at 223–24, 681 S.E.2d at 483.

C. Whole Record Test

Petitioner contends that he did not commit misconduct justifying discharge, his discharge was an excessive discipline in violation of the UNC policy, and the decision to discharge him was an unjust and arbitrary application of discretionary penalties. For these alleged errors, the reviewing court applies the "whole record" test. *See Smith*, 261 N.C. App. at 442, 820 S.E.2d at 569. The North Carolina Supreme Court has descried the "whole record" test as follows:

> The whole record test requires the reviewing court to examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Therefore, if we conclude there is substantial evidence in the record to support the Board's decision, we must uphold it. We note that while the whole-record test does require the court to take into account both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached, the test does not allow

> the reviewing court to replace the [ ] Board'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*.

Meads v. N.C. Dep't of Agric., 349 N.C. 656, 663, 509 S.E.2d 165, 170 (1998) (internal quotation marks, citations, and brackets omitted). "This Court has held that under the whole record test, administrative agency decisions may be reversed as arbitrary or capricious if they are patently in bad faith, or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment." *Richardson*, 199 N.C. App. at 224, 681 S.E.2d at 483 (internal quotation marks, citations, and brackets omitted).

1. Misconduct

[2] Petitioner contends that he did not commit misconduct sufficiently serious to justify his discharge under *The Code* § 603(1).[8] *The Code* § 603(1) includes "misconduct of such a nature as to indicate that the faculty member is unfit to continue as a member of the faculty" as one of the permissible grounds for discharging a tenured faculty member. However, *The Code* § 603(1) establishes that

> [t]o justify serious disciplinary action, such misconduct should be either (i) sufficiently related to a faculty member's academic responsibilities as to disqualify the individual from effective performance of university duties, or (ii) sufficiently serious as to adversely reflect on the individual's honesty, trustworthiness or fitness to be a faculty member[.]

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8. To support this assertion, Petitioner discusses "a compelling comparator" case in which the BOG "took no action" against Dr. William Roper, the former Medical School Dean, who committed "a more serious violation" than Petitioner's alleged conduct. Petitioner requests this court take judicial notice of documents included in the appendix of his brief related to the Roper case. On 5 June 2020, Respondents filed a "Motion to Strike" Petitioner's argument related to Roper and the documents attached to the appendix, arguing that they were neither part of the established record on appeal nor part of the administrative record before the agency and lower court. Respondents filed a "Second Motion to Strike" on 2 July 2020 as to certain portions of Petitioner's reply brief referencing the Roper case and two disciplinary decisions from the North Carolina State Bar. We allow Respondents' Motion to Strike and Respondents' Second Motion to Strike. *See West v. G.D. Reddick, Inc.*, 48 N.C. App. 135, 137, 268 S.E.2d 235, 236 (1980), *rev'd on other grounds*, 302 N.C. 201, 274 S.E.2d 221 (1981) ("The Court of Appeals can judicially know only what appears of record . . . . Matters discussed in a brief but not found in the record will not be considered by this Court. It is incumbent upon the appellant to see that the record is properly made up and transmitted to the appellate court." (internal citation omitted)).

Petitioner contends that the BOG's decision was not supported by substantial evidence because it was reasonable for him to seek reimbursement for legal fees he incurred when he sought "advice and assistance" from Mintz Levin regarding his concerns about his colleagues. Petitioner maintains that he hired Mintz Levin to write a letter to the BOT, not to initiate a lawsuit against UNC, and thus, he made no false statement in connection with his reimbursement request. Moreover, according to Petitioner, there is no evidence that any person had concerns about his ability to perform his duties[9] and, so, the decision to discharge him, " 'the superstar faculty member within the Department of Radiology,' who endeavored commendable to safeguard the Department from true serious misconduct that endangered the health and safety of patients and staff, [was] not justified by the statements he made when he was set up by the University's stealth investigation of him."

A whole record review supports the BOG's conclusion that "there is sufficient evidence in the record to determine that [Petitioner] knowingly misrepresented that multiple reimbursement requests for legal and travel expenses were for University purposes when, in fact, substantial portions of the expenses were for personal purposes, constituting misconduct under Section 603(1) of *The Code*." Ms. Petree's audit report referenced several emails that Petitioner sent to Mintz Levin demonstrating that Petitioner knowingly misrepresented to Mr. Collichio the basis for his reimbursement request. For example, Petitioner began a 1 February 2016 email to Mintz Levin by stating, "I believe you are the attorney who represented [another former faculty member] against UNC a few years back." Petitioner proceeded to discuss his "[p]roof of retaliation" and his grievances with how administrators handled the safety concerns he had raised. Explaining that he did not "intend to run away with a settlement[,]" Petitioner noted that he "want[ed] a message sent to UNC." Petitioner stated his belief that "once a case has been established[,]" faculty and staff "who are aware of what has happened" will "step up and testify." Additionally, Petitioner expressed his willingness to "take over the chair position department of Radiology[.]" In a subsequent email to Mintz Levin, Petitioner stated his desire "to move forward with the case." Petitioner expressed his plan to ask for "at least $10 million" for "damages to career and personal life," noted the individuals he wanted dismissed from UNC, and stated, "[a]s fewer people get dismissed, the higher [he would] request the settlement." In a

9. Petitioner was dismissed for *misconduct* under The Code § 603(1)(c)(ii); dismissal of a faculty member for *incompetence* or *neglect of duty* is found under *The Code* §§ 603(1)(a) and (b).

30 August 2016 email admonishing Mintz Levin for unsatisfactory performance, Petitioner expressed his frustration that he was now having to "deal with a financial conflict with the attorney who [he] had hired to protect [him]."

However, the day after submitting his request for reimbursement of legal fees, Petitioner sent Mr. Collichio an email stating that that he had hired Mintz Levin because he "wanted to obtain a broad overview of operational aspects, responsibilities, duties, of major university organizations." Petitioner explained that in addition to seeking legal advice related to his "current work on a new disease" known as "gadolinium deposition disease[,]" he sought consultation in the areas of "physician burn-out, safety of work environments, [and] competency," which are "all subjects that pertain directly to the role [he] serve[s] in the department of Radiology." In another email dated 18 July 2016, Petitioner noted additional subjects that he consulted with Mintz Levin about, including "nation-wide experiences and approaches to root cause analysis[,]" "nationwide experience with IRB [Institutional Review Board] and appropriate interaction[,]" "nationwide experience with FDA [Food and Drug Administration] and policies[,]" and "Focus on FDA IND [investigational new drug applications]." Thus, a review of the whole record reveals substantial evidence supporting the conclusion that Petitioner misrepresented the reasons he engaged Mintz Levin, constituting misconduct "sufficiently serious as to adversely reflect on [Petitioner's] honesty, trustworthiness or fitness to be a faculty member."

2. Excessive Discipline

[3] Petitioner also argues "discharge was an excessive discipline and UNC wrongfully failed to consider any discipline less than discharge." *The Code* § 603(1) provides that "[a] faculty member who is the beneficiary of institutional guarantees of tenure shall enjoy protection against unjust and arbitrary application of disciplinary penalties."

Petitioner contends that UNC should have counseled him regarding its concerns or "considered progressive discipline, since [Petitioner] had never had any disciplinary action against him in 24 years on the faculty." As support for this assertion, Petitioner cites cases where our courts utilized the "just cause" standard to review an agency's decision to discharge a state employee. *See* N.C. Gen. Stat. § 126-35(a) (2019) (providing that a career state employee subject to the North Carolina Human Resources Act may only be "discharged, suspended, or demoted for disciplinary reasons" upon a showing of "just cause"). However, as a tenured professor at UNC-CH, Petitioner is exempt from the provisions of the North Carolina Human Resources Act. *See* N.C. Gen. Stat.

§ 126-5(c1)(8) (2019). Thus, Petitioner's reliance on cases applying the "just cause" standard is misplaced. Moreover, as discussed above, there is substantial evidence in the record supporting the BOG's conclusion that Petitioner engaged in misconduct "sufficiently serious as to adversely reflect on the individual's honesty, trustworthiness or fitness to be a faculty member." There is no provision in *The Code* requiring UNC to consider discipline less severe than discharge. Pursuant to *The Code*, this level of misconduct on behalf of a tenured faculty member is a permissible ground for termination.

3. Unjust and Arbitrary Application of Disciplinary Penalties

[4] Petitioner also argues that "the decision to discharge [him] was an unjust and arbitrary application of disciplinary penalties because of the way that University officials set up [Petitioner] and misrepresented the evidence of the purpose of his relationship with Mintz [Levin]." According to Petitioner, "UNC embarked on a course of action to set [him] up for more serious discipline[,]" "[t]hey covertly invaded his email[,]" and "[t]hen they selectively 'cherry picked' excerpts of emails they had obtained from their invasion of his email file to manufacture a false case that [he] had retained Mintz [Levin] to file a lawsuit against the University." Petitioner asserts that UNC "ignored the compelling evidence contradicting their theory[,]" including emails Petitioner sent to Mintz Levin clarifying "that his purpose was only to have Mintz [Levin] correspond with the BOT" and evidence that he "never provided Mintz [Levin] the funding necessary for a lawsuit against UNC, never discussed or made any arrangements for such funding in the emails UNC accessed and read, and never did file a lawsuit against UNC."

However, by submitting the reimbursement request for $30,000 in legal fees and emailing Mr. Collichio explanations that the BOG found to be "dishonest," it was Petitioner's actions that led UNC-CH to investigate Petitioner's affairs. Petitioner's representations to UNC-CH that his legal fees were reimbursable because they were "business related" prompted Mr. Collichio to request supporting documentation. Thus, it was Petitioner, not a covert action on behalf of UNC-CH, that placed Petitioner's communication with Mintz Levin directly at issue. As discussed above, a review of Petitioner's communication with Mintz Levin supports the determination that Petitioner misrepresented the nature of the legal expenses for which he sought reimbursement. Thus, Petitioner has failed to demonstrate that the BOG's decision to terminate him was made "patently in bad faith," lacked "fair and careful consideration[,] or fail[ed] to indicate any course of reasoning and the exercise of judgment." *Richardson*, 199 N.C. App. at 224, 681 S.E.2d at 483.

For the reasons discussed above, as to Petitioner's direct appeal, we affirm.

III. Cross-Appeal

[5] Respondents contend that the trial court erred by concluding that UNC-CH should have paid Petitioner through the BOG's decision on 12 September 2018. In particular, Respondents argue that the trial court's decision is inconsistent with the plain language of *The Code* and state law governing judicial review of administrative agency decisions.[10]

As noted before, we conduct *de novo* review of a trial court's decision that an agency's interpretation of its policies was "affected by other error of law." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894–95 (2004). Generally, we give "controlling weight" to an agency's own interpretation of its policies, "unless it is plainly erroneous or inconsistent with the [policy]." *Morrell v. Flaherty*, 338 N.C. 230, 237–38, 449 S.E.2d 175, 180 (1994) (quotation and citations omitted). But we will not defer to an interpretation when an "alternative reading is compelled by the [policy's] *plain language*." *Id.* (emphasis added). Further, "[i]f the *only* authority for the agency's interpretation of the law is the decision in that case, that interpretation may be viewed skeptically on judicial review." *Frampton v. Univ. of N.C.*, 241 N.C. App. 401, 411, 773 S.E.2d 526, 533 (2015) (quoting *Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 681–82, 652 S.E.2d 251, 252–53 (2007)).

In its 12 September 2018 decision regarding Petitioner's termination, the BOG found: "The [BOG's] interpretation of its own policy in Section 603(10) is that the final decision concerning discharge from employment at a constituent institution is the decision made by a constituent institution's chancellor." The decision further stated that "[b]ecause Chancellor Folt made a final decision consistent with Section 603(9) with regard to [Petitioner's] discharge from employment on June 9, 2017, [Petitioner] is not entitled to pay beyond June 9, 2017." On judicial review, the trial court disagreed with the BOG and concluded the following:

> 8. Reviewing *de novo* Petitioner's claim that UNC-CH should have continued to pay his salary throughout his administrative appeal through the decision of the BOG,

10. Petitioner filed a "Motion to Strike Respondents-Appellants' Brief on Cross-Appeal" on 23 March 2020, arguing that Respondents' brief "grossly violates Rule 28(b)(3) and (5) of the North Carolina Rules of Appellate Procedure and thereby grossly disregards the requirement of a fair presentation of the issues to the appellate court." We deny Petitioner's motion because Respondents' brief includes a sufficient summary of this case's procedural history and relevant facts in accordance with Rule 28(b)(3) and (5).

> the Court finds that the determination to stop paying Petitioner after the UNC Board of Trustees issued its decision and while Petitioner's appeal was pending before the BOG was not consistent with Section 603(9) and (10) of The Code and, thus, was affected by other error of law. Instead, Petitioner should have been paid through the September 12, 2018 decision of the BOG.

As noted above, *The Code* § 603(9) provides, in relevant part, that:

> If the chancellor concurs in a recommendation of the [Faculty Hearings Committee] that is favorable to the faculty member, the chancellor's decision shall be final. If the chancellor . . . concurs in a committee recommendation that is unfavorable to the faculty member, the faculty member may appeal the chancellor's decision to the board of trustees. . . . [The decision of the board of trustees] shall be final except that the faculty member may[] . . . file a written notice of appeal[] . . . with the Board of Governors if the faculty member alleges that one or more specified provisions of the Code of the University of North Carolina have been violated.

The Code § 603(10) further states:

> When a faculty member has been notified of the institution's intention to discharge the faculty member, the chancellor may reassign the individual to other duties or suspend the individual at any time *until a final decision* concerning discharge has been reached by the *procedures* described herein. Suspension shall be exceptional *and with full pay*.

(Emphasis added).

Respondents interpret *The Code* §§ 603(9) and (10) to mean that Chancellor Folt's determination was final, that any other review by the BOT or BOG qualifies as an "appeal," and, therefore, UNC-CH was not obligated to pay Petitioner beyond the decision of Chancellor Folt on 9 June 2017, let alone that of the BOT on 1 August 2017. In our *de novo* review of the plain language of *The Code*, however, the BOG's determination to stop paying Petitioner after the BOT issued its decision and while Petitioner's appeal was pending before the BOG was not consistent with *The Code* §§ 603(9) and (10). *The Code* § 603(9) clearly distinguishes between a "favorable" and "unfavorable" recommendation for a faculty

member and uses different language to describe the finality of each decision. Where there is a "favorable" determination for a faculty member, the chancellor's decision is clearly "final." For a recommendation "unfavorable" to the faculty member, as in this case, *The Code* explicitly provides that a faculty person "may appeal the chancellor's decision to the [BOT]." The decision of the BOT, then, "*shall be final except* that the faculty member may[] . . . file a written notice of appeal[] . . . with the [BOG]." (Emphasis added). Here, *The Code*, as written, carves out a specific exception for the finality of a decision regarding a faculty member's dismissal until review by the BOG.

The Code § 603(10) supports this reading of § 603(9). Under § 603(10), once a faculty person has been notified of the "institution's intention to discharge," the chancellor may "reassign" or "suspend" the individual "*until a final decision* concerning discharge has been reached *by the procedures described herein*." (Emphasis added). The provision provides for "full pay" until that point. The procedures referred to in § 603(10) and outlined, in full, under § 603(9), indicate that the decision regarding Petitioner's employment was not final while the appeal to the BOG was ongoing. Accordingly, Petitioner should have been compensated through the BOG's decision on 12 September 2018.

Beyond an examination of the plain language of *The Code*, Respondents attempt to compare this case to several other cases that distinguish between a "decision" and an "appeal" or in which a chancellor's decision was deemed "final." Yet, none of those cases interpret the language of *The Code* §§ 603(9) and (10) at issue here. Nor do they consider the continuation of salary of a tenured faculty member through the appeal process of a discharge decision. In addition, Respondents fail to provide any prior examples, except in this case, where the BOG has determined to end payment to a tenured faculty member at the decision of the BOT while an appeal is pending to the BOG.

Based on the foregoing reasons, we conclude that UNC violated its own policies when it ceased Petitioner's pay at the date of the BOT decision before the BOG issued its ultimate decision. Thus, as to Respondents' cross-appeal, we affirm the decision of the trial court.

IV. Conclusion

For the reasons discussed above, we affirm the trial court.

AFFIRMED.

Judges DIETZ and HAMPSON concur.

SEMELKA v. UNIV. OF N. CAROLINA

[275 N.C. App. 683 (2020)]

RICHARD C. SEMELKA, M.D., PLAINTIFF-APPELLEE

v.

THE UNIVERSITY OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE INSTITUTION OF THE STATE OF NORTH CAROLINA; THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, A CONSTITUENT INSTITUTION OF THE UNIVERSITY OF NORTH CAROLINA; CAROL L. FOLT, SUED IN HER INDIVIDUAL AND OFFICIAL CAPACITIES; JAMES WARREN DEAN, JR., SUED IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; WILLIAM L. ROPER, SUED IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; ARVIL WESLEY BURKS, JR., SUED IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; AND MATTHEW A. MAURO, SUED IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, DEFENDANTS-APPELLANTS

No. COA19-1090

Filed 31 December 2020

1. Appeal and Error—preservation of issues—issue raised in motion and at hearing—issue not abandoned

In an action alleging that plaintiff's termination from the University of North Carolina was retaliatory in violation of the Whistleblower Act, where defendants specifically raised N.C.G.S. § 1-77 in their motion to dismiss and at the hearing before the trial court, plaintiff's contention that defendants waived their argument regarding section 1-77 was meritless.

2. Venue—action against UNC—all parties in Orange County—transferred to Orange County

In an action alleging that plaintiff's termination from the University of North Carolina (UNC) was retaliatory in violation of the Whistleblower Act, the Court of Appeals agreed with defendants that venue in Wake County was improper and held that N.C.G.S. § 1-82 was the controlling statute, pursuant to which the case should be tried in Orange County because plaintiff and defendants resided there (in addition to UNC being located there) at all times relevant to the case.

Appeal by Defendants from order entered 19 June 2019 by Judge G. Bryan Collins, Jr., in Superior Court, Wake County. Heard in the Court of Appeals 8 September 2020.

Bailey & Dixon, LLP, by J. Heydt Philbeck, Sr., and Law Office of Mark L. Hayes, by Mark L. Hayes, for Plaintiff-Appellee.

Joshua H. Stein, Attorney General, by Special Deputy Attorney General Vanessa N. Totten, Special Deputy Attorney General Kimberly D. Potter, and Assistant Attorney General Zachary Padget, for Defendants-Appellants.

McGEE, Chief Judge.

The University of North Carolina ("UNC"), The University of North Carolina at Chapel Hill ("UNC-CH"), Carol L. Folt, James Warren Dean, Jr., William L. Roper, Arvil Wesley Burks, Jr., and Matthew A. Mauro (collectively, "Defendants") appeal from the trial court's 19 June 2019 order denying their motion to dismiss for improper venue, or, alternatively, to transfer from Superior Court in Wake County, North Carolina to Superior Court in Orange County, North Carolina. We vacate the trial court's order and remand with instructions to transfer this action to Superior Court, Orange County.

I. Factual and Procedural History

Richard C. Semelka, M.D. ("Plaintiff") was formerly employed as a tenured professor at UNC-CH's School of Medicine. Plaintiff was dismissed from his employment on 9 June 2017 for allegedly exhibiting a "pattern of dishonesty[,]" including, but not limited to, requesting reimbursement for non-reimbursable expenses. After exhausting the administrative remedies available under the Administrative Procedures Act, N.C. Gen. Stat. § 150B–1 *et seq.*, Plaintiff filed a "Petition for Judicial Review" in Superior Court, Orange County, requesting review of the dismissal decision by the UNC Board of Governors.[1] The trial court entered an order affirming the UNC Board of Governors' decision to discharge Plaintiff on 25 April 2019, and that appeal is presently pending before this Court (COA19-1076).[2]

Plaintiff filed a complaint in Superior Court, Orange County (the "Orange County complaint") on 11 January 2018, alleging that his termination was retaliatory in violation of the North Carolina Whistleblower Act, N.C. Gen. Stat. § 126-84 *et seq.*[3] Defendants moved to dismiss Plaintiff's claims; however, on 10 August 2018, the day before the scheduled hearing on Defendants' motion, a voluntary dismissal of the Orange County complaint was filed. Two weeks later, Plaintiff filed a complaint

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1. In the Petition for Judicial Review, Plaintiff alleged that UNC has a "principal office in Orange County[.]"

2. In the parallel case (COA19-1076), UNC and UNC-CH filed a cross-appeal of certain issues, as well.

3. In regard to venue, the Orange County complaint alleges: all individual Defendants reside in Orange County; UNC-CH "is located in Orange County, North Carolina[;]" UNC "has a principal place of business in Orange County, North Carolina[;]" and the cause of action "occurred in Orange County, North Carolina."

on 24 August 2018 in Superior Court, Wake County (the "Wake County complaint") alleging again that his termination was retaliatory in violation of the North Carolina Whistleblower Protection Act, N.C. Gen. Stat. § 126-84 *et seq*. The Wake County complaint named the same Defendants and included the same fundamental causes of action as the Orange County complaint.

Defendants filed a motion to dismiss the Wake County complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2), 12(b)(3) and 12(b)(6) on 28 September 2018, asserting: "Plaintiff has filed this case in Wake County, which is an improper venue. Orange County is the County of proper venue in this matter, and therefore Plaintiff's Complaint should be dismissed for improper venue pursuant to Rule 12(b)(3) of the N.C. Rules of Civil Procedure and N.C. Gen. Stat. §§ 1-77(2), 1-82, 1-83(1)." Defendants asked the trial court to dismiss the Wake County complaint in its entirety and for "such other relief as the Court deems proper[.]" At a hearing on 2 May 2019, the parties argued whether venue was proper in Wake County, or, alternatively, whether the case should be transferred to Orange County—or dismissed without prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(3). The trial court treated Defendants' motion to dismiss as a request for change of venue and stated the following: "Since this is a case of first impression, I'm going to give the Plaintiff the benefit of the doubt and find that Wake County is a proper venue for this case. Barely."

The trial court entered a written order denying Defendants' motion to dismiss in its entirety on 19 June 2019. Defendants appeal.

II. Discussion

Defendants argue that the trial court erred by denying their motion to dismiss and contend that this "case must be remanded to Wake County Superior Court with instructions to dismiss this case or, in the alternative, to transfer this case to Orange County Superior Court." Specifically, Defendants argue that under N.C. Gen. Stat. § 1-77, venue in Wake County is improper because the individual Defendants "are public officials, and [because] the alleged cause of action in this case arose in Orange County[.]" Alternatively, Defendants assert that this case is governed by N.C. Gen. Stat. § 1-82 (2019) as "no party to this action resides in Wake County."

Because Defendants have a statutory right to a legally proper venue and because the interlocutory order below had an effect on this "substantial right," this appeal is properly before this Court pursuant to

N.C. Gen. Stat. § 7A-27(b)(3)(a) (2019). *See* N.C. R. App. P. 3(a) (2020); *see also Stokes v. Stokes*, 371 N.C. 770, 773, 821 S.E.2d 161, 164 (2018) (citations omitted) ("An interlocutory order changing venue as of right affects a substantial right and thus is immediately appealable."); *Caldwell v. Smith*, 203 N.C. App. 725, 727, 692 S.E.2d 483, 484 (2010) (citations omitted) ("The denial of a motion for change of venue, though interlocutory, affects a substantial right and is immediately appealable where the county designated in the complaint is not proper.").

A. Waiver

[1] Plaintiff first contends that Defendants failed to preserve, and thus waived, their argument that N.C. Gen. Stat. § 1-77 is the controlling venue provision.

Defendants filed a motion to dismiss Plaintiff's Wake County complaint on multiple grounds, including improper venue pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) (2019). In support thereof, as discussed *supra*, Defendants argued that venue in Wake County was improper pursuant to "N.C. Gen. Stat. §§ 1-77(2), 1-82, 1-83(1)[,]" thereby specifically raising N.C. Gen. Stat. § 1-77 in their motion to dismiss. In addition to Defendants' motion specifically stating venue in Wake County was improper based on N.C. Gen. Stat. § 1-77(2), at the 2 May 2019 hearing, defense counsel clarified that Defendants "moved to dismiss on improper venue based [on] . . . venue statutes [N.C. Gen. Stat. §] 1-77 as well as [N.C. Gen. Stat. §] 1-82." Defendants expressly contended that N.C. Gen. Stat. § 1-77 governs the issue in this case, "[b]ut in the alternative . . . it should be addressed by [N.C. Gen. Stat. §] 1-82[.]" Thus, Plaintiff's contention that Defendants abandoned their argument regarding N.C. Gen. Stat. § 1-77 (or N.C. Gen. Stat. § 1-82) is without merit.

B. Venue

[2] Defendants argue that venue in Wake County is improper under N.C. Gen. Stat. § 1-77 or, in the alternative, under N.C. Gen. Stat. § 1-82.

Regarding legally improper venues, N.C. Gen. Stat. § 1-83 provides the following:

> If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place

> of trial is thereupon changed by consent of parties, or by order of the court.
>
> The court may change the place of trial in the following cases:
>
> (1) When the county designated for that purpose is not the proper one.
>
> (2) When the convenience of witnesses and the ends of justice would be promoted by the change.
>
> (3) When the judge has, at any time, been interested as party or counsel.
>
> (4) When motion is made by the plaintiff and the action is for divorce and the defendant has not been personally served with summons.

N.C. Gen. Stat. § 1-83(1)-(4) (2019). As this Court has stated, "[d]espite the use of the word 'may,' it is well established that 'the trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county.' " *Stern v. Cinoman*, 221 N.C. App. 231, 232, 728 S.E.2d 373, 374 (2012) (quoting *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 495, 216 S.E.2d 464, 465 (1975)). This Court reviews determinations of venue under N.C. Gen. Stat. § 1-83(1) *de novo*. *Id.* (citations omitted).

Under the specific facts of this case, we hold that N.C. Gen. Stat. § 1-82 controls. This statute provides that cases not covered by more specific venue statutes "must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at [the] commencement[]" of the action. N.C. Gen. Stat. § 1-82 (2019). The Wake County complaint—which is basically a carbon copy of the Orange County complaint—alleges that Plaintiff himself is a resident of Orange County and that Defendants UNC-CH, Folt, Dean, Roper, Burks, and Mauro resided in Orange County at all times relevant to this case. Plaintiff nonetheless argues that venue is proper in Wake County because "UNC resides in Wake County and venue is proper there." Plaintiff contends that "UNC's corporate body is more akin to a starfish than a person, with each constituent institution a co-equal arm." Employing this logic, Plaintiff maintains that an action against any institution under the "UNC umbrella" may be filed in any county in which one of its sixteen constituents has a "principal office" or "wherever it maintains a business presence." Indeed, Plaintiff alleged in his Petition for Judicial Review, filed in Orange County, that UNC is

"capable to be sued in all courts whatsoever . . . ." Plaintiff proffers no authority to support these positions.[4]

The "University of North Carolina is a public, multicampus university dedicated to the service of North Carolina and its people. It encompasses the 16 diverse constituent institutions and other educational, research, and public service organizations." N.C. Gen. Stat. § 116-1(b) (2019). UNC is an "agency of the State[.]" *Martinez v. Univ. of N. Carolina*, 223 N.C. App. 428, 431, 741 S.E.2d 330, 332 (2012); *Appeal of Univ. of N. Carolina*, 300 N.C. 563, 572, 268 S.E.2d 472, 478 (1980). Moreover, UNC is "located" for venue purposes in Orange County. *See generally Willingham v. Univ. of N. Carolina*, No. 5:14-CV-432, 2014 WL 6606578, at *2 (E.D.N.C. Nov. 19, 2014) (noting that all parties to an action brought against UNC—including many of the same Defendants named in this case—are located in Orange County for venue purposes). Moreover, in the Orange County complaint, Plaintiff acknowledged that "UNC has a principal place of business in Orange County, North Carolina." Also, Plaintiff concedes that, under N.C. Gen. Stat. § 1-82, venue is proper wherever UNC has a "principal office." Accordingly, because Plaintiff filed suit against an agency of the State, which is located in Orange County, and public officers associated therewith, and because all parties resided in Orange County for venue purposes at the time of the commencement of Plaintiff's suit, this matter should be adjudicated in Superior Court, Orange County. *Smith v. State*, 289 N.C. 303, 334, 222 S.E.2d 412, 432 (1976) ("[N.C. Gen. Stat. §] 1-77, however, does not apply to actions against the State . . . . This case, therefore, is governed by [N.C. Gen. Stat. §] 1-82 . . . . We recognize that there may be reasons why any action against the State should be brought in Wake County, where its capital is located. If so, the General Assembly will undoubtedly so provide."). "While a party has a right to a legally proper venue, a party does not have a right to a preferred venue." *Stokes v. Stokes*, 371 N.C. 770, 774, 821 S.E.2d 161, 164 (2018).

"[W]hen an action is instituted in the wrong county, the Superior Court should, upon apt motion, remove the action, not dismiss it."

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4. We do not reach Plaintiff's argument that N.C. Gen. Stat. § 1-79 governs this case as Plaintiff provides no support for the proposition that UNC (or any other Defendant) is a "domestic corporation" under N.C. Gen. Stat. § 1-79 (2019) or N.C. Gen. Stat. § 55-1-40(4) (2019) (defining "corporation" and "domestic corporation" under the North Carolina Business Corporation Act). Moreover, Plaintiff does not identify UNC (or any other Defendant) as a domestic corporation in the *unverified* Wake County complaint. *See generally Kiker v. Winfield*, 234 N.C. App. 363, 365, 759 S.E.2d 372, 373 (2014), *aff'd*, 368 N.C. 33, 769 S.E.2d 837 (2015) (holding that allegations in unverified complaint were insufficient to establish venue).

Coats v. Sampson Cty. Mem'l Hosp., Inc., 264 N.C. 332, 335, 141 S.E.2d 490, 492 (1965) (citations omitted). Accordingly, we decline Defendants' invitation to dismiss this action outright; rather, under the facts of this case, the matter shall be transferred to the proper venue–Superior Court, Orange County.

III. Conclusion

For the foregoing reasons, we vacate the trial court's 19 June 2019 order and remand to Superior Court, Wake County with instructions to transfer this action to Superior Court, Orange County.

VACATED AND REMANDED.

Judges DIETZ and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
DARRELL TRISTAN ANDERSON, DEFENDANT

No. COA19-841

Filed 31 December 2020

1. Constitutional Law—Eighth Amendment—juvenile offender —consecutive life sentences with parole—constitutionally permissible

The trial court's imposition of two consecutive life sentences with the possibility of parole on defendant—who was 17 years old when he committed two murders—did not violate defendant's rights under the Eighth Amendment to the U.S. Constitution or Art. I, sec. 27 of the North Carolina Constitution. Although defendant would not be eligible for parole for fifty years, the sentences did not constitute a de facto life sentence without parole because they did not exceed his expected lifespan.

2. Sentencing—two life sentences—concurrent versus consecutive—trial court did not exercise discretion—remanded for resentencing

The trial court erroneously determined it lacked discretion to have defendant's two sentences for murder run concurrently, rather than consecutively, at defendant's new sentencing hearing (held after defendant's motion for appropriate relief was granted).

Where the trial court resentenced defendant from two consecutive sentences of life without parole to two consecutive sentences of life with the possibility of parole, but indicated it might have chosen a different option if allowed to do so, the matter was remanded for resentencing. There was nothing in the statutes to suggest that N.C.G.S. § 15A-1354(a) (giving trial courts discretion to have multiple sentences run concurrently or consecutively) did not apply to new sentencing hearings under N.C.G.S. § 15A-1340.19B.

Chief Judge McGEE dissenting.

Appeal by Defendant from judgments entered 20 February 2019 by Judge Joseph N. Crosswhite in Superior Court, Davidson County. Heard in the Court of Appeals 25 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for Defendant.

DILLON, Judge.

Defendant Darrell Tristan Anderson was sentenced to two consecutive sentences of life without parole ("LWOP") for two murders he committed when he was 17 years old.

Following the General Assembly's enactment of N.C. Gen. Stat. § 15A-1340.19A, *et seq*. to comply with *Miller v. Alabama*, 567 U.S. 460 (2012), Defendant filed a motion for appropriate relief ("MAR") requesting resentencing.

Defendant's motion was granted, and he was resentenced to two consecutive terms of life *with* parole. Based on the statute, under these sentences, Defendant will be eligible for parole after 50 years imprisonment when he is 67 years of age. Defendant appeals.

I. Argument

[1] On appeal, Defendant contends that this punishment – two consecutive life sentences with parole – amounts to a *de facto* LWOP sentence and is unconstitutional under the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution.

This Court recently held an identical sentence unconstitutional on these grounds in *State v. Kelliher*, 273 N.C. App. 616, 849 S.E.2d 333 (2020). However, our Supreme Court has stayed *Kelliher* and granted discretionary review of that decision. Accordingly, *Kelliher* is not binding on our Court.

We hold that the sentences imposed by the trial court, though significant, are not unconstitutional. *Miller v. Alabama* has never held as being unconstitutional a life *with* parole sentence imposed on a defendant who commits a murder when he was 17 years old. Here, Defendant will be eligible for parole in 50 years. Assuming that a *de facto* LWOP sentence (where a defendant is sentenced to consecutive terms for multiple felonies) is unconstitutional, we hold that a 50-year sentence does not equate to a *de facto* life sentence based on the evidence in this case. Our General Statutes recognize that the life expectancy for a 17-year old is 59.8 years. N.C. Gen. Stat. § 8-46 (2002).

[2] Defendant also argues that the trial court erred by determining it lacked discretion to modify Defendant's sentence to run concurrently, rather than consecutively, as he was originally sentenced. For the reasons explained below, we agree and remand for resentencing.

The trial court stated that it lacked jurisdiction to order the terms to run concurrently. The court did state that it "was not inclined to do so," assuming it did have the jurisdiction. But this statement does not reflect what the trial court would actually do if it was forced to make a decision. People often end up doing things they are not "inclined" to do. It is apparent then that the trial court did not exercise discretion to determine whether a concurrent sentence might be appropriate.

Sections 15A-1340.19A-C, which governed the MAR hearing, described the procedure as a new sentencing hearing. N.C. Gen. Stat. § 15A-1340.19A-C (2019). Section 15A-1340.19B states that the trial court may only sentence the defendant in this context either to LWOP or life with parole. N.C. Gen. Stat. § 15A-1340.19B. However, the Section is silent as to whether the trial court can sentence the defendant to concurrent terms, even though he was sentenced previously to consecutive terms.

Section 15A-1354, though, states that when "multiple sentences of imprisonment are imposed on a person at the same time[,]" the trial court has discretion to determine whether those sentences are to run consecutively or concurrently. N.C. Gen. Stat. § 15A-1354(a). There is nothing in this statute that suggests that it does not apply to a new sentencing hearing under N.C. Gen. Stat. § 15A-1340.19B.

We hold, therefore, that the trial court does have discretion to determine whether multiple sentences are to run concurrently, notwithstanding how the defendant might have been sentenced previously. We, therefore, remand for resentencing on this issue.

II. Conclusion

For the foregoing reasons, we affirm the portion of the judgment imposing two sentences of life with parole. However, we vacate the portion of the judgment directing that the sentences are to run consecutively. We remand that portion for a new hearing and direct the trial court to exercise discretion to determine whether consecutive or concurrent sentences are appropriate.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judge MURPHY concurs.

Chief Judge McGEE dissents by separate opinion.

McGEE, Chief Judge, concurring in part and dissenting in part.

I agree with the majority that N.C. Gen. Stat. §§ 15A-1340.19A, *et seq*. does not prohibit consecutive sentences as a statutory matter based on the reasoning stated in my dissent in *State v. Conner*, 275 N.C. App. 758, 853 S.E.2d 824 (filed December 31, 2020). I also agree with the majority's determination that Defendant must be resentenced. However, because I would hold that consecutive sentences of life with parole constitute a *de facto* life without parole ("LWOP") punishment prohibited by our state and federal constitutions as explained in *State v. Kelliher*, 273 N.C. App. 616, 849 S.E.2d 333, *temp. stay allowed*, 376 N.C. 554, 848 S.E.2d 493 (2020), I respectfully dissent.

I. FACTUAL AND PROCEDURAL HISTORY

Although I would decide this appeal consistent with *Kelliher*, the individual facts leading to Defendant's convictions, sentencing, and resentencing are unique. Those particular details are recited below to describe Defendant's specific circumstances and provide relevant context absent from the majority.

A. Defendant's Early Life

Defendant was born in 1984 as the youngest of four children. He lived with his brother, two sisters, and both parents, but his father, James

Anderson, Sr. ("Mr. Anderson"), did not contribute to raising Defendant. Instead, Defendant's mother and his three siblings took responsibility for Defendant's care. Mr. Anderson was gainfully employed, but the family frequently went without electricity because he did not pay the utility bills; when the utility company would shut the lights off, Mr. Anderson would steal power by reconnecting it himself.

Mr. Anderson regularly smoked crack cocaine at home and would choke his children; Mr. Anderson first physically abused Defendant in this manner at age five. He also encouraged Defendant to drink often by supplying him with alcohol as early as age seven. His abuse further included sexually molesting Defendant's two sisters when they were as young as age six. In 2008, Mr. Anderson was convicted of sexually abusing a child outside the nuclear family.

Defendant was ill-behaved early on and frequently fought with his older brother; he was eventually diagnosed with ADHD and prescribed Ritalin. At around ten years old, Defendant started living part-time with his older sister, who had since moved into her own house. She tried to be a positive influence on her younger brother and was apparently successful; Defendant never got into trouble while living there, was able to control his ADHD with Ritalin, and told his sister that he wanted to grow up, have a family, and be a writer. He was also succeeding in school, and his teachers spoke well of him to his sister.

Defendant had few other good role models. When Defendant was eleven, his older brother participated in a robbery and murder. Defendant's older cousin, Eddie Neely, was his only friend, and the two would spend time together at Defendant's parents' house. Mr. Neely used and dealt cocaine, and, according to Defendant's sister, would "tell [Defendant] to do all his bad things. . . . Eddie was just using [Defendant] to do his dirty work."

Defendant's behavior and family life declined when he stayed at his parents' house and outside the presence of his sister. He began to use marijuana at age 13 and was smoking marijuana and drinking alcohol on a daily basis by the following year. This drug use—which sometimes involved Mr. Neely—would extend to powdered cocaine and ecstasy later. His father grew increasingly physically abusive as Defendant aged, on one occasion going so far as to attack Defendant with an axe. When Defendant turned 17, he began smoking crack cocaine with his father. Defendant dropped out of school that same year.

B. The Robbery and Murders

Defendant and Mr. Neely were spending time together on the night of 3 December 2002 when they decided to sell crack cocaine to an acquaintance, Myra Hedgepeth. The two arrived at Ms. Hedgepeth's home to find her with her boyfriend, Edward Baird, and two other men. The group smoked crack cocaine and drank beer together before Defendant, Mr. Neely, and one of the other men at the house left to drink liquor elsewhere.

Around 10:00 p.m., and after he and Defendant had returned to Defendant's home, Mr. Neely told Defendant he wanted more crack cocaine. They considered robbing a convenience store for drug money but ultimately decided to rob Ms. Hedgepeth instead. Defendant took a shotgun from his closet and the two walked back to Ms. Hedgepeth's house to carry out the crime.

Ms. Hedgepeth was not at the home when Defendant and Mr. Neely arrived. They were greeted instead by Mr. Baird, who Defendant took hostage in the living room while Mr. Neely went to find Ms. Hedgepeth. Mr. Neely located her and brought her back to the house; once inside, Mr. Neely subdued the couple while Defendant searched Ms. Hedgepeth's belongings for cash.

Defendant's search came up empty. He asked Ms. Hedgepeth where her money was, and she replied that she did not have any. Moments later, Defendant shot Mr. Baird in the head.

Ms. Hedgepeth attempted to flee, pushing Defendant towards Mr. Neely while she ran for the door. Defendant managed to grab her and a struggle ensued. The shotgun fired again during the course of the fight, striking Mr. Neely in the hand. Ms. Hedgepeth eventually made it out of the house in the confusion. Defendant and Mr. Neely ran outside after her, where they found her lying in the front yard screaming. Defendant shot and killed her, and the two fled the scene in Ms. Hedgepeth's car.

Defendant and Mr. Neely were arrested in connection with the murders, each telling the police that the other shot and killed Mr. Baird and Ms. Hedgepeth. Defendant later revised his earlier statements and confessed to killing both victims.

C. Defendant's Plea, Sentencing, and Resentencing

Defendant was indicted on two counts each of first-degree murder and robbery with a dangerous weapon in December of 2002. The State filed a notice of intent to seek the death penalty the following January,

and a grand jury issued superseding indictments for two counts of first-degree murder with aggravating circumstances a month later. Defendant subsequently pled guilty to the murder charges in exchange for dismissal of the robbery counts and two sentences of life without parole. The trial court entered judgments consistent with the plea in August of 2003.

After the General Assembly enacted N.C. Gen. Stat. §§ 15A-1340.19A, *et seq*. in an effort to comply with *Miller*, Defendant filed an MAR on 26 June 2013 requesting a new sentencing hearing. The trial court granted Defendant's motion in an order entered a week later.

By 2018, Defendant had not yet received a resentencing hearing. His counsel filed a motion challenging the constitutionality of both LWOP sentences and N.C. Gen. Stat. § 15A-1340.19A that November, which was heard at his resentencing hearing on 20 February 2019. At resentencing, and after the State recited the facts of Defendant's crimes, Defendant offered evidence in mitigation through the testimony of Defendant's sister. In addition to recounting Defendant's upbringing, she described how Defendant had changed in prison:

> Well, since he's been incarcerated, he . . . wrote a 500-page book and then he wrote maybe about four or five little small books that I'm trying to get published.
>
> . . . .
>
> The stories [are] about young teens getting in trouble.
>
> . . . .
>
> [H]e's trying to encourage teens and abus[ed] children[] not to follow no one's steps, for one. And listen to people getting in trouble. Change [their] [lives] around[.]

His sister further testified that Defendant had attained his GED and job training in upholstery while incarcerated.

Defendant also offered documentary evidence in mitigation. This included several of his short stories and a report from the Department of Correction disclosing Defendant's full scale I.Q. of 65, reflecting a "notable life deficit" in learning. Defendant's presentation concluded with an allocution in which he expressed regret for his crimes and detailed how his troubled upbringing and drug abuse substantially diminished his mental and moral development. He further explained his desire to help children learn from his mistakes, but was concerned that consecutive sentences of life with parole would "hinder [his] success and

prevent [him] from reaching the children and being successful at [his] desire and [his] dreams and dedicating something to society." The trial court responded to the allocution by saying, "I've been doing this job for eleven years and that's one of the most powerful things I've ever heard anybody say. . . . So I want to thank you for saying that. I just want to acknowledge that. So thank you very much for saying that." The judge then asked Defendant if he had another copy of his written allocution so the court could mark it as an exhibit and place it in the file.

In closing arguments, Defendant's counsel asked the trial court to sentence Defendant to concurrent sentences of life with parole, as the alternative presented, "under the auspices of the Eighth Amendment, . . . a de facto life without parole [sentence]." The prosecutor responded by first acknowledging that "it was my opinion that [Defendant's] apology was sincere and that his remorse was genuine." He then "concede[d] that the defendant has presented evidence from which the Court could find . . . [facts in] mitigation" under N.C Gen. Stat § 15A-1340.19B(c). The State also stated that it would "trust the Court to weigh whether a sentence of life with or without parole is appropriate in light of that mitigating evidence." As for whether Defendant's sentences should run concurrently or consecutively, the State argued that the former would be contrary to his plea agreement, and that: (1) such a sentence was procedurally barred by denial of a prior MAR in which Defendant argued his plea was not freely and voluntarily made; (2) the trial court lacked jurisdiction to enter concurrent sentences because Defendant's MARs did not "provide a factual and legal basis for that relief[;]" (3) Defendant's evidence at resentencing did not support a conclusion that his plea was involuntarily given; and (4) the facts of Defendant's crimes support a discretionary imposition of consecutive sentences.

The trial court announced its sentencing decision from the bench, ordering that Defendant be sentenced to life with parole on both counts. It denied Defendant's motion and request for concurrent sentences, concluding that it lacked jurisdiction and, even if it did have jurisdiction, would not run the sentences concurrently in its discretion. Defendant gave oral notice of appeal, and the trial court entered written orders and judgments consistent with its oral ruling following the hearing.

II. ANALYSIS

Defendant's sentences, which place parole eligibility at age 67 after 50 years imprisonment, are identical to the sentences this Court held unconstitutional in *Kelliher* following consideration of *Roper v. Simmons*, 543 U.S. 551, 161 L. Ed. 2d 1 (2005), *Graham v. Florida*, 560

U.S. 48, 176 L. Ed. 2d 825 (2010), *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), and *Montgomery v. Louisiana*, ___ U.S. ___, 193 L. Ed. 2d 599 (2016). As we held in that case:

> (1) *de facto* LWOP sentences imposed on juveniles may run afoul of the Eighth Amendment; (2) such punishments may arise out of aggregated sentences; and (3) a sentence that provides no opportunity for release for 50 or more years is cognizable as a *de facto* LWOP sentence. Consistent with the Eighth Amendment as interpreted by *Roper*, *Graham*, *Miller*, and *Montgomery*, these holdings compel us to reverse and remand Defendant's sentence. Under different circumstances, we would leave resentencing to the sound discretion of the trial court. Here, however, we hold that of the two binary options available—consecutive or concurrent sentences of life with parole—one is unconstitutional. We therefore instruct the trial court on remand to enter two concurrent sentences of life with parole as the only constitutionally permissible sentence available under the facts presented.

Kelliher, 273 N.C. App. at 644, 849 S.E.2d at 352 (citation omitted). That decision's reasoning applies with equal force to this case, and I would hold that the same relief should be granted here.

The majority, as in *Conner*, declines to apply *Kelliher*'s reasoning because: (1) "*Miller* has never held as being unconstitutional a life with parole sentence imposed on a defendant who commits a murder when he was 17 years old[;]" and (2) the life expectancy and mortality table found in N.C. Gen. Stat. § 8-46 (2019) lists a 17-year old's life expectancy as 59.8 years. In making its first point, the majority does not address the numerous decisions from state appellate courts—expressly relied upon in *Kelliher*—that have held *Miller* does apply to juveniles convicted of homicides and sentenced to terms of imprisonment that are the functional equivalent of a LWOP punishment. *See*, *Kelliher*, 273 N.C. App. at 633-34 n. 11, 849 S.E.2d at 345 n. 11 (citing 17 states whose appellate courts have recognized lengthy term-of-years sentences as *de facto* LWOP sentences subject to the constitutional protections of *Roper*, *Graham*, and/or *Miller*, including eleven decisions with holdings that directly applied those protections to a juveniles convicted of homicide or would apply them to such cases).

To the extent the statutory mortality table found in N.C. Gen. Stat. § 8-46, which was not relied upon by the State at resentencing or on

appeal, applies to the constitutional question before this Court, that statute by its very terms provides that it "*shall* be received . . . *with other evidence as to the health, constitution and habits of the person*[.]" (emphasis added). Thus, the life expectancy "table . . . is not conclusive, but only evidentiary," *Young v. E. A. Wood & Co.*, 196 N.C. 435, 437, 146 S.E.2d 70, 72 (1929) (construing a predecessor statute), and "life expectancy is determined from evidence of the plaintiff's health, constitution, habits, and the like, *as well as* from [the statutory] mortuary tables." *Wooten v. Warren by Gilmer*, 117 N.C. App. 350, 259, 451 S.E.2d 342, 359 (emphasis added) (citation omitted). The 59.8 year life expectancy for 17-year-old minors found in the statute cannot be said to be conclusive in light of Defendant's "health, constitution, habits, and the like." *Id.* For example—and setting aside any impact that a minimum of 50 years of imprisonment will have on Defendant—it is uncontroverted that Defendant has a years-long history of heavy and varied drug abuse dating back to at least age seven that could bear upon longevity.

In sum, though I agree with the majority that Defendant should be resentenced, the majority does not convince me that *Kelliher*'s analysis is inapplicable to the present case. I would reverse Defendant's sentence and remand with the instruction to resentence him to concurrent terms of life with parole. *See Kelliher*, 273 N.C. App. at 644, 849 S.E.2d at 352. For these reasons, I respectfully dissent from the majority's holding to the contrary.

STATE v. BLAKE

[275 N.C. App. 699 (2020)]

STATE OF NORTH CAROLINA
v.
JERMAIL BLAKE

No. COA19-1135

Filed 31 December 2020

1. Jury—unanimous verdict—reasonable doubt standard—failure to follow—structural error

There was structural error in a murder trial where, immediately after indicating their verdict was unanimous but before judgment was entered, several jurors told the trial court that they were not "sure that the defendant committed this crime but . . . someone needs to go to prison." Evidence Rule 606's proscription against impeachment of a jury verdict was inapplicable because the jury's failure to apply the "guilt beyond a reasonable doubt" standard rendered the trial fundamentally unfair.

2. Criminal Law—new trial awarded—order on MAR vacated—gatekeeper orders

Where defendant appealed his conviction for voluntary manslaughter and was awarded a new trial, the Court of Appeals as a result also vacated the order denying his motion for appropriate relief (MAR). The Court of Appeals further noted that the trial court, when denying his MAR, lacked authority to bar defendant from making any other filings in the case; a gatekeeper order was inappropriate where defendant had made no frivolous filings.

Appeal by defendant from judgment entered 24 May 2019 by Judge Anna M. Wagoner and order entered 30 August 2019 by Judge Richard S. Gottlieb in Superior Court, Rowan County. Heard in the Court of Appeals 6 October 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alexander G. Walton, for the State.

Sarah Holladay, for defendant.

STROUD, Judge.

Defendant appeals from his conviction for voluntary manslaughter. Defendant argues there was prejudicial error in three phases of his trial:

(1) structural error based upon the jury's disregard of the trial court's instructions; (2) denial of his right to be present for all stages of his trial as he was not present for post-trial motions; and (3) error in the Order denying his Motion for Appropriate Relief, by imposing a bar on future post-conviction litigation. We conclude there was structural error where a number of jurors told the presiding judge immediately after indicating their verdict was unanimous, but before judgment was entered, that they were not "sure that the defendant committed this crime but, . . . 'Someone -- that man died, so someone needs to go to prison[.]' " Accordingly, Defendant is entitled to a new trial. We also vacate the Order denying Defendant's Motion for Appropriate Relief.

I. Factual and Procedural Background

The offense charged arose from a party on the night of 30 December 2016 at Anthony Angle's house. Three witnesses testified for the State about the events of 30 December 2016. Their accounts to the exact details were not entirely consistent and in some instances contrary to the physical evidence, but all indicated that Defendant and Altereck Shields got into a physical altercation that resulted in Mr. Shield's death.

Mr. Angle testified that Mr. Shields arrived at the party around 11:30 AM. Approximately an hour later Defendant, who is Mr. Angle's cousin, and one of Defendant's friends arrived at the party. Mr. Angle sold Defendant a gram of cocaine, and Defendant consumed half that amount. Defendant and Mr. Shields got into an argument in the kitchen "about who the -- who were the best Bloods, East Coast or West Coast, at the time." Mr. Angle stepped out of the kitchen for a minute, and when he returned, Defendant and Mr. Shields were in a scuffle and "barrel hooked up." Mr. Angle and other people at the party tried to break Defendant and Mr. Shields up but they were unsuccessful and decided to "push 'em out the door so they don't bust holes in the wall." After the two men were outside, Mr. Angle observed Defendant and Mr. Shields fall over a small wall and continue fighting. Then Mr. Shields straddled Defendant while he was still on the ground and hit him several times with his fists. Mr. Angle saw Defendant produce a knife and stab Mr. Shields with one of his kitchen knives. Then one of the party guests said, "You done killed my cousin," and started beating Defendant; others then joined in. Mr. Angle tried to stop the crowd but could not and called 911. Mr. Shields ultimately died because of his injuries.

Defendant was indicted on one count of second degree murder and tried at the 20 May 2019 criminal session of Superior Court, Rowan County, with the Honorable Anna M. Wagoner presiding. The

State presented testimony from eight witnesses; Defendant presented evidence consisting of photographs, documents, and recordings, but no witnesses testified for Defendant. The jury deliberations begin at 11:46 AM on 21 May 2019. At 12:23 PM the trial judge indicated she had received a note from the jury:

> THE COURT: All right. I just have a note from the jury with some questions which I will read out loud. The first one is: May we have pictures of the back of the house; Number 2: Pictures of kitchen and dining room; and, Number 3: Is there a record of 911 call by Mr. Andrade or Andrade or whatever the [sic] call him? And if yes, can we have?

After discussing with counsel, the trial court agreed to show the jury the requested pictures, but there was no record of the 911 call to present to the jury. The court went on recess for lunch until 1:46 PM. When the jury returned to the courtroom, they were allowed to look at the pictures and asked an additional question about the ages of the Defendant and the deceased.

The jury returned to the jury room at 1:53 PM. At 4:09 PM the jury returned a unanimous verdict finding Defendant guilty of voluntary manslaughter. The trial court polled the jury, and all jurors individually indicated this was still their verdict. But after polling the jury, the trial court held an unrecorded bench conference with counsel and after coming back on the record said, "I just want to be sure because a few of the jurors were a little hesitant, unsure, if that was truly your verdict." The trial court questioned one juror individually, and she confirmed her agreement with the verdict. The trial court then thanked the jury for its service and asked the jury to step into the jury room. Between 4:19 PM and 4:28 PM, the trial court met with the jury and then met with counsel in an unrecorded conference in chambers. Immediately after the conference in chambers, Defendant's counsel made a motion to set aside the verdict "*based on what Your Honor's heard.*" (Emphasis added.) The motion was denied. The trial court had another unreported conference with counsel in chambers at 4:29 PM, and the proceedings resumed at 4:34 PM. The trial court then announced that the parties were discussing sentencing and decided to do the sentencing tomorrow morning "in order to give the defense an opportunity to decide what they may want to present in mitigation and anything else."

The next day, Defendant and the State appeared in court, and Defendant's counsel explained his client consented to hearing a matter in chambers:

> Your Honor, I do have one matter for Your Honor to consider on the record; however, we're agreeable to do this -- my client is giving his consent to do this in chambers if Your Honor would prefer. That's actually our request.

The parties then proceeded to sentencing, and Defendant's counsel presented mitigating factors. Defendant was sentenced in the mitigated range, and he gave oral notice of appeal. Proceedings then continued on the record in the judge's chambers with the trial judge, Defendant's counsel, two assistant district attorneys, and the court reporter:

> THE COURT: All right. We are having this hearing in chambers with the consent of the defendant because of the court's concern about the incredibly bad blood between these parties and the court would prefer that no one else be injured. Okay. Yes, sir, I think you had a --
>
> MR. SEASE: Would specifically ask -- the defense would specifically ask for permission from Your Honor to renew and further enumerate on a motion to set aside the verdict at the close of all the evidence and the verdict has already been announced.
>
> THE COURT: All right. You may renew it.
>
> MR. SEASE: Thank you.
>
> THE COURT: You're welcome.
>
> MR. SEASE: At this juncture what we would consider is, although the deliberations of the jury are sacrosanct in nature, they can be delved into in a limited fashion if certain things apply and they're very, very limited. What I would propose to Your Honor in the way that this case played out is that during closing arguments, by no fault of the State whatsoever, a picture of the body of the victim was posted which led to the subsequent and understandable symp – strike that –
>
> THE COURT: Upset.
>
> MR. SEASE: -- sobbing and crying, and, again, understandable, why wouldn't they feel that way, but from the victim's family. It was what felt to the defense like eternity, it wasn't actually that long, but it continued on. The State stopped to try to further escort these people out so that it wouldn't distract anyone from the closing.

> We would contend that the jury, of course, heard it, and that based on the verdict and based on what the defense would feel – the defense would feel that that would be a realistic thing they would consider. It's an extraneous, prejudicial thing to consider for the jury, one that cannot be met by cross-examination by the defendant. It wasn't in evidence. It wasn't law. It wasn't anything but an extraneous consideration that's outside the purview of what they're allowed to consider. Further, it has come to our attention that juror No. 9 may be first cousin –
>
> THE COURT: Who at one time was an alternate; correct?
>
> MR. SEASE: Who at one time was an alternate and by the fact that the original juror No. 9 had a family emergency and did not come to court was placed into seat No. 9. And it has come to our attention that she may or may not but we believe that she may be first cousins with Denerio Robinson, Duck, one of the witnesses for the State. We have been able to corroborate that she lives beside of Robinsons, but to be fair it's not Denerio Robinson; it's Demeria, D-e-m-e-r-i-a, Robinson. We also have reason to believe that Denerio Robinson's dad's last name is Allen.
>
> . . . .
>
> Just based on what – the information that I've received about the case, we'd ask Your Honor to set that verdict aside[.]

The trial court denied Defendant's motions and informed counsel for both parties:

> All right. Now, the court is going to put on the record as well that, after the jury announced its verdict and they were discharged, I spoke to them like I always speak to the jurors – jury after the case was over. *And several of them, say the majority, indicated to me that they did not believe any of the witnesses, that in their opinion the witnesses -- and I'm saying their because I don't know which -- I would say at least seven -- the witnesses were not believable, that they weren't sure that the defendant committed this crime but, quote, this is what I was told three or four times, "Someone -- that man died, so someone*

> *needs to go to prison*," which I disclosed to the attorneys yesterday and I'm disclosing to them again today outside of the presence of the public and outside the presence of the defendant with his consent. I think that's it.

(Emphasis added.) After additional discussion with counsel on the record, the trial court stated, "And I think anything else that happened will be subject for motion for appropriate relief. We'll cross that bridge when we come to it." On 3 June 2019, Defendant filed a Motion for Appropriate Relief ("MAR"). The MAR was heard by the Honorable Richard S. Gottlieb. On 28 August 2019, Judge Gottlieb entered an order denying Defendant's MAR, and Defendant timely appealed.

II. Structural Error

[1] Defendant argues, "structural error occurred where judgment was entered despite the jury informing the trial court that they were not convinced of [Defendant's] guilt, but felt that someone had to be punished for the victim's death." (Original in all caps.) "Structural error is a rare form of constitutional error resulting from 'structural defects in the constitution of the trial mechanism' which are so serious that 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.' " *State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-310, 111 S.Ct. 1246, 1264-65, 113 L.Ed.2d 302, 331 (1991)).

> The United States Supreme Court has identified only six instances of structural error to date: (1) complete deprivation of right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); (2) a biased trial judge, *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); (3) the unlawful exclusion of grand jurors of the defendant's race, *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); (4) denial of the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); (5) denial of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); and (6) constitutionally deficient jury instructions on reasonable doubt, *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

State v. Polke, 361 N.C. 65, 73, 638 S.E.2d 189, 194 (2006). "In each of the six United States Supreme Court cases rectifying structural error, the defendant made a preliminary showing of a violated constitutional right

and the identified constitutional violation *necessarily* rendered the criminal trial fundamentally unfair or unreliable as a vehicle for determining guilt or innocence." *State v. Garcia*, 358 N.C. at 410, 597 S.E.2d at 745.

A. Standard of Review

As a form of constitutional error, we review structural error *de novo*. *State v. Veney*, 259 N.C. App. 915, 917, 817 S.E.2d 114, 116 (2018). Structural error is reversible *per se*. *State v. Garcia*, 358 N.C. at 409, 597 S.E.2d at 744. The trial court instructed the jury on second degree murder, voluntary manslaughter, or not guilty, and the jury unanimously found Defendant guilty of voluntary manslaughter. After the verdict was announced, Defendant's counsel moved to poll each individual juror. The clerk asked each individual juror if the verdict was still their verdict, and they all answered, "Yes." The trial court told the jury "this will conclude your service as jurors." The jury returned to the jury room at 4:19 PM, and the trial transcript states there was an "Unreported conference in chambers" and "Proceedings resume at 4:28 PM." Defendant's counsel asked the trial court to set aside the verdict, "Your Honor, just the defense would make a motion to set aside the verdict at this time *just based on what Your Honor's heard*. I don't wish to belabor the point. Thank you." (Emphasis added.) The next day, the trial court stated on the record what the jury told her between 4:19 and 4:28 PM:

> All right. Now, the court is going to put on the record as well that, after the jury announced its verdict and they were discharged, I spoke to them like I always speak to the jurors -- jury after the case was over. And several of them, say the majority, indicated to me that they did not believe any of the witnesses, that in their opinion the witnesses -- and I'm saying their because I don't know which -- I would say at least seven -- the witnesses were not believable, that they weren't sure that the defendant committed this crime but, quote, this is what I was told three or four times, "Someone -- that man died, so someone needs to go to prison," which I disclosed to the attorneys yesterday and I'm disclosing to them again today outside of the presence of the public and outside the presence of the defendant with his consent. I think that's it.

The State argues plain error is the proper standard of review because it contends the specific grounds for Defendant's initial motion to set aside the verdict were "not apparent from the context" where this was discussed in chambers and off the record. But plain error review is applicable only to evidentiary errors and jury instructions, not the

argument raised by Defendant. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) ("[P]lain error review in North Carolina is normally limited to instructional and evidentiary error." (citing *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002))). And as soon as Defendant's counsel became aware of this issue, Defendant did preserve it for full review. As noted above, Defendant's counsel identified the reasons for his motion to set aside the verdict more than once; the reasons included "what your Honor's heard," which in context refers to the judge's discussion in the jury room with the jurors, as well as the reaction of the victim's family to the photograph of the victim and the juror who may have been related to one of the State's witnesses. On appeal, Defendant's argument as to structural error is based only upon the jurors' comments, and we conclude this argument was fully preserved for appellate review as Defendant made a timely motion at trial and identified the grounds for this argument. N.C. R. App. P. 10(a)(1).

B. Jury's Disregard of Instructions on Reasonable Doubt

Defendant argues,

> Given the jury's determination that the State had not proven [Defendant's] guilt beyond a reasonable doubt, the only proper course of action was to set aside the verdict. Polling the jury to determine whether they agreed with the verdict could not cure the fundamental defect that the verdict itself did not include a finding that [Defendant] was guilty beyond a reasonable doubt.

We agree.

Here, the jury was instructed,

> The State must prove to you that the defendant is guilty beyond a reasonable doubt.
>
> A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or the lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

We conclude the jury was properly instructed on reasonable doubt.

Yet the jurors—"the majority" of them—told the trial court they had disregarded the instruction regarding finding guilt "beyond a reasonable doubt:"

> several of them, say the majority, indicated to me that they did not believe any of the witnesses, that in their opinion the witnesses -- and I'm saying their because I don't know which -- I would say at least seven -- the witnesses were not believable, that *they weren't sure that the defendant committed this crime but, quote, this is what I was told three or four times, "Someone -- that man died, so someone needs to go to prison[.]"*

(Emphasis added.) We conclude the jury disregarded its instruction by the trial court and convicted Defendant on a standard less than beyond a reasonable doubt. The majority of the jurors told the trial court they did not believe "at least seven" of the State's eight witnesses and convicted Defendant because "someone needs to go to prison." The jurors' comments to the trial court demonstrated that the trial did not accomplish its central purpose: "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986)). We conclude this defect in Defendant's trial resulted in the trial no longer "serv[ing] its function as a vehicle for determination of guilt or innocence." *State v. Garcia*, 358 at 409, 597 S.E.2d at 744.

The State argues that "there is a strong presumption against finding structural error and the doctrine only applies to a limited number of cases. Defendant's claim does not fit into any of specific types of cases outlined by the Courts." *See State v. Anderson*, 355 N.C. 136, 142, 558 S.E.2d 87, 92 (2002) ("Additionally, the Supreme Court has found structural error to exist in very few cases."). The State is correct that the types of cases where structural error has been found are limited, but the circumstances here present the same type of constitutional error present in some of those cases. In *Sullivan v. Louisiana*, the United States Supreme Court addressed the right to a verdict based upon the jury's determination of guilt beyond a reasonable doubt:

> What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements[.] This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings.

> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

508 U.S. 275, 277-78, 113 S. Ct. 2078, 2080-81, 124 L. Ed. 2d 182, 188 (1993).

Defendant both preserved this error at trial and has demonstrated prejudice, although in this instance, the burden to demonstrate prejudice was not on Defendant. The burden is on the State to demonstrate that a constitutional error is harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b) (2019) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.").

> When violations of a defendant's rights under the United States Constitution are alleged, harmless error review functions the same way in both federal and state courts: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." In other words, an error under the United States Constitution will be held harmless if "the jury verdict would have been the same absent the error." Under both the federal and state harmless error standards, the government bears the burden of showing that no prejudice resulted from the challenged federal constitutional error. But if the error relates to a right not arising under the United States Constitution, North Carolina harmless error review requires the defendant to bear the burden of showing prejudice. In such cases the defendant must show "a reasonable possibility 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."

State v. Lawrence, 365 N.C. at 513, 723 S.E.2d at 331 (alteration in original) (citations omitted).

The State has not demonstrated this error was harmless beyond a reasonable doubt. Instead, the State argues this error is not one of the errors previously identified as structural error and asserts that the "[r]ecord clearly reflects, there was no juror misconduct" based upon the polling of the jurors.

C. Rule 606 of the North Carolina Rules of Evidence

The State argues, "the 'evidence' Defendant points to in an attempt to impeach the verdict came in the form of the trial court's resuscitation of events following Defendant's conviction." Rule 606 of the North Carolina Rules of Evidence states:

> (b) Inquiry into validity of verdict or indictment.–Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

N.C. Gen. Stat. § 8C-1, Rule 606.

> The proscription against impeachment of a jury verdict "is well settled in North Carolina." "[A]fter a verdict has been rendered and received by the court, and jurors have been discharged, jurors will not be allowed to attack or overthrow their verdict, nor will evidence from them be received for such purpose."
>
> The purpose of the "no-impeachment rule" is "to promote freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." This rule has been codified under N.C. Gen. Stat. § 8C-1, Rule 606(b), and N.C. Gen. Stat.

> § 15A-1240(a). As our Supreme Court has observed, "Rule 606(b) reflects the common law rule that affidavits of jurors are inadmissible for the purposes of impeaching the verdict except as they pertain to extraneous influences that may have affected the jury's decision."

State v. Corbett, 269 N.C. App. 509, 521-22, 839 S.E.2d 361, 377, *writ allowed*, 373 N.C. 580, 838 S.E.2d 461 (2020); *State v. Lyles*, 94 N.C. App. 240, 246, 380 S.E.2d 390, 394 (1989) ("Finally, although Rule 606(b) is broader in some respects than Section 15A–1240, we do not agree with any suggestion that the two statutes conflict. In our view, the exceptions to the anti-impeachment rule listed in Section 15A–1240 are designed to protect the same interests as, and are entirely consistent with, the exceptions in Rule 606(b).").

In *State v. Coleman*, 161 N.C. App. 224, 587 S.E.2d 889 (2003), this Court addressed an instance of a claim that a juror had disregarded instructions during the trial. In *Coleman*, during the second day of jury deliberation, the trial court received "a note from the jury alleging that one juror was 'not following the law.' " *Id.* at 228, 587 S.E.2d at 892-93 (2003). "In response to the note, the trial court informed the jury that a juror could not be replaced and instructed the jury as to its duty to follow the law." *Id.* at 228, 587 S.E.2d at 893. The defendant did not request any additional instructions or make any motions in response to the note. *Id.* at 229, 587 S.E.2d at 893. The jury ultimately delivered a unanimous verdict. *Id.* at 228, 587 S.E.2d at 892. Reviewing the defendant's argument on appeal under Rule 2, this Court noted, "To warrant an investigation, 'the circumstances must be such as not merely to put suspicion on the verdict, because there was an opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion' it is a decision left to the trial court's discretion." *State v. Coleman*, 161 N.C. App. 224, 229, 587 S.E.2d 889, 893 (2003) (quoting *State v. Aldridge*, 139 N.C. App. 706, 713, 534 S.E.2d 629, 634 (2000)). This Court concluded,

> In the case before us, it was within the discretion of the trial court to determine whether an inquiry was necessitated by the note from the jury. Based on the ambiguity of the note's allegation and the corrective measure taken by the trial court in its subsequent instruction, there was no obligation to investigate further.

Id. at 229, 587 S.E.2d at 893.

Here, the jury's misconduct did not involve just one juror but a "majority." The misconduct was not "merely a matter of suspicion;" the misconduct was confirmed by the trial court. In addition, the misconduct goes to the very heart of the defendant's right to a presumption of innocence and the requirement that he be convicted only upon proof "beyond a reasonable doubt." *Sullivan v. Louisiana*, 508 U.S. at 277-78, 113 S. Ct. at 2080-81, 124 L. Ed. 2d at 188. In addition, the circumstances of this case do not involve an "inquiry into the validity of the verdict" raised after the trial by the Defendant. *See* N.C. Gen. Stat. § 8C-1, Rule 606(b) ("Upon an inquiry into the validity of a verdict or indictment . . . ."). The transcript reflected the trial judge's immediate concern regarding the verdict, both by the additional inquiry in open court and her discussion with the jurors after the verdict. The trial court included the details of the jurors' comments in the record. There were no affidavits from jurors or attempts by the defendant to obtain any information from jurors after the trial.

We have been unable to find a comparable situation in our caselaw, but *State v. Coleman*, 161 N.C. App. 224, 228, 587 S.E.2d 889, is instructive. We conclude this misconduct by the jurors did more than "merely . . . put suspicion on the verdict," and therefore it was not left to the trial court's discretion to remedy the injustice. *See id.* at 229, 587 S.E.2d at 893. Further, we conclude based on the facts of this case that it is not the type of situation Rule 606 was designed to protect against, and Rule 606 does not preclude the juror's misconduct from being structural error. *See State v. Corbett*, 269 N.C. App. 509, 522, 839 S.E.2d 361, 377 (2020). ("The purpose of the 'no-impeachment rule' is 'to promote freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment.' " (quoting *Cummings v. Ortega*, 365 N.C. 262, 267, 716 S.E.2d 235, 239 (2011))).

Based upon this structural error, where the jurors failed to follow the trial court's instructions to find Defendant guilty beyond a reasonable doubt, the appropriate remedy for Defendant is a new trial. *State v. Garcia*, 358 at 409, 597 S.E.2d at 744 (" 'Such errors "infect the entire trial process," and "necessarily render a trial fundamentally unfair[.]" ' For this reason, a defendant's remedy for structural error is not depend[e]nt upon harmless error analysis; rather, such errors are reversible per se." (citations omitted)). The trial court erred by not granting Defendant's motion to set aside the verdict, and Defendant is entitled to a new trial.

III. Motion for Appropriate Relief

[2] Because we are granting Defendant a new trial, we will not address Defendant's argument regarding not being present for all stages of the trial. However, Defendant has also appealed from the trial court's Order denying his MAR. As the trial judge noted after the final denial of Defendant's motions, "anything else that happened will be subject for motion for appropriate relief. We'll cross that bridge when we come to it."

On 3 June 2019, Defendant filed an MAR. Defendant filed the MAR within 10 days of the judgment in accord with North Carolina General Statute §15A-1414 (2019). In the MAR, Defendant raised essentially the same arguments as in he did on appeal as well as additional arguments not addressed on appeal regarding the issues noted in his arguments to the trial court as quoted above. Judge Gottlieb denied the MAR without an evidentiary hearing on 28 August 2019. The Order includes a decree that "[p]ursuant to N.C.G.S. § 15A-1419, Defendant's failure to asset any other grounds in [the MAR] shall be subject to being treated in the future as a BAR to any other claims, assertions, petitions or motions that he might hereafter file in this case."

A. Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). "However, the trial court's conclusions are fully reviewable on appeal." *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998) (citing *State v. Stevens*, 305 N.C. at 720, 291 S.E.2d at 591).

Although we must vacate the Order denying Defendant's MAR based upon our determination that he is entitled to a new trial, we will address briefly his argument regarding the Order because it is based not just on the substantive issues already addressed but also upon the decree purporting to bar defendant from filing future MARs. North Carolina General Statute § 15A-1414 provides "After the verdict but not more than 10 days after entry of judgment, the defendant by motion may seek appropriate relief for any error committed during or prior to the trial." N.C. Gen. Stat. § 15A-1414(a) (2019). The statute further provides,

> (b) Unless included in G.S. 15A-1415, all errors, including but not limited to the following, must be asserted within 10 days after entry of judgment:
>
> . . . .
>
> (2) The verdict is contrary to the weight of the evidence.
>
> (3) For any other cause the defendant did not receive a fair and impartial trial.

N.C. Gen. S. § 15A-1414(b)(2)-(3) (2019). North Carolina General Statute § 15A-1415 limits noncapital defendants to ten grounds on "which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment[.]" N.C. Gen. Stat. § 15A-1415 (2019). North Carolina General Statute § 15A-1419 provides grounds for *denying* a MAR, including,

> (a) The following are grounds for the denial of a motion for appropriate relief, including motions filed in capital cases:
>
> (1) *Upon a previous motion* made pursuant to this Article, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. This subdivision does not apply when the previous motion was made within 10 days after entry of judgment or the previous motion was made during the pendency of the direct appeal.
>
> (2) *The ground or issue underlying the motion was previously determined on the merits* upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.
>
> (3) *Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.*

N.C. Gen. Stat. § 15A-1419(a)(1) (2019) (emphases added). In addition, denial is not proper if a defendant can show: "(1) Good cause for excusing the grounds for denial listed in subsection (a) of this section and can demonstrate actual prejudice resulting from the

defendant's claim; or (2) That failure to consider the defendant's claim will result in a fundamental miscarriage of justice." N.C. Gen. Stat § 15A-1419(b)(1)-(2) (2019).

The State does not identify any legal basis for the trial court's order barring Defendant from filing *future* MARs but argues, "Defendant's challenge to the Order denying is Motion for Appropriate Relief is premature and not ripe for review because there have not been any post-conviction claims, assertions, petitions, or motions and the Order has no effect on this appeal." However, the State cites to no authority in support of its position, and we conclude the trial court did not have authority under North Carolina General Statutes §§ 15A-1414-15, -1419 to direct that Defendant would be barred from *filing* "any other claims, assertions, petitions or motions that he might hereafter file in this case."

It is a correct statement of law that a defendant's future MAR may be denied if he attempts to raise an issue in a MAR which has previously been determined if he was in the position to raise it in a prior motion or appeal. *See* N.C. Gen. Stat. § 15A-1419(a). But North Carolina General Statutes. § 15A-1419(a) does not give a trial court authority to enter a gatekeeper order declaring in advance that a defendant may not, in the future, file an MAR; the determination regarding the merits of any future MAR must be decided based upon that motion. *See* N.C. Gen. Stat. § 15A-1420(c) (2019). Gatekeeper orders are normally entered only where a defendant has previously asserted numerous frivolous claims. *See generally Fatta v. M & M Properties Mgmt., Inc.*, 224 N.C. App. 18, 31, 735 S.E.2d 836, 845 (2012) ("The gatekeeper provision limited plaintiff from filing or submitting to the Iredell County Superior Court any further motion, pleading, or other document unless the document was signed by a North Carolina licensed attorney."). Defendant had filed only one MAR and this motion was filed within ten days after the trial. This is not a case where a defendant has filed many frivolous MARs asserting the same claims. Based upon our determination that Defendant must receive a new trial, the Order denying Defendant's MAR is vacated.

IV. Conclusion

Based on the particular circumstances of this case, there was structural error where multiple jurors indicated to the trial court before judgment was entered that "they weren't sure that the defendant committed this crime." The judgment and the Order denying Defendant's MAR are vacated, and this matter is remanded for a new trial.

NEW TRIAL.

Chief Judge McGEE and Judge ARROWOOD concur.

STATE v. BRADSHER

[275 N.C. App. 715 (2020)]

STATE OF NORTH CAROLINA
v.
WALLACE BRADSHER, DEFENDANT

No. COA19-365

Filed 31 December 2020

1. Obstruction of Justice—felony—by intentionally providing false and fabricated statements—sufficiency of evidence—statements only misleading—investigatory path

The State failed to introduce sufficient evidence to convict defendant of felony obstruction of justice based on the intentional provision of false and fabricated statements to a State Bureau of Investigation (SBI) agent where the agent's testimony established only that defendant made misleading statements and omitted material information—not that his statements were actually false. Even assuming that one of defendant's statements was false, the statement did not change the agent's investigative path, so it did not show actual obstruction.

2. Appeal and Error—preservation of issues—swapping horses on appeal—basis for admissibility of testimony

Defendant's argument that a witness's testimony was improperly excluded as hearsay was not preserved for appellate review where defendant argued at trial for the business record exception and vaguely claimed that the testimony was not hearsay but on appeal argued that the testimony was admissible as a direction or command. Defendant could not argue a new ground for the testimony's admissibility on appeal.

3. False Pretense—jury instructions—specific false representations alleged in indictment—alternative false representations in evidence

In a prosecution for obtaining property by false pretenses, the trial court did not err, or commit plain error, by failing to instruct the jury on the specific false representations alleged in the indictment, where there was no variance between the indictment, the proof presented at trial, and the instructions to the jury. Defendant failed on appeal to identify any alternative false representations advanced by the State at trial upon which the jury could have relied to determine that he had obtained property by false pretenses.

4. Appeal and Error—arrested judgment—to avoid double jeopardy concerns—underlying verdict not vacated

Defendant's appeal from his conviction for obtaining property by false pretenses based on the theory of acting in concert was from a final judgment and was properly before the Court of Appeals, even though the trial court arrested judgment on that charge, because the purpose of arresting judgment was to avoid double jeopardy concerns (the same conduct supported both of defendant's convictions for false pretenses) and thus it did not vacate the underlying verdict.

5. False Pretense—acting in concert—presence—constructive—too remote

The State presented insufficient evidence to support defendant's conviction for obtaining property by false pretenses on the theory of acting in concert where defendant was neither actually nor constructively present when the crime was executed. When the perpetrator, who was defendant's employee, executed the crime by submitting false information through her computer, defendant was not even in the same county or in contact with her remotely via phone or email, and his later acts covering up the employee's fraud were too remote in distance and time to satisfy the requirement of constructive presence.

Appeal by Defendant from judgment entered 7 September 2018 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Court of Appeals 7 January 2020.

Attorney General Joshua H. Stein, by Deputy Solicitor General James W. Doggett for the State.

Assistant Appellate Defender Michele A. Goldman and Appellate Defender Glenn Gerding, for Defendant.

McGEE, Chief Judge.

Wallace Bradsher ("Mr. Bradsher" or "Defendant Bradsher") was indicted by a grand jury in a superseding indictment on 24 October 2017 charging him with conspiracy to commit the offense of obtaining property by false pretenses, obtaining property by false pretenses, aiding and abetting the offense of obtaining property by false pretenses, three counts of obstruction of justice, and failure to discharge the duties of his office. The case was tried at the 29 May 2018 session of Superior Court, Wake County. At trial, Defendant Bradsher, representing himself,

moved to dismiss all charges at the close of the State's evidence. The motion to dismiss was denied. Defendant Bradsher declined to present any evidence. A jury found Defendant Bradsher not guilty of conspiracy to commit the offense of obtaining property by false pretenses and one count of obstruction of justice. The jury found Defendant guilty of one count of felony obstruction of justice, one count of misdemeanor obstruction of justice, two counts of obtaining property by false pretenses, and one count of failure to discharge the duties of his office. The trial court arrested judgment on the count of obtaining property by false pretenses based on the theory of acting in concert, but entered judgment on the count of aiding and abetting obtaining property by false pretenses.

I. Factual and Procedural History

Mr. Bradsher was elected to the position of district attorney for Prosecutorial District 9A, comprised of Person and Caswell Counties, and assumed office on 1 January 2011. Prior to his election, Mr. Bradsher was a criminal defense attorney in private practice and employed his wife, Pam Bradsher ("Ms. Bradsher"), at his law office. When he became district attorney, Mr. Bradsher hired Ms. Bradsher to work as support staff in his district attorney's office.

In 2013, Craig Blitzer ("Mr. Blitzer"), was a criminal defense attorney in private practice considering running for district attorney for Prosecutorial District 17A, composed solely of Rockingham County, just west of District 9A. Like Mr. Bradsher, Mr. Blitzer's wife, Cindy Blitzer ("Cindy or Ms. Blitzer"), worked at his law firm in private practice. Mr. Blitzer was aware that Ms. Bradsher worked for Mr. Bradsher in the neighboring prosecutorial district and Mr. Blitzer hired his wife to work on his support staff in his district attorney's office. He asked Mr. Bradsher whether he had any issues employing his wife at the district attorney's office and Mr. Bradsher said he did not.

Mr. Blitzer did run for the district attorney seat and was elected in 2014. Ms. Blitzer was close to finishing nursing school, but quit school to help Mr. Blitzer with his campaign. After taking office, Mr. Blitzer hired Ms. Blitzer to work for him in his district attorney's office.

The North Carolina Administrative Office of the Courts ("AOC") soon noticed both Mr. Blitzer and Mr. Bradsher had employed their wives in their respective offices. Margaret Wiggins ("Ms. Wiggins"), AOC's Human Resources Officer, emailed both Mr. Bradsher and Mr. Blitzer on 8 January 2015, and informed each that hiring their wives violated the anti-nepotism laws of the State Ethics Act and they were not permitted

to do so. Ms. Wiggins suggested they seek a waiver from the State Ethics Commission if they wanted to continue to employ their own wives.

As a result of the information from Ms. Wiggins, Mr. Bradsher sought a waiver of the State Ethics Act from the Commission so he could continue Ms. Bradsher's employment. Mr. Bradsher and Mr. Blitzer were told they could not employ their own wives while awaiting a decision on a waiver request. Mr. Bradsher suggested, as an interim solution, that he and Mr. Blitzer could hire each other's wife as an employee. Both hoped the employment change would be temporary. Mr. Bradsher sought approval from Ms. Wiggins who, after consulting with counsel for AOC, approved the plan because it did not violate the Act.

The Bradshers and the Blitzers met at a restaurant to discuss the plan. At the meeting, Mr. Blitzer told Mr. Bradsher that Ms. Blitzer wanted to return to school to complete her nursing degree eventually. Mr. Bradsher said he would try to help Ms. Blitzer finish her nursing degree at a community college.

Ms. Bradsher quit her job in district 9A and was hired in district 17A. At the same time, Ms. Blitzer quit her job in district 17A and was hired in district 9A. As an employee of Mr. Bradsher, Ms. Blitzer initially worked in a secondary office located in Caswell County, which was closer to the Blitzers' residence in Rockingham County. Her supervisor was an assistant district attorney, John Stultz III ("Mr. Stultz"), who was in charge of that office. As her supervisor, Mr. Stultz was responsible for approving Ms. Blitzer's hours in BEACON, the timekeeping and payroll system used by AOC. Ms. Blitzer would submit her hours worked in BEACON for Mr. Stultz's approval.

Five weeks after beginning work at the District 9A Caswell office, Ms. Blitzer decided the office arrangement was unacceptable. She testified that she "had no space to work[,]" lacked a computer, and that the commute was too long. She discussed these issues with Mr. Stultz and with her husband, Mr. Blitzer. She asked Mr. Blitzer to discuss the issue with Mr. Bradsher. At trial, she testified her husband said he spoke with Mr. Bradsher and he said she could work out of the Rockingham County office of Prosecutorial District 17A while still being employed by District 9A. She testified she was happy about the change because the new location "was air conditioned and cool in that office and there was a desk and an office for [her] to work in with a computer[,]" and "it was much closer to home[.]" She testified she was also permitted to work at home if needed.

Ms. Blitzer testified that, while she was working in the Caswell office, she would "go to the courtroom with Mr. Stultz and [] speak to

victim witnesses, basically anything Mr. Stultz needed [her] to do." As part of her job responsibilities, both before and after the change, Ms. Blitzer was asked to work on cases that District 17A had transferred to 9A because of conflicts of interest that prevented Mr. Blitzer from working on them. One of her responsibilities was a "conflict case" involving an infant homicide called the Shockley case. Mr. Stultz was the attorney assigned to the Shockley case. Ms. Blitzer testified she organized the "extensive" evidence for the Shockley case.

The summer of 2015, the State Ethics Commission informed Mr. Bradsher the State Ethics Act's anti-nepotism laws were not waivable. Ms. Bradsher soon resigned from Mr. Blitzer's office and took a new job at a local community college. When Ms. Bradsher resigned, Mr. Blitzer hired Tyler Henderson ("Mr. Henderson"). Although he was employed by District 17A, Mr. Blitzer assigned Mr. Henderson to work in District 9A exclusively on 9A matters. Mr. Blitzer did not supervise Mr. Henderson's work. Ms. Blitzer, meanwhile, was still employed by District 9A but working in 17A.

Sometime in 2015, an assistant district attorney in Mr. Blitzer's office told the State Bureau of Investigation ("SBI") that Ms. Blitzer was not working the hours she said she was and the SBI began investigating. Mr. Blitzer learned about the investigation in December 2015, but did not tell his wife or Mr. Bradsher about it. The 2015 investigation was quickly dropped, but a subsequent internal SBI investigation did not explain why.

Mr. Stultz asked Mr. Bradsher to reassign the Shockley case in August 2015 and Mr. Bradsher took over the case himself. In early March 2016, Mr. Bradsher and Mr. Henderson went to the District 17A office, where Ms. Blitzer worked, to get the Shockley case file from her in order to prepare the case for trial. Mr. Blitzer testified that he told Mr. Bradsher about the 2015 SBI investigation that day. According to Mr. Blitzer, Mr. Bradsher told him to vary Ms. Blitzer's time by entering vacation and sick time. Time records produced by AOC and introduced at trial however, indicated that the only varied hours entered by Ms. Blitzer occurred between 21 January and 17 February 2016. Mr. Blitzer testified that Ms. Blitzer worked the hours entered into BEACON until the Shockley case file was taken in March 2016, but after that, Ms. Blitzer "had nothing to do." Although Ms. Blitzer testified she tried to call Mr. Bradsher about having nothing to do, she did not recall whether she left a message and did not recall sending him any text messages. She then testified she thought she probably did leave him a message but did not remember what she said and afterward solely relied on her husband to communicate with Mr. Bradsher.

Ms. Blitzer had always planned to return to school to complete her nursing degree. Ms. Blitzer learned that, despite Mr. Bradsher's efforts, she would not be able to complete her nursing degree at Person Community College as he had suggested, because, after she completed the required testing, they wanted her to retake almost half the curriculum she had already completed before she withdrew from her previous program. Ms. Blitzer was unwilling to do so. She began exploring other ways to finish her degree and chose to apply to an accelerated nursing program which required her to retake some classes. Ms. Blitzer began online courses while still employed by District 9A and working in District 17A. Mr. Blitzer directed two of his employees to help Ms. Blitzer complete the online courses by logging into Ms. Blitzer's online account and helping her complete homework and a test during work hours.

In April 2016, soon after the Shockley case file was taken by Mr. Bradsher, Ms. Blitzer enrolled in a full-time nursing program at South University physically located in High Point, North Carolina, while still being employed by the State. She took courses there four days a week. Although she was not working during this time, Ms. Blitzer continued entering hours into BEACON as though she was working. The time records introduced at trial showed she continued to do so until she left her position.

Mr. Blitzer testified that, during April 2016, he and Mr. Bradsher traveled together to a statewide meeting of the Conference of District Attorneys in Ocracoke, North Carolina. During the drive to the meeting, Mr. Blitzer told Mr. Bradsher, "[Ms. Blitzer] ha[d] no work because you took the Shockley case and no one is calling her back as to what to do." Mr. Blitzer testified that Mr. Bradsher's "response was to just have her concentrate on school and he'd get back with her." Mr. Blitzer testified Ms. Blitzer never received any further work from Mr. Bradsher after that conversation. He testified that, to the best of his knowledge, his wife was still inputting hours as if she were working. He testified he did not bring the issue up again with Mr. Bradsher until October 2016.

Mr. Blitzer further testified he and his wife were experiencing financial difficulties that were not resolved during this time and that they still needed Ms. Blitzer's paycheck. Ms. Blitzer testified she continued to submit hours without working because "[she] needed a job and we had bills to pay." Mr. Blitzer acknowledged their financial difficulties contributed to his decision not to say anything about "this nonwork issue" to Mr. Bradsher.

In April 2016, the assistant district attorney who originally reported a problem with Ms. Blitzer's hours to the SBI again reported to the

SBI that Ms. Blitzer was attending school during work hours. The SBI opened a new investigation led by SBI Agent David Whitley ("Agent Whitley"). Agent Whitley interviewed two 17A assistant district attorneys about Ms. Blitzer's work hours and another SBI agent watched Ms. Blitzer attend classes at South University during work hours.

Mr. Blitzer learned about the new SBI investigation in June 2016 and, although he consulted an attorney, he did not tell Ms. Blitzer or Mr. Bradsher about the investigation. Agent Whitley contacted Mr. Bradsher and they had a phone conversation during which Agent Whitley told Mr. Bradsher about the complaint regarding Ms. Blitzer's payment for hours not worked and they also arranged a time for Agent Whitley to interview Mr. Bradsher on 6 September 2016.

Mr. Bradsher called Mr. Stultz into his office on 15 August 2016 and told him the SBI was investigating Ms. Blitzer's hours. Mr. Stultz mistakenly believed he was no longer required to approve Ms. Blitzer's hour submissions on BEACON and had not done so since March 2016. He told Mr. Bradsher he could approve the hours Ms. Blitzer had submitted since his last approval, but before doing so he asked Mr. Bradsher if Ms. Blitzer was still doing the shared-employee program. Mr. Bradsher responded that she was. Mr. Stultz logged onto BEACON and approved the hours.

Agent Whitley interviewed Mr. Bradsher on 6 September 2016 in Mr. Bradsher's office and told him the SBI was investigating whether Ms. Blitzer was working the hours she claimed. Agent Whitley testified that Mr. Bradsher told him that Ms. Blitzer worked on conflict cases with Mr. Stultz, did special projects assigned by Mr. Bradsher, and helped with District 17A matters under a shared-employee program arranged between the two districts and modeled after a federal shared-employee program between state prosecutors and federal U.S. Attorney offices. Agent Whitley testified that Mr. Bradsher said Ms. Blitzer worked under that program as an employee of 17A while working in 9A.

During the interview, Mr. Bradsher identified for Agent Whitley employees who worked or had contact with Ms. Blitzer. Agent Whitley asked for additional information about the special projects Mr. Bradsher said he assigned Ms. Blitzer, but Mr. Bradsher told Agent Whitley he could not recall further details. Mr. Bradsher said he would check with Ms. Blitzer, but Agent Whitley told him not to contact her. At trial, Ms. Blitzer testified she had never been assigned any special projects. Agent Whitley testified the "overall impression [Mr. Bradsher] gave [him] was that [Ms. Blitzer] was working[,]" but his impression was not tied to any particular statement made by Mr. Bradsher. He testified that if Mr.

Bradsher provided information showing Ms. Blitzer was working, the investigation would have been shorter. The investigation continued into 2017, with Agent Whitley interviewing Mr. Bradsher's employees over several weeks to determine the extent to which Ms. Blitzer was working.

The Blitzers they contacted Mr. Bradsher in October 2016 and Ms. Blitzer said she wanted to resign following media scrutiny of her employment. The Blitzers both testified Mr. Bradsher told Ms. Blitzer not to resign. The Blitzers also both testified Mr. Bradsher told Ms. Blitzer to keep entering hours into BEACON and that he would tell investigators she had been working on special projects. Ms. Blitzer testified she continued to submit time for hours she never worked.

Gayle Peed ("Ms. Peed"), Mr. Bradsher's administrative assistant, testified that on 24 October 2016, Mr. Bradsher directed her to call Ms. Blitzer and fire her effective that day because Ms. Blitzer would not speak with him. She did so. Ms. Peed also testified that, at Mr. Bradsher's instruction, she responded to an email from AOC regarding Ms. Blitzer's time record. Ms. Peed testified that Ms. Blitzer never responded to a request to verify her hours and that, according to Mr. Bradsher's direction, the reply email informed AOC that "[Mr. Bradsher and she] couldn't certify [Ms. Blitzer's] time because [Ms. Blitzer] was under investigation."

Mr. Blitzer did not give a statement to Agent Whitley until May 2017. Mr. Blitzer pleaded guilty to misdemeanor failure to discharge duties, repaid the State for $48,000 for the money Ms. Blitzer had wrongfully accrued, consented to suspension of his law license, and agreed to cooperate in the civil and criminal cases against Mr. Bradsher. In exchange, the State agreed to decline any further prosecution of either of the Blitzers for any crimes related to Ms. Blitzer's employment.

A grand jury returned a bill of indictment on 24 October 2017 against Mr. Bradsher with seven counts, charging him with conspiracy to obtain property by false pretenses, failure to discharge his duties, two counts of obtaining property by false pretenses, and three counts of obstructing justice. Mr. Bradsher was tried on the charges on 29 May 2018 in Superior Court, Wake County.

During the State's case, the trial court excluded testimony from Ms. Peed as hearsay, which ruling Mr. Bradsher challenges on appeal. After the State rested, Mr. Bradsher moved to dismiss each count based on insufficiency of evidence. The trial court denied his motion to dismiss. Mr. Bradsher declined to present his own evidence. At the close of all evidence, Mr. Bradsher renewed his motion to dismiss, which was again denied.

On 18 June 2018, the jury found Mr. Bradsher not guilty of conspiracy to commit the offense of obtaining property by false pretenses and one count of obstructing justice, but found him guilty of failure to discharge his duties, felony obstruction of justice based on the provision of false information to Agent Whitley, misdemeanor obstruction of justice based on the provision of false information to Mr. Stultz, obtaining property by false pretenses based on the theory of acting in concert, and aiding and abetting the obtaining of property by false pretenses. The trial court arrested judgment on the count of obtaining property by false pretenses based on the theory of acting in concert, due to double jeopardy concerns. The trial court entered judgment on the count of aiding and abetting obtaining property by false pretenses. The trial court sentenced Mr. Bradsher to 4 to 14 months imprisonment for the aiding and abetting conviction, consolidated the charges of felony obstruction of justice, misdemeanor obstruction of justice, and failure to discharge duties, and sentenced him to a term of 6 to 17 months, which was suspended for 24 months of supervised probation pending the submission of a DNA sample imposed based on those charges. Mr. Bradsher appeals.

II. Analysis

Defendant Bradsher argues four issues on appeal: (1) "[t]he State failed to prove [Defendant] impeded, delayed, and obstructed the investigation by intentionally making false statements to Agent Whitley on 6 September 2016"; (2) "[t]he trial court erred in excluding [Ms.] Peed's testimony about [Defendant]'s statements"; (3) "[t]he trial court plainly erred in failing to instruct the jury on the specific false representations alleged in the indictment"; and (4) "[t]he State failed to establish [Defendant] personally committed or acted in concert to commit obtaining property by false pretenses."

A. Obstruction of Justice

[1] Defendant argues the trial court erred in denying his motion to dismiss the charge of felony obstruction of justice for insufficient evidence on the grounds that "the State failed to prove Defendant impeded, delayed, and obstructed the investigation by intentionally making false statements to Agent Whitley on 6 September 2016." After reviewing the arguments and the record, we agree.

"At common law it is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice. If common law obstruction of justice is done 'with deceit and intent to defraud' it is a felony." *State v. Ditenhafer*, 373 N.C. 116, 128, 834 S.E.2d 392, 400 (2019). "The elements of common law felonious obstruction of justice

are: (1) the defendant unlawfully and willfully; (2) obstructed justice; (3) with deceit and intent to defraud." *State v. Cousin*, 233 N.C. App. 523, 537, 757 S.E.2d 332, 342-43 (2014) (cited in *Ditenhafer*, 373 N.C. at 128, 834 S.E.2d at 400).

Defendant argues the State failed to produce any evidence of the obstructive act alleged in the indictment. Our Supreme Court has long held that "[i]t is error, generally prejudicial, for the trial judge to permit a jury to convict upon a theory not supported by the bill of indictment." *State v. Brown*, 312 N.C. 237, 248, 321 S.E.2d 856, 863 (1984); *see also Ditenhafer*, 373 N.C. at 126, 834 S.E.2d at 399 (declining to consider any of the defendant's acts not specifically alleged in indictment). Count V of the indictment alleged that Defendant "commit[ted] the infamous offense of obstruction of justice by knowingly and intentionally providing false and fabricated statements to [Agent] Whitley . . . designed to mislead the agent thereby impeding, delaying and obstructing the investigation, and legal and public justice." Defendant argues that the State failed to introduce any evidence showing Mr. Bradsher made any specific false or fabricated statement and, instead, that Agent Whitley testified the conversation merely left him with the "overall impression" that Ms. Blitzer was actually working. The State argues that Mr. Bradsher's statements to Agent Whitley that Ms. Blitzer "worked on conflict cases" and that Ms. Blitzer "worked on special projects" that "he had assigned to her" were false.

Without specifying a particular time period, the statement that Ms. Blitzer "worked on conflict cases" was not false. Although the statement omits that Ms. Blitzer had not worked on a conflict case for five months at the time of the conversation, that makes the statement at most misleading, not false. Because the indictment did not allege Mr. Bradsher obstructed justice through an omission, but through false or fabricated statements, we cannot consider this statement.

There is, however, conflicting evidence about whether Mr. Bradsher's statement to Agent Whitley that Ms. Blitzer "worked on special projects" assigned by Mr. Bradsher was false. Mr. Bradsher claimed to Agent Whitley that Ms. Blitzer worked on special projects, but the Blitzers both denied that she did. When asked by Agent Whitley what special projects Ms. Blitzer worked on, Mr. Bradsher could not recall details. Taking the evidence in the light most favorable to the State, we assume Mr. Bradsher's statement was false.

Even assuming the statement was false, however, the State must still show Defendant Bradsher "obstructed justice" through the false statement. The State argues, relying on *State v. Cousin*, 233 N.C. App. 523,

757 S.E.2d 332 (2014), that "when persons knowingly provide false statements to law enforcement, they obstruct justice." In *Cousin*, this Court held that the evidence supported a conviction for obstruction of justice where the defendant gave eight written statements to law enforcement in connections with a homicide identifying various alternating persons as the killer. *Id.* at 530-31, 757 S.E.2d at 338-39. The detective "testified as to the significant burden imposed on the investigation," including following up with each person and determining they each had an alibi and were not present at the scene of the crime. *Id.* at 531, 757 S.E.2d at 339.

In the present case, Agent Whitley testified his "investigative path" was to document any work Ms. Blitzer "may have actually done." Agent Whitley testified he sought in the interview with Mr. Bradsher "to answer some basic questions: where [Ms.] Blitzer was located, who her supervisor was, what type of work she did, that type of thing." Agent Whitley followed up with several employees Ms. Blitzer had worked with, a process that took a "couple of weeks." He acknowledged his follow-up interviews with Ms. Blitzer's co-workers were based on Mr. Bradsher's truthful response to the question of which people she had worked and interacted with, not any misstatement he made. Agent Whitley did not testify he specifically asked Mr. Bradsher if Ms. Blitzer was currently working—he merely testified the interview left him with that "general impression." Although Mr. Bradsher's statement about special projects may have been misleading, there is no evidence it changed Agent Whitley's "investigative path" or extended his investigation beyond what it would have ordinarily taken. This is short of the burden imposed by the defendant's false statements in *Cousin* and does not show actual obstruction of the investigation.

The State alternatively argues that "[o]bstruction occurs whenever a person acts intentionally to hinder justice." However, this is not a correct statement of the law. To support a conviction for obstruction of justice, the State must establish substantial evidence for every element of the crime, including that the act in question "obstructed justice[.]" *Cousin*, 233 N.C. App. at 537, 757 S.E.2d at 342-43. We hold the State did not provide substantial evidence of obstruction to support the conviction for felony obstruction of justice in this case.

B. Exclusion of Ms. Peed's Testimony about Mr. Bradsher's Statements

[2] Defendant next argues the trial court erred in excluding Ms. Peed's testimony about his statements to her as hearsay. At trial, Mr. Bradsher sought to elicit testimony from Ms. Peed, his administrative assistant, about an email sent to AOC based on Mr. Bradsher's instruction not to

certify Ms. Blitzer's last set of hours, when Ms. Blitzer did not respond to an inquiry about whether the hours were valid. Defendant contends the email tended to show he did not know that Ms. Blitzer was submitting false hours in her BEACON entries.

The following exchange occurred on cross-examination of Ms. Peed by Mr. Bradsher:

> [Mr. Bradsher]: Okay. Do you recall, on a form tendered by AOC, the District 9A's position about approving [Ms. Blitzer's] hours and [Ms. Blitzer's] lack of response?
>
> [Prosecutor]: Objection.
>
> THE COURT: Sustained
>
> . . .
>
> [Mr. Bradsher]: All right. And after you received [an email from AOC], what did you reply, that you recall?
>
> [Peed]: That I had not received – we had not received any response from Cindy Blitzer and she was under investigation and so we couldn't –
>
> [Prosecutor]: Objection[.]

At that point, the trial court excused the jury for voir dire of Ms. Peed. Ms. Peed responded to the prosecutor's question about the source of the information in the email as follows:

> After I talked with Mr. Bradsher – I showed him the email that [AOC] sent. Initially, the first time it was sent, [Mr. Bradsher] told me to email Ms. Blitzer and see if we could get her to certify those hours. Some time later [AOC] sent the email back again asking for a response, and . . . I took that to [Mr. Bradsher] and said, "Cindy Blitzer never responded." And [Mr. Bradsher] told me to tell [AOC] we couldn't certify the time because [Ms. Blitzer] was under investigation. So[,] I answered the email in that way.

Ms. Peed agreed that "[i]t was not [her] decision to send this email of [her] own volition and [her] decision as to what [she] w[as] going to put in the email; it was based upon the direction of [Mr. Bradsher][.]" Mr. Bradsher argued Ms. Peed's testimony about the content of the email was permissible alternatively because it fell under the business record exception, and because the State opened the door because the prosecutor asked Ms. Peed about other statements Mr. Bradsher made to her. He

also said the statement was "not hearsay." The trial court held that the message to AOC was hearsay and did not admit it.

" 'Hearsay' is 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." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2019). On appeal, Defendant argues the trial court erred in excluding the testimony because the statement was not hearsay as it was testimony of a direction or command. He argues Ms. Peed's testimony about Defendant's statements to her are not hearsay because they are directions. Defendant cites *State v. Mitchell*, 135 N.C. App. 617, 619, 522 S.E.2d 94, 95 (1999), in which this Court held directions, commands, and suggestions are not hearsay because "they are simply offered to prove that the directive was made, not to prove the truth of any matter asserted therein."

We note the State contends Defendant's argument that Ms. Peed's testimony is not hearsay because it is a direction is not preserved. To preserve an argument regarding the admissibility of evidence, a party "must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2019). The State argues that Defendant never argued before the trial court that the statement was not hearsay because it was a direction. The State acknowledged Defendant's assertion that the statement was "not hearsay," but argues he did not explain this statement further at trial and later conceded it was hearsay because he wanted to admit the statement to show "the truth of what happened."

Defendant in turn argues that his statement at trial that the challenged testimony was "not hearsay" was sufficient to preserve the argument that it was a command for appeal because "Mr. Bradsher alerted the trial court to the theory of admissibility he raises on appeal and thereby preserved the issue for appellate review."

After reviewing the trial transcript, we hold Defendant's argument is not preserved. In arguing for admission of the testimony, Defendant does in passing state the testimony is "not hearsay," but he does not explain why and the basis of the argument is not apparent from the circumstances. In context, Defendant makes the following arguments:

> Your honor, first of all, I think [the statement] could fall within a business record exception.
>
> Second of all, the State, in issue of fundamental fairness, has asked Ms. Peed other statements that I have made.

> In an attempt to clarify and cross-examine what the State has raised, I believe, even if deemed hearsay, this would be admissible.
>
> I also contend to the court in [cross-examination of an AOC staff member], I specifically addressed this in cross-examination. And her response, not in response to any question, was, "If such document exists." So that has been put out in front of the jury through a State's witness in cross-examination of [the employee] about first the effect of BEACON, the effect of the approval of BEACON and then specifically about the nonresponse.
>
> Ms. Blitzer has testified. She indicated she did not respond to that email. And I contend, first of all, that it's not hearsay.
>
> Yes, this is a unique case because I am being charged for conduct in the official capacity as district attorney. And it is alleged that this has been obtained property by false pretenses. And as part of a regular business communication between the A[dministrative]A[ssistant] of District 9A and AOC, the administrative assistant transfers this information, I contend that it is admissible, Your Honor.

It is not clear from Defendant's argument at trial what he means by "it's not hearsay." Defendant begins by arguing for a business record exception and that the State opened the door. He then says it is not hearsay before again arguing it falls under the business record exception. Based on the transcript, it seems likely Defendant was referring exclusively to whether the statement fell under the business record exception, particularly since he made no argument it was not hearsay as a command or under another theory. At no point does he argue the statement was admissible as a direction or a command.

The transcript also suggests that others did not understand it that way. The prosecutor only responded by arguing that the business record exception did not apply, that it did not matter that it occurred during the regular course of business, and that it was not relevant. Finally, although the trial court made a thorough ruling, it did not specifically respond to an argument that the statement was not hearsay because it was a command, instead ruling that it was irrelevant whether it was made in Defendant Bradsher's official capacity and that it was not subject to a business record exception.

"[Our] Court[s] ha[ve] long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit

parties to swap horses between courts in order to get a better mount . . . ." *State v. Sharpe*, 344 N.C. 190, 473 S.E.2d 3 (1996) (citation omitted). The purpose of preservation rules "is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal." *State v. Canady*, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991). In *Sharpe*, our Supreme Court held that where the defendant had made arguments for admissibility under two hearsay exceptions before the trial court, the State responded only to those arguments, and the trial court expressly ruled on admissibility only under those grounds, then the defendant could not argue a new ground on appeal. *Sharpe*, 344 N.C. at 195, 473 S.E.2d at 5-6. While Defendant's statement that Ms. Peed's testimony was "not hearsay" is ambiguous, all parties focused on whether the statement was admissible as a business record. Defendant's statement did not adequately call the trial court's attention to the argument he now presents on appeal: that the statement was not hearsay because it was a command. We therefore hold this argument is not preserved for appellate review.

C. Jury Instruction

[3] Defendant also argues the trial court plainly erred by "failing to instruct the jury on the specific false representations alleged in the indictment." We note Defendant has "specifically and distinctly" contended that the error at issue was plain error, as is required for this Court to review instructional or evidentiary issues not otherwise preserved on appeal. N.C. R. App. P. 10(a)(4) (2019). Our Supreme Court has clarified the standard of review for plain error as follows:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 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." Moreover, because plain error is to be "applied cautiously and only in the exceptional case," the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations omitted). "In deciding whether a defect in the jury instruction constitutes 'plain error', the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983) (citation omitted).

In the present case, Defendant argues the trial court erred in failing to instruct the jury on what the particular false representations alleged in the indictments were. The State alleged two counts of obtaining property by false pretenses. On the first count, the allegation was that Mr. Bradsher and co-conspirators "submitted fraudulent entries of hours worked for Cindy Blitzer" to AOC. On the other count, the State had to prove "Cindy Blitzer submitted fraudulent entries of hours worked for Cindy Blitzer" to AOC.

In *State v. Locklear*, 259 N.C. App. 374, 816 S.E.2d 197 (2018), on which Defendant relies, this Court reasoned and held that "[b]ecause 'a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment,' and 'the state must prove . . . that [the] defendant made the misrepresentation as alleged,' it only makes sense that the trial court must instruct the jury on the misrepresentation as alleged in the indictment." *State v. Locklear*, 259 N.C. App. 374, 383, 816 S.E.2d 197, 204 (2018) (alterations and internal citations omitted). However, "[a] jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds 'no variance between the indictment, the proof presented at trial, and the instructions to the jury.' " *State v. Ledwell*, 171 N.C. App. 314, 320, 614 S.E.2d 562, 566 (2005) (citation omitted).

In *Locklear*, the misrepresentation alleged in the indictment was "filing a fire loss claim under the defendant's home owner insurance policy, when in fact the defendant had intentionally burned her own residence." *Id.* at 383-84, 816 S.E.2d at 205. The evidence presented at trial, however, included additional misrepresentations the defendant made to the insurance company. The jury convicted the defendant of obtaining property by false pretenses but acquitted the defendant of setting fire to her home. Based on these conflicting verdicts, this Court held it was likely the jury would have reached a different result had the instruction on the specific misrepresentation been given and held the trial court plainly erred in failing to do so.

On appeal, Defendant argues that, as in *Locklear*, the jury's verdicts along with the evidence of multiple false representations made at trial, show that had the trial court given the instruction regarding the misstatements alleged, the jury would likely have acquitted Defendant of the charges of obtaining property by false pretenses. Defendant identifies two assertions he argues were "false representations" the State advanced at trial to support the obtaining property by false pretenses charges that were not the false representation alleged in the indictment, that Ms. Blitzer submitted fraudulent hours to AOC: (1) "[Mr.] Stultz

approved [Ms. Blitzer's] fraudulent hours;" and (2) "Mr. Bradsher continued to employ [Ms. Blitzer] knowing she was not working or knowing she worked on 17A matters while employed by 9A." The State contends it did not in fact produce evidence of multiple false statements at trial. Rather, the State argues that the statements Defendant claims were evidence of false statements were in fact statements the State contended were true. Thus, according to the State, there was no variance between the false statements alleged in the indictment and the evidence produced at trial, and the jury could not have relied on those alternative statements to determine Defendant obtained property by false pretenses.

First, Defendant argues that one of the alternative statements the State proffered at trial is that Mr. Stultz approved fraudulent hours to the AOC on behalf of Ms. Blitzer. Although, as discussed below, this action was insufficient evidence of Mr. Bradsher's presence at the scene of Ms. Blitzer's crime under an acting in concert theory, it does not follow that the State was advancing an alternative false representation when it alleged Mr. Bradsher urged Mr. Stultz to approve Ms. Blitzer's hours.

Defendant also argues that the State advanced the following allegation as an alternative false representation supporting Defendant's conviction: that Mr. Bradsher "falsely held out Ms. Blitzer as his employee when she actually worked for her husband". In support of this argument, Defendant cites only the following statement made by the prosecutor in the State's closing argument: "I would submit to you that [Mr. Bradsher] does make a representation by her continued employment and having his employees continue to release her time for a period of time to AOC." The prosecutor did not argue this alleged representation was false. To the contrary, the evidence presented at trial showed that Mr. Bradsher acknowledged that Ms. Blitzer was his employee and that all the work she performed as an employee was in the service of Mr. Bradsher's office. Thus, this lone statement cannot serve as an alternative "false representation" to satisfy the obtaining property by false pretenses requirement.

The State further contends that "[i]f any other uncharged false pretenses were discussed at trial, they are irrelevant, because Mr. Bradsher does not maintain that juror confusion about any other false pretenses prejudiced him." Although Defendant argues the State improperly seeks to narrow the field of alternative false statements that could give rise to the jury's verdicts, Defendant makes no other argument as to what these statements might be. "It is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005); *see* N.C. R. App. P. 28(b)(6) (2019) ("Assignments of error not set out in the appellant's brief, or in

support of which no reason or argument is stated or authority cited, will be taken as abandoned."). Therefore, we do not consider any statements besides those argued by Defendant in his brief on appeal. We hold the trial court did not err, nor plainly err, in failing to give an instruction about the misrepresentation alleged in the indictment.

D. Obtaining Property by False Pretenses

[4] Defendant also argues the trial court erred in denying his motion to dismiss the charge of obtaining property by false pretenses based on the theory of "acting in concert." As an initial matter, we note the trial court arrested the verdict on this charge after the jury returned verdicts for two counts of obtaining property by false pretenses. For an appeal to be properly before this Court, the appeal must arise from a final judgment entered by the trial court.

"In certain cases, 'an arrest of judgment does . . . have the effect of vacating the verdict,' but 'in other situations an arrest of judgment serves only to withhold judgment on a valid verdict which remains intact.' " *State v. Reeves*, 326 N.C. App. 570, 575, 721 S.E.2d 317, 321 (2012) (quoting *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990)).

In *Pakulski*, our Supreme Court explained this distinction:

> When judgment is arrested because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment, the verdict itself is vacated and the state must seek a new indictment if it elects to proceed again against the defendant. However, we hold that when judgment is arrested on predicate felonies in a felony murder case to avoid a double jeopardy problem, the guilty verdicts on the underlying felonies remain on the docket and judgment can be entered if the conviction for the murder is later reversed on appeal, and the convictions on the predicate felonies are not disturbed upon appeal.

Pakulski, 326 N.C. at 439, 390 at 132; *see also Reeves*, 218 N.C. App. at 575, 721 S.E.2d at 321 ("Whether a verdict has been vacated will determine whether the arrested judgment serves as a final judgment, thus making its appeal before this Court proper."). In *Reeves*, this Court applied *Pakulski* and held that a conviction of reckless driving that was arrested because it was "used to enhance the DWI [conviction]" was a final judgment and thus properly before this Court because it was arrested to avoid double jeopardy concerns and "remain[ed] on the docket and could be revisited on remand." *Reeves*, 218 N.C. App. at 576, 721 S.E.2d at 322.

In the present case, Defendant was indicted on two counts of obtaining property by false pretenses. Count II, in both the arguments made by the State and the instructions given to the jury, was based on a theory of "acting in concert." Count III, on the other hand, was predicated on a theory of aiding and abetting. The jury returned verdicts of guilty on both counts. At trial, the State suggested the trial court should arrest judgment on one of the obtaining property by false pretenses counts "considering the factual allegations." The trial court did arrest judgment on Count II and entered judgment on Count III, the aiding and abetting count. In its brief, the State acknowledges that "[t]he trial court arrested judgment on this count, because the same conduct supported both false-pretenses convictions." It appears from the record that the trial court arrested the verdict to avoid double jeopardy concerns. Therefore, the guilty verdict "remain[s] on the docket and judgment can be entered if the conviction [for the aiding-and-abetting count] is later reversed on appeal[.]" *Pakulski*, 439-40, 390 S.E.2d at 132; *see also Reeves*, 218 N.C. App. at 576, 721 S.E.2d at 322. Because the arrest of judgment on Count II was entered to avoid double jeopardy concerns and thus did not vacate the underlying verdict, Defendant's appeal is from a final judgment and is properly before this Court.

[5] Defendant argues the trial court erred in denying his motion to dismiss because "[t]he State failed to establish Mr. Bradsher personally committed or acted in concert to commit obtaining property by false pretenses[.]" In reviewing the denial of a defendant's motion to dismiss for sufficiency of the evidence, "the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549-50 (2018) (citations and internal quotation marks omitted). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *Id.* at 492, 809 S.E.2d at 550 (citation omitted). We hold there was insufficient evidence to support a conviction for obtaining property by false pretenses based on theory of acting in concert. We vacate the conviction of obtaining property by false pretenses.

Our Supreme Court has defined the elements of the crime of obtaining property by false pretenses in N.C. Gen. Stat. § 14-100 as follows: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d

277, 286 (1980) (citation omitted). The State may establish a person is guilty of the crime either because he personally committed the offense or because he "acted in concert" to commit it. In the present case, the State did not argue Defendant personally committed all the elements of the offense; therefore, the State was required to show Defendant "acted in concert."

Our Supreme Court has noted

> the principle of concerted action need not be overlaid with technicalities. It is based on the common meaning of the phrase "concerted action" or "acting in concert." To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose. These terms mean the same in the law of crimes as they do in ordinary parlance.

State v. Joyner, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979) (internal citation omitted). Thus,

> [i]t is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle *so long as he is present at the scene of the crime* and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

Id. at 357, 255 S.E.2d at 395 (emphasis added). "A defendant's presence at the scene may be either actual or constructive. A person is constructively present during the commission of a crime if he is close enough to provide assistance if needed and to encourage the actual execution of the crime." *State v. Gaines*, 345 N.C. 647, 675-76, 483 S.E.2d 396, 413 (1997) (internal citations omitted).

In the present case, Defendant argues, relying on *Gaines*, *State v. Greenlee*, 227 N.C. App. 133, 741 S.E.2d 498 (2013) and *State v. Zamora-Ramos*, 109 N.C. App. 420, 660 S.E.2d 151 (2008) that the State did not show "Mr. Bradsher's actual or constructive presence when [Ms. Blitzer] entered fraudulent hours in BEACON[,]" because "[n]o evidence demonstrated Mr. Bradsher was with [Ms. Blitzer] or otherwise actually present when [Ms. Blitzer] submitted her fraudulent hours[, t]here was no evidence of Mr. Bradsher's constructive presence when [Ms.Blitzer] entered her hours in Rockingham County[,]" and "[n]othing suggested

Mr. Bradsher was communicating with [Ms. Blitzer] by phone or email when [Ms. Blitzer] submitted the fraudulent hours."

The State, in turn, argues Mr. Bradsher was constructively present because he "was close enough to help Ms. Blitzer defraud the State" and "actually did help her . . . . by tricking his employee, Mr. Stultz, into logging into B[EACON] and approving her hours." Furthermore, the State argues Mr. Bradsher was "close enough to encourage Ms. Blitzer to defraud the State" and "actually did so" by 'telling Mr. Blitzer to have her 'concentrate on school.' " In response to Defendant's argument that Mr. Bradsher was not close enough to assist Ms. Blitzer, the State argues that "Mr. Bradsher's proximity to Ms. Blitzer is irrelevant[,]" because "[c]onstructive presence turns on whether Mr. Bradsher was operationally close enough to help her, not on his 'actual distance' from her." The State also argues it is "irrelevant that Mr. Bradsher might not have helped or encouraged Ms. Blitzer immediately before or after she submitted her hours[,]" because the crime at issue was a "continuing act" that Mr. Bradsher "encouraged."

After reviewing the record and the caselaw cited in the briefs, we hold the State did not establish actual or constructive presence and, therefore, there is insufficient evidence to establish Defendant committed the crime of obtaining property by false pretenses based on the theory of acting in concert.

As an initial matter, the State did not argue at trial or on appeal that Mr. Bradsher was actually present when Ms. Blitzer logged false hours in BEACON. Therefore, the State must show constructive presence, which requires showing that Mr. Bradsher "[wa]s close enough to provide assistance if needed and to encourage the actual execution of the crime." *Gaines*, 345 N.C. at 675-76, 483 S.E.2d at 413 (citation omitted). The criminal conduct alleged is obtaining property by false pretenses—the false pretenses alleged in count II in the bill of indictment being the submission of "fraudulent entries of hours worked for [Ms.] Blitzer to the State of North Carolina, Administrative Office of the Courts in Wake County, North Carolina, indicating the fact that she was entitled to be compensated for hours that [Mr. Bradsher] and his co-conspirators knew [she] had not worked." The record shows Ms. Blitzer submitted the falsified hours through BEACON from her work location in an office of the 17A district attorney's office in Rockingham County. As Mr. Bradsher argues, he was not physically present or anywhere near this office when Ms. Blitzer inputted her hours; rather, he was at his own office in District 9A. Moreover, there is no evidence in the record to suggest Mr. Bradsher

was in contact by phone or email to lend help or encouragement to Ms. Blitzer when she submitted the hours.

The State argues Mr. Bradsher was "close enough to help" Ms. Blitzer and he "actually did help her . . . . by tricking his employee, Mr. Stultz, into logging into B[EACON] and approving her hours." Although the record does show Mr. Bradsher told Mr. Stultz to approve the hours, that alone does not satisfy the requirement for constructive presence. Mr. Stultz's approval of the hours came long after and far away from the "actual execution of the crime" alleged in the indictment— that is, Ms. Blitzer's submission of falsified hours at her computer in Rockingham County. Although Mr. Bradsher's conversation with Mr. Stultz may have helped cover up that crime, the actual series of acts at issue had already been completed elsewhere. Thus Mr. Bradsher's acts did not help Ms. Blitzer in the actual execution of the offense. Any help Mr. Bradsher provided after the fact by justifying her hours to Mr. Stultz was too remote in both time and distance to support Defendant Bradsher's constructive presence "to provide assistance if needed and to encourage the actual execution of the crime." *Gaines*, 345 N.C. at 675-76, 483 S.E.2d at 413.

The State concedes Mr. Bradsher was not "near her or in contact with her" when Ms. Blitzer entered the fraudulent hours. Nevertheless, the State argues in its brief that "Mr. Bradsher's proximity to Ms. Blitzer is irrelevant"—that "[c]onstructive presence turns on whether Mr. Bradsher was operationally close enough to help her, not on his 'actual distance' from her." The State cites *State v. Barnes*, 91 N.C. App. 484, 487, 372 S.E.2d 352, 354 (1988), *aff'd as modified*, 324 N.C. 539, 380 S.E.2d 118 (1989) (per curiam), in support of its contention. The State's reliance on *Barnes* is misplaced.

In *Barnes*, the defendant and several others were paid by the defendant's uncle to go to the house of the uncle's former girlfriend and "rough her up" and to "rough up" her boyfriend if he "got in the way." *Id.* at 486, 372 S.E.2d at 353. Two of the men approached the house while the defendant and another man stayed back. The two men assaulted the girlfriend and her boyfriend, but the boyfriend escaped and was caught by the defendant, who fired a gun ordering the boyfriend to return to the house with him and the other man. The trial testimony indicated the defendant was waiting either "down the road" or "five or six yards" from the house. The defendant was convicted of burglary based on the theory of acting in concert.

On appeal, the defendant argued the trial court erred in not dismissing the charge because he was not "present" when the other two assailants broke into the house. This Court held the State satisfied the

requirement of constructive presence, noting that whether the defendant was five or six yards away or down the road, he was close enough to provide assistance by firing a gun to halt the fleeing victim. *Id.* at 487-88, 372 S.E.2d at 354. In so holding, the *Barnes* Court said "this Court has held that actual distance is not determinative, but that 'the accused must be near enough to render assistance if need be and to encourage the actual perpetration of the crime.' " *Id.* at 487, 372 S.E.2d at 354 (citation omitted).

The State turns the rule stated in *Barnes* on its head by arguing that physical proximity is "irrelevant" to the question of constructive presence. *Barnes* makes clear that, while actual distance is not always "determinative" as to whether a defendant is present, such that a defendant some physical distance away can still be constructively present, actual distance remains highly relevant. There, this Court expressly noted the defendant was either five or six yards away or, at most, down the road, and the testimony at trial demonstrated he was physically close enough to render assistance, because he did so at the time of the actual perpetration of the crime, just after the house was broken into and as the assault on the occupants was occurring. In contrast, in the present case, Defendant Bradsher was not even in the same county when Ms. Blitzer recorded her false hours. Holding Defendant was near enough to give assistance and encouragement to Ms. Blitzer at that time, as the State requests in arguing "proximity is irrelevant to the question of constructive presence," would sever the "presence" requirement from the theory of acting in concert.

The circumstances in the case before this Court are analogous to *State v. Greenlee*, 227 N.C. App. 133, 741 S.E.2d 498 (2013), where this Court held a motion to dismiss a charge for acting in concert to obtain property by false pretenses was improperly denied where there was no evidence the "defendant was present, nearby, *or even in the same county*." 227 N.C. App. 133, 138, 741 S.E.2d 498, 502 (2013) (emphasis added). In that case, the false pretense and the criminal act at issue involved the sale of stolen goods at pawn shops. *Id.* The State attempts to distinguish *Greenlee* by arguing that, here, "when Mr. Bradsher assisted Ms. Blitzer's crime, he was actually closer to the scene of the crime in Wake County, where the fraud culminated, than Ms. Blitzer was herself." As we have previously discussed, Mr. Bradsher's instructions to Mr. Stultz were too remote in distance and time to satisfy the requirement of constructive presence. Even so, the relevant "scene of the crime" for purposes of the presence requirement is not where the "fraud culminated" but where the "actual execution of the crime" occurred—the scene where the

criminal acts at issue were perpetrated.[1] In this case, that is Rockingham County, where Ms. Blitzer submitted the fraudulent work hours.

The State also attempts to distinguish *Greenlee* by arguing that "unlike here, there was no suggestion that the defendant could have assisted remotely in the crimes at issue." Presumably, the "remote assistance" to which the State refers is Mr. Bradsher's ability to call, text, or email Ms. Blitzer if there was a problem in submitting hours.[2] But our courts have not held the actor's mere ability to contact or be contacted by another for assistance while the act was being committed was sufficient to show the other's constructive presence at the scene when the crime was actually committed. Indeed, in *State v. Zamora-Ramos*, this Court held there was insufficient evidence to support a conviction for trafficking in cocaine by transportation based on the theory of acting in concert even where the defendant "maintained telephone conduct with [the actor] during the commission of the crime," because "[t]he State did not produce any evidence that defendant was close enough during the commission of the crime to provide assistance to [the actor] if needed or to encourage the actual execution of the crime." *State v. Zamora-Ramos*, 190 N.C. App. 420, 425-26, 660 S.E.2d 151, 155 (2008). In the present case, there is no evidence that Mr. Bradsher engaged in contact of any kind with Ms. Blitzer when she was actually executing the crime. To hold the theory of acting in concert would be satisfied merely where "remote assistance" is possible would broadly expand the universe of criminal conduct under this theory.

Finally, the State argues Ms. Blitzer engaged in "successive acts of misrepresentation [that] were in essence a continuing act" and, therefore, it is irrelevant that Mr. Bradsher might not have helped or encouraged Ms. Blitzer when she submitted the hours. In support of this contention, the State cites *State v. Williams*, in which this Court held a continuous pattern of food stamp fraud could be considered a "continuous act" and thus reach the monetary threshold for a felony. 101 N.C. App. 412, 415,

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1. *State v. Louchheim*, 296 N.C. 314, 250 S.E.2d 630 (1979), on which the State relies, established only that Wake County is a permissible venue for prosecution of obtaining property by false pretenses where some overt acts in furtherance of a conspiracy to defraud a state agency occurred there—not that it is the *only* permissible venue in such a case, nor that such location would even qualify as a "scene of the crime" for purposes of the theory of acting in concert, as distinguished from conspiracy.

2. To the extent those acts were assistance, they were, as discussed above, too remote in both distance and time from the act to satisfy the requirement that the defendant be "close enough to provide assistance if needed and to encourage the actual execution of the crime." *Gaines*, 345 N.C. at 675-76, 483 S.E.2d at 413.

399 S.E.2d 348, 350 (1991). *Williams* is inapposite, however, because it interprets N.C. Gen. Stat. § 108A-53, the statute criminalizing food stamp fraud and, specifically, at which level the conduct covered can be treated as a felony. Although food stamp fraud involves a kind of false representation, it is a distinct offense from obtaining property by false pretenses. More fundamentally, it is not relevant to what constitutes the "execution of the crime" for purposes of the theory of acting in concert. Holding that acts committed anytime in the time period between discrete acts over many days would satisfy the requirement for constructive presence renders the presence requirement meaningless, particularly when combined with the State's argument regarding physical distance.

Because there is insufficient evidence to show Defendant Bradsher was constructively present when Ms. Blitzer inputted the fraudulent hours, we hold the trial court erred in denying Defendant's motion to dismiss the charge of obtaining property by false pretenses based on the theory of acting in concert.

III. Conclusion

We hold the trial court erred in denying Defendant's motion to dismiss for insufficient evidence as to the charge of felony obstruction of justice based on allegations of false statements made to Agent Whitley because the State did not provide substantial evidence of obstruction to support the conviction. Next, we hold Defendant did not preserve his argument that Ms. Peed's testimony was not hearsay because it was a command. We further hold the trial court did not err in its jury instructions. Finally, we hold the trial court erred in denying Defendant's motion to dismiss the charge of obtaining property by false pretenses based on the theory of acting in concert because there is insufficient evidence that Defendant was constructively present when Ms. Blitzer inputted the fraudulent hours. Therefore, we vacate the trial court's judgment as to the offense of felony obstruction of justice. We also vacate the judgment of obtaining property by false pretenses based on a theory of acting in concert, which the trial court had arrested. We remand this case to the trial court to resentence Defendant based on the charges of misdemeanor obstruction of justice and failure to discharge duties that it had consolidated with the felony obstruction of justice charge which we have vacated.

NO ERROR IN PART, VACATED IN PART AND REMANDED.

Judges DIETZ and YOUNG concur.

STATE OF NORTH CAROLINA
v.
DESHANDRA VACHELLE COBB, DEFENDANT

No. COA19-681

Filed 31 December 2020

1. Search and Seizure—vehicle checkpoint—reasonableness—public concern

An order denying defendant's motion to suppress evidence of driving while impaired (DWI) obtained at a police checkpoint was vacated and remanded for further findings where, in addressing defendant's argument that the checkpoint violated her Fourth Amendment rights, the order failed to adequately consider the three factors from *Brown v. Texas*, 443 U.S. 47 (1979). Specifically, the trial court failed to make any findings concerning the gravity of the public concern served by the seizure and failed to consider all of the circumstances relating to the degree to which the seizure advanced the public interest.

2. Appeal and Error—preservation of issues—not raised at hearing—no automatic preservation

Defendant's argument that the trial court erred by concluding that a police checkpoint complied with N.C.G.S. § 20-16.3A(a)(2a)'s written policy requirement was not preserved for appellate review where she did not make the argument at her motion to suppress (MTS) hearing—and instead pursued a constitutional argument. The trial court's order denying defendant's MTS was based on constitutional grounds, not statutory grounds, and the Court of Appeals rejected defendant's argument that, because the trial court concluded that the checkpoint authorization form complied with the statutory requirement, the issue was automatically preserved because it concerned "whether the judgment is supported . . . by the findings of fact and conclusions of law" (Appellate Rule 10(a)(1)).

Judge STROUD dissenting.

Appeal by Defendant from judgment entered 11 February 2019 by Judge Claire V. Hill in Harnett County Superior Court. Heard in the Court of Appeals 21 January 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kindelle McCullen, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for Defendant.

BROOK, Judge.

Deshandra Vachelle Cobb ("Defendant") appeals from judgment entered upon plea of guilty to driving while impaired. On appeal, Defendant argues that the trial court erred in denying her motion to suppress because a checkpoint violated her Fourth Amendment rights. She also argues that the checkpoint was not conducted pursuant to the requirements of N.C. Gen. Stat. § 20-16.3A(a)(2a). After careful review, we vacate the trial court's order and remand for further proceedings consistent with this opinion.

I. Factual Background and Procedural History

On 28 August 2016 at approximately 12:15 a.m., Defendant approached a checkpoint in Harnett County. As she rolled down her window, a trooper detected a strong odor of alcohol. The trooper asked Defendant if she had had anything to drink, and she replied that she had two Grey Goose shots at the bar. The trooper asked that she step out of the car, noticed that she was unsteady on her feet, and performed field sobriety tests on her. Defendant refused a portable breath test and was placed under arrest for driving while impaired. She subsequently submitted a breath sample indicating that her blood alcohol content was .11. Defendant was charged by citation with one count of driving while impaired and one count of reckless driving.

Defendant initially pleaded guilty in district court on 11 October 2018, and the State dismissed the reckless driving charge that same day; Defendant appealed to superior court on 18 October 2018. On 6 February 2019, Defendant filed a motion to suppress, arguing that the checkpoint was unconstitutional and did not comply with N.C. Gen. Stat. § 20-16.3A. The motion came on for hearing before the Honorable Claire V. Hill in Harnett County Superior Court on 11 February 2019.

At the hearing on the motion to suppress, Sergeant John Bobbitt, a member of the State Highway Patrol ("SHP"), testified about the 28 August 2016 checkpoint. He testified that he supervised the checkpoint, which was conducted pursuant to a written plan in the form of a "HB-14[,]" or a checking station authorization form. The form indicated that the checkpoint was located at "NC 24" in Harnett County and its purpose was to check for valid driver's licenses and evidence of impairment. Sgt. Bobbitt testified that the troopers operating the checkpoint

were in uniform, wearing reflective vests and flashlights, and that at least two vehicles had their blue lights on to indicate that there was a checkpoint ahead.

When asked how the checkpoint's location was chosen, Sgt. Bobbitt testified that

> [i]t's a safe area for that amount of troopers to get out at one time to check driver's licenses. It's an area that . . . needs to be worked more often and we check when we -- it's an area four. It's a rural part of the county. That's just one place that is pretty good for us to get out and . . . a place to put our cars, plus other vehicles; other cars.

He could not recall when he decided to set up the checkpoint, or how much time elapsed between deciding to set up and assembling the checkpoint.

Judge Hill denied Defendant's motion to suppress in open court that same day and by written order on 3 April 2019. The trial court made the following pertinent findings of fact and conclusions of law:

> 4. That on or about August 28, 2016, the SHP was operating a checking station on or about NC 24 at NC 27[,] a public street or highway located in Harnett County, North Carolina.
>
> 5. Sergeant John Bobbitt with the SHP was the supervisor in charge of the above-referenced checking station.
>
> . . .
>
> 8. Sgt. Bobbitt completed the HP-14 which is the SHP Checking Station Authorization form.
>
> 9. S[gt]. Bobbitt signed as the "authorizing supervisor signature" on the above-referenced form.
>
> 10. The above-referenced form complied with the statutory and other regulatory requirements regarding checking stations.
>
> 11. S[gt]. Bobbitt testified that this location was not located far from NC 87 and that he chose the location.
>
> 12. Checking stations had been previously conducted at this location approximately 4-5 times.
>
> . . .

14. Sgt. Bobbitt did not recall the specific discussion that was had regarding setting up this checking station due to the lapse of time [between Defendant's arrest and the motion to suppress hearing].

15. Sgt. Bobbitt was the supervisor of the checking station and did participate in the checking station. Four other troopers participated in the checkpoint.

16. The public concern addressed with this particular checking station was the public safety in confirming motorists were in compliance and not violating any Chapter 20 Motor Vehicle Violation.

17. This purpose was noted on HP-14 which was admitted into evidence that noted that this was a Standard Checking Station for Chapter 20 enforcement to include, at a minimum, checking each driver stopped for a valid driver's license and evidence of impairment. The time of the operation of the station was 12:15 am to 2:00 am.

18. The checking station as it was operated advanced the public concern and was reasonable.

19. The seizure was short in time for most drivers [ ] since most drivers were stopped for less than one minute.

20. At least two SHP vehicles with blue lights were on at all times during the time that the checking station was authorized.

. . .

23. The participating members were wearing their SHP uniforms with reflective vests and utility flashlights.

24. The checking station could be observed from any direction of approach from one-tenth up to one-half a mile and there was adequate time to observe the checking station and come to a stop when a motorist was traveling at the posted speed limit.

25. The location of this checking station was a short distance to Highway 87 and three county lines making it a major thoroughfare into and out of the county. The road is heavily travelled at times. The location was approximately 7 miles from Lee County line, 10 miles from Moore County line and 10 miles from Cumberland County line.

> 26. The checking station plan was followed.
>
> 27. Traffic did back up some but not extreme and every vehicle that approached this checking station was checked.
>
> 28. If drivers had their license and registration the stop lasted one minute or less.
>
> . . . [T]he Court concludes as a matter of law that:
>
> 1. The plan was reasonable and the checking station did not violate the Defendant's U.S. or N.C. constitutional rights.
>
> 2. The checking station as it was operated advanced the public concern and was reasonable.
>
> 3. Enforcement of the motor vehicle laws is a legitimate public purpose and promotes public safety.
>
> 4. The short amount of time that the checking station potentially interfered with an individual's liberty was not significant.

On 11 February 2019, Defendant pleaded guilty to driving while impaired, preserving her right to appeal the denial of her motion to suppress. Judge Hill sentenced Defendant to 60 days' imprisonment, suspended upon 12 months of unsupervised probation.

Defendant entered written notice of appeal on 25 February 2019.

II. Analysis

On appeal, Defendant argues that the trial court erred in denying her motion to suppress. Defendant first argues that the checkpoint violated her Fourth Amendment rights. She further argues that there was no evidence and the trial court made no findings that the checkpoint was conducted pursuant to a written policy, as required by N.C. Gen. Stat. § 20-16.3A(a)(2a).

A. Standard of Review

Our review of a trial court's denial of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "[T]he trial court's unchallenged

findings of fact are binding on appeal." *State v. Ramseur*, 226 N.C. App. 363, 366, 739 S.E.2d 599, 602 (2013). "This Court reviews conclusions of law stemming from the denial of a motion to suppress *de novo*. . . . 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. Borders*, 236 N.C. App. 149, 157, 762 S.E.2d 490, 498-99 (2014) (citation omitted).

B. The Checkpoint's Constitutionality

i. Governing Case Law

The Fourth Amendment to the United States Constitution and Article 1, Section 20 of the North Carolina Constitution protect against unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. A checkpoint constitutes a seizure and therefore must comply with the Fourth Amendment to pass constitutional muster. *State v. Mitchell*, 358 N.C. 63, 66, 592 S.E.2d 543, 545 (2004). "When considering a challenge to a checkpoint, the reviewing court must undertake a two-part inquiry to determine whether the checkpoint meets constitutional requirements." *State v. Veazey*, 191 N.C. App. 181, 185, 662 S.E.2d 683, 686 (2008).

"First, the court must determine the primary programmatic purpose of the checkpoint." *Id.* Checking for valid driver's licenses, vehicle registration violations, and evidence of impairment are lawful "primary purpose[s]" for a checkpoint." *Id.*; *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 121 S. Ct. 447, 452, 148 L. Ed. 2d 333, 341 (2000). "However, . . . a checkpoint whose primary purpose is to find any and all criminal violations is unlawful, even if police have secondary objectives related to highway safety." *Veazey*, 191 N.C. App. at 189, 662 S.E.2d at 689.

"Second, if a court finds that police had a legitimate primary programmatic purpose for conducting a checkpoint, . . . the court must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances." *Id.* at 185-86, 662 S.E.2d at 686-87 (alterations, citation, and marks omitted).

> To determine whether a checkpoint was reasonable under the Fourth Amendment, a court must weigh the public's interest in the checkpoint against the individual's Fourth Amendment privacy interest. In *Brown v. Texas*, the United States Supreme Court held that when conducting this balancing inquiry, a court must weigh (1) the gravity of the public concerns served by the seizure, (2) the

> degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty. If, on balance, these factors weigh in favor of the public interest, the checkpoint is reasonable and therefore constitutional.

Id. at 186, 662 S.E.2d at 687 (internal alterations, citations, and marks omitted) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357, 362 (1979)).

"Under the first *Brown* prong, the trial court [is] required to assess the gravity of the public concerns served by the seizure." *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690 (citation and marks omitted). "This factor is addressed by first identifying the primary programmatic purpose [of the checkpoint] and then assessing the importance of the particular stop to the public." *State v. Rose*, 170 N.C. App. 284, 294, 612 S.E.2d 336, 342 (2005) (internal citation omitted). In *State v. McDonald*, 239 N.C. App. 559, 570, 768 S.E.2d 913, 921 (2015), our Court warned against collapsing "the gravity of the public concern" assessment into the "permissible purpose" inquiry, noting "the identification of such a purpose does not exempt the trial court from determining the gravity of the public concern actually furthered under the circumstances surrounding the specific checkpoint being challenged."

Federal and state case law demonstrate how this inquiry should and should not work. On the one hand, in *Illinois v. Lidster*, 540 U.S. 419, 427, 124 S. Ct. 885, 891, 157 L. Ed. 2d 843, 852 (2004), the checkpoint not only had a permissible purpose but also the "relevant public concern was grave[:] . . . to help find the perpetrator of a specific and known crime[.]" On the other hand, in *Veazey* and *McDonald*, this Court held that this first prong was not met when the trial court failed to make any findings that "*specifically* addresse[d] the strength of the public interest in the *particular checkpoint* at issue[,]" emphasizing that the inquiry is individual-circumstances driven. *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690 (emphasis added); *McDonald*, 239 N.C. App. at 570, 768 S.E.2d at 921.

"After assessing the public interest, the trial court [is] required to assess the degree to which the seizure advance[s] the public interest." *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690 (citation and marks omitted). In other words, the trial court must "determine whether the police appropriately tailored their checkpoint stops to fit their primary purpose." *State v. Nolan*, 211 N.C. App. 109, 121, 712 S.E.2d 279, 287 (2011) (alterations, citation, and internal marks omitted).

> Our Court has previously identified a number of non-exclusive factors that courts should consider when determining whether a checkpoint is appropriately tailored, including: whether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected.

Veazey, 191 N.C. App. at 191, 662 S.E.2d at 690.

In *Veazey*, we held that the "trial court's written findings on the second *Brown* prong raise[d] concerns regarding whether the checkpoint was tailored to achieve its purported objectives" when the only relevant findings were:

> 4. The checking station was set up in a safe location, however, Trooper Carroll was unaware of any specific problems with unlicensed drivers or motor vehicle law violations at this location.
>
> 22. Trooper Carroll testified that he used his training and experience and exercised his discretion regarding: the location of this checking station, when the checking station should start, and how long it should last or when it should end.

Id. at 192, 662 S.E.2d at 690 (alterations omitted). We noted the same concerns in *McDonald* when "the trial court's order failed to address (1) why the intersection . . . was chosen for the [c]heckpoint; (2) whether the [c]heckpoint had a predetermined starting or ending time; and (3) whether there was any reason why that particular time span was selected." 239 N.C. App. at 571, 768 S.E.2d at 921.

For the third *Brown* prong, "the trial court [is] required to assess the severity of the interference with individual liberty occasioned by the checkpoint." *Veazey*, 191 N.C. App. at 192, 662 S.E.2d at 690 (internal marks and citation omitted). "[C]ourts have consistently required restrictions to the discretion of the officers conducting the checkpoint to ensure that the intrusion on individual liberty is no greater than is necessary to achieve the checkpoint's objectives." *Id.*, 662 S.E.2d at 691.

> Courts have previously identified a number of non-exclusive factors relevant to officer discretion and

> individual privacy, including: the checkpoint's potential interference with legitimate traffic; whether police took steps to put drivers on notice of an approaching checkpoint; whether the location of the checkpoint was selected by a supervising official, rather than by officers in the field; whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern; whether drivers could see visible signs of the officers' authority; whether police operated the checkpoint pursuant to any oral or written guidelines; whether the officers were subject to any form of supervision; and whether the officers received permission from their supervising officer to conduct the checkpoint. Our Court has held that these and other factors are not "lynchpins," but instead are circumstances to be considered as part of the totality of the circumstances in examining the reasonableness of a checkpoint.

Id. at 193, 662 S.E.2d at 691 (internal alterations, citations, and marks omitted).

"[I]n order to pass constitutional muster, [ ] orders [on motions to suppress in the checkpoint context] must contain findings and conclusions sufficient to demonstrate that the trial court has meaningfully applied the three prongs of the test articulated in *Brown*." *McDonald*, 239 N.C. App. at 571, 768 S.E.2d at 921. Without such findings and conclusions, it is impossible to weigh the public interest against the individual's privacy interest. *See Veazey*, 191 N.C. App. at 186, 662 S.E.2d at 687. And, when an order fails to contain findings that support the conclusion that the checkpoint was reasonable, the trial court on remand must "explain why it concluded that, on balance, the public interest in the checkpoint outweighed the intrusion on [the d]efendant's protected liberty interests." *Id.* at 194-95, 662 S.E.2d at 692; *see also McDonald*, 239 N.C. App. at 571, 768 S.E.2d at 921 ("[W]e must vacate the trial court's order and remand so that the trial court can make appropriate findings as to the reasonableness of the [c]heckpoint under the Fourth Amendment."); *Rose*, 170 N.C. App. at 298-99, 612 S.E.2d at 345 (remanding for further findings where trial court addressed only first prong and part of third prong).

ii. Application

[1] Defendant concedes and we agree that the trial court correctly determined that the checkpoint had a legitimate primary purpose. The trial court found that the purpose of the checkpoint was to check "each

driver stopped for a valid driver's license and evidence of impairment[,]" both of which are lawful programmatic purposes. *See Edmond*, 531 U.S. at 37-38, 121 S. Ct. at 452. However, the trial court did not adequately weigh the three *Brown* factors and thus could not assess whether the public interest in this checkpoint outweighed its infringement on Defendant's Fourth Amendment privacy interests.

As for the first factor, the gravity of the public concern served by the seizure, the trial court failed to make any findings that assessed "the importance of the particular stop to the public." *Rose*, 170 N.C. App. at 294, 612 S.E.2d at 342. The trial court made ample findings as to there being a permissible general purpose for the checking station, finding that

> 16. The public concern addressed with this particular checking station was the public safety in confirming motorists were in compliance and not violating any Chapter 20 Motor Vehicle Violation.
>
> 17. This purpose was noted on HP-14 which was admitted into evidence that noted that this was a Standard Checking Station for Chapter 20 enforcement to include, at a minimum, checking each driver stopped for a valid driver's license and evidence of impairment.

But these findings and the order more broadly fail to "specifically address[ ] the strength of the public interest in the particular checkpoint at issue." *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690. Like in *McDonald*, the trial court focused on "a permissible purpose" to the exclusion of "determining the gravity of the public concern *actually* furthered under the circumstances surrounding the *specific* checkpoint being challenged." 239 N.C. App. at 570, 768 S.E.2d at 921 (emphases added).

With regard to the second prong of the *Brown* test, the degree to which the seizure advanced the public interest, the trial court made the following pertinent findings:

> 11. S[gt]. Bobbitt testified that this location was not located far from NC 87 and that he chose the location.
>
> . . .
>
> 14. Sgt. Bobbitt did not recall the specific discussion that was had regarding setting up this checking station due to the lapse of time [between Defendant's arrest and the motion to suppress hearing].
>
> . . .

> 17. . . . The time of the operation of the station was 12:15 am to 2:00 am.
>
> . . .
>
> 25. The location of this checking station was a short distance to Highway 87 and three county lines making it a major thoroughfare into and out of the county. The road is heavily travelled at times. The location was approximately 7 miles from Lee County line, 10 miles from Moore County line and 10 miles from Cumberland County line.

Though these written findings address certain factors that this Court has previously noted are relevant to whether the checkpoint was appropriate tailored, the order lacks a consideration of other relevant factors. For instance, the trial court's order does not touch upon whether the checkpoint was set up on a whim or whether it had a "predetermined" start and end time.[1] *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690. Moreover, while the trial court found that the checkpoint was set up at a "major thoroughfare" that was "heavily traveled at times[,]" that only partly answers the question of why that location was chosen. *Id.* at 192, 662 S.E.2d at 690 ("[The officer] was unaware of any specific problems with unlicensed drivers or motor vehicle law violations at this location."). And it does nothing to address why that particular time span was chosen. *Id.* at 191, 662 S.E.2d at 690.

Turning to the final *Brown* prong, the severity of the interference with individual liberty, the trial court's findings reflect a thorough consideration of the relevant factors. The trial court identified "a number of non-exclusive factors relevant to officer discretion and individual privacy, including:" that the checkpoint minimally interfered with traffic, officers activated their blue lights to put other drivers on notice of the checkpoint, the location was chosen by Sgt. Bobbitt rather than officers in the field, officers stopped every vehicle that passed through the checkpoint, officers wore their uniforms and reflective vests as a visible sign of authority, officers operated the checkpoint pursuant to the written guidelines set forth in HP-14, and Sgt. Bobbitt supervised the checkpoint. *See id.* at 193, 662 S.E.2d at 691.

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1. Though the checking station authorization form indicates the time was predetermined, the trial court failed to explicitly find so. *See McDonald*, 239 N.C. App. at 570, 768 S.E.2d at 920-21 ("While it appears that evidence was received at the suppression hearing as to many of the factors that are relevant under the *Brown* test, the trial court's order lacks express findings on a number of these issues.").

Despite this, the order reflects "that the trial court has [not] meaningfully applied the three prongs of the test articulated in *Brown*." *McDonald*, 239 N.C. App. at 571, 768 S.E.2d at 921. Though the court addressed the third *Brown* prong, it made no findings regarding the gravity of the public concern (the first prong) and failed to consider all of the circumstances relating to the degree to which the seizure advanced the public interest (the second prong). Given this, as in *Veazey*, the "trial court's written findings tend to weigh in favor of a conclusion that the checkpoint was an unreasonable detention." 191 N.C. App. at 194, 662 S.E.2d at 692. "The trial court therefore was required to explain why it concluded that, on balance, the public interest in the checkpoint outweighed the intrusion on Defendant's protected liberty interests." *Id.* at 194-95, 662 S.E.2d at 692. "Accordingly, we remand for further factual findings . . . and a weighing of [the pertinent] factors to determine whether the checkpoint was reasonable." *Rose*, 170 N.C. App. at 297, 612 S.E.2d at 345.

C. The Checkpoint's Compliance with N.C. Gen. Stat. § 20-16.3A(a)(2a)

[2] Defendant next argues that the trial court erred in finding and concluding that the checkpoint complied with N.C. Gen. Stat. § 20-16.3A(a)(2a)'s written policy requirement. The State argues this was not preserved for our review. We agree with the State.

As a general matter, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Here, Defendant's motion to suppress argued that "the checkpoint as constituted [ ] did not conform with [N.C. Gen. Stat. § 20-16.3A], et seq. and as such the stop was illegal[.]" Defendant did not pursue this statutory argument at the motion to suppress hearing, however, instead focusing exclusively on her constitutional arguments. More to the point, while mentioning N.C. Gen. Stat. § 20-16.3A generally in her motion, Defendant did not make plain at any point that the thrust of her statutory argument focused on subsection (a)(2a) and its requirement that checkpoints must "[o]perate under a written policy[.]" N.C. Gen. Stat. § 20-16.3A(a)(2a) (2019). As the written policy argument was not specifically "brought to the court's attention," it was not preserved pursuant to the general rule. *State v. Smith*, 267 N.C. App. 364, 368, 832 S.E.2d 921, 925 (2019).

Defendant argues her challenge falls within an exception to the general rule that automatically preserves "whether the judgment is supported . . . by the findings of fact and conclusions of law" if that issue is

properly raised in appellant's brief. N.C. R. App. P. 10(a)(1). Defendant rightly notes that trial court's finding of fact 10 is, in part, a legal conclusion that "[t]he [checking station authorization] form complied with the statutory . . . requirement regarding checking stations[,]" *see In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) ("[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." (internal citations omitted)), and one that lacks factual support in the order. But, the unsupported conclusion in finding of fact 10, standing alone, cannot change the fact that the order, like the suppression hearing, focused on the previously discussed constitutional issues. At bottom, this is a judgment denying the motion to suppress on constitutional, not statutory (and certainly not written policy), grounds. This case is thus distinguishable from instances where our Court has reviewed issues preserved through this means of automatic preservation. *See*, *e.g.*, *Anderson Chevrolet/Olds*, *Inc. v. Higgins*, 57 N.C. App. 650, 653-54, 292 S.E.2d 159, 161 (1982) (challenge to whether findings of intent supported conclusion of contract formation preserved where judgment turned in pertinent part on those issues).

Therefore, Defendant's challenge to the conclusion of law contained in finding of fact 10 is not preserved for our review.

III. Conclusion

While Defendant's statutory argument is not preserved for our review, her constitutional argument is properly before us. On the strength of that argument and for the reasons stated above, we vacate the trial court's order denying Defendant's motion to suppress and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Chief Judge McGEE concurs.

Judge STROUD dissents by separate opinion.

STROUD, Judge, dissenting.

I respectfully dissent as to the majority's resolution of Defendant's constitutional issue because the trial court's order made findings of fact sufficient to permit appellate review and the trial court correctly addressed "the three prongs of the test articulated in *Brown* [*v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979)]." *State v. McDonald*,

239 N.C. App. 559, 571, 768 S.E.2d 913, 921 (2015). The trial court's findings support the conclusion that the checking station was reasonable. The majority essentially considered all of the issues *de novo*. Using the proper standard of review, I would conclude the trial court did not err by denying Defendant's motion to suppress. However, I agree with the majority that Defendant failed to preserve the issue of the checkpoint's compliance with North Carolina General Statute § 20-16.3A(a)(2a) for review. I would therefore affirm the trial court's order.

Our review of a trial court's denial of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "Unchallenged findings of fact are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review." *State v. Stanley*, 259 N.C. App. 708, 711, 817 S.E.2d 107, 110 (2018) (quoting *State v. Warren*, 242 N.C. App. 496, 498, 775 S.E.2d 362, 364 (2015), *aff'd per curiam*, 368 N.C. 756, 782 S.E.2d 509 (2016)).

Defendant argues "[t]he trial court erred by denying [Defendant's] motion to suppress because the checkpoint violated [Defendant's] Fourth Amendment rights. The checkpoint was set up on a whim, the discretion of officers conducting the checkpoint was insufficiently limited, and the public interest did not outweigh the intrusion on [Defendant's] privacy[.]" Defendant does not challenge any of the findings of fact as unsupported by the evidence, so they are binding on appeal. *Id.* Instead, Defendant argues the findings were not sufficient to support the trial court's "conclusion that the checkpoint was reasonable" because the findings did not address "the gravity of the public interest served by the checkpoint." Defendant compares this case to *State v. Veazey*, 191 N.C. App. 181, 662 S.E.2d 683 (2008). But *Veazey* is easily distinguished from this case.

In *Veazey*, the trooper testified to several different purposes of the checkpoint, and the trial court announced oral findings but did not enter a written order with findings of fact and conclusions of law until about five months after the notice of appeal.[1] 191 N.C. App. at 184, 662 S.E.2d

1. Some of the issues in *Veazey* arose from the differences between the trial court's findings and conclusions as rendered in open court and the written order, entered after defendant had already given notice of appeal. 191 N.C. App. at 184, 662 S.E.2d at 685. "The trial court issued a final written order denying Defendant's motion to suppress on 19 November 2007, more than five months after Defendant's plea and the trial court's entry of judgment. However, in contrast to the trial court's prior oral findings of fact, the trial

at 685. This Court determined that the trial court's finding as to purpose was simply a recitation of the Trooper's testimony and did not resolve the factual issue:

> Given these concerns and the variations in Trooper Carroll's testimony, the trial court was required to make findings regarding the actual primary purpose of the checkpoint and it was required to reach a conclusion regarding whether this purpose was lawful. However, in its 26 February 2007 oral findings, the trial court merely found that "[Trooper Carroll] [s]aid the purpose of the checkpoint was to—for license checks, make sure persons were observing the motor vehicle statutes, State of North Carolina." This finding simply recites two of Trooper Carroll's stated purposes for the checkpoint and is not an independent finding regarding the actual primary purpose. Without such a finding, the trial court could not, and indeed did not, issue a conclusion regarding whether the primary purpose of the checkpoint was lawful. Similarly, the findings in the trial court's 19 November 2007 written order simply recite Trooper Carroll's testimony regarding the checkpoint's purpose. The written order contains no independent finding regarding the primary purpose of the checkpoint, and it contains no conclusion addressing the lawfulness of the primary purpose.

Id. at 190-91, 662 S.E.2d 683, 689 (2008) (alteration in original) (citation omitted).

In this case, the trial court entered a written order with detailed findings of fact addressing the issues raised by Defendant's motion to suppress and argument at the hearing and made the appropriate

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court's written findings characterized Trooper Carroll's testimony as containing admissions that the checkpoint was a 'generalized checking station,' and that Trooper Carroll had significant discretion regarding the operation of the checkpoint. Despite these findings, however, the trial court concluded:

> 1. That Trooper Carroll complied with the requirements for conducting a checking station.
>
> 2. The evidence obtained need not be suppressed.

The trial court also voided Defendant's prior oral notice of appeal on the ground that it was entered prior to the trial court's entry of a final written order denying Defendant's motion to suppress. Defendant filed a new notice of appeal on 19 November 2007 from the trial court's final written order denying his motion to suppress." *Id.* at 184, 662 S.E.2d at 685.

conclusions of law. Some of the findings were recitations of testimony, such as Finding No. 11, "Sergeant Bobbitt testified that this location was not located far from NC 87 and that he chose the location." But the findings overall are sufficiently detailed that they make the trial court's resolution of the issues clear. This case did not have the discrepancies in the testimony or confusion regarding the order presented in *Veazey*, 191 N.C. App. 181, 662 S.E.2d 683.

At the hearing on the motion to suppress, Defendant acknowledged that the primary purpose of the checking station was lawful: "And step one is the purpose, the primary purpose. And that primary purpose is to check licenses. We don't disagree with they got to the primary purpose, step one." In *Veazey*, this Court noted that checking drivers' licenses is a lawful primary purpose. 191 N.C. App. at 189, 662 S.E.2d at 689 (2008) ("North Carolina Courts have also upheld checkpoints designed to uncover drivers' license and vehicle registration violations." (citing *State v. Mitchell*, 358 N.C. 63, 592 S.E.2d 543 (2004))).

After determining the primary purpose of the checking station is lawful, the trial court is required to follow the three-prong inquiry set out in *Brown v. Texas* 443 U.S. 47, 61 L. Ed. 2d 357 (1979):

> Under the first *Brown* prong, the trial court was required to assess "the gravity of the public concerns served by the seizure." Both the United States Supreme Court as well as our Courts have suggested that "license and registration checkpoints advance an important purpose[.]" The United States Supreme Court has also noted that states have a "vital interest" in ensuring compliance with other types of motor vehicle laws that promote public safety on the roads.

Veazey, 191 N.C. App. at 191, 662 S.E.2d at 690 (citations omitted).

As I have already noted, Defendant has not challenged any findings as unsupported by the evidence. Instead, Defendant argues the trial court should have made more findings or more detailed findings. But as long as the trial court's findings address the requirements for the checkpoint adequately to allow appellate review, they are sufficient. The trial court found that the purpose of the checking station was to check for "a valid driver's license and evidence of impairment." The trial court further found this "checking station as it was operated advanced the public concern . . . ." I conclude these findings do take into consideration "the gravity of the public interest served by the checkpoint" and support the conclusion that the checking station was reasonable.

Defendant next argues the "conclusion that the checkpoint was reasonable was unsupported by any findings showing that the checkpoint was appropriately tailored to serve the public interest, particularly where the evidence showed that the checkpoint was set up on a whim." This Court has identified several non-exclusive factors in determining the second *Brown* prong including:

> whether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected.

Veazey, 191 N.C. App. at 191, 662 S.E.2d at 690.

Defendant focuses on testimony regarding the decision of the exact location for the checkpoint but overlooks the rest of the evidence. Sgt. Bobbitt testified that the place was chosen based upon traffic, a location near the county line, a clear sight distance, and a safe place for cars to be pulled off the road. The trial court's findings address the factors Sgt. Bobbitt considered, including proximity to main roads and other counties. The checkpoint had a predetermined start and end time. These findings support the trial court's conclusion that the stop was reasonable.

Defendant next argues the "conclusion that the checkpoint was reasonable failed to account for the intrusion on [Defendant's] privacy interest due to the unfettered discretion of officers in the field."

> Finally, the trial court was required to assess "the severity of the interference with individual liberty" occasioned by the checkpoint. In general, " '[t]he circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop.' " However, courts have consistently required restrictions on the discretion of the officers conducting the checkpoint to ensure that the intrusion on individual liberty is no greater than is necessary to achieve the checkpoint's objectives.
>
> Courts have previously identified a number of non-exclusive factors relevant to officer discretion and individual privacy, including: the checkpoint's potential interference with legitimate traffic; whether police took steps to put drivers on notice of an approaching

> checkpoint; whether the location of the checkpoint was selected by a supervising official, rather than by officers in the field; whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern; whether drivers could see visible signs of the officers' authority; whether police operated the checkpoint pursuant to any oral or written guidelines, whether the officers were subject to any form of supervision; and whether the officers received permission from their supervising officer to conduct the checkpoint. Our Court has held that these and other factors are not " 'lynchpin[s],' but instead [are] circumstance[s] to be considered as part of the totality of the circumstances in examining the reasonableness of a checkpoint."

Veazey, 191 N.C. App. at 192, 662 S.E.2d at 690-91 (alterations in original) (citations omitted).

Here, the trial court made findings on many of the relevant factors identified in *Veazey* including the impact on traffic; that every vehicle approaching the checking station was checked; that the officers were wearing their uniforms with reflective vests and flashlights; that two patrol vehicles had their blue lights on at all times; that the checking station could be seen from either direction of approach and motorists traveling the speed limit had adequate time to stop; that the stop was conducted pursuant to HP-14, a Checking Station Authorization form, which was completed by Sgt. Bobbit, the supervising officer who ordered the checking station and was present at the checking station; and that the stops lasted one minute or less for drivers who had their licenses with them and no other reason for further investigation. I conclude the trial court did take into account the intrusion on Defendant's privacy interest, and this argument is overruled.

Defendant's final argument is that the trial court erred by concluding that the checking station was reasonable given the insufficient findings on the *Brown* factors and the failure of the trial court to conduct any balancing of those factors. Having rejected Defendant's individual arguments as to reasonableness, I would conclude the trial court made sufficient findings and properly weighed the *Brown* factors.

For the foregoing reasons, I would conclude the trial court did not err in denying Defendant's motion to suppress and must respectfully dissent.

STATE v. CONNER

[275 N.C. App. 758 (2020)]

STATE OF NORTH CAROLINA
v.
RILEY DAWSON CONNER, DEFENDANT

No. COA19-1087

Filed 31 December 2020

1. Sentencing—juvenile—first-degree murder—rape—consecutive sentences

Where a 15-year-old defendant pled guilty to the rape and murder of his paternal aunt and was sentenced to 240 to 348 months imprisonment for the rape and a consecutive sentence of life with parole for the murder—under which terms he would not be eligible for parole for at least 45 years, at age 60—his consecutive sentences were statutorily permissible where N.C.G.S. § 15A-1340.19A (the "*Miller*-fix" statutes) did not prohibit consecutive sentences and section 15A-1354 gave the trial court discretion to run defendant's sentences consecutively.

2. Sentencing—juveniles—first-degree murder—eligibility for parole at age 60

Where a 15-year-old defendant pled guilty to the rape and murder of his paternal aunt and was sentenced to 240 to 348 months imprisonment for the rape and a consecutive sentence of life with parole for the murder—under which terms he would not be eligible for parole for at least 45 years, at age 60—his consecutive sentences were not unconstitutional because *Miller v. Alabama*, 567 U.S. 460 (2012), did not hold sentences of life with parole imposed on juveniles to be unconstitutional. Even assuming that de facto life without parole sentences are unconstitutional, the life expectancy for a 15-year-old is 61.7 years (N.C.G.S. § 8-46), and defendant would be eligible for parole before that time. A Court of Appeals opinion holding otherwise had been stayed and granted discretionary review by the N.C. Supreme Court, so it was not binding.

3. Satellite-Based Monitoring—lifetime—imposed without a hearing

Where a 15-year-old defendant pled guilty to the rape and murder of his paternal aunt, the trial court erred by imposing lifetime satellite-based monitoring without holding a hearing on the issue. The order was vacated and the matter remanded for a hearing.

Chief Judge McGEE concurring in part and dissenting in part.

STATE v. CONNER

[275 N.C. App. 758 (2020)]

Appeal by Defendant from judgments entered 21 February 2019 by Judge Michael A. Stone in Superior Court, Columbus County. Heard in the Court of Appeals 25 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for the Defendant.

DILLON, Judge.

Fifteen-year-old Riley Dawson Conner ("Defendant") pleaded guilty to the rape and murder of his paternal aunt. Defendant was sentenced on 21 February 2019 to 240 to 348 months imprisonment for rape and, following a hearing pursuant to N.C. Gen. Stat. § 15A-1340.19A, *et seq*. and *Miller v. Alabama*, 567 U.S. 460 (2012), was sentenced to a consecutive sentence of life with parole for murder. Under the terms of Defendant's sentences, he will not be eligible for parole for at least 45 years and has no opportunity for release until at least age 60. The trial court further ordered Defendant's enrollment in lifetime satellite-based monitoring ("SBM") without holding a hearing on the issue. Defendant appeals.

I. Argument

Defendant makes three arguments on appeal: (1) his consecutive sentences are not permitted under N.C. Gen. Stat. § 15A-1340.19A, *et seq*. (the "*Miller*-fix statutes"); (2) these sentences are the functional equivalent of life without parole ("LWOP") and are thus unconstitutional when imposed on a redeemable juvenile under the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution; and (3) the trial court erred in imposing lifetime SBM without a hearing. We address Defendant's three arguments in turn.

[1] Regarding Defendant's first argument, we hold that consecutive sentences for multiple crimes are generally permissible under Section 15A-1340.19A. There is nothing in that statute which states that such sentences are generally not permissible.

Section 15A-1354, though, states that when "multiple sentences of imprisonment are imposed on a person at the same time" the trial court has discretion to determine whether those sentences are to run consecutively or concurrently. N.C. Gen. Stat. § 15A-1354 (2019). Accordingly, this argument is overruled.

[2] Regarding Defendant's second argument, we hold that the sentences are not unconstitutional. We recognized that our Court recently held an identical sentence unconstitutional on these grounds in *State v. Kelliher*, 273 N.C. App. 616, 849 S.E.2d 333 (2020). However, our Supreme Court has stayed *Kelliher* and granted discretionary review of that decision. Accordingly, *Kelliher* is not binding on our Court.

Miller has never held as being unconstitutional a life *with* parole sentence imposed on a defendant who commits a murder when he was a minor. Here, Defendant will be eligible for parole when he is 60 years old. Assuming that a *de facto* LWOP sentence (where a defendant is sentenced to consecutive terms for multiple felonies) is unconstitutional, we hold that based on the evidence before the trial court a 45-year sentence imposed on this 15-year old does not equate to a *de facto* life sentence. Our General Statutes recognize that the life expectancy for a 15-year old is 61.7 years. N.C. Gen. Stat. § 8-46 (2019).

[3] Regarding Defendant's third argument, we agree and vacate the trial court's order imposing SBM and remand this issue for a new hearing.

II. Conclusion

We affirm the judgment sentencing Defendant to consecutive terms. The imposition of consecutive sentences is allowed when minors are sentenced under Section 15A-1390B. And the consecutive sentences imposed by the trial court was not unconstitutional. However, we vacate the SBM order and remand for a hearing on the matter that complies with the statutory procedure in N.C. Gen. Stat. § 14-208.40A.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judge MURPHY concurs.

Chief Judge McGEE dissents by separate opinion.

McGEE, Chief Judge, concurring in part and dissenting in part.

I agree with the majority that N.C. Gen. Stat. §§ 15A-1340.19A, *et seq.* (the "*Miller*-fix statutes") do not prohibit consecutive sentences as a statutory matter, and I agree that Defendant's SBM order should be vacated and remanded. However, because I would hold that Defendant's sentences constitute a *de facto* life without parole ("LWOP") punishment prohibited by our state and federal constitutions following the analysis conducted in *State v. Kelliher*, 273 N.C. App. 616, 849 S.E.2d 333, *temp. stay allowed*, 376 N.C. 900, 848 S.E.2d 493 (2020), I respectfully dissent.

I. FACTUAL AND PROCEDURAL HISTORY

Although I would dispense of this appeal consistent with *Kelliher*, Defendant's punishment does differ from the one held unconstitutional in that case, and the individual facts leading to Defendant's convictions, sentencing, and resentencing are unique. Those particular details are recited below to describe Defendant's specific circumstances and provide relevant context not included in the majority.

A. Defendant's Early Life

Defendant was born in 2000 and lived with his mother in a home near Tabor City, North Carolina, for the first four years of his life. Defendant and his parents later moved in together in a home on Savannah Road, a street so known for its illegal activity that Defendant's maternal aunt, Kimberly Gore, called it "the pits of hell." As Defendant's mother would later describe Savannah Road, "[i]t's nowhere for a child to be. . . . Because there's nothing but drugs down there and witnessing [prostitution] . . . drugs everywhere, [and] drinking. [Defendant] really didn't need to be down there and if I could go back . . . I'd change it." In describing how she would change her care of Defendant, she stated only that she "would have never started smoking crack and . . . would have never let him went [sic] down that dirt road ever."

Both of Defendant's parents were heavily involved in illegal drugs and criminal activities during his early formative years. As previously suggested, his mother was addicted to crack, while his father dealt marijuana with his brother-in-law. When Defendant was about four years old, he witnessed a police raid on his Savannah Road home and the arrest of his father and uncle. It was the first of several times that Defendant would watch his father get arrested in front of him. Defendant next moved in with Ms. Gore, his maternal aunt, asking her "why didn't you come get me? I was scared. Where were you?" Defendant ceased living with his mother, who testified she was out "[r]unning the roads, getting in trouble. . . . [C]rack t[ook] over [her] whole life and that was all [she] was worried about was going to get the next hit."

Defendant's parents had another child, Layla, in June of 2004. His father borrowed a van to pick Defendant's mother and Layla up from the hospital, but he never showed up; instead, he drove the van through the front windows of a convenience store to steal cigarettes and a jar of money because, according to Ms. Gore, "drugs were more important [to Defendant's parents than] [Defendant] and Layla." When Layla was a few months old, Defendant's parents took Defendant and Layla to a crack house, prompting Ms. Gore to call the Department of Social Services.

Defendant's maternal grandparents then took custody of Defendant and Layla.

Defendant rarely saw his parents while living with his grandparents. His mother promised to attend Defendant's birthday parties over the next several years, but only showed up once or twice. On one of those visits, Defendant begged his mother to stay with him; when she did not, Defendant chased her car down the road shouting "I hate you, I hate you." Ms. Gore and Defendant's grandparents would buy Christmas gifts for Defendant but, on two occasions, his parents stole the gifts and sold them for drugs. Defendant's father continued his life of crime, which included robbing a bank and other acts of larceny. He involved Defendant's mother in one of these offenses, employing her as a getaway driver; Defendant's father was incarcerated for seven years as a result, while his mother received probation. Ultimately, she also served time in prison because, per her testimony, she "was strung out on crack" and unable to comply with her probation terms.

Defendant suffered from severe night terrors while living with his grandparents. According to Ms. Gore:

> [H]e would wake—well, not wake up, but he would be—the outbursts, the flailing of his arms, the slinging, the beating, walking to one end of the house to the other, trying—you could not wake him up. . . . He was not hearing a word you would say.
>
> . . . .
>
> This is—this is a whole other level. This is not I dreamed of a bad monster. This is inconsolable. You literally cannot bring him out of it.

At age eight, a doctor with Little River Medical Center assessed Defendant with ADHD and potential PTSD.

During middle school, Defendant frequently got into fights with other kids after they made fun of him for having drug-addicted parents. He was eventually expelled because of his conflicts with other students. Ms. Gore grew increasingly concerned with Defendant's conduct, testifying "his behavior was just more than what [she] was willing to allow into [her] family and home." His grandparents attempted to homeschool Defendant but were unable to do so because, per Ms. Gore, "[h]e was at that point just too out of hand." Ms. Gore suspected Defendant had begun abusing drugs: "I think that was probably originally when the drug use started because at that—he was in the 11, 12 year old age at that

point." In fact, Defendant had started smoking marijuana at age nine and was abusing Xanax and drinking alcohol daily at age eleven. At age twelve, Defendant became sexually active. He was diagnosed with frontal lobe epilepsy and a secondary diagnosis of behavioral issues in this time frame, revealing that his night terrors were in fact frequent recurring nocturnal seizures that severely interfered with his ability to sleep.

Despite these difficulties, Ms. Gore and her parents "tried to give [Defendant] the most normal life—he and his sister, . . . because of the—just, you know, to [Defendant's parents], they meant nothing. They were nothing to them." Unfortunately, Defendant's maternal relatives eventually grew unable to care for him; Defendant's grandmother suffered a stroke, his grandfather could not be at home due to work, and Ms. Gore "just lost the ability to influence him[.]" As a result, Defendant went to stay with his father—who had recently been released from prison. Their time together was short-lived, as his father was arrested again less than a year later. Defendant then spent some time with his mother in South Carolina, where he was cited for possession of marijuana at school. A psychosocial evaluation performed by the South Carolina Department of Justice following the citation revealed that Defendant had "borderline intellectual functioning" with an IQ of 79.

Defendant was influenced by his father's family on Savannah Road. One of his paternal aunts worked as a prostitute, and took Defendant with her to a motel where she met clients. That same aunt owned a trailer on Savannah Road where her boyfriend, who was also a crack addict, lived. Defendant and others in the neighborhood would hang out at the trailer and get high together. One of Defendant's friends was a cousin on his father's side, Brad Adams. Mr. Adams was at least ten years older than Defendant and Ms. Gore testified that "he was a mentor to [Defendant] . . . . [Defendant] looked up to him and wanted to be in that club [of criminals]." Defendant's mother echoed this description: "[Defendant] loved Brad. [Defendant]—I mean, he worshiped him. . . . [Defendant] loved him and would do anything in the world for him." Mr. Adams was a poor role model for Defendant; he supplied alcohol, cocaine, opiates, methamphetamines, PCP, and heroin to Defendant, and was involved in numerous criminal schemes.

Defendant was diagnosed in 2014 with mild conduct disorder, severe cannabis use disorder, moderate alcohol use disorder, and sedative, hypnotic, or anxiolytic use disorder. Beginning in early 2016, Defendant's seizures grew increasingly severe and violent. An emergency room visit that January showed that Defendant was experiencing roughly six-to-ten seizures a night; two follow-ups the next month disclosed his seizures

had increased to six-to-twelve per night, were uncontrolled, and were progressively worsening "possibl[y] due to PTSD."

B. The Rape, Murder, and Defendant's Arrest

When Defendant was fifteen years old, Defendant took a family member's van to a local supermarket, broke into the building, and stole a large number of cigarettes. Local law enforcement responded to the building's alarm and identified Defendant as the perpetrator based on a security video. They received a separate call reporting the van as stolen. A deputy arrived on Savannah Road, took a statement, and stayed in the area to try and locate Defendant. Officers saw the van return to the neighborhood and made a traffic stop, only to discover that the driver was the owner. After she explained that she had retrieved her van from Defendant, law enforcement searched the vehicle and discovered the stolen cigarettes. They then filed a juvenile petition and arranged a meeting between Defendant and a court counselor for 11 March 2016. Shortly after the police had departed, one of Defendant's paternal aunts, Felicia Porter ("Ms. Porter"), called 911 to report that Defendant had returned to Savannah Road and was involved in a scuffle inside her house. In the days following the 911 call, Defendant reportedly said that he would "make that b**** [Ms. Porter] pay[.]"

On the morning of Defendant's scheduled meeting with the court counselor, Ms. Porter woke up in her home on Savannah Road around 6:00 a.m. to take her husband to work. She returned home around 9:00 a.m. and started browsing Facebook. Defendant began the day by smoking marijuana and snorting PCP. At 9:30 a.m., Ms. Porter's neighbor, John Cunningham, was outside trying to get his truck dislodged from a field when he saw Defendant walk down the street to Ms. Porter's residence. Defendant knocked on Ms. Porter's door and convinced her to come outside. When she came out of the house, Defendant raped her. He then beat her to death with a shovel and left her body in the woods nearby. Ms. Porter's body, later recovered by police, evinced numerous severe and traumatic injuries suffered during the attack, including a broken arm, the loss of all of her front teeth, and a multitude of lacerations and broken bones in her face. With his crimes completed, Defendant burned an article of Ms. Porter's clothing in a burn pile in the backyard before walking back by Mr. Cunningham at around 10:30 a.m. The two briefly talked about Defendant's upcoming court appointment and parted ways.

After Defendant left with his mother for his meeting with the court counselor, Ms. Porter's relative and neighbor, Bessie Porter, called Ms. Porter's residence on the telephone. When there was no answer, she

called Mr. Cunningham, who also did not answer because he was outside working on his truck. Mr. Adams, Defendant's "mentor," lived with Bessie Porter and left her house to meet with Mr. Cunningham when he did not pick up the phone. After Mr. Adams helped Mr. Cunningham free his truck from the field, the two walked down to Ms. Porter's residence to check on her. They noticed several things amiss at the house, leading them to file a missing persons report later that afternoon. The local sheriff's department discovered Ms. Porter's body two days later, and the State Bureau of Investigation located the broken shovel used to kill Ms. Porter three days after that. DNA evidence from a rape kit and the underwear found on Ms. Porter's body would later identify Defendant as the perpetrator.

Defendant was interviewed in connection with the rape and murder on 12 March 2016 and denied any involvement. The following week, Defendant was admitted to a local hospital for a bout of uncontrolled seizures. He was transferred to UNC Memorial Hospital on 21 March for a four day stay, during which time his seizures were so severe that he broke his hospital bed. An MRI conducted by the hospital revealed "scarring" and "damage to [Defendant's] frontal lobe on the right side" in the form of mesial temporal sclerosis,[1] possibly as the result of multiple head injuries dating back to the age of five. A hospital psychiatrist noted that Defendant's "mood liability and agitation are at least in part due to his frontal lobe seizures," while a pediatric neurologist urged Defendant's mother to seek psychological treatment for Defendant because his "severe oppositional behavior problem and agitation . . . is due to frequent partial epilepsy" and his "seizures are associated with psychiatric agitations . . . [and] significant behavioral changes." Defendant's discharge papers disclosed that his "frontal lobe epilepsy may affect [his] ability to regulate his emotions and prevent[] [him] from getting adequate sleep."

Defendant later admitted to his involvement in his aunt's murder in a police interview on 29 March 2016. More specifically, Defendant told law enforcement that he and Mr. Adams had gone to his aunt's house to try and recover a kilogram of heroin they had given to her husband; when they did not find the drugs, Mr. Adams killed and raped Ms. Porter.

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1. According to a forensic psychologist who testified as an expert at Defendant's sentencing hearing, a male's frontal lobes do not fully develop until age 25, and "are responsible for judgment . . . [,] the ability to make decisions . . . [,] plan, delay gratification, [and] regulate emotions." As a result, "adolescents really aren't capable of the same type of judgment [as adults]. Their impulse control, their judgment, their ability to think about alternatives is impaired."

Defendant then gave another conflicting recitation of events in a subsequent interview wherein he asserted that there were no drugs involved and admitted to raping Ms. Porter while maintaining that Mr. Adams committed the murder.

Not long after these interviews, Defendant had a mental breakdown over what he had done and begged his mother to call the State Bureau of Investigation. He then met with an SBI investigator, confessed to the crimes, and was taken into custody.

C. Defendant's Plea and Sentencing

Defendant was indicted by a grand jury in December 2016 on two counts of possession of stolen goods and one count each of breaking and entering, larceny after breaking and entering, larceny of a motor vehicle, first-degree rape, and first-degree murder. Defendant reached a plea agreement with the State whereby he pled guilty to rape and murder while the State dismissed all remaining charges. He also filed a motion to declare LWOP and the sentencing scheme found in N.C. Gen. Stat. § 15A-1340.19A unconstitutional as applied to him.

The trial court heard Defendant's motion at a four-day sentencing hearing beginning 18 February 2019. Defendant argued that, under *Roper v. Simmons*, 543 U.S. 551, 161 L. Ed. 2d 1 (2005), *Graham v. Florida*, 560 U.S. 48, 176 L. Ed. 2d 825 (2010), *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), and *Montgomery v. Louisiana*, ____ U.S. ____, 193 L. Ed. 2d 599 (2016), LWOP sentences for homicide are constitutional under the Eighth Amendment to the United States Constitution only when "a juvenile is permanently incorrigible, permanently depraved." As for Defendant's circumstance, his counsel contended that a showing of permanent incorrigibility could not be made and "ask[ed] that he be sentenced to life with the possibility of parole, which, of course, doesn't mean he'll get paroled. It only means he would get a hearing in 25 years."

The trial court denied Defendant's motion and proceeded to sentencing. Defendant offered testimony from Ms. Gore, Defendant's mother, and a mitigation specialist consistent with the above recitation of the factual history. A forensic psychologist also testified to his assessment of Defendant's mental acuity, telling the trial court that Defendant tested with an IQ of 62 "in the extremely low range." Nonetheless, the psychologist testified that Defendant had improved significantly over his two-and-a-half years while in custody. When they first met, Defendant was "aggressive, agitated, [and] fidgety[;]" now, "he was much more calm. . . . He seemed to be invested in his schoolwork, and that was affirmed by the director of the [juvenile detention] facility." Defendant

was no longer experiencing seizures, as "his medication compliance with anti-seizure convulsive medications ha[d] been quite effective." There was also "an opening up of [Defendant] talking more about his feelings, which is, again, a good prognostic sign[.]" When asked if he found that Defendant "has demonstrated ability to change[,]" he responded:

> I do. I do. Several factors there. I think . . . , first of all, he has accepted responsibility for his behavior. He expressed guilt for what he's done.
>
> The adolescent brain doesn't preclude a person from knowing . . . right from wrong, but it does influence their ability to make good decisions and not be under the influence of impulse and not considering consequences. But I strongly believe that [Defendant] has the potential to change.
>
> . . . .
>
> And so, this is a person who has never, ever had psychological interventions to amend or to correct some of the deficits that we see in [Defendant].

The psychologist also spoke to the impact of a LWOP sentence on Defendant's development:

> [W]hat I am concerned about in a case like [Defendant's] is that if you take away that potential or that hope for possible release some day [it] really is tantamount to a death sentence.
>
> . . . .
>
> [G]iving him the option for parole places the onus of [Defendant]'s behavior on him directly.
>
> . . . .
>
> If [Defendant] does well, that greatly enhances the chance that he may be released some day. If he screws up, his sentence is going to be continued and he's not going to have that option.
>
> So it really places the responsibility for what happens to [Defendant] on [Defendant], which I think is the appropriate thing to do in [Defendant]'s case but most anybody in his situation.

The trial court also received documentary evidence regarding Defendant's homelife and upbringing, medical conditions and treatment, and development and infractions while in detention. Although Defendant had seen periods of improvement in the custody of the Division of Juvenile Justice, a recent Court Behavior Report disclosed that "[s]ince [Defendant]'s initial admission in March 2016, his behavior has gone through several cycles of weeks-months of appropriate behaviors and several weeks-months of negative behaviors." For example, Defendant and another juvenile mounted an unsuccessful escape attempt in May 2018 but subsequently showed improved behavior over the seven months prior to his sentencing.

In its closing argument, the State contended that Defendant presented the "exceedingly rare . . . situation where a juvenile would get life without [parole] . . . . This is that rare case. . . . And the only real appropriate sentence to this [case] would be . . . life without [parole]." In the event the trial court disagreed, it asked that "the Court . . . put a sentence on the rape, where he can be held accountable for the rape, and then the murder at the end of the rape[.] . . . [W]e'd ask you to do that, stack them. And then that covers everybody." Defendant's counsel argued to the contrary, asserting that "[t]his is a case of transient immaturity" such that a LWOP sentence would be unconstitutional. Defendant argued that a stacked sentence would likewise be a cruel and unusual punishment as "a de facto life sentence in and of itself."[2]

The trial court announced Defendant's sentences from the bench on 21 February 2019, ordering Defendant serve 240 to 348 months for rape—the maximum allowable in the presumptive range based on Defendant's prior record level of I. N.C. Gen. Stat. § 15A-1340.17(c) (2019). It then sentenced Defendant on first degree murder under N.C. Gen. Stat. § 15A-1340.19A by making the following findings of fact:

> The defendant, at the time of the offense and leading up to the time of the plea, exhibited numerous signs of developmental immaturity. The immaturity was exacerbated by low levels of structure, supervision, and discipline.
>
> The defendant's father has been incarcerated for most of the life of the defendant.

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2. Although the transcript shows Defendant's counsel mistakenly described "concurrent" sentences for rape and murder as a *de facto* LWOP sentence, he later made clear that his argument was aimed at consecutive sentences.

The defendant's mother has struggled with substance abuse, periods of incarceration, and has not been present for the vast majority of defendant's life.

The defendant has been passed to one family member to another for basic living and custodial purposes and never received any parental leadership, guidance, or structure.

Additionally, the defendant suffers from chronic frontal lobe epilepsy which went untreated for years causing daily seizures. Such seizures caused frontal lobe brain injury to the defendant in addition to chronic sleep deprivation.

The defendant was subject[ed] in his transient living conditions to criminal activity, violence, and rampant substance abuse.

In fact, his own substance abuse started at approximately age nine . . . .

The defendant's only role model was a negative role model, Brad Adams, an individual with a horrible criminal history and habitual felon. The defendant looked up to Brad Adams, who was ten years senior to the defendant in age.

The defendant had a limited ability to fully appreciate the risks and consequences of his conduct based upon the totality of his poor upbringing.

. . . .

It is clear that his I.Q. and educational levels appear at the low range of average to below average.

. . . .

And the defendant was subjected to an overall environment of drugs and other criminal activity.

Based upon testing and other professional evaluations, it is clear that the defendant would benefit from education, counseling, and substance abuse treatment while in confinement and incarceration.

. . . .

Additionally, although it has taken some time for him to do so, . . . the defendant[] has recently demonstrated some

> increased maturity while being incarcerated, and that he did agree to enter this plea . . . .
>
> Therefore, with regard to conclusions of law, the evidence supports the statutory criteria and those contained in *Miller v. Alabama*, and for the sentence on the first degree murder, he is to receive life with the possibility of parole after 25 years minimum.
>
> That sentence is to run consecutive to the rape sentence[.]

Defendant's counsel renewed his constitutional objection and gave oral notice of appeal. The trial court entered its written judgments and order that Defendant submit to lifetime SBM later that day. Defendant filed written notice of appeal from the SBM order on 14 March 2019.

II. ANALYSIS

Defendant argues that the trial court erred in imposing consecutive sentences for rape and first-degree murder because: (1) consecutive sentences are not permissible under Defendant's interpretation of the *Miller*-fix statutes; and (2) the sentences, which place Defendant's earliest possible parole eligibility at 45 years imprisonment and age 60, constitute a *de facto* LWOP sentence in violation of the Eighth Amendment and Article I, Section 27 of the North Carolina Constitution. Defendant further contends that the trial court erred in failing to hold an SBM hearing. I first address Defendant's sentencing arguments, followed by the trial court's imposition of SBM.

A. Statutory Construction of Miller-*Fix Statutes*

This Court reviews questions of statutory construction *de novo*. *State v. Hayes*, 248 N.C. App. 414, 415, 788 S.E.2d 651, 652 (2016). In interpreting a statute, we must "determine the meaning that the legislature intended upon the statute's enactment." *State v. Rieger*, 267 N.C. App. 647, 649, 833 S.E.2d 699, 700-01 (2019) (citation and quotation marks omitted). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation omitted). Resort may be had, however, to the title of the act in question; as our Supreme Court has held, "even when the language of a statute is plain, 'the title of an act should be considered in ascertaining the intent of the legislature.' " *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 8, 727 S.E.2d 675, 681 (2012) (quoting *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 812, 517 S.E.2d 874, 879 (1999)).

The imposition of consecutive sentences is generally controlled by N.C. Gen. Stat. § 15A-1354, which provides, "[w]hen multiple sentences of imprisonment are imposed on a person at the same time . . . the sentences may run either concurrently or consecutively, as determined by the court." N.C. Gen. Stat. § 15A-1354(a) (2019). As for the *Miller*-fix statutes, N.C. Gen. Stat. § 15A-1340.19A states "a defendant who is convicted of first degree murder, and who was under the age of 18 at the time of the offense, shall be sentenced in accordance with this Part. For the purposes of this Part, 'life imprisonment with parole' shall mean that the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole." Defendant argues that the statutory definition of life with parole, together with both the requirement that a juvenile convicted of homicide be "sentenced in accordance with this Part" and the absence of any reference to consecutive sentences, compels the conclusion that consecutive sentences placing parole eligibility outside 25 years for a juvenile homicide offender who has not been determined incorrigible or irreparably corrupt are statutorily prohibited. Defendant points to no specific language as ambiguous, asserting instead that "the plain language indicates juvenile offenders convicted of first-degree murder—without regard to other counts—who are found to be parole eligible shall be eligible for parole after twenty-five years." Though I agree with Defendant that the statutory language is unambiguous and requires parole eligibility *after* 25 years, I disagree that it compels sentences with eligibility *at* 25 years and thus prohibits the imposition of consecutive sentences in this case.[3]

As recounted above, a juvenile convicted of homicide "shall be sentenced in accordance with" the *Miller*-fix statutes. N.C. Gen. Stat. § 15A-1340.19A. This plain language is not exclusive, as it is entirely possible for a sentence to be "in accordance with" multiple applicable statutory parts. Thus, as a statutory matter, the trial court may sentence a defendant for murder under the *Miller*-fix statutes to life with parole and run that punishment consecutively to another sentence under N.C. Gen. Stat. § 15A-1354(a) so long as doing so does not otherwise conflict with the provisions of the *Miller*-fix statutes. Though these statutes overlap, this does not compel the total rejection of N.C. Gen. Stat. § 15A-1354(a) as a more general statute. To the contrary, "if 'there is one statute dealing with a subject in general and comprehensive terms, and another

3. Because Defendant was sentenced pursuant to N.C. Gen. Stat. § 15A-1340.19B(a)(2), I do not address whether consecutive sentences are statutorily permissible for juveniles convicted of first degree murder under the felony murder rule and sentenced pursuant to N.C. Gen. Stat. § 15A-1340.19B(a)(1).

dealing with a part of the same subject in a more minute and definite way, *the two should be read together and harmonized*[.'] " *LexisNexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of Courts*, 368 N.C. 180, 186, 775 S.E.2d 651, 655 (2015) (emphasis added) (quoting *Nat'l Food Stores v. N.C. Bd. of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966)) (additional citations omitted). It is only when there is a " ['] necessary repugnancy between them [that] the special statute . . . will prevail over the general statute[.]' " *Id.* (quoting *Nat'l Food Stores*, 268 N.C. at 629, 151 S.E.2d at 586) (additional citations omitted).

The applicable statutory definition of "life imprisonment with parole," N.C. Gen. Stat. § 15A-1340.19A, does not create such a "necessary repugnancy." *LexisNexis*, 368 N.C. at 186, 775 S.E.2d at 655 (citations and quotation marks omitted). That definition provides only that a defendant "serve a *minimum* of 25 years imprisonment prior to becoming eligible for parole." N.C. Gen. Stat. § 15A-1340.19A (emphasis added). Applying the statute's plain language, a punishment pushing a defendant's ultimate eligibility for parole beyond 25 years due to consecutive sentencing does not contravene the minimum provided by the definition. To the contrary, the holding requested by Defendant—that the definition of "life imprisonment with parole" compels sentences allowing for parole eligibility *at* 25 years—would impermissibly deviate from the unambiguous statutory language. *See State v. Jackson*, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001) ("When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." (citation and quotation marks omitted)).

This holding is consistent with our Supreme Court's treatment of N.C. Gen. Stat. § 15A-1354(a) in *State v. Ysaguire*, 309 N.C. 780, 309 S.E.2d 436 (1983), where the defendant argued that consecutive sentences pursuant to N.C. Gen. Stat. § 15A-1354(a) were not permitted under the Fair Sentencing Act because "the General Assembly did not address the issue of consecutive sentences in the . . . Act[.]" 309 N.C. at 785, 309 S.E.2d at 440. The Supreme Court rejected the argument, stating that "[s]ince that statute was in effect when the legislature enacted the Fair Sentencing Act, the legislature by leaving it substantially intact must have intended that the sentencing judge retain the discretion to impose sentences consecutively or concurrently." *Id.* This was so even though such discretion seemingly ran contrary to the legislative purposes behind the Fair Sentencing Act:

> Leaving sentencing judges with unbridled discretion on the matter of whether to run multiple sentences concurrently or consecutively conflicts with the general theory of uniformity sought by fair sentencing. Nevertheless, our legislature, in espousing both the spirit and the letter of fair sentencing in North Carolina, elected to incorporate the freedom for judges to impose consecutive sentences. Since that is the prerogative of the legislature, we find nothing inherent in consecutive sentencing which violates our Fair Sentencing Act.

Id.

I also do not agree with Defendant's argument that the title of the act enacting the *Miller*-fix statutes discloses an intention to prohibit consecutive sentences and require a punishment that provides parole eligibility at 25 years. The legislative title used in this case—"An Act to Amend the State Sentencing Laws to Comply with the United States Supreme Court Decision in *Miller v. Alabama*"—does not disclose an intention to prohibit consecutive sentences or require them to provide parole eligibility at 25 years through imposition of concurrent sentences only. 2012 N.C. Sess. Laws 713, 713. As this Court recently recognized in *Kelliher*, the statutory definition of "life imprisonment with parole" reflects "that our General Assembly has determined parole eligibility at 25 years for multiple offenses sanctionable by life with parole is not so excessive as to run afoul of *Miller*." 273 N.C. App. at 643, 849 S.E.2d at 351. This does not mean, however, that sentences placing parole eligibility at 25 years is the sole constitutionally permissible punishment. In other words, the enabling act's title simply reveals that the General Assembly considered parole eligibility after 25 years to be *a*, but not necessarily the *only*, constitutional punishment allowed by *Miller*. Since "the title given to a particular statutory provision is not controlling," *State v. Fletcher*, 370 N.C. 313, 328, 807 S.E.2d 528, 539 (2017) (citation omitted), and the plain language of the *Miller*-fix statute does not disclose an intention to prohibit consecutive sentences for juveniles subject to *Miller*'s protections, I agree with the majority that the trial court was statutorily empowered to impose consecutive sentences in its discretion.

B. Defendant's Constitutional Argument

In *Kelliher*, this Court addressed whether *de facto* LWOP sentences are: (1) the equivalent of *de jure* LWOP sentences for juvenile sentencing and constitutional purposes; and (2) cognizable in the form of lengthy

aggregated, consecutive sentences.[4] We joined the majority of jurisdictions[5] by answering both questions in the affirmative before holding

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4. Though our Supreme Court has stayed *Kelliher*, I nonetheless find its reasoning persuasive in resolving this appeal.

5. The State argues in its brief in this appeal that jurisdictions are "essentially evenly split" on whether *de facto* LWOP sentences are subject to *Graham*'s and *Miller*'s constitutional protections based on a review of cases conducted by the South Carolina Supreme Court in *State v. Slocumb*, 827 S.E.2d 148, 156 n.16 (S.C. 2019). My review of those same cases, with additional research, does not support this contention. For example, *Slocumb* did not list Iowa as a jurisdiction that bars *de facto* LWOP sentences under the United States Constitution, citing *State v. Null*, 836 N.W.2d 41, 76 (Iowa 2013) (holding a *de facto* LWOP sentence was subject to *Miller* protections under the Iowa state constitution rather than the federal constitution). However, the Iowa Supreme Court decided *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013), the same day as *Null*, and plainly held that a life sentence with parole eligibility after 60 years was a "cruel and unusual punishment under the Eighth Amendment to the United States Constitution *and* article I, section 17 of the Iowa Constitution." 836 N.W.2d at 122 (emphasis added). *Slocumb* treated Missouri similarly, listing that state among those that do not recognize *de facto* LWOP sentences based on *Willbanks v. Mo. Dep't of Corr.*, 522 S.W.3d 238 (Mo. 2017) (en banc); however, Missouri's Supreme Court issued an opinion on the same day as *Willbanks* holding a *de facto* LWOP sentence *is* cognizable so long as it is not the result of an aggregation of lesser sentences. *State ex rel. Carr v. Wallace*, 527 S.W.3d 55, 61 n.7 (Mo. 2017). Likewise, *Slocumb* included Illinois among the states that did not recognize *de facto* LWOP sentences based on an Illinois intermediate court's decision from 2015 despite also recognizing that Illinois's Supreme Court held a *de facto* LWOP sentence violated the Eighth Amendment the following year. *Compare People v. Cavazos*, 40 N.E.3d 118, 139 (Ill. App. Ct. 2015) (holding *Miller* does not apply to term-of-years sentences), *with People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016) ("[S]entencing a juvenile to a mandatory term of years that is the functional equivalent of life without the possibility of parole constitutes cruel and unusual punishment in violation of the eighth amendment."). *Slocumb* stated elsewhere that Louisiana does not recognize *de facto* LWOP sentences as violating *Graham* or *Miller* based on a 2013 Louisiana Supreme Court decision, *State v. Brown*, 118 So.3d 332 (La. 2013), but failed to cite a later case from that court that plainly held *de facto* LWOP sentences are "illegal" under *Graham*. *State ex rel. Morgan*, 217 So.3d 266, 271 (La. 2016). I also note that at least one state identified in *Slocumb* as not recognizing *de facto* LWOP sentences has since done so. *See White v. Premo*, 443 P.3d 597, 604-05 (Or. 2019) (holding juvenile's 800-month sentence for murder with parole eligibility at 54 years was "sufficiently lengthy" to require *Miller* protections). Indeed, one state has applied *Miller* to a *de facto* LWOP sentence for the first time since *Kelliher*. *See Williams v. State*, ___ P.3d ___, 2020 WL 5996442, *13 (Kan. Ct. App. Oct. 9, 2020) ("[W]e hold the constitutional protections afforded under *Miller* are triggered when a juvenile convicted of premeditated first-degree murder is subject to a sentence of a term of years that is the functional equivalent to a sentence of life without parole."). *Slocumb*'s tabulation further included multiple unpublished (and thus non-precedential) opinions from intermediate courts. Finally, *Slocumb*'s statement was not limited to state courts, and included federal courts that considered *de facto* LWOP sentences in a distinguishably different, albeit related, legal context. *See Kelliher*, 273 N.C. App. at 637-38, 849 S.E.2d at 347-48 (distinguishing the federal circuit courts' treatment of *Roper*, *Graham*, *Miller*, and *Montgomery* under federal habeas review from the questions presented to this Court). In sum, my independent review of the pertinent case law from around the country discloses that a clear majority of courts have recognized *de facto* LWOP sentences as unconstitutional when imposed on juveniles who have not been deemed incorrigible or irreparably corrupt.

that a defendant's consecutive sentences of life with parole—which placed parole eligibility at 50 years imprisonment and age 67—was an unconstitutional *de facto* LWOP sentence under the Eighth Amendment and Article I, Section 27 of the North Carolina Constitution. Although Defendant's aggregate punishment in this case differs from the one imposed in *Kelliher*, I would nonetheless hold that Defendant's imprisonment for a minimum of 45 years and earliest possible release at age 60 still presents a *de facto* LWOP sentence.

1. *Kelliher*'s Analytical Principles

In this Court's analysis in *Kelliher*, we reviewed decisions from the United States Supreme Court addressing juvenile sentencing: *Roper v. Simmons*, 543 U.S. 551, 161 L. Ed. 2d 1 (2005), *Graham v. Florida*, 560 U.S. 48, 176 L. Ed. 2d 825 (2010), *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), and *Montgomery v. Louisiana*, ____ U.S. ____, 193 L. Ed. 2d 599 (2016). Several principles from those cases apply with equal force in this case: (1) "juveniles are of a special character for the purposes of the Eighth Amendment," *Kelliher*, 273 N.C. App. at 627, 849 S.E.2d at 340 (discussing *Roper*), and are categorically less culpable for their crimes because of their "immaturity, vulnerability to influence and lack of control, and malleability," *id.* at 630-31, 849 S.E.2d at 343 (citing *Miller*, 567 U.S. at 471, 183 L. Ed. 2d at 418-19); (2) this diminished culpability undercuts the punishment justifications for the harshest sentences, *see id.* at 631, 849 S.E.2d at 343 (discussing *Miller*'s recognition that *Graham* analogized LWOP sentences and the death penalty); (3) "juvenile homicide offenders who are neither incorrigible nor irreparably corrupt[] are—like other juvenile offenders—so distinct in their immaturity, vulnerability, and malleability as to be outside the realm of LWOP sentences under the Eighth Amendment," *id.* at 632, 849 S.E.2d at 344 (summarizing *Montgomery*); and (4) it is unconstitutional to impose a LWOP sentence that denies a juvenile who has not been determined incorrigible or irreparably corrupt "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," and provides "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Id.* at 633, 849 S.E.2d at 344 (citations and quotations omitted).

Kelliher relied on the above precepts to hold *de facto* LWOP sentences—expressed as either a singular sentence or aggregated consecutive sentences—are subject to the constitutional protections of *Miller* and *Graham*. *Id.* at 644, 849 S.E.2d at 352. In applying that holding to the defendant's case, we noted that, although "the task of demarcating the bounds of a *de facto* LWOP sentence may be difficult, the task

is not impossible." *Id.* at 641, 849 S.E.2d at 350. This Court then looked to approaches employed by other jurisdictions and the North Carolina Constitution's enumeration of inalienable rights before holding that the defendant's 50-year sentence and earliest opportunity for release at age 67 was unconstitutional. *Id.* I would apply that process to determine whether the sentence involved in this case constitutes an unconstitutional *de facto* LWOP sentence.

2. Is Defendant's Sentence an Unconstitutional *De Facto* LWOP Sentence

Different jurisdictions have employed different methods of identifying *de facto* LWOP sentences. *See Carter v. State*, 192 A.3d 695, 727-30 (Md. 2018) (reviewing five different means courts have used to discern *de facto* LWOP sentences). As this Court observed in *Kelliher*, "many of them have found such sentences to exist when release . . . is only available after roughly 50 years, and sometimes less." 273 N.C. App. at 641, 849 S.E.2d at 350. *See also Carter*, 192 A.3d at 729 ("Many decisions that attempt to identify when a specific term of years without eligibility for parole crosses the line into a life sentence for purposes of the Eighth Amendment appear to cluster *under* the 50-year mark." (emphasis added)). We also found relevant the fact that our State Constitution lists the "enjoyment of the fruits of [one's] own labor," alongside "life, liberty . . . and the pursuit of happiness" as "inalienable rights[,]" N.C. Const. Art I, § 1, suggesting that other courts' use of retirement age and respect for " [']the chance to rejoin society in qualitative terms['] " was pertinent to identifying *de facto* LWOP sentences. *Kelliher*, 273 N.C. App. at 642, 849 S.E.2d at 350 (quoting *People v. Contreras*, 411 P.3d 445, 454 (Cal. 2018)). *See also Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1046 (Conn. 2015) (holding a 50 year *de facto* LWOP sentence violated the Eighth Amendment in part because "[a] juvenile offender's release when he is in his late sixties comes at an age when the law presumes that he no longer has productive employment prospects"); *Carter*, 192 A.3d at 734 (holding parole eligibility after 50 years was a *de facto* LWOP sentence in part because "the eligibility date will be later than a typical retirement date for someone of [the defendant's] age").

Defendant's sentence constitutes a *de facto* LWOP sentence under the above considerations even though it is factually distinct from the punishment imposed in *Kelliher*. Assuming that Defendant is eligible at the earliest possible moment—at age 60 after serving 45 years—similar punishments have elsewhere been held to constitute *de facto* LWOP sentence. *See Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2014) (holding a sentence of just over 45 years and release at age 61 was a *de facto* LWOP

sentence). Such a "geriatric release . . . does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*." *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (quoting *Graham*, 560 U.S. at 75, 176 L. Ed. 2d at 845-46). As we quoted favorably in *Kelliher*:

> [T]he language of *Graham* suggests that the high court envisioned more than the mere act of release or a de minimis quantum of time outside of prison. *Graham* spoke of the chance to rejoin society in qualitative terms—"the rehabilitative ideal" ([*Graham*] at 130 S. Ct. 2011)—that contemplate a sufficient period to achieve reintegration as a productive and respected member of the citizenry. The "chance for reconciliation with society" (id. at 130 S. Ct. 2011), "the right to reenter the community" (id. at 130 S. Ct. 2011), and the opportunity to reclaim one's "value and place in society" (*ibid.*) all indicate concern for a measure of belonging and redemption that goes beyond mere freedom from confinement. . . . Confinement with no possibility of release until age 66 or age 74 seems unlikely to allow for the reintegration that *Graham* contemplates.

Contreras, 411 P.3d at 454.

As for whether Defendant's sentence allows him "to reclaim one's 'value and place in society,' " *id.* (quoting *Graham*, 560 U.S. at 74, 176 L. Ed. 2d at 845), the fact that Defendant will be released a few years before reaching retirement age[6] does not sway me from concluding otherwise; in actuality, that fact bolsters declaring Defendant's sentence unconstitutional when the realities facing juvenile defendants upon release from lengthy sentences are taken into account.

In arguing that Defendant's sentence does offer a meaningful opportunity for release, the State quotes *State v. Smith*, 892 N.W.2d 52 (Neb. 2017), in which the Supreme Court of Nebraska stated, "because [the defendant] will be parole eligible at age 62, we do not agree that his sentence represents a geriatric release or equates to no chance for fulfillment outside prison walls, because in today's society, it is not unusual for people to work well into their seventies and have a meaningful life well

6. While the Social Security Act defines retirement age as falling between age 60 and 67, depending on the circumstances, 42 U.S.C. § 416(l), a panel of the Third Circuit observed in a *de facto* LWOP case that "by all accounts, the national age of retirement to date is between sixty-two and sixty-seven inclusive." *United States v. Grant*, 887 F.3d 131,151, *reh'g en banc granted*, *opinion vacated*, 905 F.3d 285 (3rd Cir. 2018).

beyond age 62 or even at age 77." 892 N.W.2d at 66. What the Nebraska court—and the majority in this case—failed to consider, however, were the realities facing those released from prison, choosing instead treating a juvenile released after decades in prison as if he were an otherwise ordinary member of society.[7] As in *Kelliher*, this "ignore[s] *Graham*'s own caution against denying the true reality of the actual punishment imposed on a juvenile when determining whether it violates the Eighth Amendment." 273 N.C. App. at 636, 849 S.E.2d at 346. *See also Graham*, 560 U.S. at 70-71, 176 L. Ed. 2d at 843 ("A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. *This reality cannot be ignored.*" (emphasis added)).

It is both a matter of common sense and beyond any serious dispute to state that those who have served lengthy active sentences face markedly diminished job prospects compared to the rest of the general public.[8] When that is taken into account, Defendant's release offers a mere "de minimis quantum of time out of prison[,]" *Contreras*, 411 P.3d at 454, that does not afford him a meaningful opportunity to pursue his "inalienable right[] . . . to enjoy the fruits of [his] labor." N.C. Const. Art. I, § 1. As the Supreme Court of Connecticut observed, "[t]he United States Supreme Court viewed the concept of 'life' in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion

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7. I do not rely on estimations of life expectancy in reaching my determination that Defendant's punishment is a *de facto* LWOP sentence, but observe that other courts have recognized that data indicates "the life expectancy of incarcerated youthful offenders is significantly reduced compared to that of the general population." *Bear Cloud*, 334 P.3d at 142 (footnote omitted). *See also Casiano*, 115 A.3d at 1046 (reviewing several statistical analyses and judicial decisions recognizing a "reduction in life expectancy due to the impact of spending the vast majority of one's life in prison" (citations omitted)).

8. According to an analysis by the North Carolina Department of Commerce's Labor and Economic Analysis Division, previously incarcerated individuals "struggle with low rates of employment and poor wage earnings compared to the rest of the population." Andrew Berger-Gross, *The State of Reentry: An Update on Former Offenders in North Carolina's Labor Market*, The LEAD Feed (Oct. 29, 2019), https://www.nccommerce.com/blog/2019/10/29/state-reentry-update-former-offenders-north-carolina's-labor-market. The analysis, which looked at data from 2017 as the most recent available, showed that "[r]ates of employment and wage earnings among the formerly incarcerated remain relatively low compared to the rest of the population. Sixty-one percent of North Carolinians were employed at some point during 2017, compared to 45% of former prisoners." *Id.* (citation omitted). Employment amongst the previously incarcerated has declined in North Carolina: "In the late 1990s, it was relatively normal for people to find work after exiting prison . . . . Now, only a minority of former prisoners find work after release, despite record-high employer demand for labor in our state." *Id.* Those that found employment in their first year of release earned a real median annual wage of $5,912 compared to $27,934 of all workers in North Carolina. *Id.*

that an individual is effectively incarcerated for 'life' if he will have no opportunity to truly reenter society or have any meaningful life outside of prison." *Casiano*, 115 A.3d at 1047 (citing *Graham*, 560 U.S. at 75, 176 L. Ed. 2d at 846) (additional citations omitted). A release from prison with the statistically unlikely chance to contribute to society for a scant few years does not comport with this application of Eighth Amendment principles, as it still places a juvenile who has not been deemed incorrigible or irreparably corrupt:

> behind bars before he has had the chance to exercise the rights and responsibilities of adulthood, such as establishing a career . . . [or] raising a family . . . . Even assuming the juvenile offender does live to be released, after a half century of incarceration, he will have irreparably lost the opportunity to engage meaningfully in many of these activities and will be left with seriously diminished prospects for his quality of life for the few years he has left.

Id.

I acknowledge that other courts have reached different conclusions. *See*, *e.g.*, *Ira v. Janecka*, 419 P.3d 161, 170 (N.M. 2018) (holding a sentence of almost 46 years was not an unconstitutional *de facto* LWOP sentence). This appears inevitable when sentences like Defendant's fall near "the outer limit of what is constitutionally acceptable." *Id.* (citation omitted). I am guided, however, by the concerns in *Kelliher* and its application of the Eighth Amendment and the North Carolina Constitution, and would hold that Defendant's punishment in this case constitutes an unconstitutional *de facto* LWOP sentence.

The majority declines to apply or discuss *Kelliher*'s reasoning because: (1) "*Miller* has never held as being unconstitutional a life *with* parole sentence imposed on a defendant who commits a murder when he was a minor[;]" and (2) the life expectancy and mortality table found in N.C. Gen. Stat. § 8-46 (2019) lists a 15-year old's life expectancy as 61.7 years. In making its first point, the majority does not recognize or address the numerous decisions from state appellate courts—expressly relied upon in *Kelliher*—that have held *Miller* does apply to juveniles convicted of homicides and sentenced to terms of imprisonment that are the functional equivalent of a LWOP punishment. *See Kelliher*, 273 N.C. App. at 633 n. 11, 849 S.E.2d at 345 n. 11 (citing 17 states whose appellate courts have recognized lengthy term-of-years sentences as *de facto* LWOP sentences subject to the constitutional protections of *Roper*, *Graham*, and/or *Miller*, including eleven decisions with holdings

that directly applied those protections to juveniles convicted of homicide or would apply them to such cases).

To the extent the statutory mortality table found in N.C. Gen. Stat. § 8-46, which was not relied upon by the State at resentencing or on appeal, applies to the constitutional question before this Court, that statute by its very terms provides that it "*shall* be received . . . *with other evidence as to the health, constitution and habits of the person*[.]" (emphasis added). Thus, the life expectancy "table . . . is not conclusive, but only evidentiary," *Young v. E. A. Wood & Co.*, 196 N.C. 435, 437, 146 S.E.2d 70, 72 (1929) (construing a predecessor statute), and "life expectancy is determined from evidence of the plaintiff's health, constitution, habits, and the like, *as well as* from [the statutory] mortuary tables." *Wooten v. Warren by Gilmer*, 117 N.C. App. 350, 259, 451 S.E.2d 342, 359 (emphasis added) (citation omitted). The 61.7 year life expectancy for 15-year-old minors found in the statute certainly are not conclusive in light of Defendant's "health, constitution, habits, and the like." *Id.* For example—and setting aside any impact that a minimum of 45 years of imprisonment will have on Defendant—it is uncontroverted that Defendant suffers from mesial temporal sclerosis, epilepsy, PTSD, has a history of head injuries dating back to infancy, and years-long history of heavy, and varied drug abuse dating back to age eleven. The statutory life expectancy and mortality table *requires* consideration of this evidence alongside the tables themselves, N.C. Gen. Stat. § 8-46, and the majority's reliance on the lone 61.7 number provided by the statute does not change the "reality" of Defendant's punishment. *Cf. Graham*, 560 U.S. at 70-71, 176 L. Ed. 2d at 843.

II. CONCLUSION

As this Court said in *Kelliher*, the application of the Eighth Amendment and the North Carolina Constitution to juvenile sentencing presents myriad complexities. 273 N.C. App. at 644, 849 S.E.2d at 351-52. Nevertheless, "[t]his Court's duty is to uphold the federal and state Constitutions irrespective of these difficulties." *Id.* at 644, 849 S.E.2d at 352. Looking to the general principles set forth in *Roper*, *Graham*, *Miller*, and *Montgomery*, as well as to their application in *Kelliher*, I would hold that Defendant's consecutive sentences constitute an unconstitutional *de facto* LWOP punishment. For these reasons, I respectfully dissent from the majority's holding to the contrary.

STATE OF NORTH CAROLINA
v.
VINCENT LAMONT HARRIS, DEFENDANT

No. COA18-952-2

Filed 31 December 2020

Satellite-Based Monitoring—lifetime—aggravated offense—Grady inapplicable

The Supreme Court's decision in *State v. Grady*, 372 N.C. 509 (2019), was inapplicable to defendant's case, where he was ordered to enroll in satellite-based monitoring (SBM) for the remainder of his life, because the basis of imposing SBM was that defendant had committed an aggravated offense—while the basis was recidivism in *Grady*. The Court of Appeals reaffirmed its prior decision that the State had failed to meet its evidentiary burden of showing the reasonableness of the lifetime SBM.

Judge STROUD concurring in part and dissenting in part.

Appeal by defendant from order entered 19 February 2018 by Judge Quentin T. Sumner in Granville County Superior Court. Heard in the Court of Appeals 8 May 2019, and decided by this Court in a decision issued 2 July 2019. On review in the Court of Appeals by reconvening order of the Supreme Court issued 30 September 2019, and entered in this Court 1 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

YOUNG, Judge.

Vincent Lamont Harris (defendant) appealed from the trial court's order requiring him to submit to satellite-based monitoring (SBM) for life. On appeal, this Court concluded that the State failed to meet its burden of showing the reasonableness of the imposition of SBM, and reversed. This matter has come before us once more on a reconvening order, to be reconsidered in light of our Supreme Court's decision in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019). We hold that *Grady*

is inapplicable to the instant case, and therefore reaffirm our prior decision, and reverse.

I. Factual and Procedural Background

The facts of this case were set out in greater detail in our previous decision in this matter, *State v. Harris*, 266 N.C. App. 241, 829 S.E.2d 525 (2019) (unpublished). The salient facts, in short, are as follows: Defendant was arrested on a warrant and charged with second-degree rape. Defendant was found guilty and sentenced to a prison term. Subsequently, the trial court held a hearing on whether defendant was eligible for SBM, after which the court entered an order finding that defendant committed an aggravated offense, and requiring defendant to enroll in SBM for the remainder of his natural life. Defendant appealed from this order.

On appeal, this Court held that the State's burden at the SBM hearing was, in part, to show that defendant posed a threat of reoffending, such that SBM would be reasonable. We held that the State had failed to meet this burden, and reversed.

Subsequently, our Supreme Court entered its decision in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019). The Court held that the SBM statute was categorically unconstitutional as applied to those who were only eligible for SBM on the basis of a finding of recidivism. As a result of this decision, this Court has entered reconvening orders on many of our recent SBM decisions, to be reconsidered in light of the *Grady* decision. Such is the case before us. The question for this Court is whether our Supreme Court's decision in *Grady* impacts our decision in the instant case, and if so, whether a change in our opinion is required.

II. *Grady*

In *Grady*, the defendant conceded that he met the statutory definition of a recidivist – "that is, a person who has a prior conviction for a reportable offense." *Grady*, 372 N.C. at 516, 831 S.E.2d at 549; *see also* N.C. Gen. Stat. § 14-208.6(2b) (2017). The question before the Court was whether the imposition of SBM, which included "the GPS monitoring device itself and the 24/7 tracking[,]" was unconstitutional, either as a program altogether or as applied to the defendant.

The Court pursued extensive review. It noted, for example, that "the primary purpose of SBM is to solve crimes." *Id.* at 526, 831 S.E.2d at 556. The Court noted, however, that this alone was not sufficient to hold the program to constitute a reasonable search; rather, it was necessary to review the totality of the circumstances, comparing the intrusion on the

defendant's Fourth Amendment interests with the promotion of legitimate governmental interests. *Id.* at 527, 831 S.E.2d at 557.

The Court held that defendants, having served their prison sentences and whose legal rights have been restored, did not have "a diminished expectation of privacy in their persons and in their physical locations at any and all times of the day or night for the rest of their lives." *Id.* at 533, 831 S.E.2d at 561. As such, these individuals were still entitled to their Fourth Amendment right to privacy. The Court further held that,

> in light of the physical intrusiveness of the [physical device], the quarterly equipment checks, and the extent to which GPS locational tracking provides an "intimate window" into an individual's "privacies of life," we conclude that the mandatory imposition of lifetime SBM on an individual in defendant's class works a deep, if not unique, intrusion upon that individual's protected Fourth Amendment interests.

Id. at 538, 831 S.E.2d at 564.

Finally, the Court examined the State's argument that imposing SBM promoted the legitimate governmental interest in preventing crime. The Court held:

> It is well established that the State bears the burden of proving the reasonableness of a warrantless search. *Coolidge*, 403 U.S. at 455, 91 S.Ct. 2022. While the State's asserted interests here are without question legitimate, what this Court is duty bound to determine is whether the warrantless search imposed by the State on recidivists under the SBM program actually serves those legitimate interests. The State has the burden of coming forward with some evidence that its SBM program assists in apprehending sex offenders, deters or prevents new sex offenses, or otherwise protects the public. Simply put, as the U.S. Supreme Court explained in *Ferguson v. City of Charleston*, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." 532 U.S. 67, 86, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) (quoting *Edmond*, 531 U.S. at 42, 121 S.Ct. 447). Here, despite having the burden of proof, the State concedes that it did not present any evidence tending to show the SBM program's efficacy in furthering the State's legitimate interests. *Grady*, 817

S.E.2d at 27. We cannot simply assume that the program serves its goals and purposes when determining whether the State's interest outweighs the significant burden that lifetime SBM imposes on the privacy rights of recidivists subjected to it. *Cf. Doe v. Cooper*, 842 F.3d 833, 846 (4th Cir. 2016) ("[N]either anecdote, common sense, nor logic, in a vacuum, is sufficient to carry the State's burden of proof. Thus, while the State's argument may be conceptually plausible, it presented no evidence or data to substantiate it before the district court." (citing *United States v. Carter*, 669 F.3d 411, 418–19 (4th Cir. 2012))).

To be clear, the scope of North Carolina's SBM program is significantly broader than that of other states. Lifetime monitoring for recidivists is mandated by our statute for anyone who is convicted of two sex offenses that carry a registration requirement. A wide range of different offenses are swept into this category. For example, a court is required to impose lifetime SBM on an offender who twice attempts to solicit a teen under the age of sixteen in an online chat room to meet with him, regardless of whether the person solicited was actually a teen or an undercover officer, or whether any meeting ever happened. *See* N.C.G.S. § 14-202.3 (2017); *State v. Fraley*, 202 N.C. App. 457, 688 S.E.2d 778, *disc. rev. denied*, 364 N.C. 243, 698 S.E.2d 660 (2010). Not only does the lifetime imposition of SBM vastly exceed the likely sentence such an offender would receive on a second offense, in addition, the State has simply failed to show how monitoring that individual's movements for the rest of his life would deter future offenses, protect the public, or prove guilt of some later crime.

Applying the correct legal standard to the record in this case, we conclude that the State has not met its burden of establishing the reasonableness of the SBM program under the Fourth Amendment balancing test required for warrantless searches. In sum, we hold that recidivists, as defined by the statute, do not have a greatly diminished privacy interest in their bodily integrity or their daily movements merely by being also subject to the civil regulatory requirements that accompany the status of being a sex offender. The SBM program constitutes a substantial

> intrusion into those privacy interests without any showing by the State that the program furthers its interest in solving crimes that have been committed, preventing the commission of sex crimes, or protecting the public. In these circumstances, the SBM program cannot constitutionally be applied to recidivists in Grady's category on a lifetime basis as currently required by the statute.

Id. at 543-45, 831 S.E.2d at 568.

The Court, in its conclusion, narrowly tailored its holding. The Court held that "[t]he generalized notions of the dangers of recidivism of sex offenders, for which the State provided no evidentiary support, cannot justify so intrusive and so sweeping a mode of surveillance upon individuals, like defendant, who have fully served their sentences and who have had their constitutional rights restored." *Id.* at 545, 831 S.E.2d at 569. The Court therefore determined that "no circumstances exist" in which the imposition of SBM on a recidivist would be constitutionally valid, and therefore that SBM was categorically unconstitutional as applied to recidivists. *Id.* at 547, 831 S.E.2d at 570. However, the Court clarified that its decision "does not address whether an individual who is classified as a sexually violent predator, or convicted of an aggravated offense, or is an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen may still be subjected to mandatory lifetime SBM—regardless of whether that individual is also a recidivist." *Id.* at 550, 831 S.E.2d at 572. The decision was specific to those defendants enrolled in SBM exclusively on the basis of having attained the status of a recidivist, and for no other reason.

III. Reconvening Review

Our prior decision in the instant case, however, was not premised upon defendant's recidivist status. Indeed, in the trial court's judicial findings on SBM, it did not find defendant to be a recidivist, but rather found as its basis for imposing SBM that defendant committed an aggravated offense. Rather, it was premised upon the State's failure to meet its evidentiary burden. We specifically held that "[t]he State presented no testimony about the degree of likelihood of the defendant to reoffend, no evidence of other offenses that would leave anyone to believe the defendant would reoffend and no evidence of efficiency [sic] of SBM." *Harris*, 266 N.C. App. 241, 829 S.E.2d 525. We concluded that, because the State had failed to meet this burden, the trial court's order was subject to reversal. Moreover, because the State was not entitled to a second chance to meet that burden, this was a reversal without remand.

We recognize and respect the authority established by our Supreme Court in *Grady*. However, that case was explicitly limited to matters concerning recidivism. Our prior decision in this matter was not premised upon the defendant's status as a recidivist, but upon the State's failure to meet its evidentiary burden. Moreover, our prior decision in this matter concerned a defendant who committed an aggravated offense; the Court in *Grady* explicitly noted that its holding did not apply to such a situation. Accordingly, we hold that our previous decision in this matter was properly decided, and for the same reasons as in that case, we reverse the order of the trial court imposing SBM.[1]

REVERSED.

Judge HAMPSON concurs.

Judge STROUD dissents in a separate opinion.

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

I respectfully concur in part and dissent in part. I concur with the majority's opinion as to imposition of SBM while Defendant is under post-release supervision. I dissent from the majority's opinion as to imposition of SBM after Defendant is released from supervision.

The majority notes that Defendant failed to preserve the issue of reasonableness of SBM during and after post-release supervision. I believe this issue was preserved for review because the Defendant filed a "Motion to Dismiss State's Petition for Satellite-Based Monitoring and to Declare Satellite-Based Monitoring Unconstitutional," specifically noting arguments regarding the reasonableness of SBM and the trial court held a hearing on this motion before entering the SBM order. In the motion, Defendant argued that if the trial court ordered SBM, it must "impose SBM for a period of time no longer than the search would continue to be reasonable under the Fourth Amendment and Article I, § 20." Defendant also argued these issues in his briefs on appeal. I would find that Defendant preserved this issue for review.

At the time of the trial court's SBM order, Defendant had already served his sentence for second degree rape and had been released from

1. The dissent raises the issue of the reasonableness of SBM during and after post-release supervision. However, because this issue was not properly preserved by argument at trial, we decline to consider it.

custody on 27 August 2016; he was to remain on post-release supervision for five years. *See* N.C. Gen. Stat. § 15A-1368.2(c) (2019). I believe this Court is bound to follow *State v. Hilton*, 271 N.C. App. 505, 845 S.E.2d 81 (2020), where this Court held that "imposition of SBM on Defendant *during the period of his post-release supervision* constitutes a reasonable search[,]" but reversed and remanded the trial court's order based upon its conclusion that "the imposition of SBM [after expiration of post-release supervision] is unreasonable". *Id.* at 506, 845 S.E.2d at 83. I do not believe the procedural and factual circumstances of this case can be materially distinguished from *Hilton*, and thus we are bound to follow that precedent, at least until our Supreme Court directs otherwise in the SBM cases currently under review. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). And despite a dissent in *Hilton*, *Hilton* was not appealed for further review by our Supreme Court. *See State v. Hilton*, 271 N.C. App. 505, 845 S.E.2d 81.

I would therefore "affirm the trial court's order to the extent that it imposes SBM on Defendant for the remainder of his post-release supervision" and "reverse the trial court's order to the extent that the order imposes SBM *beyond* Defendant's period of post-release supervision" with remand for further proceedings. *Id.* at 514, 845 S.E.2d at 88.

STATE OF NORTH CAROLINA
v.
SUWANDA EVETTE HUMPHREYS, DEFENDANT

No. COA19-1051

Filed 31 December 2020

1. Crimes, Other—disorderly conduct on school property—substantial interference with operation of school—profanity heard by students on way to class

In a prosecution for disorderly conduct on school property under N.C.G.S. § 14-288.4(a)(6) arising from defendant's actions during a police search of her vehicle in a high school parking lot, the State failed to present sufficient evidence that defendant substantially interfered with the operation of the school in educating students to survive defendant's motion to dismiss. The only evidence of any interference was that a group of students heard defendant use profanity on their way to class, which did not amount to a substantial interference with, disruption of, or confusion of the operation of the school in its instruction and training of its students.

2. Police Officers—resisting a public officer—during vehicle search—mere remonstration

In a prosecution for resisting a public officer arising from defendant's actions during a police search of her vehicle in a high school parking lot, the State failed to present sufficient evidence that defendant resisted, delayed, or obstructed an officer from performing his duties to investigate defendant's car (to which a K-9 had alerted for controlled substances) and to keep his fellow officer safe during the search to survive defendant's motion to dismiss. Defendant's actions in disobeying the officer's order to stand in a specific place during the vehicle search, while staying where the officer could see her as she observed the search and responding "you can keep an eye on me from right here," amounted only to remonstration where her actions and words were not aggressive or suggestive of violence.

3. Police Officers—resisting a public officer—during a vehicle search—willfulness

In a prosecution for resisting a public officer arising from defendant's actions during a police search of her vehicle in a high school parking lot, even assuming the State presented sufficient evidence that defendant delayed, resisted, or obstructed an officer from performing his duties to investigate defendant's car (to which a K-9 had

alerted for controlled substances) and to keep his fellow officer safe during the search, the State failed to present sufficient evidence that defendant's actions were willful and unlawful. The evidence showed that defendant believed she had the right to stand where she could observe the search, so long as she was not obstructing the search and the other officer could see her.

Appeal by Defendant from judgment entered 20 March 2019 by Judge Anna M. Wagoner in Rowan County Superior Court. Heard in the Court of Appeals 12 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin Hukka, for the State.

Blass Law, PLLC, by Danielle Blass, for defendant-appellant.

MURPHY, Judge.

When a defendant makes a motion to dismiss a charge of disorderly conduct on school property under N.C.G.S. § 14-288.4(a)(6), the State must present substantial evidence to show a substantial interference with the operation of the school in educating students. Here, the only evidence of Defendant's interference with the operation of a school and its students was a group of students hearing her use profanity on their way to class. This alone does not constitute evidence of a substantial interference with the operation of the school and its students. The trial court erred in denying Defendant's motion to dismiss the charge of disorderly conduct.

Additionally, when a defendant moves to dismiss a charge of resisting a public officer in violation of N.C.G.S. § 14-233, the State must present substantial evidence to support a finding the defendant willfully and unlawfully obstructed, delayed, or resisted a public officer. When a defendant merely remonstrates, she does not resist arrest. Similarly, even if a defendant resists arrest but does so with the belief she has the right to, caselaw holds she does not act willfully and unlawfully under N.C.G.S. § 14-233. Here, there is insufficient evidence Defendant did anything more than merely remonstrate. Even if her actions exceeded remonstration, there is insufficient evidence Defendant acted willfully in purposeful or deliberate violation of the law as she reasonably believed she had the right to act as she did in observing the officers and protesting what she perceived as an unlawful search. The trial court erred in denying Defendant's motion to dismiss the charge of resisting a public officer.

BACKGROUND

On 28 March 2018, the school resource officer, Deputy Tommy Cato ("Deputy Cato"), requested a random K-9 walkthrough of the East Rowan High School parking lot. During the walkthrough, K-9 Kilo, led by Sergeant Wes Smith ("Sergeant Smith"), alerted to Defendant's car, driven by her daughter. The assistant principal, Charles Edwards, notified Defendant, Suwanda Evette Humphreys, the dog had alerted to her car, and Defendant arrived at the parking lot shortly thereafter, where her daughter had been sent from class. Sergeant Smith testified Defendant was belligerent, cursing, and very loud upon her arrival.

Although the school officials believed they could search the car without consent, they attempted to gain consent for the search from Defendant. Defendant initially refused to give consent, stating the officers needed a warrant; however, eventually she consented to the search of her car once she was told the car would be towed and a search warrant would be obtained if it was not searched at the school. Throughout Sergeant Smith's search, Defendant made sure to observe the conduct of Sergeant Smith to ensure the search was conducted appropriately. {Video[1] 1:00-1:45} Defendant also repeatedly looked over Sergeant Smith's shoulder while he was attempting to search the car. Deputy Cato and Sergeant Smith repeatedly asked Defendant to back up or back away from Sergeant Smith. Defendant did not comply with Deputy Cato's or Sergeant Smith's requests and continued observing the search. Also, during the search, Defendant said to a class of students walking through the parking lot to their weightlifting class, "[y]ou-all about to see a black woman -- an unarmed black woman get shot."

At some point during the search, while Sergeant Smith was on the passenger's-side of the car, Defendant moved to the back driver's-side of the car. {Video 0:40} After telling her daughter "make sure you can see," {Video 1:00} Defendant moved to the front driver's-side of the car. {Video 1:05} When she moved to the front of the car, Deputy Cato, who was at the back driver's-side of the car, instructed her to "come on back" to where he was {Video 1:07} because "[he needed] to keep an eye on [her]." {Video 1:15} Defendant walked out of view of Deputy Cato for approximately three seconds {Video 1:18-1:21} and then returned to be in Deputy Cato's view. {Video 1:20} While in Deputy Cato's view, Defendant refused to come back to him and stated, "you can keep an

1. Throughout our opinion we refer to State's Exhibit 1, a video depicting some of the interactions leading up to Defendant's arrest, as "Video," and fully incorporate the same into our opinion by reference for a more complete understanding of the evidence.

eye on me from right here." {Video 1:20-1:23} Deputy Cato again stated, "come on back over here," and Defendant again responded, "you can keep an eye on me from right here." {Video 1:24-1:28} Defendant then instructed her daughter to turn her "recorder on cause [Deputy Cato could see her], [she was] not in this man's way and [she was not] bothering nobody and [she was] not moving." {Video 1:27-1:36} Deputy Cato then asked, "are you refusing to come back here?" {Video 1:37-1:39} To which Defendant responded, "I'm not breaking no law." {Video 1:38-1:41} Deputy Cato stated, "you're under arrest." {Video 1:40-1:42} While being arrested, Defendant asked, "for what?" and stated, "I'm not breaking no law." {Video 1:41-1:48} She continued to reiterate that she had broken no law even after her arrest. {Video 2:00-3:30}

Following this incident, Defendant was charged with disorderly conduct in violation of N.C.G.S. § 14-288.4(a) and resisting a public officer in violation of N.C.G.S. § 14-223. Deputy Cato later testified at trial he placed Defendant under arrest because she resisted, delayed, or obstructed him by moving away from him, which he believed impeded his ability to observe Defendant, and her daughter who was at the back passenger's-side of the car, while Sergeant Smith searched the car. {Video 1:00-1:45}

Defendant was tried on 20 March 2019. At the close of the State's evidence, Defendant unsuccessfully moved to dismiss both charges for insufficient evidence. Defendant renewed both motions to dismiss at the close of all evidence, but the trial court again denied the motions. The jury found Defendant guilty of disorderly conduct and resisting a public officer. Defendant entered written notice of appeal on 28 March 2019.

ANALYSIS

On appeal, Defendant argues: (A) the trial court erred by failing to dismiss the disorderly conduct charge for insufficient evidence or we should vacate the judgment against her for disorderly conduct because of a fatal variance between the *Magistrate's Order* and evidence at trial, and alternatively argues ineffective assistance of counsel; and (B) the trial court erred by failing to dismiss the resisting a public officer charge.

A. Disorderly Conduct

[1] With respect to disorderly conduct on school property under N.C.G.S. § 14-288.4(a)(6) Defendant argues the State failed to present substantial evidence showing Defendant interfered with the operation of the school. We agree. There is not substantial evidence to support the disorderly conduct charge under N.C.G.S. § 14-288.4(a)(6) because

a reasonable mind would not interpret Defendant's conduct to substantially interfere with the instructing and training of the students at the school.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "When reviewing a sufficiency of the evidence claim, this Court considers whether the evidence, taken in the light most favorable to the [S]tate and allowing every reasonable inference to be drawn therefrom, constitutes 'substantial evidence of each element of the crime charged.' " *State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 261 (2008). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

N.C.G.S. § 14-288.4(a)(6) reads:

> (a) Disorderly conduct is a public disturbance intentionally caused by any person who . . . :
>
> (6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

N.C.G.S. § 14-288.4(a)(6) (2019). N.C.G.S. § 14-288.1(8) defines "[p]ublic disturbance" as:

> Any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access.

N.C.G.S. § 14-288.1(8) (2019).

Our Supreme court interpreted the exact language of N.C.G.S. § 14-288.4(a)(6) in *In re Eller*. "When the words 'interrupt' and 'disturb' are used in conjunction with the word 'school,' they mean to a person of ordinary intelligence a *substantial interference* with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled." *In re Eller*, 331 N.C. 714, 718, 417 S.E.2d 479, 482 (1992) (quoting *State v. Wiggins*, 272 N.C. 147, 154, 158 S.E.2d 37, 42 (1967)). Our Supreme Court there held "[u]nder the

instant facts, we conclude that the State has not produced substantial evidence that the respondents' behavior constituted a 'substantial interference.' " *Id.* at 718, 417 S.E.2d at 482.

Our Supreme Court made no distinction between the two parts of the disjunction in N.C.G.S. § 14-288.4(a)(6) in applying the rule from *Wiggins*. Similarly, we have not made distinctions between the disjunction in N.C.G.S. § 14-288.4(a)(6) in applying the rule from *Wiggins*. *See, e.g.*, *In re Grubb*, 103 N.C. App. 452, 453-54, 405 S.E.2d 797, 798 (1991) (applying the rule from *Wiggins* to the exact language currently in N.C.G.S. § 14-288.4(a)(6)); *In re Brown*, 150 N.C. App. 127, 129-131, 562 S.E.2d 583, 585-586 (2002) (applying the rule from *Wiggins* to a finding that a juvenile "engag[ed] in conduct which disturb[ed] the peace, order or discipline at [a] public . . . educational institution"); *In re Pineault*, 152 N.C. App. 196, 199, 566 S.E.2d 854, 857 (2002); *In re M.G.*, 156 N.C. App. 414, 416, 576 S.E.2d 398, 400-01 (2003); *In re S.M.*, 190 N.C. App. 579, 582-83, 660 S.E.2d 653, 655-56 (2008). We decline the State's invitation to do so here.

As a result, a defendant violates N.C.G.S. § 14-288.4(a)(6) if she causes "a *substantial interference* with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled." *Eller*, 331 N.C. at 718, 417 S.E.2d at 482.

> There is no "bright line" test for what constitutes "substantial interference" with a school. However, appellate cases decided since *Eller* have tended to uphold juvenile adjudications for disorderly conduct in school when there is evidence of, e.g., (1) the use of vulgar language by the student; (2) aggressive or violent behavior by the juvenile; or (3) disruptive behavior serious enough to require the student's teacher to leave her class unattended in order to discipline the student.

S.M., 190 N.C. App. at 583-84, 660 S.E.2d at 656.

We have previously found a substantial disruption where a juvenile used vulgar language and required school staff to delay the performance of their duties. *See Pineault*, 152 N.C. App. at 199, 566 S.E.2d at 857 (a student loudly stated "[f]—k you" to other students and then a teacher, who had to spend several minutes escorting the student to the principal's office); *M.G.*, 156 N.C. App. at 415, 576 S.E.2d at 399 (a student yelled "shut the f—k up" to a group of students and was escorted by a teacher to detention for several minutes).

However, an interference has been found not to be substantial when the interference was not extended or significant, and required little intervention to remedy. *See Grubb*, 103 N.C. App. at 452-53, 405 S.E.2d at 797 (a student distracted her class by talking loudly during class, and continued to do so even after being reprimanded, however stopped talking after a second reprimand); *Eller*, 331 N.C. at 716, 417 S.E.2d at 481-82 (two students struck a radiator with a carpenter's nail several times during class, making a loud rattling sound that caused other students to look for where the sound was coming from and caused the teacher to interrupt her lecture for fifteen to twenty seconds each time the noise was made); *Brown*, 150 N.C. App. at 127-28, 562 S.E.2d at 584-85 (a student talked during a test multiple times, backtalked a teacher, slammed the door to his classroom, and then cried and begged his teacher not to send him to the office); *S.M.*, 190 N.C. App. at 585, 660 S.E.2d at 657 (a student was in the hallway when she should have been in class, ran when asked to stop, was eventually chased down the hall and stopped by the school resource officer, and a few students and teachers watched as the student was escorted to the office).

Here, Defendant's conduct, viewed in the light most favorable to the State, was not a "*substantial interference* with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled" in violation of N.C.G.S. § 14-288.4(a)(6). *Eller*, 331 N.C. at 718, 417 S.E.2d at 482. Once the K-9 indicated Defendant's car, operated by her daughter, might contain drugs, school officials and police officers waited for Defendant to arrive at the school since she indicated she did not want the car searched without a warrant.

Upon arriving, Defendant continued to state her car could not be searched, at which point the students of a class, walking through the parking lot to get to the field house for weightlifting, had to be redirected around the area of the search. Additionally, some students arriving to school late were directed around the area of the search. However, the school would have directed students around the police search regardless of Defendant's presence, words, or actions. Defendant did not cause these potential interferences.

Throughout the incident Defendant used profanity. Additionally, while the class of students walked through the parking lot, Defendant said "[y]ou-all about to see a black woman -- an unarmed black woman get shot." There was no evidence that a teacher was instructing this class of students at that time. Defendant's statement to the class of students is the only evidence in the Record where Defendant engaged with students other than her daughter. Rather, they were walking through

the parking lot to reach the field house, where their weightlifting class met. Similarly, there was some indication these students "hear[d] [Defendant] saying some things she probably shouldn't say," presumably profanity. However, since "there[] [was] a commotion going on [with] a police officer [], [and] a dog . . . [the students] all look[ed]," and "hear[d] [Defendant] saying some things she probably shouldn't say." According to the testimony, the students took notice of the commotion along their normal path to their weightlifting class regardless of Defendant's actions, and Defendant's profanity did not interfere with the students by drawing their attention to the commotion.

Based on this evidence, even when viewed in the light most favorable to the State, the only interference with a school function caused by Defendant was the class of high school students hearing profanity during their normal walk to class. This alone does not constitute a substantial interference. The scope of Defendant's interference was minor in that it was only observed by a single group of students and a few individual students arriving late, along with the two officers and two assistant principals. The students who saw and heard the commotion did so only briefly while walking to class; whereas, the adults who witnessed it are fully capable of hearing such language. Additionally, unlike in *M.G.* and *Pineault*, there is no indication Defendant's conduct prolonged any process such that school staff could not perform their regular duties; in fact, school staff continued to perform their regular duties of being present for the search. Finally, there was no aggressive or violent behavior on the part of Defendant beyond the use of profanity directed at law enforcement and an assistant principal, or its use in a general communicative manner. There was no evidence Defendant's conduct caused "a *substantial interference* with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled." *Eller*, 331 N.C. at 718, 417 S.E.2d at 482.

The trial court erred by denying Defendant's motion to dismiss the charge of disorderly conduct for insufficient evidence under N.C.G.S. § 14-288.4(a)(6). We reverse the trial court's denial of the motion to dismiss and vacate Defendant's conviction for disorderly conduct.

Although both parties discuss disorderly conduct under N.C.G.S. § 14-288.4(a)(2), we note, at the beginning of the trial, the State voluntarily dismissed any basis for disorderly conduct other than N.C.G.S. § 14-288.4(a)(6). *See* N.C.G.S. § 15A-931(a) (2019) ("[T]he prosecutor may dismiss any charges stated in a criminal pleading including those deferred for prosecution by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at

any time."). Any charge under N.C.G.S. § 14-288.4(a)(2) was voluntarily dismissed based on the following exchange:

> [THE STATE]: -- before we proceed just to clarify on that warrant, on the disorderly conduct, the count two, the State is going to proceed under [N.C.G.S. § 14-288.4], but (a)(6) -- specifically (a)(6), which would be on educational premise.
>
> THE COURT: As opposed to?
>
> [THE STATE]: It just lists the statute as a whole. We're just going to narrow it in to (a)(6), which would be causing a public disturbance, disrupting, disturbing or interfering with the teaching of students at an educational institution, or engaging in conduct that disturbs the peace, order or discipline at an educational institution.
>
> THE COURT: Any objection?
>
> [DEFENDANT]: Without objection.
>
> THE COURT: No objection. Okay.

As a result, we need not address any argument related to disorderly conduct under N.C.G.S. § 14-288.4(a)(2).

Defendant also contends there was a fatal variance between the *Magistrate's Order* and the evidence at trial, but admits she did not preserve this issue for appeal and asks us to invoke Rule 2 to review it. Since this issue is rendered moot by the State's voluntary dismissal and our reversal of the disorderly conduct conviction above, we decline to invoke Rule 2 to review this unpreserved issue, and do not address the alternative ineffective assistance of counsel argument.

B. Resisting a Public Officer

Defendant argues the trial court erred by failing to dismiss the charge for resisting a public officer because: (1) Deputy Cato was not discharging an official duty; (2) Defendant did not obstruct Deputy Cato from attempting to discharge a duty; and (3) Defendant did not act willfully and unlawfully. Although Deputy Cato was discharging his official duties, Defendant did not obstruct Deputy Cato from performing these duties and did not act willfully and unlawfully. The trial court erred by denying Defendant's motion to dismiss the charge of resisting a public officer in violation of N.C.G.S. § 14-233. As previously stated, "[t]his Court reviews the trial court's denial of a motion to dismiss *de novo*." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33.

N.C.G.S. § 14-223 has five essential elements:

> (1) that the victim was a public officer;
>
> (2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer;
>
> (3) that the victim was discharging or attempting to discharge a duty of his office;
>
> (4) that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and
>
> (5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

State v. Peters, 255 N.C. App. 382, 386-87, 804 S.E.2d 811, 815 (2017) (citing *State v. Washington*, 193 N.C. App. 670, 679, 668 S.E.2d 622, 628 (2008)); *see also* N.C.G.S. § 14-223 (2019). Defendant concedes that she knew the victim was a public officer.

1. Discharging a Public Duty

The element requiring the discharge of an official duty is met. Deputy Cato was discharging his duty to investigate the car to which K-9 Kilo alerted. With respect to this duty, Deputy Cato stated, "I'm a law enforcement officer, and yes, I am called by the admin staff occasionally for marijuana on campus, for a weapon on campus, for disorderly conduct." Deputy Cato was also discharging his duty to keep Sergeant Smith safe. *See State v. Friend*, 237 N.C. App. 490, 495, 768 S.E.2d 146, 149 (2014) (holding an officer remaining at a jail to ensure the safety of other officers constituted an official duty of his office). Like the officer in *Friend*, Deputy Cato was discharging his duty to keep his fellow officer safe during the search of Defendant's car. Therefore, the official duty element is satisfied.

2. Resist, Delay, or Obstruct

[2] However, there is not substantial evidence to support the resistance, delay, or obstruction element. "[M]erely remonstrating with an officer in behalf of another, or criticizing or questioning an officer while he is performing his duty, when done in an orderly manner, does not amount to obstructing or delaying an officer in the performance of his duties." *State v. Leigh*, 278 N.C. 243, 251, 179 S.E.2d 708, 713 (1971).

The State relies on *State v. Bell* to support its position that Defendant was not merely remonstrating, but *Bell* is distinguishable from the

present case. *State v. Bell*, 164 N.C. App. 83, 594 S.E.2d 824 (2004). In *Bell*, the defendant interrupted a police officer's investigation of a student by shouting loudly, attracting a nearby crowd, leaning inside the officer's patrol car, pushing the officer, preventing the officer from closing the door to his patrol car, and repeatedly disobeying orders to step back. *Id.* at 85-86, 594 S.E.2d at 826. We held the evidence "was sufficient to allow a jury to find that [the] defendant obstructed and delayed [the officer] in the performance of his duties." *Id.* at 95, 594 S.E.2d at 831. Similarly, in *State v. Singletary*, the defendant exceeded mere remonstration and obstructed an officer's duties by advancing within six feet of an officer, waiving his fists in the air, after being told to halt. *State v. Singletary*, 73 N.C. App. 612, 616, 327 S.E.2d 11, 14 (1985).

At trial, Deputy Cato indicated Defendant resisted, delayed, or obstructed him when she moved away from him. Although Defendant may have been within six feet of Sergeant Smith, her actions and words were not aggressive or suggestive of violence. Rather, Defendant appeared to orderly, even if loudly, remonstrate by remaining where she could observe Sergeant Smith executing the search. Unlike the defendant in *Bell*, Defendant never pushed either of the officers or physically obstructed their search.

Additionally, after Defendant walked to the front driver's-side of the car being searched, and partially out of view in front of another car, she was told to "come on back [to Deputy Cato]" because he needed to "keep an eye on [her]." {Video 1:05-1:15} In response, Defendant walked back into his view and told Deputy Cato he could "keep an eye on [her from where he was]." {Video 1:18-1:23} For the entirety of this exchange, except the three seconds when Defendant started to walk in front of the other car parked to the left of the car being searched and returned into view upon Deputy Cato's instruction, {Video 1:18-1:21} Defendant stayed in view of Deputy Cato. Defendant was told to come back because she needed to be where Deputy Cato could see her and, although she did not come all the way back to Deputy Cato, she remained in view of Deputy Cato in a location where she had previously been observing the search of her vehicle. As such, the factual situation in this case is distinct from *Bell* and *Singletary* and does not exceed mere remonstration.

There was insufficient evidence of Defendant having resisted, delayed, or obstructed Deputy Cato. The trial court erred in denying Defendant's motion to dismiss. We reverse the trial court's denial of the motion to dismiss the resisting a public officer charge and vacate the conviction for resisting a public officer.

3. Willful and Unlawful Action

[3] As an independent and adequate ground for reversal, the willful and unlawful element is not satisfied.

> To establish guilt beyond a reasonable doubt, [N.C.G.S. §] 14-223 requires that the State prove a defendant acted "willfully" when resisting, delaying, or obstructing a public officer in the discharge of his or her duties. To prove 'willfulness,' the State must introduce sufficient evidence that the defendant acted without justification or excuse, "purposely and deliberately in violation of law."

Peters, 255 N.C. App. at 388, 804 S.E.2d at 816 (quoting *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965)).

> When used in [N.C.G.S. § 14-223], 'willful' is to be interpreted as something more than an intention to do a thing. It implies the doing [of] the act purposely and deliberately, indicating a purpose to do it without authority — careless whether [someone] has the right or not — in violation of law, and it is this which makes the criminal intent without which one cannot be brought within the meaning of a criminal statute.

Id. (interpreting "willful" in the context of a violation of N.C.G.S. § 14-223) (quoting *State v. Moore*, 240 N.C. App. 465, 478, 770 S.E.2d 131, 141 (2015)). Determining intent entails considering the "acts and conduct of the defendant and the general circumstances existing at the time[.]" *State v. Norman*, 14 N.C. App. 394, 399, 188 S.E.2d 667, 670 (1972).

Defendant indicated she stood near the front of her car in order to lawfully observe the search. The evidence does not indicate that she stood near her car with a purpose to do so without authority or careless of whether she had the right to stand there. In fact, on the scene, Defendant stated, "I'm not breaking no law" when she was told she needed to return to Deputy Cato and then was arrested. {Video 1:39} During and after being arrested, Defendant reiterated she was not breaking any law. {Video 1:46, 2:00, 2:24, 3:30} Although Deputy Cato and Sergeant Smith asked Defendant to move multiple times, it is clear that even after these requests Defendant believed she had the right to stand and observe the search, so long as Deputy Cato could see her and she was not obstructing Sergeant Smith's search of the vehicle. {Video 1:00-2:30} A reasonable mind would not conclude this evidence supports a finding that Defendant acted "purposely and deliberately, indicating

a purpose to do it without authority — careless whether [she had] the right or not — in violation of law[.]" *Peters*, 255 N.C. App. at 388, 804 S.E.2d at 816 (quoting *Moore*, 240 N.C. App. at 478, 770 S.E.2d at 141).

There was insufficient evidence of Defendant acting willfully and unlawfully as used in N.C.G.S. § 14-233. The trial court erred in denying Defendant's motion to dismiss. We reverse the trial court's denial of the motion to dismiss the resisting a public officer charge and vacate Defendant's conviction for resisting a public officer.

CONCLUSION

The trial court erred in denying the motion to dismiss the disorderly conduct charge because there was not substantial evidence to support Defendant's violation of N.C.G.S. § 14-288.4(a)(6). The trial court also erred in denying Defendant's motion to dismiss the resisting a public officer charge because the State did not present substantial evidence to support a finding Defendant willfully and unlawfully obstructed, delayed, or resisted Deputy Cato in violation of N.C.G.S. § 14-233. We reverse the rulings on the motions to dismiss and vacate Defendant's convictions.

REVERSED.

Judges HAMPSON and YOUNG concur.

STATE v. McCANTS

[275 N.C. App. 801 (2020)]

STATE OF NORTH CAROLINA
v.
DESMIN TARON McCANTS, DEFENDANT

No. COA19-115

Filed 31 December 2020

1. Search and Seizure—warrantless searches—post-release supervision—statutory authority—premises

Where a warrantless search of defendant's residence during his mandatory post-release supervision (PRS) from prison uncovered contraband, the trial court should have granted defendant's motion to suppress because the Department of Public Safety's special commission lacked statutory authority to impose as a condition of defendant's PRS that he submit to warrantless searches of his residence. The plain language of the statute governing the conditions of PRS (N.C.G.S. § 15A-1368.4(e)) only expressly granted the commission the authority to impose a condition allowing PRS officers to search a supervisee's *person* and prohibited "any other searches that would otherwise be unlawful"; furthermore, this specific statute controlled over the more general catch-all statute (N.C.G.S. § 15A-1368.4(c)), and a comparison with other similar statutory subsections demonstrated the General Assembly's intent to limit warrantless searches of PRS supervisees to their persons.

2. Search and Seizure—warrantless searches—post-release supervision—premises—consent

Where the Department of Public Safety's special commission lacked statutory authority to impose as a condition of defendant's mandatory post-release supervision (PRS) that he submit to warrantless searches of his residence, defendant's purported consent could not justify the otherwise unlawful search of his residence because defendant was required by statute to consent to PRS and the conditions imposed.

Appeal by Defendant from judgment entered 2 August 2018 by Judge Stanley L. Allen in Superior Court, Guilford County. Heard in the Court of Appeals 3 September 2019.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for Defendant-Appellant.

McGEE, Chief Judge.

Desmin Taron McCants ("Defendant") appeals from a judgment entered upon his guilty plea following denial of his motion to suppress. Defendant argues that the trial court erred by denying his motion to suppress evidence discovered during a warrantless search of his premises conducted pursuant to a non-statutory condition added to his mandatory post-release supervision. We agree and reverse the 2 August 2018 order denying Defendant's motion to suppress, vacate the 2 August 2018 judgment entered on Defendant's *Alford* plea, and remand for entry of an order granting Defendant's motion to suppress and any additional proceedings not inconsistent with this opinion.

I. Factual and Procedural History

Defendant was convicted of assault with a deadly weapon with intent to kill ("AWDWIK") on 14 August 2014 for an incident involving discharging a firearm into occupied property that occurred on 13 October 2013, when Defendant was nineteen years old. Several additional convictions for crimes Defendant had committed over a four-month period in 2013 were consolidated for judgment with Defendant's AWDWIK conviction. AWDWIK is a Class E felony and, having no prior convictions, Defendant was a prior record level I—thereby subjecting Defendant to either active or intermediate punishment. Defendant was given intermediate punishment, meaning that Defendant's active sentence was suspended and he was placed on supervised probation. The trial court included as part of Defendant's intermediate punishment special probation, or a "split-sentence," meaning that Defendant would serve a period of incarceration not to exceed one-quarter of his maximum imposed sentence period, with the remaining time being a probationary period consisting of regular supervised probation. N.C.G.S. § 15A-1351(a) (2017).

Just over seven months into Defendant's period of supervised probation, he was charged for possession of marijuana with intent to sell. Defendant was convicted on this charge on 1 August 2016, his probation for the 14 August 2014 convictions was revoked, and his sentences were activated. Defendant was initially transferred from jail and admitted into the prison system on 31 August 2016. Defendant was released from prison on 31 March 2017, and placed on one year mandatory post-release supervision ("PRS"), to run from 1 April 2017 to 1 April 2018. Conditions of PRS are governed by N.C.G.S. § 15A-1368.4

(2017), and a special commission (the "Commission") that is a part of the Department of Public Safety ("DPS") has been delegated authority by the General Assembly to decide which conditions authorized by N.C.G.S. § 15A-1368.4 to impose for every prisoner subject to PRS. N.C.G.S. § 143B-720(a) (2017) ("There is hereby created a Post-Release Supervision and Parole Commission of the Division of Adult Correction and Juvenile Justice [('DAC')] of [DPS.]"); N.C.G.S. § 15A-1368(b) (2017) ("The Post-Release Supervision and Parole Commission, as authorized in Chapter 143[B] of the General Statutes, shall administer post-release supervision as provided in this Article.").[1] DPS sets out its main rules and procedures for supervising PRS supervisees, parolees, and probationers in two policy manuals: "North Carolina Department of Public Safety, Division of Adult Correction and Juvenile Justice, Community Corrections, Policy & Procedures" (April 1, 2019) ("DPS Corrections") (www.ncdps.gov/Adult-Corrections/Prisons/Policy-Procedure-Manual); and "State of North Carolina Department of Public Safety, Prisons, Policy & Procedures," (June 6, 2019) ("DPS Prisons"—along with DPS Corrections, "DPS Policy" or "the Policy") (https://files.nc.gov/ncdps/C.1500_Inmate_Release_Proc_06_06_19.pdf).

Upon release, Defendant moved into his mother's home (the "Home"), inhabited by Defendant's mother, Defendant's uncle and, at least at times, Defendant's girlfriend. Two witnesses testified at Defendant's suppression hearing challenging the warrantless search of the Home where he was residing. This testimony provides most of the alleged facts relevant to this appeal. The State's first witness was Defendant's supervising PRS officer, Nicole Patterson ("Officer Patterson"), and the State's second witness was Kevin Gibson ("Chief Gibson"), who testified that he was one of the "chief probation/parole officer[s] in the Guilford County Greensboro office." Chief Gibson testified that he supervised "a unit of eight officers," and that he "work[ed] in the [Greensboro] office with Officer Patterson[,]" but Chief Gibson did not specify if Officer Patterson was one of the eight officers he supervised.

Officer Patterson testified that three days after Defendant's release, on 4 April 2017, she went to the Home to conduct a "home visit" pursuant to a condition of Defendant's PRS. *See* N.C.G.S. § 15A-1368.4(e)(6) (stating imposition of this controlling condition "[p]ermit[s] a [PRS] officer to visit at reasonable times at the supervisee's home or elsewhere"). Although not specifically authorized by the plain language of N.C.G.S.

1. Although the statute states "as authorized in Chapter 143," it is actually Chapter 143B that contains the relevant provisions. *See* N.C.G.S. § 15A-1368(b).

§ 15A-1368.4(e)(6), on this "home visit," Officer Patterson, pursuant to the Policy, conducted what she testified to as a "warrantless search" of Defendant's bedroom, as well as the main common areas of the Home. Officer Patterson testified that she limited her warrantless search of the Home to "plain-view," meaning she looked through the personal possessions of the home's residents that were visible without her having to move or open anything. Officer Patterson testified that she did not observe anything suspicious during her 4 April 2017 warrantless search. Pursuant to the Policy, Officer Patterson did note the layout of the Home and drew a general diagram of the Home to assist in future warrantless searches. DPS Corrections, Ch. C, § .0202.

Based upon factors that will be discussed later, the Policy appears to have either permitted or required warrantless searches of Defendant's residence, including thorough searches of closed areas and containers. According to testimony, Defendant was labeled a "high-risk offender" based upon DPS guidelines, and he was also "verified" as a member of the "Folk Nation" gang in 2016, while he was in prison. Both of these determinations, made pursuant to the Policy, subjected Defendant to warrantless searches of his residence. The State's testimony also indicated that, pursuant to the Policy, *all* PRS supervisees were subject to at least one warrantless search of their residences within ninety days of release and, further, that the Post-Release Supervision and Parole Commission ("the Commission") imposed as a condition of his PRS that Defendant submit to warrantless searches of his premises. The record does not indicate whether the Commission specifically based its imposition of the residential warrantless search condition on Defendant's "high-risk offender" status, or his status as a "validated" gang "member."

The trial court found that on 11 May 2017, Officer Patterson requested the Home be included in a large "joint search operation" or "operational search"—Operation Arrow – that had already been planned and scheduled to occur on 11 May 2017, for the purpose of conducting warrantless searches of the residences of multiple Guilford County PRS supervisees, parolees, and probationers. Chief Gibson had been active in organizing Operation Arrow with other DPS personnel, as well as federal and local law enforcement. Chief Gibson testified that on 11 May 2017, his "duties . . . [were as] part of a joint search operation held . . . in Guilford County . . . [and that] the target was searching high-risk offenders and offenders that were validated gang members[,]" "and also to insure that they were compliant with the terms of their supervision which, in this particular case, was not to possess a firearm, . . . not to possess any type of illegal drugs, contraband or stolen goods." "We were proceeding to various residences in Guilford County to conduct searches on various individuals."

As a part of Operation Arrow, an unannounced warrantless and suspicionless search of the Home was conducted on 11 May 2017, and a handgun was located in the cabinet portion of the bedside table in Defendant's bedroom. As a result, Defendant was arrested and charged with possession of a firearm by a felon, along with violating conditions of his PRS. Defendant moved to suppress the handgun as the fruit of an illegal warrantless search. The suppression hearing was conducted on 31 July – 1 August 2018, and the trial court denied Defendant's motion to suppress by order entered 2 August 2018. Defendant agreed to enter an *Alford* plea for the charge of possession of a firearm by a felon, and judgment was entered on 2 August 2018, in which Defendant expressly preserved his right to appeal the denial of his motion to suppress. Defendant appeals.

II. Analysis

In this case, Defendant argues that "the trial court erred in denying [Defendant's] motion to suppress because the warrantless search of [his] home violated North Carolina law and the Fourth Amendment." We agree.

A. *Standard of Review*

> When a defendant in a criminal prosecution makes a motion to suppress evidence obtained by means of a warrantless search, the State has the burden of showing, at the suppression hearing, "how the [warrantless search] was exempted from the general constitutional demand for a warrant."

State v. Phillips, 151 N.C. App. 185, 188, 565 S.E.2d 697, 700 (2002) (citations omitted). "In reviewing the trial court's order following a motion to suppress, we are bound by the trial court's findings of fact if such findings are supported by competent evidence in the record; but the conclusions of law are fully reviewable on appeal." *State v. Smith*, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997) (citations omitted). "The trial court's conclusion of law that [no constitutional error warrants the suppression of evidence] is a fully reviewable legal question." *State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000) (citation omitted).

B. *Defendant's Argument*

Defendant argues that the denial of his motion to suppress was error because the "warrantless search of his home was neither authorized by North Carolina law nor based on any established exception to the warrant requirement[,]" "and was otherwise unlawful under the

Fourth Amendment and Art. I § 20[.]" Specifically, Defendant argues that the General Assembly has not given DPS the authority to require, or power to conduct, warrantless searches of the residences of PRS supervisees, like him, who are not subject to the search provisions of N.C.G.S. § 15A-1368.4(b1); Defendant's alleged consent was neither knowing nor voluntary and, therefore, cannot make lawful an otherwise unlawful warrantless search; and the search was not "reasonably related to his supervision" as required by the statutes authorizing warrantless searches of PRS supervisees, parolees, and probationers.

C. *Fourth Amendment and Art. 1, § 20*

[1] Defendant contends that the warrantless search of the Home "violated the state and federal constitutions" "because the May 11, 2017 warrantless search of [the Home] was neither authorized by North Carolina law nor based on any established exception to the warrant requirement." We must consider the requirements of the Fourth Amendment and Art. 1, § 20, as applied to PRS supervisees, like Defendant, who are not subject to the search provisions of N.C.G.S. § 15A-1368.4(b1), in order to determine whether DPS, the Commission, or Chief Gibson could lawfully require Defendant to submit to the warrantless and suspicionless search of the Home.

"[W]e start with the 'basic Fourth Amendment principle' that warrantless searches are presumptively unreasonable." *State v. Grady*, 372 N.C. 509, 523–24, 831 S.E.2d 542, 554–55 (2019) (citation omitted). Further, "[i]t is well established that the State bears the burden of proving the reasonableness of a warrantless search." *Id.* at 543, 831 S.E.2d at 568 (citation omitted). As a general principle, " '[t]he Fourth Amendment prohibits only *unreasonable* searches.' " *Id.* at 510, 831 S.E.2d at 546 (quoting *Grady v. North Carolina*, 575 U.S. 306, 310, 191 L. Ed. 2d 459, 462 (2015)). "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* As noted by our Supreme Court:

> The Fourth Amendment to the United States Constitution and Art. 1, § 20 of the North Carolina Constitution prohibit officers of the law, under ordinary circumstances, from invading the home *except under authority of a search warrant issued in accord with constitutional and statutory provisions*. Further, evidence obtained during an unconstitutional search is inadmissible at trial, not as a rule of evidence, but as a requisite of due process.

> A warrantless search is not unconstitutional, however, when (1) probable cause to search exists and (2) the government satisfies its burden of demonstrating that the exigencies of the situation made search without a warrant imperative. If the circumstances of a particular case render impracticable a delay to obtain a warrant, a warrantless search on probable cause is permissible, because the constitutional proscriptions run only against *unreasonable* searches and seizures.

State v. Allison, 298 N.C. 135, 140–41, 257 S.E.2d 417, 421 (1979) (emphasis added) (citations omitted). In *Grady*, our Supreme Court stated:

> The "basic purpose" of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." . . . *[S]ee Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."); *see also Riley v. California*, 573 U.S. 373 (2014) ("[T]he Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.").
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> . . . .
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> The Supreme Court has explained that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant" supported by a showing of probable cause.

Grady, 372 N.C. at 523–24, 831 S.E.2d at 554–55 (footnote and some citations omitted). Moreover,

> "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, *not by a policeman or government enforcement agent*."

Camara v. Mun. Court of City & Cty. of San Francisco, 387 U.S. 523, 529, 18 L. Ed. 2d 930, 935 (1967) (emphasis added) (citation omitted).

However, "[t]ranslation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of this Court." *Id.* at 528, 18 L. Ed. 2d at 935. The issue in *Camara* involved an appellant who "was awaiting trial on a criminal charge of violating the San Francisco Housing Code by refusing to permit a warrantless inspection of his residence," where the code " '[a]uthorized employees of the City . . ., so far as may be necessary for the performance of their duties, . . . [to] have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.' " *Id.* at 525, 526, 18 L. Ed. 2d at 933, 934 (citation omitted). Discussing arguments concerning whether public policy needs outweigh an individual's rights to privacy, the Supreme Court reasoned:

> In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment. Under the present system, when the inspector demands entry, the occupant has no way of knowing . . . the *lawful limits* of the inspector's power to search, and *no way of knowing whether the inspector himself is acting under proper authorization.* These are questions which may be reviewed by a neutral magistrate *without any reassessment of the basic agency decision* to canvass an area. Yet, *only by refusing entry and risking a criminal conviction* can the occupant at present challenge the inspector's decision to search. And even if the occupant possesses sufficient fortitude to take this risk, as appellant did here, he may never learn any more about the reason for the inspection than that the law generally allows housing inspectors to gain entry. The *practical effect of this system is to leave the occupant subject to the discretion of the official in the field.* This is precisely the discretion to invade private property which *we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.* We simply cannot say that the protections provided by the warrant procedure are not needed in this context; *broad statutory safeguards are no substitute for individualized*

> *review*, particularly when those safeguards may *only be invoked at the risk of a criminal penalty*.

Id. at 532–33, 18 L. Ed. 2d at 937–38 (emphasis added) (citations omitted); *see also Wyman v. James*, 400 U.S. 309, 316–17, 27 L. Ed. 2d 408, 413 (1971). The Court noted:

> In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.

Camara, 387 U.S. at 533, 18 L. Ed. 2d at 938 (citation omitted).

"It is by now accepted that a parolee, despite a reduced expectation of privacy, comes within the ambit of the fourth amendment's protection against unreasonable searches and seizures." *United States v. Bradley*, 571 F.2d 787, 789 n.2 (4th Cir. 1978) (citation omitted). In *Bradley*, the Fourth Circuit applied the rationale used in *Camara* to the warrantless search of a parolee and adopted "the general rule announced in *Camara* . . . that warrants are required prior to conducting administrative searches." *Id.* at 789 (citation omitted). The Court reasoned:

> While parole searches may indeed be analogous to administrative searches in that the governmental interest in supervision is great and the parolee's privacy interest is diminished by the fact of constructive custody, nonetheless there is no statutory authorization or guidelines, state or federal, to bring the instant case within the [established] exception. We therefore conclude that *Camara*, requiring as it does prior judicial approval to unconsented searches even in the face of reduced privacy interest, is the more persuasive authority.

Id. at 789–90 (4th Cir. 1978). However, the United States Supreme Court has concluded that for prisoners who *choose* probation or parole over imprisonment, and accept the attendant conditions, warrantless searches, if authorized by statute, may be reasonable even though there has been no prior judicial approval, and even though the search is conducted without probable cause or reasonable suspicion of unlawful

activity, and no exigent circumstances exist. *Samson v. California*, 547 U.S. 843, 856, 165 L. Ed. 2d 250, 262 (2006).

The State relies heavily on *Samson* in its appellate brief. *Samson* involved the following facts:

> [Petitioner] was on state parole in California[.] On September 6, 2002, Officer Alex Rohleder . . . observed petitioner walking down a street with a woman and a child. . . . Officer Rohleder was aware that petitioner was on parole and believed that he was facing an at-large warrant. . . . . Officer Rohleder confirmed, by radio dispatch, that petitioner was on parole and that he did not have an outstanding warrant. Nevertheless, pursuant to Cal. Penal Code Ann. § 3067(a) and based solely on petitioner's status as a parolee, Officer Rohleder searched petitioner['s person].

Id. at 846–47, 165 L. Ed. 2d at 255–56. The petitioner in *Samson* argued the warrantless search violated the Fourth Amendment even though it was authorized by statute. The Court noted:

> California law provides that every prisoner eligible for release on state parole "shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." We granted certiorari to decide whether a suspicionless [and warrantless] search, *conducted under the authority of this statute*, violates the Constitution.

Id. at 846, 165 L. Ed. 2d at 255 (emphasis added) (citation omitted). The statute that authorized the search of the parolee's person in *Samson* was Cal. Penal Code § 3067, which stated in part:

> (a) Any inmate who is eligible for release on parole pursuant to this chapter *shall agree in writing to be subject* to search or seizure by a parole officer or other peace officer at any time of the day or night, *with or without a search warrant and with or without cause.*
>
> . . . .
>
> (d) It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment.

Cal. Penal Code § 3067 (2000) (emphasis added).[2] We note that although Cal. Penal Code § 3067 requires the eligible prisoner to agree to the search condition, that requirement is conditioned on the eligible prisoner choosing parole instead of serving the remainder of the original sentence in prison.

The Court in *Samson* considered all the facts of the case in context, including the specific provisions of the authorizing statute; the great state interest in reducing recidivism in California—which was the highest in the nation at that time; the fact that the petitioner was serving an active prison sentence, that he was given the *choice* to either remain incarcerated until the end of his sentence, or agree to certain terms of parole and serve the remainder of his sentence outside of prison and, by choosing parole, he knowingly and purposefully *accepted its conditions*; and the petitioner's knowledge and acceptance of the warrantless search condition was further demonstrated by the fact that he signed the order granting him parole *in exchange for agreeing to the imposed conditions*. The Court held that the petitioner's reasonable expectation of privacy, for the purpose of his Fourth Amendment challenge, was severely diminished based on the facts and context of his case:

> [T]he parole search condition *under California law*[, which] *requir[es]* inmates who opt for parole to submit to [warrantless and] suspicionless searches by a parole officer or other peace officer "at any time," Cal. Penal Code § 3067(a)[,] was "clearly expressed" to petitioner. He signed an order submitting to the condition and thus was "unambiguously" aware of it. *[A]cceptance* of a clear and unambiguous search condition "significantly diminishe[s] [the parolee's] reasonable expectation of privacy." Examining the totality of the circumstances pertaining to petitioner's status as a parolee, "an established variation on imprisonment," including the plain terms of the parole search condition, we conclude that petitioner did not have an expectation of privacy that society would recognize as legitimate.

Samson, 547 U.S. at 852, 165 L. Ed. 2d at 259 (emphasis added) (footnote and some citations omitted). The Court further noted:

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2. The version of the statute reviewed in *Samson* was amended in 2011. *See* 1996 Cal. Legis. Serv. Ch. 868, § 2; 2011 Cal. Legis. Serv. 1st Ex. Sess. Ch. 12, § 25.

> "The essence of parole is release from prison, before the completion of sentence, *on the condition* that the prisoner abide by certain rules during the balance of the sentence." "In most cases, *the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements*."

Id. at 850, 165 L. Ed. 2d at 258 (emphasis added) (citations omitted). The Court explained that the issue before it was "whether California's supervisory *system* is *drawn* to meet its needs and is reasonable, taking into account a parolee's substantially diminished expectation of privacy." *Id.* at 855, 165 L. Ed. 2d at 261 (emphasis added) (footnote omitted). The Court held the Fourth Amendment does not *per se* "prohibit a police officer from conducting a suspicionless search of a parolee" if the parolee has accepted a specific condition of parole, *authorized by statute*, that requires the parolee to submit to warrantless searches and safeguards the parolee from abusive state administration of the condition. *Id.* at 857, 165 L. Ed. 2d at 262; *id.* at 846, 856, 165 L. Ed. 2d at 255, 262. As noted by the Fourth Circuit, in *Samson*, "the Supreme Court [] upheld suspicionless searches of parolees *pursuant to a state statute allowing for such searches*." *Jones v. Chandrasuwan*, 820 F.3d 685, 692–93 (4th Cir. 2016) (emphasis added) (citation omitted).

The State contends that the present case is analogous to *Samson*, and this Court should therefore affirm the trial court's denial of Defendant's motion to suppress. The State argues that a PRS supervisee, like a parolee or probationer, has a greatly diminished reasonable expectation of privacy because the supervisee remains in the custody of DPS, has been explained the conditions of PRS imposed by the Commission, has agreed to the conditions imposed, and has been released from prison pursuant to the supervisee's acceptance of the conditions imposed. Further, the State contends, the General Assembly has granted the Commission the *statutory authority* to impose as a PRS condition that supervisees "consent" to warrantless searches of their residences—thereby indicating the great public interest in close supervision of PRS supervisees—to reduce recidivism, protect the public, and assist in reintegrative efforts.

Although the constitutionality of a warrantless search must be determined by considering all the circumstances, we do not believe individuals subject to DPS custody, based solely on their statuses as PRS supervisees, parolees, or probationers, lose *all* reasonable expectations of privacy protected by the Fourth Amendment. Almost every factor considered in *Samson* is inextricably entwined with the status of the

petitioner as a parolee, yet the Court did not simply hold that all parolees may be required to submit to warrantless searches, or that every parolee has lost any reasonable expectation of privacy and, therefore, every warrantless search of a parolee is constitutional. The *Samson* Court's reasonableness determination, for both the state's legitimate interests and the parolee's reasonable expectations of privacy, focused on California's specific "system of parole"; whether its statutory basis was such that the imposition of warrantless searches as a condition of parole was reasonable for Fourth Amendment purposes; and, if so, whether the officer who conducted the search did so in compliance with the statutory requirements. *Samson*, 547 U.S. at 851, 165 L. Ed. 2d at 259 (emphasis added) ("California's system of parole is consistent with these observations: A California inmate *may* serve his parole period either *in physical custody*, or *elect* to complete his sentence *out of physical custody* and *subject to certain conditions*. Cal. Penal Code § 3060.5 []. Under the latter option, an inmate-turned-parolee remains in the legal custody of the California Department of Corrections through the remainder of his term, § 3056, and must comply with all of the terms and conditions of parole[.]").

Defendant argues the State's reliance on *Samson* is misplaced because "the search in *Samson* was conducted in compliance with" specific statutory authority requiring parole eligible prisoners to agree to warrantless searches of their persons *as a condition precedent* to their release on parole. We agree that *Samson* does not compel affirming the trial court's order in this case, and hold that no condition of PRS that requires a supervisee to agree to warrantless searches is constitutional, under either our state or federal constitution, absent *express statutory or constitutional authority* granting the Commission the power to impose such a condition.

D. *Post-Release Supervision – Chapter 15A, Article 84A*

Concerning "North Carolina law," Defendant contends: "Specifically, the search of [the Home] violated [N.C.G.S.] § 15A-1368.4(e)(10)[,]" found in the article governing PRS. N.C.G.S. § 15A-1368.4 is titled "Conditions of Post-Release Supervision," and the only subsection of N.C.G.S. § 15A-1368.4 that specifically authorized the Commission to impose warrantless searches as a condition of Defendant's PRS was N.C.G.S. § 15A-1368.4(e)(10).[3] Defendant further argues that, at a minimum, if imposition of random warrantless searches of PRS supervisees as a

3. N.C.G.S. § 15A-1368.4(b1), discussed below, does not apply to Defendant.

condition of PRS is to survive Fourth Amendment analysis, the authority for such a condition must be specifically granted by statute—that is, "pursuant to [state law] that itself satisfies the Fourth Amendment reasonableness requirement[.]" Defendant contends that, because the General Assembly *specifically* addresses searches of PRS supervisees similarly situated to Defendant in N.C.G.S. § 15A-1368.4(e)(10), subsection (e)(10) provided the *sole* authority granting the Commission the authority to permit PRS officers to conduct warrantless searches of Defendant as a condition of his PRS. The relevant part of subsection (e)(10) states:

> Controlling Conditions. – *Appropriate* controlling conditions, violation of which may result in revocation of post-release supervision, are:
>
> . . . .
>
> Submit at reasonable times to searches of the supervisee's *person* by a post-release supervision officer for *purposes reasonably related to the post-release supervision.* The Commission *shall not require* as a condition of post-release supervision that the supervisee submit to any other searches that would *otherwise be unlawful.*

N.C.G.S. § 15A-1368.4(e)(10) (emphasis added).

Defendant contends that "the search of [his] home violated [N.C.G.S.] § 15A-1368.4(e)(10)" because "there are four requirements for a PRS search: (1) the search must be conducted at 'reasonable times'; (2) the search must be of the 'supervisee's person'; (3) the search must be conducted by a post-release supervision officer; and, (4) the search must be 'for purposes reasonably related to the post-release supervision.' " Because the task force conducting Operation Arrow searched not only Defendant's "person," but his residence as well, Defendant argues that "requirement" two was not met, the search of the Home was illegal under North Carolina law, and it was unconstitutional.

The post-release supervision program was created in the 1993 "Act to Provide for Structured Sentencing" ("Structured Sentencing Act") as Article 84A of Chapter 15A of the North Carolina General Statutes ("Article 84A"). 1993 North Carolina Laws Ch. 538, § 20.1. (H.B. 277). Post-release supervision is defined in Article 84A as:

> The time for which a sentenced prisoner is released from prison before the termination of his *maximum* prison term, *controlled by the rules and conditions of this Article.*

> Purposes of post-release supervision include all or any of the following: to monitor and control the prisoner in the community, to assist the prisoner in reintegrating into society, to collect restitution and other court indebtedness from the prisoner, and to continue the prisoner's treatment or education.

N.C.G.S. § 15A-1368(a)(1) (emphasis added).

Determinations regarding the imposition or violation of conditions of PRS or parole are made by the Commission, which was created by the Structured Sentencing Act: "There is hereby created a Post-Release Supervision and Parole Commission of the [DAC][4] of the [DPS]." N.C.G.S. § 143B-720(a) (2017); 1993 North Carolina Laws Ch. 538, § 20.1.[5] The "general authority [of the Commission] is described in G.S. 143B-720[.]" N.C.G.S. § 15A-1368(a)(3) (2017). The Commission "shall administer post-release supervision as provided in" Article 84A. N.C.G.S. § 15A-1368(b). The Commission consists of "four full-time members" "appointed by the Governor[.]" N.C.G.S. § 143B-720(a) and (a2). Decisions concerning parole are determined by a majority vote of the Commission, however, "a three-member panel of the Commission may set the *terms and conditions* for a post-release supervisee *under G.S. 15A-1368.4* and may decide questions of violations thereunder, *including the issuance of warrants*." N.C.G.S. § 143B-721(d) (2017).

Although N.C.G.S. § 143B-720 deals primarily with parole, it grants the Commission authority to impose a single specific condition of PRS: "The Commission is authorized and empowered to impose as a condition of parole or post-release supervision that restitution or reparation be made by the prisoner[.]" N.C.G.S. § 143B-720(d). Relevant to PRS, N.C.G.S. § 143B-720 also grants the Commission the "authority to revoke and terminate persons on post-release supervision, *as provided in Article 84A* of Chapter 15A of the General Statutes[,]"and "[t]he Commission may accept and review requests from persons placed on probation, parole, or post-release supervision to terminate a mandatory condition of satellite-based monitoring[.]" N.C.G.S. § 143B-720(a) and (e) (emphasis added).

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4. "The functions of [DAC] shall include all functions of the *executive branch* of the State in relation to corrections and the rehabilitation of adult offenders, including detention, parole, and aftercare supervision, and further including those prescribed powers, duties, and functions *enumerated in the laws of this State*." N.C.G.S. § 143B-704(a) (emphasis added).

5. When the Commission was initially created, this section was found at N.C.G.S. § 143B-266.

Concerning the Commission's authority to make rules, N.C.G.S. § 143B-720 only grants the Commission "power" "to adopt such rules and regulations, *not inconsistent with the laws of this State*, in accordance with which prisoners eligible for *parole* consideration may have their cases reviewed and investigated and by which such proceedings may be initiated and considered"; "[a]ll rules and regulations adopted by the Commission [related to granting or denying parole] shall be enforced by the [DAC]." N.C.G.S. § 143B-720(c). No rule-making authority is granted by N.C.G.S. § 143B-720(c) relating to probation or PRS—in fact, no additional rule-making authority is included in N.C.G.S. § 143B-720. A different statute, N.C.G.S. § 143B-702, does give DAC general rule-making authority "related to the conduct, supervision, rights and privileges of persons in its custody or under its supervision[,]" but there is no indication in this general rule-making provision that the General Assembly intended to grant the Commission, DAC, or DPS the authority to make rules allowing the imposition of conditions of PRS not specifically authorized by N.C.G.S. § 15A-1368.4 or to grant the Commission authority to create conditions of PRS that exceed the confines of those statutes.

DPS Policy establishes the rules and obligations of probation/parole/PRS officers (referred to in the Policy as probation/parole officers). Although many of the provisions in the Policy apply to probation, parole, and PRS, the statutory support cited in the Policy for certain rules and procedures is generally limited to statutes from a single article of Chapter 15A—Article 82. For example, the "Joint Law Enforcement Operations" and "Searches" sections of the Manual, which are relevant to the facts of this case, cite N.C.G.S. § 15A-1343(b)(13), concerning probation, but do not cite N.C.G.S. § 15A-1368.4, which controls conditions of PRS—section 15A-1343(b)(13) *specifically mandates* warrantless searches of *premises* as a condition of *probation*, whereas section N.C.G.S. § 15A-1368.4 contains no specific authority to impose warrantless searches of a supervisee's residence as a condition of PRS, and the specific authority granted in subsection 15A-1368.4(e)(10) is limited to searches of the supervisee's "*person*."

Article 84A states: "The conditions of post-release supervision are as authorized in G.S. 15A-1368.5." N.C.G.S. § 15A-1368.2(c) (2017). However, this appears to be a typographical error as the conditions of post-release supervision actually appear in N.C.G.S. § 15A-1368.4.[6]

6. N.C.G.S. § 15A-1368.5 involves "[c]ommencement of post-release supervision" and the application of Article 84A when the defendant has "multiple" convictions, not conditions of PRS. N.C.G.S. § 15A-1368.5 (2017).

Article 84A further states that the commission "*shall* administer post-release supervision *as provided in this Article*." N.C.G.S. § 15A-1368(b) (emphasis added). Article 84A "applies to all felons sentenced to an active punishment under Article 81B of this Chapter[,]" and therefore applied to Defendant. N.C.G.S. § 15A-1368.1 (2017). "A period of post-release supervision begins on the day the prisoner is released from imprisonment." N.C.G.S. § 15A-1368.5 (2017). N.C.G.S. § 15A-1368.2, "Post-release supervision eligibility and procedure[,]" states: "Except as otherwise provided in this subsection, a prisoner to whom this Article applies *shall* be released from prison for post-release supervision on the date equivalent to his maximum imposed prison term less 12 months in the case of Class B1 through E felons and less nine months in the case of Class F through I felons, less any earned time awarded by the [DAC.]" N.C.G.S. § 15A-1368.2(a) (emphasis added).

Further: "*A prisoner shall not refuse post-release supervision*"—*i.e.*, no prisoner may choose to complete the active sentence imposed for the prisoner's conviction instead of spending the last nine or twelve months of that sentence outside of prison and under the conditions set by the Commission. N.C.G.S. § 15A-1368.2(b). There is nothing in Article 84A allowing a prisoner to reject any condition imposed by the Commission, and only the Commission may revoke or modify post-release supervision. N.C.G.S. § 15A-1368.3(a) and (b).

E. *Conditions of PRS – N.C.G.S. § 15A-1368.4*

"In [g]eneral[,] [c]onditions of post-release supervision may be reintegrative in nature or designed to control the supervisee's behavior and to enforce compliance with law or judicial order." N.C.G.S. § 15A-1368.4(a). "A supervisee may have his supervision period revoked for any violation of a controlling condition or for repeated violation of a reintegrative condition. Compliance with reintegrative conditions may entitle a supervisee to earned time credits[.]" *Id.* The single generally "*required*" condition of PRS is that the supervisee not commit a crime, and violation of this condition may result in revocation.[7] N.C.G.S. § 15A-1368.4(b). "*Reintegrative*" conditions are directed to helping the supervisee successfully adapt to post-incarceration life. N.C.G.S. § 15A-1368.4(d)(6).

"*Controlling*" conditions are imposed to help DPS maintain the appropriate level of supervision of the supervisee in order to prevent

7. For supervisees convicted of certain crimes, additional conditions are required. N.C.G.S. § 15A-1368.4(b1).

the supervisee from fleeing, engaging in illegal conduct, or posing an unreasonable danger to the public—as well as ensuring repayment of certain costs or fees. Controlling conditions include, *inter alia*: not using illegal drugs; not possessing any firearms; reporting to a post-release supervision officer at reasonable times; permitting a post-release supervision officer to visit at reasonable times at the supervisee's home; remaining in one or more specified places for a specified period or periods each day; wearing a device that permits the supervisee's compliance with the conditions to be monitored electronically; complying with a court order to pay court costs and costs for appointed counsel; complying with an order from a court of competent jurisdiction regarding the payment of an obligation of the supervisee in connection with any judgment. N.C.G.S. § 15A-1368.4(e). Also included and most relevant to this case is: "*Submit[ting]* at reasonable times to *searches* of the supervisee's *person* by *a post-release supervision officer* for purposes *reasonably related to* the post-release supervision." N.C.G.S. § 15A-1368.4(e)(10) (emphasis added). This condition also states: "The Commission *shall not require* as a condition of post-release supervision that *the supervisee* submit to any other searches that would *otherwise be unlawful*." *Id.* (emphasis added).

The General Assembly has also included a "catch-all" provision in N.C.G.S. § 15A-1368.4(c), granting the Commission the discretion to impose conditions not specifically authorized in the other subsections of N.C.G.S. § 15A-1368.4. The State argues this "catch-all" provision, N.C.G.S. § 15A-1368.4(c), grants the Commission extraordinary discretion and authority, as no terms in the provision specifically limit the Commission's discretionary powers. We do not agree that the inclusion of a catch-all provision in a statute constitutes a grant of unlimited authority and discretion. It must be considered in the context of the other provisions of the statute, as well as any associated statutes, and the purpose of the statute may also be relevant. Alleged grants of authority to make discretionary decisions affecting an individual's constitutional rights demand particular scrutiny. The appellate courts of this state have discussed the limited nature of the discretion granted to trial courts—and by implication executive commissions—through the inclusion of catch-all provisions:

> North Carolina § 50B-3(a)(13) is a "catch-all" provision which allows the trial court to "[i]nclude *any* additional prohibitions or requirements the court deems necessary to protect any party or any minor child." Our Supreme Court has interpreted the "catch-all" provision of § 50B-3(a)(13) and held that the word "any" does not give the trial court

> unlimited power to order additional relief. *See State v. Elder*, 368 N.C. 70, 773 S.E.2d 51 (2015).

Russell v. Wofford, 260 N.C. App. 88, 92, 816 S.E.2d 909, 912 (2018) (citation omitted). The catch-all provision in N.C.G.S. § 15A-1368.4 states:

> Discretionary Conditions. – The Commission, *in consultation with the Section of Community Corrections of the Division of Adult Correction and Juvenile Justice*, may impose conditions on a supervisee it believes reasonably necessary to ensure that the supervisee will *lead a law-abiding life or to assist the supervisee to do so*. The Commission may also impose a condition of community service on a supervisee who was a Class F through I felon and who has failed to fully satisfy any order for restitution, reparation, or costs imposed against the supervisee as part of the supervisee's sentence; *however*, the Commission shall not impose such a condition of community service if the Commission determines, upon inquiry, that the supervisee has the financial resources to satisfy the order.

N.C.G.S. § 15A-1368.4(c) (emphasis added). N.C.G.S. § 15A-1368.4(c) is a "catch-all" section, although it also grants the authority to impose the fairly specific condition involving community service, underlined above, its grant is limited to certain specific circumstances. In the underlined portion, the General Assembly demonstrates that it can and will include specific clarifying language when necessary to ensure the Commission understands the limits of its delegated authority. However, we presume the General Assembly did not believe it necessary to clarify that the word "person," as used in N.C.G.S. § 15A-1368.4(e)(10), was not intended to also mean "vehicle" or "premises." Because the State and Defendant disagree on the meaning of certain provisions in Article 84A, we review the relevant statutes.

F. *Statutory Construction*

It is clear that no condition of PRS, whether express or discretionary, may be constitutionally applied if it exceeds the authority granted by the General Assembly, or it violates any provisions of our federal or state constitutions. The State argues that the discretionary condition imposed by the Commission requiring Defendant to submit to warrantless searches of his residence was valid, because N.C.G.S. § 15A-1368.4(c) allows "[t]he Commission, in consultation with the Section of Community Corrections . . . , [to] impose conditions on a

supervisee it believes reasonably necessary to ensure that the supervisee will lead a law-abiding life or to assist the supervisee to do so." N.C.G.S. § 15A-1368.4(c). Defendant contends that if the General Assembly intended to grant the Commission the authority to impose as a condition of PRS warrantless searches of a supervisee's residence, it would have done so by an express grant of this authority in N.C.G.S. § 15A-1368.4(e)(10). We agree.

As noted by our Supreme Court: "[I]f the words of a statute are plain and unambiguous, the court need look no further." *Westminster Homes, Inc., v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 304, 554 S.E.2d 634, 638 (2001) (citation omitted). However, "if the language is unclear, judicial construction may be required." *Id.*

1. **Plain Language**

We first look at the plain language of the contested section of the statute:

> As a cardinal principle of statutory interpretation, "[i]f the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993). Thus, in effectuating legislative intent, it is the duty of the courts to *give effect to the words actually used* in a statute *and not* to delete words used or to *insert words not used*. *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009).

State v. Watterson, 198 N.C. App. 500, 505, 679 S.E.2d 897, 900 (2009) (emphasis added). The plain and unambiguous language of N.C.G.S. § 15A-1368.4(e)(10) grants the Commission the *discretionary* authority to impose a condition allowing PRS officers to conduct "*searches*" of a "supervisee's *person*," but nothing else: "Appropriate controlling conditions, violation of which may result in revocation of post-release supervision, [include]: . . . Submit[ting] at reasonable times to searches of the supervisee's *person* by a post-release supervision officer for purposes reasonably related to the post-release supervision." N.C.G.S. § 15A-1368.4(e)(10). There is nothing ambiguous about the language of N.C.G.S. § 15A-1368.4(e)(10). It granted the Commission the authority to require as a condition of PRS that Defendant submit to searches of his person—it did not grant the Commission the authority to extend the reach of this "search condition" to include Defendant's "premises." Nothing in this subsection, nor elsewhere in Article 84A, specifically

authorized the Commission to impose a condition of PRS requiring Defendant to submit to *warrantless* searches of his *premises*.

In addition, there is a subsection contained in N.C.G.S. § 15A-1368.4(e) that authorizes the Commission to impose as a condition of PRS that a supervisee must "permit a [PRS] officer to *visit* . . . the supervisee's *home*[.]" N.C.G.S. § 15A-1368.4(e)(6) (emphasis added). This subsection concerns the authority of PRS officers to make visits to supervisees' residences, but that authority is limited to a "visit at reasonable times[,]" and does not include a right to "search" the supervisee's home—other than any "plain-view" "search" the officer may conduct while in areas of the home necessary to conduct the home visit, or areas of the home into which the officer is invited. *Id.* Clearly, N.C.G.S. § 15A-1368.4(e)(6) does not authorize a PRS officer's visit to a supervisee's home to include a warrantless search. This condition serves to alert PRS supervisees that their expectations of privacy cannot reasonably include preventing PRS officers from making "visits" to their premises as part of legitimate PRS duties. In fact, as the "controlling conditions" of N.C.G.S. § 15A-1368.4(e) are not "required conditions," it is presumed that some supervisees in Defendant's position will *not* be subject to home visits or searches of their persons. *Compare with* N.C.G.S. § 15A-1368.4(b) and (b1).

It is "the duty of the courts to give effect to the words actually used in a statute *without . . . insert[ing] words not used*." *Watterson*, 198 N.C. App. at 505, 679 S.E.2d at 900 (emphasis added) (citation and quotation marks omitted). If the language used is clear, "[t]he intent of the legislature . . . is to be found not in what the legislature meant to say, but in the meaning of what it did say." *State v. James*, 371 N.C. 77, 86, 813 S.E.2d 195, 203 (2018). A plain language review of N.C.G.S. § 15A-1368.4(e)(10) includes no grant of the authority to impose as a condition of PRS that Defendant submit to warrantless searches of his residence. Therefore, we next look to the "catch-all" provision contained in N.C.G.S. § 15A-1368.4 in order to determine if such authority may be contained therein.

2. **The Specific Controls the General**

" '[I]t is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application.' " *Westminster Homes, Inc.*, 354 N.C. at 304, 554 S.E.2d at 638 (citation omitted). As this Court held in an opinion construing a criminal statute where the issue was the element of intent:

> Because the General Assembly *specifically included additional intent provisions in these subsections of the statute, we can presume that it did not intend for courts to impose additional* intent *requirements in the other subsections. See N.C. Dep't of Revenue v. Hudson*, 196 N.C. App., 765, [768], 675 S.E.2d 709, 711 (2009) ("When a legislative body '*includes particular language in one section* of a statute but *omits it in another* section of the same Act, it is *generally presumed that [the legislative body] acts intentionally and purposely in the disparate* inclusion or *exclusion*.' " (quoting *Rodriguez v. United States*, 480 U.S. 522, 525 (1987))).

Watterson, 198 N.C. App. at 505–06, 679 S.E.2d at 900 (emphasis added) (citation omitted).

The catch-all provision, N.C.G.S. § 15A-1368.4(c), is by its very nature inherently general—as its intent is to provide the Commission with the discretion to adapt and impose conditions tailored to the particular needs of individual supervisees. We do not believe the General Assembly, by including a catch-all provision, intended to grant the Commission unlimited discretion to impose *any* condition, without restriction—even including conditions that exceed the intrusion into the supervisee's privacy rights expressly granted by the General Assembly in the specific conditions of the statute. We presume the General Assembly considers that a PRS supervisee's reasonable expectations of privacy are significantly diminished when it sets the limits of the powers of the Commission. As this court noted regarding catch-all provisions in Chapters 50B and 50C, citing *State v. Elder*, 368 N.C. 70, 773 S.E.2d 51 (2015), the trial court does "not have 'unfettered discretion to order a broad range of remedies' " simply because it " 'believes they are necessary for the protection of any party or child' " nor does it have " 'unfettered discretion' " "to order any relief [it] believes necessary[.]" *Russell*, 260 N.C. App. at 94, 816 S.E.2d at 913 (citations omitted). We find this reasoning applicable to the catch-all provision set forth in N.C.G.S. § 15A-1368.4(c)

We hold that by authorizing the Commission to impose a "search" condition in N.C.G.S. § 15A-1368.4(e)(10) that, by its plain language, is limited to a supervisee's "person," the General Assembly thereby intended to foreclose imposition of "search" conditions pertaining to a supervisee's residence. N.C.G.S. § 15A-1368.4(e)(10) expresses the *limits* of the Commission's authority in that regard, and N.C.G.S. § 15A-1368.4's catch-all provision, subsection 15A-1368.4(c), as a

general grant of discretionary authority, cannot serve to expand the specific provisions, authority, and limits, established in N.C.G.S. § 15A-1368.4(e)(10). *See* N.C.G.S. § 15A-1368.4(c) ("Discretionary Conditions.—The Commission, in consultation with the Section of Community Corrections of the Division of Adult Correction and Juvenile Justice, may impose conditions on a supervisee it believes reasonably necessary to ensure that the supervisee will lead a law-abiding life or to assist the supervisee to do so.").[8]

The only "search"-related condition authorized in Article 84A, applicable to Defendant, is the "controlling" condition of N.C.G.S. § 15A-1368.4(e)(10), that specifically allows as a controlling condition that a supervisee "[s]ubmit at reasonable times to searches of the supervisee's *person*[.]" N.C.G.S. § 15A-1368.4(e)(10) (emphasis added). N.C.G.S. § 15A-1368.4(c), the catch-all provision, does not mention searches—whether of a supervisee's person, vehicle, residence, or anything else. Subsection 15A-1368.4(c) is simply a general "catch-all" provision granting the Commission flexibility and discretion to impose reasonable conditions of PRS that are not *already covered* by the specific conditions the General Assembly included in section 15A-1368.4.[9] The General Assembly has demonstrated that it knows how to grant the Commission the extraordinary authority of requiring a supervisee to permit PRS officers to conduct warrantless searches of the supervisee's residence as a condition of PRS, but it did not grant the Commission that extraordinary authority in N.C.G.S. § 15A-1368.4(e). The rules of statutory interpretation compel a determination that the general provisions of N.C.G.S. § 15A-1368.4(c) do not allow imposition of *warrantless* searches of a supervisee's *premises*, when the words "warrantless" and "premises" could have simply been included in the relevant subsection specifically concerning imposition of a "search" requirement as a condition of PRS—N.C.G.S. § 15A-1368.4(e)(10).

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8. We note that there is no record evidence that the Commission purported to impose the warrantless search condition pursuant to N.C.G.S. § 15A-1368.4(c), that the Commission decided to impose the condition "in consultation with" Community Corrections, nor any record evidence demonstrating that the Commission made a *discretionary* decision based upon Defendant's specific circumstances that this condition was "reasonably necessary to ensure that [Defendant would] lead a law-abiding life or assist [Defendant] to do so." N.C.G.S. § 15A-1368.4(c).

9. We make no holding concerning whether, under N.C.G.S. § 15A-1368.4(c), conditions concerning searches of the person, or clarifying the authority and limits of searches pursuant to N.C.G.S. § 15A-1368.4(e)(10), might violate the Fourth Amendment, and no inferences involving these issues should be made based upon the analysis and holdings in this opinion.

3. ***In Pari Materia***

a. N.C.G.S. §§ 15A-1368.4(b1)

As this Court noted in *Russell*, when there is a question concerning the intent of the General Assembly with respect to a particular statutory provision, we look to "similar statutory scheme[s]" in other subsections, sections, or chapters because "it is useful to compare the language of the two Chapters and consider the types of relief allowed . . . to determine" the intent of the General Assembly and, thereby, the limits of the authority granted. *Russell*, 260 N.C. App. at 91, 816 S.E.2d at 911 (citations omitted). In this case, we first look to another subsection of N.C.G.S. § 15A-1368.4—N.C.G.S. § 15A-1368.4(b1). Comparison of the express language used in N.C.G.S. § 15A-1368.4 subsection (e)(10) with the express language of subsection (b1), convincingly indicates that the General Assembly *intended* to limit "searches" as conditions of PRS pursuant N.C.G.S. § 15A-1368.4(e)(10) to searches of the "person." " 'Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list.' " *In re Investigation of Death of Eric Miller*, 357 N.C. 316, 325, 584 S.E.2d 772, 780 (2003) (footnote omitted) (citation omitted). This canon applies unless " '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[.]' " *Mazda Motors of Am., Inc., v. Southwestern Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (citation omitted).

N.C.G.S. § 15A-1368.4(b1) is titled: "Additional Required Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor[,]" and it *requires* the Commission to impose the following condition of PRS on supervisees convicted of certain sex crimes or crimes involving the abuse of children: "Submit at reasonable times to *warrantless searches* by a post-release supervision officer of the supervisee's *person* and of the supervisee's *vehicle* and *premises* . . . for purposes reasonably related to the post-release supervision[.]" N.C.G.S. § 15A-1368.4(b1)(8) (emphasis added). The General Assembly did not include the words "warrantless" or "premises" in the controlling condition applicable to Defendant's PRS, instead it granted the Commission the *limited* authority to include as a condition of Defendant's PRS that Defendant "[s]ubmit at reasonable times to *searches* of [Defendant's] *person*[.]" N.C.G.S. § 15A-1368.4(e)(10) (emphasis added). This Court must consider any "differences in [ ] otherwise identically worded statutes," because these differences in wording "strongly suggest that the General Assembly did not intend"

the words included in one statute, or subsection of a statute, to apply to other statutes or subsections that do not include those words. *State v. Watterson*, 198 N.C. App. 500, 506, 679 S.E.2d 897, 901 (2009).

Appellate courts " 'presume that the General Assembly would not contradict itself in the same statute[.]' " *State v. James*, 371 N.C. 77, 85, 813 S.E.2d 195, 202 (2018) (citation omitted). Unless giving meaning to every word of N.C.G.S. §§ 15A-1368.4(b1)(8) and 15A-1368.4(e)(10) would lead to absurd results, this Court must presume the General Assembly acted knowingly and with intent when granting the Commission the specific authority to impose "warrantless searches" of both a supervisee's "person" and "premises" as a condition of PRS pursuant to N.C.G.S. § 15A-1368.4(b1)(8) but, pursuant to N.C.G.S. § 15A-1368.4(e)(10), limited the Commission's authority to impose as a condition of PRS the requirement that a supervisee submit to a "search" to the supervisee's "person." *See State v. White*, 232 N.C. App. 296, 305, 753 S.E.2d 698, 704 (2014); *see also Nance v. S. Ry. Co.*, 149 N.C. 366, 371, 63 S.E. 116, 118 (1908); *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005).

As there is nothing absurd in the General Assembly allowing the imposition of more rigorous supervision for supervisees it deems, as a class, to require stricter supervision, we cannot ignore the difference in the plain language of the two subsections. *See Beck*, 359 N.C. at 614, 614 S.E.2d at 277. In addition, N.C.G.S. § 15A-1368.4(b1)(8), unlike N.C.G.S. § 15A-1368.4(e)(10), is a *mandatory* condition, indicating the intent of the General Assembly to treat supervisees who have been convicted of certain sex crimes or crimes involving child abuse differently than all other supervisees—who are only *potentially* subject to the discretionary conditions set forth in N.C.G.S. § 15A-1368.4(e)(10).

b. Articles 82 and 85

A review of the associated sections of Articles 82 and 85 further inform our decision. Article 82 mandates: "As [a] regular condition[ ] of probation, a [probationer] *must*:" "Submit at reasonable times to warrantless searches by a probation officer of the probationer's person . . . *and premises* while the probationer is present, for purposes directly related to the probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful." N.C.G.S. § 15A-1343(b)(13) (2017) (emphasis added). Article 85 *permits*: "As [a] condition[ ] of parole, the Commission *may* require that the parolee" "[s]ubmit at reasonable times to warrantless searches by a parole officer of the parolee's person . . . *and premises* while the parolee is present, for purposes reasonably related to the parole supervision. The

Commission may not require . . . that the parolee submit to any other searches that would otherwise be unlawful." N.C.G.S. § 15A-1374(b)(11) (2017) (emphasis added). We find that the General Assembly's decision to specifically allow, or require, warrantless searches of both the persons *and* the premises of probationers and parolees in N.C.G.S. § 15A-1343(b)(13) and N.C.G.S. § 15A-1374(b)(11), while omitting language in N.C.G.S. §§ 15A-1368.4(e)(10) granting the authority to include as a condition of PRS that supervisees submit to warrantless searches of their premises, demonstrates the intent of the General Assembly to withhold that authority from N.C.G.S. §§ 15A-1368.4(e)(10).

Especially relevant to our review are amendments to the General Statutes made in 2007. Prior to these amendments, N.C.G.S. § 15A-1374(b)(11) did *not* allow warrantless searches of *a parolee's premises* as a condition of parole—its language was nearly identical to that of N.C.G.S. § 15A-1368.4(e)(10). Further, N.C.G.S. § 15A-1368.4(b1) was not part of Article 84A—it did not yet exist. However, in 2007 the General Assembly made several amendments to the conditions relating to searches of parolees and PRS supervisees, as follows:

> **SECTION 8**. G.S. 15A-1374(b)(11) reads as rewritten:
>
> (b) Appropriate Conditions. — As conditions of parole, the Commission may require that the parolee comply with one or more of the following conditions:
>
> (11) Submit at reasonable times to warrantless searches ~~of his person~~ by a parole officer of the parolee's person *. . . and premises* while the parolee is present, for purposes reasonably related to ~~his~~ parole supervision. The Commission may not require as a condition of parole that the parolee submit to any other searches that would otherwise be unlawful.

2007 North Carolina Laws 213, § 8 (additions pursuant to the amendment are underlined, deletions are stricken) (italics added). At the same time, the General Assembly amended N.C.G.S. § 15A-1368.4 to *add* subsection (b1), including the requirement that supervisees subject to subsection (b1) "[s]ubmit at reasonable times to warrantless searches by a post-release supervision officer of the supervisee's person . . . and premises[.]" 2007 North Carolina Laws 213, § 9. Despite amending N.C.G.S. § 15A-1374(b)(11) from language identical to that found in N.C.G.S. § 1368.4(e)(10) in all relevant ways, in order to include offenders' "premises" in the warrantless search condition, and adding subsection (b1) to N.C.G.S. § 1368.4, subsection (e)(10) of N.C.G.S. § 1368.4

was not amended. We presume the General Assembly acted purposefully and with knowledge, and that its choice not to amend N.C.G.S. § 1368.4(e)(10) in a similar manner to N.C.G.S. §§ 15A-1374(b)(11) and 1368.4(b1) indicates its intent that PRS supervisees *not* be subject to warrantless searches of their premises unless their convictions subject them to the terms of N.C.G.S. § 1368.4(b1).

4. Searches That Would Otherwise be Unlawful

Finally, N.C.G.S. § 15A-1368.4(e)(10) states: "The Commission shall not require as a condition of post-release supervision that the supervisee submit to *any other searches* that would *otherwise be unlawful*." N.C.G.S. § 15A-1368.4(e)(10) (emphasis added). When read *in pari materia*, the relevant subsections of 15A-1368.4 granted the Commission the authority to require (1) that Defendant allow "a post-release supervision officer to visit at reasonable times at [his] home"; (2) that Defendant "[s]ubmit at reasonable times to searches of [his] *person* by a post-release supervision officer for purposes reasonably related to the post-release supervision";[10] (3) that the Commission, "*in consultation with the Section of Community Corrections of [DAC]*, [could] impose conditions on [Defendant] it believe[d] reasonably necessary to ensure that [Defendant would] lead a law-abiding life or [that would] assist [Defendant] to do so." However, (4) the General Assembly, by plain language included in both of the "search" subsections of the statute, clearly *prohibited* the Commission from "requiring" as a "condition of [PRS] that [Defendant] submit to *any other searches* that would *otherwise be unlawful*." N.C.G.S. §§ 15A-1368.4(b1)(8), (c), (e)(6), and (e)(10) (emphasis added).

Presuming the Commission intended to impose the discretionary condition that Defendant "[s]ubmit at reasonable times to warrantless searches by a post-release supervision officer of [his] . . . premises while [he was] present, for purposes reasonably related to [Defendant's] post-release supervision"[11] pursuant to N.C.G.S. § 15A-1368.4(c), it was required to do so "in consultation with the Section of Community Corrections of [DAC]," and there is no record evidence that it did so. N.C.G.S. § 15A-1368.4(c).

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10. There is a question if this wording means the search of Defendant's person could be conducted by *any* PRS officer, or only by *his* supervising PRS officer, *i.e.*, Officer Patterson. For the purposes of this appeal only, we will assume without deciding that Chief Gibson qualified as "a post-release supervision officer" under the statute.

11. The quoted language is taken from N.C.G.S. § 15A-1368.4(b1)(8).

More relevantly, a condition requiring Defendant to submit to warrantless searches of his residence would constitute a "search[ ] that would otherwise be unlawful." N.C.G.S. § 15A-1368.4(e)(10). A suspicionless warrantless search is in most circumstances a clear violation of the Fourth Amendment. One of the few exceptions recognized by the Supreme Court is when legislation, based on factual circumstances demonstrating a strong and legitimate governmental interest, specifically, and with appropriate limitation, authorizes warrantless searches as a condition for the release from prison of an inmate prior to the termination of the sentence imposed, to which the inmate consents in exchange for release. We hold that for a warrantless search of a PRS supervisee by a PRS officer to pass constitutional muster, it must be clearly and expressly authorized by statute, or be otherwise lawful—for example, pursuant to arrest or based on probable cause and exigent circumstances. The search of Defendant's residence was not based upon any condition of PRS clearly and expressly authorized by statute, and the catch-all provision of N.C.G.S. § 15A-1368.4(c) cannot make lawful "searches that would otherwise be unlawful." N.C.G.S. §§ 15A-1368.4(e)(10). The General Assembly, by including this language, clearly established that it did *not* intend for N.C.G.S. § 15A-1368.4(c) to provide an avenue for imposing search conditions on PRS supervisees that could not be lawfully imposed pursuant to N.C.G.S. § 15A-1368.4(e)(10) or, if applicable, N.C.G.S. § 15A-1368.4(b1).

G. *Voluntariness of Defendant's Waiver*

[2] Defendant argues that the trial court erred in concluding that Defendant's waiver of his right to deny the warrantless search of his residence was made voluntarily. We agree.

Defendant argued in his motion to suppress that his constitutional rights were violated by the imposition of any condition requiring him to submit to warrantless searches of his residence. Defendant's motion argued that the Supreme Court, in its opinions holding imposition of conditions requiring warrantless and suspicionless searches, has "relied heavily on each state's statutory scheme for supervising probationers and parolees." Defendant's motion continues: "In North Carolina, unlike in California[, *see Samson*, 547 U.S. 843, 165 L. Ed. 2d 250], the statutory conditions of post[-]release supervision require only that the post[-]release supervisee 'submit at reasonable times to searches of the supervisee's person by a post[-]release supervision officer for purposes reasonably related to the post[-]release supervision.' " (Citing N.C.G.S. § 15A-1368.4(e)(10)). Defendant further argued in his motion to suppress:

> Additionally, [N.C.G.S. § 15A-1368.4(e)(10) states] "[t]he commission **shall not require** as a condition of post-release supervision that the supervisee submit to any other searches that would otherwise be unlawful." North Carolina law does not require that Defendant be subject to warrantless searches of his residence. Indeed, it specifically protects him from being forced to submit to searches that would otherwise be unlawful. Therefore, any condition of Defendant's post[-]release supervision that would require him to submit to warrantless, suspicionless searches of his home is invalid.

The United States Supreme Court decided analogous issues in *Bumper v. North Carolina*, 391 U.S. 543, 20 L. Ed. 2d 797 (1968). In *Bumper*, "[t]he issue . . . presented [was] whether a search can be justified as lawful on the basis of consent when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant"—*i.e.*, proper legal authority. *Id.* at 548, 20 L. Ed. 2d at 802 (footnotes omitted). The Court first noted: "When [the State] seeks to rely upon consent to justify the lawfulness of a search, [it] has the burden of proving that the consent was, in fact, freely and voluntarily given. *This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority*." *Id.* at 548–49, 20 L. Ed. 2d at 802 (emphasis added) (footnotes omitted). The Court further reasoned: "When a law enforcement officer claims authority to search a home under a warrant, [the officer] announces in effect that the occupant *has no right to resist* the search. The situation is instinct with coercion—albeit colorably lawful coercion. *Where there is coercion there cannot be consent*." *Id.* at 550, 20 L. Ed. 2d at 803 (emphasis added). This logic applies equally when law enforcement officers—whether from a federal law enforcement agency, a police department, a sheriff's office, DPS task force officers, or probation/parole officers—claim authority to search a home under a condition of PRS requiring the supervisee to submit to the search. *See id.* at 549–50, 20 L. Ed. 2d at 802–03. Finally, the Court recognized:

> A search conducted in reliance upon a warrant *cannot* later be justified on the basis of consent *if it turns out that the warrant was invalid. The result can be no different when* it turns out that *the State* does not even attempt to rely upon the validity of the warrant, or *fails to show that there was, in fact, any warrant at all.*

Id. (emphasis added) (footnotes omitted). The *Bumper* Court "h[eld] that there can be no consent under such circumstances." *Id.* at 548, 20 L. Ed. 2d at 802.

Therefore, the State *cannot* prove Defendant effectively waived his Fourth Amendment rights to be free from unreasonable searches if it does not first prove that the execution of the warrantless search of the Home during Operation Arrow *was based upon a valid condition of PRS* authorizing unannounced suspicionless and warrantless searches of Defendant's premises. *Id.*; *see also Lo-Ji Sales, Inc., v. New York*, 442 U.S. 319, 329, 60 L. Ed. 2d 920, 930 (1979) (holding that once an individual is "aware of the presumed authority of the [officer to conduct the] search . . ., his conduct complying with official requests cannot . . . be considered freely and voluntarily given" because "[a]ny 'consent' given in the face of 'colorably lawful coercion' cannot validate" an otherwise illegal search (citation omitted)).

Defendant argues the State failed to meet its burden of producing sufficient evidence supporting the trial court's finding of fact (12): "[D]efendant knowingly, willfully and understandingly consented to the search." Our Supreme Court has held that "[w]hether [a person's] consent is voluntary is to be determined from the totality of the circumstances." *Smith*, 346 N.C. at 798, 488 S.E.2d at 213 (citations omitted). The trial court made the following findings of fact relevant to this argument:

> 1) [D]efendant was placed on post[-]release supervision on April 15th, 2017 and met his [Probation] Officer, Officer Patterson on April 4th, 2017.
>
> 2) Based on Department of Public Safety (DPS) assessments, [D]efendant was considered to be a high[-]risk offender.
>
> 3) Defendant was validated a gang member while in Department of Adult Corrections (DAC).
>
> 4) Based on his security risk assessment and validated gang status [D]efendant was placed in the security risk group [("SRG")] with a high likelihood of re-offending.
>
> 5) Because of his status of a high[-]risk offender with a risk assessment of 69 *DPS protocol required* an unannounced search of [Defendant's] residence.
>
> . . . .

> 7) On May 11, 2017 Officer Patterson, [D]efendant's supervising officer, placed [D]efendant's name on a list of homes to have an unannounced warrantless search.
>
> . . . .
>
> 10) This search was not a random search. Although there was a large task force targeting *parolees*, [Defendant] was specifically put on the list for a search *because he had not had a thorough home search since his release from prison*.
>
> . . . .
>
> 12) Chief Gibson *advised [D]efendant that [the Operation Arrow task force was] there for a search* and [D]efendant knowingly, willfully and understandingly consented to the search. There is no evidence before the [trial] court that [Defendant's] consent was given other than voluntary.

(Emphasis added).

"When a trial court conducts a hearing on a motion to suppress, the court 'should make findings of fact that will support its conclusions as to whether the evidence is admissible.' " *Smith*, 346 N.C. at 800, 488 S.E.2d at 214 (citation omitted). The trial court's order does not contain *any express finding* that Defendant was statutorily required to accept the conditions of his PRS. Further, the record does not include any documentation stating what Defendant's conditions of PRS were—whether imposed by the Commission or by DPS policy. However, where, as in this case, the trial court's findings of fact do not address all the relevant issues: " 'If there is no conflict in the evidence on a fact, failure to find that fact is not error. Its finding is implied from the ruling of the court.' " *Id.* (citation omitted); *see also State v. Powell*, 253 N.C. App. 590, 595 n.1, 800 S.E.2d 745, 749 n.1 (2017) (citations omitted) ("even in cases where there is no material conflict in the evidence presented, 'findings of fact [though not required] are preferred' "). We hold, based upon the testimony of the State's witnesses along with the trial court's findings of fact supported by the evidence, and as a matter of law, that Defendant did not have any legal option *other than to participate in PRS under the conditions as determined by the Commission and DPS policy*.

Finding of fact (12) is undercut by another of the trial court's findings of fact, finding (5), which states: "DPS protocol *required* an unannounced search of [Defendant's] residence." As shown below, finding (5) is supported by the uncontroverted testimony of the State's two

witnesses, DPS policy, and the relevant statutes. Contrary to the finding of the trial court, the fact that the 11 May 2017 search was required—Defendant could not refuse the eleven officers of Operation Arrow entry into the premises for the purposes of conducting a thorough warrantless search—constituted "evidence before the [trial] court that [Defendant's] consent was given other than voluntary." *See Bumper*, 391 U.S. at 548–50, 20 L. Ed. 2d at 802–03. The part of finding (12) stating that "Chief Gibson advised [D]efendant that [the Operation Arrow task force was] there [to conduct a warrantless] search" of Defendant's residence also undercuts the latter portion of finding (12), which concludes "[D]efendant knowingly, willfully and understandingly consented to the search[,]" since Defendant cannot be deemed to have consented to the search when confronted by law enforcement officers stating, under the color of law, that they have the authority to conduct the search without Defendant's consent. *Id.* For these reasons, further supported by the evidence and law discussed below, we hold the trial court erred in finding as fact that "[D]efendant knowingly, willfully and understandingly consented to the search."

1. Article 84A

Pursuant to Article 84A, Defendant had no choice but to "consent" to PRS and, therefore, also "consent" to the conditions imposed as a result of his PRS status: "[A] prisoner to whom this Article applies *shall* be released from prison *for post-release supervision* on the date equivalent to his maximum imposed prison term less 12 months in the case of Class B1 through E felons[.]" N.C.G.S. § 15A-1368.2(a) (emphasis added). Further: "A prisoner *shall not refuse* post-release supervision." N.C.G.S. § 15A-1368.2(b) (emphasis added). The General Assembly defines PRS as "[t]he time for which a sentenced prisoner is released from prison before the termination of his maximum prison term, *controlled by the rules and conditions of this Article*." N.C.G.S. § 15A-1368(a)(1) (2017).

Therefore, the provisions of Article 82 and Article 85 are not applicable to persons on PRS unless Article 84A expressly states otherwise. Further, the "rules and conditions" governing PRS are solely those expressly set forth in Article 84A, absent any specific provisions in the article granting DPS, or its sub-sections such as DAC or the Commission, the authority or duty to adopt rules and guidelines governing PRS and PRS supervisees. In Article 84A, the General Assembly did not grant DPS the authority to make rules governing PRS that deviate materially from what is specifically required or prohibited in the article. N.C.G.S. §§ 15A-1368(a)(3), (b). The only specific grant of authority to adopt rules relating to PRS and PRS supervisees is found in the very last subsection

of Article 84A–N.C.G.S. § 15A-1368.6(e), which states: "The Commission shall adopt rules governing the [PRS revocation] hearing." N.C.G.S. § 15A-1368.6(e). DPS is without the authority to impose conditions of PRS, all conditions must be imposed by the Commission.

2. DPS Policy

As noted above, DPS sets out its main rules and procedures for supervising PRS supervisees, parolees, and probationers in two policy manuals: the DPS Corrections manual and the DPS Prisons manual, which we refer to together as DPS Policy or simply the Policy. According to DPS Policy: "Newly admitted offenders to Prisons" must undergo an evaluation or "Risk/Needs Assessment" ("RNA"), "A validated tool used to help identify criminogenic needs, risks and barriers that an offender has which may prevent them from being successful," DPS Prisons, Ch. C, § .0203(c)(5), that includes the same diagnostics, interviews, investigations, and assessments that a PRS supervisee must undergo both prior to release on PRS and as a continuing duty of the supervisee's PRS supervision officer. "This tool identifies the risk for re-arrest and provides" a "service priority level" for the inmate. *Id.* "The results of the tool assist with the creation and continuation of a [case] plan for the inmate's . . . transition back to the community." *Id.* at .1405(b). This process includes using a commercially available statistical diagnostic tool, the "Offender Trait Inventory—Revised" ("OTI-R") to generate the prisoner's security "risk level," primarily based on the inmate's criminal record. The RNA also includes two additional sets of data—a questionnaire completed by the inmate, the "Offender Self Report Questionnaire," and the "Staff Interview and Impressions," which both include specific questions regarding mental health, social history, and anti-social tendencies. *Id.* at .0201(a); .0202(a); .0202(c)(5); .0203(c); .1403(n); .1405(b); DPS Corrections, Ch. C, § .0202. The RNA also includes "evaluat[ing] each case to identify ['gang-related' or] Security Risk Group [SRG] affiliations, crime-related problems, correctional goals, need for outer controls, and other factors relating to the classification process." DPS Prisons, Ch. C, § .0202(a)(4). RNA data, as well as other case management data, is entered into "[t]he OPUS system[, which] automatically compiles relevant information[.]." *Id.* at .0106(a)(1) and (3).

When the time for an inmate's release on PRS is nearing, the Commission will review the inmate's OPUS file and, after the "Commission has approved the release" and imposed initial PRS conditions, the "release officer" will meet with the inmate to "review the post-release agreement"—which includes a "line-by-line review of all conditions," "read . . . aloud, [and] explain[ed] . . . to the [inmate,]" after which time "the [inmate will] sign the agreement[,]" "to acknowledge

awareness and understanding" of the agreement. *Id.* at .0304; .1503(i)(4) and (5). As required by N.C.G.S. § 15A-1368.2(b), DPS policy recognizes that an inmate must participate in PRS: "If the offender attempts to refuse post-release supervision", the release officer must "contact the Post-Release/Parole Supervision Office" to inform it of the refusal. *Id.* at .1503(i)(3).

Prior to release, an inmate will be assigned a PRS supervising officer who will review the inmate's case file and PRS release agreement, which includes the PRS conditions imposed by the Commission. DPS Corrections, Ch. E, § .0303(b)(2). "In the [supervising] officer's discretion, [the officer may] contact the parole case analyst to recommend or request any special supervision conditions." *Id.* at .0303(b)(3). Shortly after release, the supervising officer has to conduct another RNA, which will usually be based upon the same OPUS data collected during the supervisee's imprisonment, including the OTI-R analysis, but the supervising officer conducts a new, face-to-face, "Staff Interview and Impressions," and has the supervisee fill out a new "Offender Self Report Questionnaire." If the supervisee has scored "50 or higher on the OTI-R," which will have already been determined by the RNA conducted in prison, the supervisee will be considered "high-risk," and the supervising officer will consult with a chief supervising officer "to determine if additional conditions should be implemented[.]" DPS Corrections, Ch. C, § .1003(h).

Further, "Once a[supervisee] has been identified and validated as a Security risk group (SRG) member, . . . the officer will have the conditions of probation/post-release modified to include the conditions of the Security Risk Group Agreement (SRG-05)." *Id.* at .0503. However: "**A signed copy of the SRG-05 does not give authority to enforce the SRG Agreement. The . . . condition must be added by the . . . Commission**." *Id.* at .0503 (emphasis in original); *see also id.* at .0307; .0802. Nonetheless, the "Initial Supervision and Contact Requirements" section of the Policy states that supervising officers "*must*" "*[c]onduct a warrantless search of the offender's premises* if . . . the offender is a *validated gang (SRG) member released on post[-]release* or probation[.]" *Id.* at .0504(c)(3) (emphasis added); *see also id.* at .0603. The Policy also states that "[a]n offender's refusal ['to submit to a warrantless search of his/her person, vehicle, and/or premises'] is considered a violation of the conditions of probation. [N.C.G.S. §] 15A-1343(b)(13)." *Id.* at .0804.[12] The Policy warns: "Note that . . . [a] post-release supervision

12. We note that N.C.G.S. § 15A-1343(b)(13), the authority cited, is only applicable to probationers.

[supervisee] . . . can neither refuse nor be denied [PRS release.]" *Id.* at .1503(i)(3).

Finally, DPS enforces certain conditions, including conducting warrantless searches, through "Joint Law Enforcement Operations" ("Joint Operations"), which are operations pairing DPS probation/parole officers "working side-by-side with law enforcement to enhance the specific objectives of: control, compliance, enforcement, treatment, and promotion of public safety." DPS Corrections, Chapter H, § .0502. The "Target Populations" of these Joint Operations include "high-risk offenders, . . . SRG offenders, [and] post-release supervision offenders[.]" *Id.*

3. Testimony of the State's Witnesses

The following testimony of the State's witnesses is relevant to our review of the order denying Defendant's motion to suppress. We consider the uncontested testimony within the context of the relevant law, and DPS policy, as set forth above.

When Officer Patterson was asked during her direct examination to "go through [her] assessment of [Defendant,]" Officer Patterson testified that she assessed Defendant as a "high-risk offender" "[d]ue to his criminal history[.]"[13] When asked "how [she] get[s] to the high[-]risk number[,]" and "[w]hat are the factors you're looking at[,]" Officer Patterson stated: "The factors are criminal history[.]" When asked if criminal history was the only factor, she said, "[c]riminal history and we have an offender self[-]report. How they answer certain questions also can trigger their level as well." However, Officer Patterson then stated that the risk assessment is "computer generated, so [the supervising officers] don't come up with the [risk] number ourselves. [O]nce we plug in everything, then the computer will give us a number"; "[a]t the time that I assessed [Defendant] . . . he assessed as a 69 [risk level]. He was extreme level" "[d]ue to his criminal history."

On cross-examination, Officer Patterson was asked if she had "any paperwork that [she] used to do the[] assessments[,]" and she answered: "Well, as far as the assessment part, his answers we had—it's computerized. So it's on our computer. So he asked—when he comes in, he answers maybe six questions, and it can right then trigger a high-risk offender because of their criminal history. So at that point, his criminal history was already—his score's already triggered through the

13. At the time of Defendant's PRS, he was a prior record level III, based upon his 14 August 2014 conviction for assault with a deadly weapon with intent to kill, and his 2 August 2016 conviction for possession of marijuana with intent to sell or deliver.

criminal history once he came out on post[-]release"; Officer Patterson agreed that "it's sort of an automatic thing" and that "it doesn't really matter what he is doing on post[-]release. What matters for the risk offender is what he had done prior to being placed on post[-]release"—meaning "it's based on criminal history." When asked to provide the "maybe six questions" she asks supervisees as part of an RNA, Officer Patterson testified that she asks if they can meet their financial obligations, if they have "a drug problem" or "alcohol issues," if they have "ever been married or in a long-term relationship," then stated: "It's two other questions I really cannot remember right now."

Officer Patterson also stated that Defendant was "validated" as a gang member while in prison in 2016, and based upon this "validation" Defendant was required to participate in a "[s]ecurity risk group program" as a "special condition[ ] of his post[-]release per the [C]ommission." She stated that the "security risk group program" is a "program as far as our gang offenders are to participate in." Supervisees assessed as "part of the security risk group" "are subject to a complete . . . unannounced warrantless search" "[f]or the first 90 days[,]" "the conditions as far as the security risk group program, . . . you *have to have an unannounced search*." (Emphasis added). Officer Patterson testified that the "complete unannounced warrantless search" condition was also a condition that was imposed on "pretty much [ ] every . . . probationer and post[-]release" supervisee—that as far as post[-]release . . . those are their conditions as far as that [they] *have to have an unannounced search*." (Emphasis added). When asked to clarify if all PRS supervisees "must" be subjected to "an unannounced search" Officer Patterson answered: "Yes." Officer Patterson testified that Defendant was "aware of the conditions . . . of [his] post[-]release, [including] any special conditions that the [C]ommission has established."

Chief Gibson testified "that prior to May 11th [he] had never had any contact with [Defendant]"; that he "had no firsthand knowledge about [Defendant's] criminal history"; that he "did [ ] not perform . . . th[e] test that Officer Patterson did to get [Defendant's] risk level." The trial court found as fact: "On May 11, 2017 Officer Patterson . . . placed [D]efendant's name on a list of homes to have an unannounced warrantless search." Chief Gibson stated that he spoke with Officer Patterson "prior to going out to the house that day[,]" and Officer Patterson told him that Defendant "was a validated gang member; that he was a high-risk offender; that he was on post[-]release." Chief Gibson testified that Defendant's residence was placed on the list of homes to search as part of Operation Arrow "because of [Defendant's] level. He was OTI score of 69."

Chief Gibson testified that "high-risk offenders" were determined by a numerical risk level generated by the offender's "prior criminal history[,]" "education level, [ ] stability factors such as whether [the offender has] been in a long-term relationship[,]" "whether [the offender] has a GED or not, whether [the offender] has a prior drug history or not," and that these "factors all go into a score that's called offender traits inventory." Neither he nor Officer Patterson testified as to Defendant's status with respect to these personal factors, nor what specific impact Defendant's status had on the calculation of Defendant's risk level, about any recommendations for special conditions he or Officer Patterson made to the Commission based upon these "factors," nor what conditions of PRS the Commission actually imposed based on these or any other personal traits or facts specific to Defendant—other than his prior criminal record. Chief Gibson testified that the "offender traits inventory" is a "statistically based" algorithm that predicts the likelihood that an "offender"—meaning, according to DPS, a probationer, parolee, or PRS supervisee—will "be re-arrested within the first year of supervision."

Concerning the Operation Arrow Joint Operation task force, Chief Gibson testified that the additional members of the force with him when he initiated contact with Defendant for the purpose of conducting a warrantless search included a DPS canine officer; an Alcohol, Tobacco and Firearms canine officer; a High Point police detective; an officer from the Guilford County Sheriff's Department; two Greensboro police officers; and four additional probation/parole officers—for a total of six federal, state, or municipal "police" officers and five "probation/parole" officers. Therefore, when Chief Gibson informed Defendant that the task force was going to search the Home as part of Operation Arrow, Defendant was facing eleven officers in total, including two canine officers.

Chief Gibson testified that he had not done "any surveillance of [Defendant's] house" prior to the search, that he "didn't see anything in plain view," such as "contraband," before the search was conducted; and that he "did not have a warrant to go in [Defendant's] house." Chief Gibson testified that when he made contact with Defendant outside the house: "[I] introduced [myself] to [Defendant,]" "I spoke with [Defendant] and identified myself to [Defendant] as Chief Probation Officer Kevin Gibson"; then "I told [Defendant] that *we were there to effect a search pursuant to the terms of his post-release conditions*." (Emphasis added). Chief Gibson stated that if Defendant had not consented, he "would have notified the parole commission that [Defendant] refused to allow us to effect a search of the residence, and then they possibly could

have issued an order for his arrest." Chief Gibson was asked if Defendant was required to submit to the warrantless search of his residence on the basis that Defendant was determined to be a "high-risk offender"; Chief Gibson answered that Defendant was required to submit to the warrantless search of the Home "because [Defendant] has a parole agreement that he signed. It's not solely because of that, but he has a parole agreement that he signed prior to getting out of prison," and Defendant "has several conditions on the parole agreement, and one of them is that he must submit to a warrantless search of his residence, which is also a condition of the security risk group program that he was under as well." Chief Gibson stated: "[Defendant] was *required* as a condition of []his parole *to consent* to this search[.]" (Emphasis added).

Chief Gibson acknowledged that the law *required* Defendant to accept "post-release supervision," Defendant did not have the option to reject PRS and serve the remainder of his active sentence. Chief Gibson acknowledged that Defendant was required to accept whatever conditions the Commission imposed; that Defendant's participation in "the security risk group program" was not "optional," "it's the law"; and that submission to warrantless searches of his home was also a required condition of Defendant's PRS because it was "a condition of the security risk group program that he was" required to participate in "as well." Chief Gibson also stated that Defendant was placed on the Operation Arrow list for warrantless searches due to his high "OTI" number, which made Defendant a "high-risk offender."

After Chief Gibson "told [Defendant] that we were there to effect a search pursuant to the terms of his post-release conditions, [he] asked [Defendant] for consent to effect that search. And [Defendant] consented to the search." Chief Gibson testified that, *after purportedly obtaining Defendant's consent* to search, "[I] advised [Defendant] that I was going to place him in handcuffs and restraints while we conducted the search, as is our policy. I advised him that he [wa]s not under arrest as a part of that, as well." Defendant was asked to sit on his porch, handcuffed, while a canine officer went through the House to determine whether there were any other people inside. Defendant's uncle and his girlfriend were in the House that morning, Defendant's mother had already left earlier that morning. Officers then thoroughly checked the living room and, once they were satisfied there were no weapons hidden in the couch or nearby, Defendant, his uncle, and his girlfriend, were given the choice of sitting on the couch or waiting outside while the warrantless search was conducted. All three, Defendant still handcuffed, decided to sit on the couch. Prior to allowing Defendant to take a seat in his residence, while

Operation Arrow conducted what the State argues was a consent search of the residence, defendant was "patted down." The task force used the diagram Officer Patterson had drawn of the inside of the House to help prepare for the warrantless search, and Chief Gibson used the diagram to confirm with Defendant the location of Defendant's bedroom.

The trial court's findings and the undisputed testimony of the State's witnesses demonstrate that the Home was searched during Operation Arrow (1) "because [Defendant] had not had a thorough home search since his release from prison[,]" which Officer Patterson testified was a requirement for all supervisees within the first ninety days of beginning PRS; (2) "[b]ecause of [Defendant's] status of a high[-]risk offender[,] . . . DPS protocol required an unannounced search of his residence"; and (3) as found by the trial court, Defendant "was validated a gang member while in Department of Adult Corrections[,]" which meant he was required to participate in the SRG program, and DPS policy required "that he must submit to a warrantless search . . . [as] a condition of the security risk group program that he was under as well." However, DPS policy states: "**A signed copy of the SRG-05 does not give authority to enforce the SRG Agreement. The . . . condition must be added by the . . . Commission**." DPS Corrections, Ch. C, § .0503 (emphasis in original). DPS policy cannot constitutionally require submission to warrantless searches due to a supervisee's SRG status, "high-risk" status, or for any other reason. The Policy can only require that a request for such a condition is made to the Commission, and the Commission can only impose conditions based upon valid statutory authority. *Id.*; *id.* at .0204; N.C.G.S. § 15A-1368(b).

DPS policy appears to conflate the Commission's authority to impose warrantless searches as conditions of probation with the Commission's authority to impose warrantless searches as conditions of PRS. The testimonies of Officer Patterson and Chief Gibson indicate they understand DPS policy to mandate imposition of warrantless searches of PRS supervisees' residences under certain circumstances. However, the General Assembly has granted the Commission greater powers with respect to the warrantless searches of probationers and parolees than those granted with respect to the warrantless searches of PRS supervisees. *See* N.C.G.S. §§ 15A-1343(b)(13), 15A-1374(b)(11) and 15A-1368.4(e)(10). Probation, which an offender agrees to in exchange for avoiding imprisonment and may decline if the inmate objects to the conditions, specifically requires warrantless searches of the parolee's residence as a condition. N.C.G.S. § 15A-1343(b)(13). But for PRS, which an inmate may *not* refuse to participate in, no

matter what conditions are imposed, the General Assembly withheld from the Commission the authority and discretion to impose warrantless searches of a supervisee's "premises"—unless the supervisee is subject to N.C.G.S. § 15A-1368.4(b1). N.C.G.S. § 15A-1368.4(e)(10) limits the authority and discretion of the Commission to deciding that a supervisee must "[s]ubmit at reasonable times to searches of the supervisee's *person* by a post-release supervision officer[.]" N.C.G.S. § 15A-1368.4(e)(10) (emphasis added).

As we have held above, the Commission did not have the authority to impose warrantless searches of the Home as a condition of Defendant's PRS. This is true whether the Commission purported to act pursuant to N.C.G.S. § 15A-1368.4(c), N.C.G.S. § 15A-1368.4(e)(10), N.C.G.S. § 15A-1343(b)(13), or whether Officer Patterson or Chief Gibson purported to act pursuant to DPS policies regarding offender risk level assessments, validation as a gang member and placement in the SRG program or, as the trial court found, because the supervisee "had not had a thorough home search since his release from prison."

Undoubtedly, Chief Gibson and the Operation Arrow task force believed they had the legal authority to conduct a suspicionless warrantless search of the Home—but they were mistaken. If "consent" to a search is based upon an officer's belief that the officer has the legal authority to conduct the search, but this belief is mistaken, the purported "consent" is not valid. *Bumper*, 391 U.S. at 549–50, 20 L. Ed. 2d at 802–03. The State has failed to demonstrate the existence of any valid condition allowing suspicionless warrantless searches of Defendant's premises.

Further, even had Chief Gibson been in possession of the legal authority to search Defendant's residence, our Supreme Court has held: "When [the State] seeks to rely upon consent to justify the lawfulness of a search, [it] has the burden of proving that the consent was, in fact, freely and voluntarily given. *This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority*." *Id.* at 548, 20 L. Ed. 2d at 802 (emphasis added) (footnotes omitted). For the same reason, Defendant cannot be found to have consented to the terms of his PRS by signing a PRS agreement in prison, or anytime thereafter. Defendant was told, and the law mandates, that he *must* accept PRS and whatever conditions are attached to it. N.C.G.S. § 15A-1368.2(b) ("A prisoner shall not refuse post-release supervision."). Defendant's agreement to abide by the conditions of his PRS was "no more than acquiescence to a claim of lawful authority." *Id.* The law cannot prejudice

Defendant for agreeing to something he had no legal right to refuse. The Supreme Court has recognized:

> [W]hen the [officer] demands entry, the occupant has no way of knowing . . . the lawful limits of the [officer]'s power to search, and no way of knowing whether the [officer] himself is acting under proper authorization. . . . . [O]nly by refusing entry and risking a criminal conviction can the occupant at present challenge the [officer]'s decision to search.

Camara, 387 U.S. at 532, 18 L. Ed. 2d at 937 (citations omitted). Defendant had no reason to question Chief Gibson's authority to conduct a warrantless search of his residence, as the PRS agreement, which Defendant was by law required to abide by, stated that a chief probation/parole officer in fact did have that authority. Chief Gibson introduced himself to Defendant, explained who he was and that the Operation Arrow task force was there to effect a search as permitted by Defendant's PRS conditions. Defendant's agreement with Chief Gibson's demand did not constitute "consent" for the purposes of the Fourth Amendment or Art. I § 20 of the North Carolina Constitution. *Bumper*, 391 U.S. at 548, 20 L. Ed. 2d at 802; *see also State v. Weavil*, 59 N.C. App. 708, 710, 297 S.E.2d 772, 774 (1982).

As in *Bumper*, this Court holds Defendant "did not consent to the search, and that it was constitutional error to admit the [fruit of the illegal search] in evidence against [Defendant]. Because the [fruit of the illegal search] was plainly damaging evidence against [Defendant] with respect to . . . the charges against him, its admission at the trial was not harmless error." *Bumper*, 391 U.S. at 550, 20 L. Ed. 2d 797 at 803 (citations omitted).

III. Conclusion

We hold the trial court erred by denying Defendant's motion to suppress the firearm and other evidence found as the result of the 11 May 2017 warrantless search of the Home. By not including the word "premises" in N.C.G.S. § 15A-1368.4(e)(10), while including the word "premises" in N.C.G.S. § 15A-1368.4(b1) and other closely related statutes, the General Assembly indicated its intent that warrantless search conditions of PRS under N.C.G.S. § 15A-1368.4(e)(10) be limited to searches of the supervisee's "person." The catch-all provision in N.C.G.S. § 15A-1368.4(c) cannot be used to expand the Commission's authority beyond that which the General Assembly intended and, therefore, cannot serve as authority to impose as a condition of PRS warrantless searches of a supervisee's

residence.[14] The Commission therefore erred in imposing that unlawful condition in Defendant's case, and the Operation Arrow warrantless search of Defendant's premises lacked legal authority. Defendant's purported consent did not serve to justify the otherwise unlawful search, as Defendant was obligated by statute to consent to PRS and the conditions imposed. Defendant's compliance with his legal duty, by signing the PRS agreement and not attempting to refuse or hinder Chief Gibson from carrying out one of the conditions contained therein, was not true consent to search as contemplated by the Fourth Amendment or Art. I § 20 of the North Carolina Constitution, and it did not serve to render constitutional the otherwise unconstitutional warrantless search.

Because Operation Arrow conducted an unlawful warrantless search on 11 May 2017, and the firearm and other contraband was discovered as a direct result of that unlawful search, we must reverse the 2 August 2018 order denying Defendant's motion to suppress, and remand for entry of an order granting Defendant's motion to suppress. As the prejudice to Defendant is clear, we vacate the 2 August 2018 judgment entered pursuant to Defendant's *Alford* plea as well, and remand for any additional proceedings not inconsistent with this opinion.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

Judges BRYANT and BROOK concur.

14. We do not address whether N.C.G.S. § 15A-1368.4(c) could be used to impose conditions related to warrantless searches of premises for PRS supervisees subject to N.C.G.S. § 15A-1368.4(b1), and we express no opinion on that issue.

STATE v. MILLER

[275 N.C. App. 843 (2020)]

STATE OF NORTH CAROLINA
v.
CALVIN LEE MILLER

No. COA19-1083

Filed 31 December 2020

1. Evidence—video of defendant kicking dog—plain error review—overwhelming evidence of guilt

The admission of a video of defendant kicking his dog did not constitute plain error in light of the overwhelming evidence of defendant's guilt of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon. The challenged portion of the video was insignificant when viewed in the context of testimony that defendant repeatedly threatened to kill his wife and that shell casings collected after his wife was shot in a parking lot matched those of defendant's .22-caliber rifle.

2. Evidence—expert opinion—forensic firearms analysis—Rule 702—reliability

In a trial for attempted first-degree murder arising from an incident in which defendant's wife was shot twice in a parking lot following a pattern of defendant making threats to kill her, the trial court did not abuse its discretion by admitting the opinion of a forensic firearms expert that the shell casings collected from the scene were an exact match to those belonging to defendant's .22-caliber rifle. Not only was the court's decision a reasoned one, made after a lengthy voir dire of the expert, but even if the decision was erroneous, defendant could not establish prejudice given the overwhelming evidence of his guilt.

3. Criminal Law—jury instructions—flight—steps after fleeing crime to avoid apprehension

In a prosecution for attempted first-degree murder, the trial court's decision to instruct the jury on flight was not an abuse of discretion where the evidence, viewed in the light most favorable to the State, gave rise to a reasonable inference that defendant left the scene of his wife's shooting and took steps to avoid apprehension because after he made eye contact with a law enforcement officer who was out looking for him several hours after the shooting, defendant entered a wooded area and curled up on the ground behind a tree.

Judge ZACHARY concurring in part and dissenting in part.

Appeal by defendant from judgments entered 31 October 2018 by Judge Walter H. Godwin, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 25 August 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Steven Armstrong, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant.

DIETZ, Judge.

Defendant Calvin Lee Miller appeals multiple felony convictions all related to his attempt to murder his wife with a rifle. Miller argues that the trial court committed plain error by admitting a video showing him kicking his dog. He also challenges the admission of testimony from the State's forensic firearms expert, arguing that the expert's ballistics comparison was unreliable under Rule 702. Finally, Miller challenges the trial court's decision to instruct the jury on flight.

As explained below, the trial court's admission of the challenged video, even if we were to assume it was error, does not rise to the level of plain error. The court's admission of the testimony of the State's expert was within the court's sound discretion. And the instruction on flight was supported by the evidence in the record. Accordingly, we find no plain error in part and no error in part in the trial court's judgments.

Facts and Procedural History

Defendant Calvin Lee Miller was married to his wife, Charlene, for 34 years. Miller and Charlene lived together until October 2017, when Charlene moved out due to Miller's drinking and abusive behavior.

After Charlene moved out, Miller repeatedly contacted her by phone, text message, and showing up at her workplace. He vacillated between asking her to return home, promising to quit drinking, and telling her that he hated her. Charlene told Miller not to come to the store where she worked if he had been drinking. On at least one occasion, Miller texted Charlene to warn her that her "day was coming." On another occasion, Miller told Charlene to pick up some of her possessions from their home and then sent pictures of her "stuff on fire."

On 3 December 2017, Miller and Charlene's adult daughter, Kortney, recorded video on her cell phone of Miller threatening to harm Charlene. Charlene was not present at the time. Miller also threatened Kortney, who was pregnant, with his .22 caliber rifle. Kortney's husband, Akia, grabbed Miller and the gun, telling Miller to never raise a gun to Kortney again. Kortney then heard Miller threaten to shoot his dog and heard several gunshots around the house. Akia also heard 13 loud noises that sounded like firecrackers and later saw the resulting bullet holes. After this incident, Akia and Kortney collected some of the shell casings left behind and placed them in a plastic baggie.

Kortney later told Charlene that Miller had a .22 caliber rifle and had threatened to harm Charlene nearly every day since he realized Charlene "wasn't coming home for sure." Based on the threats, Charlene obtained a domestic violence protective order against Miller.

On 5 December 2017, Charlene arrived at work around 6:15 a.m. She had the protective order with her but inadvertently left it in her car. Charlene did not know if Miller had been served with the order and went back out to her car to get it in case Miller showed up.

In the parking lot, Charlene was shot twice in the head with .22 caliber bullets, one hitting her in the jaw and the other hitting the top of her scalp. Charlene ran back inside the store and called 911. Police arrived and questioned Charlene about the shooting. She stated that she did not see the shooter but that it was Miller. EMS transported Charlene to the hospital where she was treated for her injuries for two weeks.

While investigating the shooting, officers searched the parking lot and recovered three spent shell casings and two live rounds of .22 caliber bullets. Around five hours after the shooting, a highway patrol officer saw Miller walking along a road not far from the scene of the shooting. The officer and Miller saw each other, and Miller raised and then lowered his hands before walking toward a wooded area. Miller entered the wood line, came back out again, and began walking toward the officer. But when Miller again saw the officer and made eye contact, he turned and went back into the woods. A few moments later, a K-9 unit joined the search and located Miller. Officers found Miller lying on the ground, "curled up in a ball, almost in the fetal position, laying down behind a large oak tree."

Miller was intoxicated, with extremely slurred speech, and said "something about not having a rifle" and "[y]'all know I wouldn't hurt my woman, my old lady." The officers had only directed Miller to "[s]urrender" and had not yet told Miller "why he had been stopped." Officers

recovered .22 caliber live rounds when they searched Miller, but they did not recover a firearm in their investigation.

On 26 February 2018, Miller was indicted for attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon. The case went to trial. At trial, Charlene, Kortney, and Akia testified to the events described above.

The State also presented the videos Kortney made on her cell phone. The videos showed Miller threatening Charlene and Kortney and pointing the gun at Kortney. Kortney identified the item Miller was holding as a ".22 rifle." The videos also showed Miller kick and threaten his small dog. Miller did not object to the admission of the videos. Akia identified a photograph of himself and Miller, screenshotted from the video Kortney took in December 2017, showing Miller holding his .22 caliber rifle.

The State also presented the testimony of Kathleen Clardy, a scientist from the firearms unit of the State Crime Lab, as an expert in the field of firearm examination. Miller objected, and the trial court conducted *voir dire*. At the conclusion of the *voir dire*, the trial court ruled that Clardy's testimony was admissible under Rule 702 after finding that her testimony was "the product of reliable principles and method[s]" and that she "applied these principles and methods to the facts of this particular case."

Clardy then testified about her examination of the various shell casings collected during the investigation. Clardy described in detail how she examined the markings on the casings under a microscope and concluded that all of the casings she examined were fired from the same firearm based on a comparison of specific markings she observed on the casings. Clardy then had another examiner peer review her work, and that examiner reached the same conclusion.

On 31 October 2018, the jury convicted Miller of all charges. The trial court sentenced Miller to 207 to 261 months in prison for attempted first degree murder and a consecutive consolidated sentence of 96 to 128 months for assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon. Miller appealed.

Analysis

I. Plain error challenge to admission of video

[1] Miller first argues that the trial court committed plain error by admitting the video showing him kicking his dog. Miller contends that the video was irrelevant, was improper character evidence, and was unduly prejudicial.

Miller acknowledges that he did not object to the admission of the video, and therefore, we review these arguments solely for plain error. *See* N.C. R. App. P. 10(a)(4). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "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.* In other words, Miller must "show that, absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335.

Here, we need not address whether admitting the video was error because, even assuming that it was, Miller cannot satisfy the prejudice prong of the plain error test. *State v. Blankenship*, 259 N.C. App. 102, 122, 814 S.E.2d 901, 916 (2018). When viewed in the context of all the evidence at trial, the challenged portion of the video, showing Miller kicking his dog, was "of relative insignificance" in light of the other overwhelming evidence of guilt offered by the State. *State v. Phillips*, 268 N.C. App. 623, 636, 836 S.E.2d 866, 875 (2019).

For example, the State presented evidence from several witnesses that, leading up to the shooting, Miller made repeated threats against Charlene's life and stated that he was going to kill her. Charlene testified that Miller was the only person who had threatened her and that, based on Miller's threats and actions, she had obtained a protective order against him. The State also presented evidence that Miller possessed and used a .22 caliber rifle several days before the shooting and that, at that time, he made threats directed at Charlene.

After the shooting, law enforcement found Miller near the scene. When officers followed Miller into a wooded area, they found him curled up behind a tree. Before the officers told Miller why they were approaching him, Miller told the officers about "not having a rifle" and that "I wouldn't hurt my woman." The officers found live rounds of ammunition when they searched Miller that matched the type of ammunition found at the crime scene. Likewise, shell casings that Miller fired from his .22 caliber rifle several days before the shooting matched the shell casings recovered from the scene of the crime.

Finally, during trial, several witnesses testified that Miller abused or threatened his dog, with one testifying that Miller was "mean to the dog, kicking it around" and another testifying that Miller threatened to shoot the dog. Miller does not challenge the admission of this testimony on appeal.

In light of all this evidence, Miller cannot show that, had the trial court excluded the portions of the challenged video that showed Miller kicking his dog, the jury probably would have reached a different verdict. The evidence of Miller's guilt was overwhelming, and the video itself, when viewed in the context of this other evidence, had no probable impact on the verdict. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334; *Phillips*, 268 N.C. App. at 636-37, 836 S.E.2d at 875. Accordingly, the trial court did not commit plain error by admitting the challenged portion of the video.

II. Admission of testimony from the State's forensic firearms expert

[2] Miller next argues that the trial court abused its discretion by admitting the testimony of the State's firearms expert, Kathleen Clardy, because her opinions on ballistics comparison and identification were unreliable under Rule 702 of the Rules of Evidence. Miller contends that Clardy's testimony was not based on reliable principles or methods and that Clardy did not apply those principles or methods reliably to the facts of this case. Under the applicable standard of review, we must reject this argument.

A trial court's ruling on the admissibility of expert testimony under Rule 702 "will not be reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). This Court can find that a trial court abused its discretion "only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.*

Under Rule 702, expert testimony, to be admissible, must satisfy a three-pronged reliability test: (1) the testimony must be based upon sufficient facts or data, (2) the testimony must be the product of reliable principles and methods, and (3) the witness must have applied the principles and methods reliably to the facts of the case. *See* N.C. R. Evid. 702(a)(1)–(3); *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9.

"The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test. The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability . . . as it enjoys when it decides *whether* that expert's relevant testimony is reliable." *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (citation omitted). "In its discretion, the trial court should use those factors that it believes will best help it determine whether the testimony is reliable in the three ways described in the text of Rule 702(a)(1) to (a)(3)." *Id.*

Miller cites to case law from other jurisdictions as well as to reports from the National Research Council and the President's Council of Advisors on Science and Technology, arguing that those cases and reports support the broad proposition that ballistics identification is "not reliable" and that federal courts have begun limiting "the nature and scope of permissible ballistics opinion testimony under Rule 702." But Miller made these same arguments, relying on this same general information, to the trial court. After Miller objected to the admission of Clardy's expert testimony, the trial court conducted a lengthy *voir dire* with both parties questioning Clardy. When asked about the error rate for this type of ballistics identification, Clardy testified that "my error rate is zero percent," but that there is no established error rate for the field as a whole. Miller questioned Clardy about the President's Council of Advisors on Science and Technology report that criticized the scientific validity of firearms examination. Clardy responded that she disagreed with elements of the report and asserted that the report should be viewed with caution because it was created by academics rather than firearms examiners.

Clardy also testified about how she uses a microscope to examine the common identifying markings on shell casings and how that process, with the shell casings at issue in this case, led her to conclude that the casings were all fired from the same firearm. She also explained that, in her evaluation, she "didn't know which cartridge cases came from where. I just knew that there were two sets that were from potentially different locations, and that they just all needed to be inter-compared." Clardy indicated that she conducted her investigation in the same manner, using the same techniques as the "350 to 400 examinations" that she had done for similar forensic investigations during her career. Clardy testified that her examination was not rushed and that a peer reviewer looked over her examination results and concurred in her findings.

At the conclusion of the *voir dire*, the trial court ruled that "under Rule 702, the Court in its discretion finds . . . that [Clardy's] testimony will be based upon sufficient facts and data," "is the product of reliable principles and method[s]," and that Clardy "has applied these methods and principles to the facts of this particular case." This decision was based on Clardy's responses to extensive foundational and *voir dire* questioning. The trial court understood that some scholars have questioned the reliability of this sort of testimony, and the court weighed that against Clardy's explanation of her principles and methods and her testimony about why she believed them to be reliable. The court's determination that Clardy's testimony satisfied Rule 702's three-prong test, despite some evidence from Miller challenging the reliability of this

type of expert testimony, was not arbitrary; it was a reasoned decision. *McGrady*, 368 N.C. at 893, 787 S.E.2d at 11; *State v. Griffin*, 268 N.C. App. 96, 108, 834 S.E.2d 435, 442 (2019).

"Under the abuse of discretion standard, our role is not to surmise whether we would have disagreed with the trial court, but instead to decide whether the trial court's ruling was so arbitrary that it could not have been the result of a reasoned decision." *McGrady*, 368 N.C. at 899, 787 S.E.2d at 15 (citation omitted). Because the trial court's ruling was a reasoned decision, not an arbitrary one, we are bound to conclude that the trial court did not abuse its discretion by overruling Miller's challenge to this expert testimony.

In any event, as with Miller's other evidentiary challenge, he cannot show prejudice. Error in the admission of expert testimony "is not prejudicial unless there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." *State v. Babich*, 252 N.C. App. 165, 172, 797 S.E.2d 359, 364 (2017). For the reasons discussed above, there was overwhelming evidence of Miller's guilt even without this expert testimony—including Miller's possession and use of a rifle of the same caliber as the casings found at the crime scene, Miller's earlier threats to kill Charlene, and his spontaneous statements about "not having a rifle" and that "I wouldn't hurt my woman" when approached by law enforcement officers shortly after the shooting. Accordingly, even if we found error here—and we do not—the error is harmless.

Lastly, we address the dissenting opinion. That opinion is part of a trend in this Court to issue dissents that are not actually dissents and often more closely resemble editorials than judicial opinions. These purported dissents have become so commonplace that they are undermining a fundamental principle of our appellate process—that a dissent from a panel opinion of this Court creates a right to appeal to our Supreme Court. *See* N.C. Gen. Stat. § 7A-30(2). In several recent cases, our Supreme Court rejected an appeal of right based on a dissent after apparently concluding that the dissent was not actually a dissent. *See Lippard v. Holleman*, 375 N.C. 492, 847 S.E.2d 882 (2020); *Sea Watch at Kure Beach Homeowners' Ass'n, Inc. v. Fiorentino*, 375 N.C. 502, 847 S.E.2d 415 (2020).

Here, too, this dissent is not a dissent, at least not in the traditional sense of an opinion disagreeing with the decision or judgment of the majority. *See, e.g.*, Opinion, Dissenting Opinion, *Black's Law Dictionary* (11th ed. 2019). Instead, our dissenting colleague would have made a

different discretionary decision than the trial court and wants to explain why, although even the dissent agrees that, because any error was harmless, this issue has no impact on the outcome of this appeal. Put simply, this dissent is an effort to force our Supreme Court to confront a legal issue of interest to our dissenting colleague although the case otherwise would not meet the criteria for review in our State's high court.

Much of this purported dissent also reads more like a legal essay than an opinion. Our dissenting colleague thinks the science behind ballistic toolmark comparisons is of "questionably reliability" and thus would have excluded some of this expert's testimony. Fair enough—the dissent contains an accurate recitation of some scientific literature and reasonable jurists can reach different results in discretionary rulings. That is the nature of judicial discretion.

But importantly, appellate judges are not trial judges. We are no more qualified to evaluate a scientific issue than our colleagues in the trial division. And under the abuse of discretion standard, appellate judges cannot substitute their judgment for that of the trial court; we examine only whether the trial court's ruling was "so arbitrary that it could not have been the result of a reasoned decision." *McGrady*, 368 N.C. at 899, 787 S.E.2d at 15. The trial court's decision here certainly was a reasoned one.

Finally, and equally important, this trend of editorial-like dissents and concurrences is not a one-way street. It can result in battling side opinions in successive cases that can make the law less clear, encouraging more legal disputes and more litigation.

This Court has long prided itself on its reputation as an apolitical "workhorse" court focused on correcting legal errors. The growing practice of expressing views about legal policy in dissenting opinions, to force issues upon our Supreme Court, threatens that reputation. This opinion explains the law; applies that law to a discretionary, fact-specific decision of the trial court in this case; concludes that the trial court acted well within its sound discretion; and, most importantly, holds that even if there was error, that error was harmless. That is, and ought to be, the end of the appropriate analysis for an intermediate appellate court and its judges.

III. Instruction on flight

[3] Finally, Miller argues that the trial court erred by instructing the jury on flight. Miller contends that this instruction was not supported by the evidence. We reject this argument.

A trial court must not "give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). When a criminal defendant contends that a particular jury instruction was unsupported by the evidence, "we review the evidence and any reasonable inference from that evidence in the light most favorable to the State." *State v. Chevallier*, 264 N.C. App. 204, 214, 824 S.E.2d 440, 449 (2019).

"A trial court may properly instruct on flight where there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged." *State v. Lloyd*, 354 N.C. 76, 119, 552 S.E.2d 596, 625 (2001). "However, [m]ere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *Id.* Thus, the "relevant inquiry is whether the evidence shows that defendant left the scene of the crime and took steps to avoid apprehension." *State v. Grooms*, 353 N.C. 50, 80, 540 S.E.2d 713, 732 (2000).

Importantly, if there is evidence in the record "reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Ethridge*, 168 N.C. App. 359, 362–63, 607 S.E.2d 325, 328 (2005), *aff'd*, 360 N.C. 359, 625 S.E.2d 777 (2006). For example, in *State v. Shelly*, this Court held that "the trial court did not err in instructing the jury on flight" where the "evidence presented at trial established that Defendant left the scene of the shooting and did not return home," but rather took "an action that was not part of Defendant's normal pattern of behavior and could be viewed as a step to avoid apprehension." 181 N.C. App. 196, 209, 638 S.E.2d 516, 525–26 (2007).

Here, as in *Shelly*, the evidence at trial showed that Miller left the scene of the shooting and did not return home or "to a place where, if necessary, law enforcement officers could find him." *Id.* at 209, 638 S.E.2d at 526. Five hours after the shooting, an officer spotted Miller walking near a wooded area not far from the scene of the crime. Miller and the officer saw each other, and Miller raised and then lowered his hands before entering the wood line. Miller briefly entered the wood line then came back out and walked towards the officer. But when Miller was close enough to see the officer and make eye contact, he turned around and reentered the woods. A K-9 unit arrived to search for Miller in the woods and found Miller curled in a ball behind a large tree. Before the officers told him why they were looking for him, Miller

made statements about not having a rifle and not hurting his wife. These statements indicate that Miller knew why the officers were interested in speaking to him.

Viewing this evidence in the light most favorable to the State and giving the State the benefit of all reasonable inferences, there was at least some evidence "reasonably supporting the theory that defendant fled after commission of the crime." *Chevallier*, 264 N.C. App. at 214, 824 S.E.2d at 449; *Ethridge*, 168 N.C. App. at 362, 607 S.E.2d at 328. The evidence supports a reasonable inference that Miller knew law enforcement was looking for him in connection with the shooting and that, upon realizing that the officers intended to approach and speak to him, he entered a wooded area and hid behind a tree in an attempt to avoid apprehension. The fact that Miller has identified other innocent explanations for his conduct that day "does not render the instruction improper." *Ethridge*, 168 N.C. App. at 363, 607 S.E.2d at 328. Accordingly, we hold that the trial court did not err in instructing the jury on flight.

Conclusion

For the reasons explained above, we find no plain error in part and no error in part in the trial court's judgments.

NO PLAIN ERROR IN PART; NO ERROR IN PART.

Judge STROUD concurs.

Judge ZACHARY concurs in part and dissents in part with separate opinion.

ZACHARY, Judge, concurring in part, dissenting in part.

I fully concur in the majority opinion, except for its analysis under N.C. Gen. Stat. § 8C-1, Rule 702. Because I conclude that the trial court's admission of testimony from the State's expert in forensic firearms examination constituted an abuse of discretion, I respectfully dissent from the majority's conclusion to the contrary.

With regard to the admission of expert witness testimony under Rule 702, the trial courts are tasked with "strik[ing] a balance between competing concerns since the testimony can be both powerful and quite misleading to a jury because of the difficulty in evaluating it." *State v. McGrady*, 368 N.C. 880, 892, 787 S.E.2d 1, 10 (2016) (citation and internal quotation marks omitted). As the majority notes, in order to

be admissible, the trial court must determine that the proposed expert testimony satisfies Rule 702(a)'s three-pronged reliability test: "(1) The testimony must be based upon sufficient facts or data. (2) The testimony must be the product of reliable principles and methods. (3) The witness must have applied the principles and methods reliably to the facts of the case." *Id.* at 890, 787 S.E.2d at 9 (quoting N.C. Gen. Stat. § 8C-1, Rule 702(a)(1)–(3) (2015)). In this determination,

> [t]he primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate[.] However, conclusions and methodology are not entirely distinct from one another, and when a trial court concludes that there is simply too great an analytical gap between the data and the opinion proffered, the court is not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.

Id. (internal citations and quotation marks omitted).

Our Supreme Court has explained that the trial court has discretion in determining how to address Rule 702(a)'s three-pronged reliability inquiry, the precise nature of which "will vary from case to case depending on the nature of the proposed testimony." *Id.* In considering the reliability of proposed scientific testimony, the trial court may contemplate factors including:

> (1) whether a theory or technique . . . can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the theory or technique's known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the theory or technique has achieved general acceptance in its field.

Id. at 890–91, 787 S.E.2d at 9 (citation and internal quotation marks omitted).

In the case at bar, Defendant challenges the reliability of the testimony of the State's expert witness in the field of firearm and toolmark identification. Specifically, Defendant emphasizes the lack of a known error rate for the field of firearm-identification analysis, especially in light of the inherent subjectivity of the matching method employed by examiners.

Firearm-identification analysis has existed as a forensic discipline for over a century. Indeed, in *Commonwealth v. Best*, 62 N.E. 748 (Mass. 1902), Justice Oliver Wendell Holmes, when serving as Chief Justice of the Supreme Judicial Court of Massachusetts, authored an opinion upholding the admission of ballistics evidence via expert testimony. However, the admissibility of firearm toolmark evidence has become increasingly controversial. *See*, *e.g.*, National Research Council, *Ballistic Imaging* 3 (2008) [hereinafter *Ballistic Imaging*].

Forensic firearm examination is, in essence, "the analysis of marks on bullets and cartridges." National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 151 (2009) [hereinafter *Strengthening Forensic Science*]. A toolmark is a mark "generated when a hard object (tool) comes into contact with a relatively softer object," such as the marks that result "when the internal parts of a firearm make contact with the [softer] brass and lead that comprise ammunition." *Id*. at 150.

There are two types of toolmarks: class and individual. "Marks on the bullets and cartridges may be common to every firearm of that type (for example, the caliber of the firearm). These are called class characteristics. Alternately, marks may be specific to that particular firearm . . . . These are called individual characteristics." Emily Nelson, *Firearm Identification*, Forensic Science Online, https://www.forensicscienceonline.org/firearm-identification/ (last visited Oct. 6, 2020).

Examiners are trained "to identify the individual characteristics of microscopic toolmarks apart from class and subclass characteristics and then to assess the extent of agreement in individual characteristics in the two sets of toolmarks [that is, the subject projectile and the test fire] to permit the identification of an individual tool or firearm." *Strengthening Forensic Science* at 153. By utilizing a method known as "pattern matching," a qualified examiner decides whether the toolmarks produced by a gun on two bullets or cartridges are sufficiently similar as to justify the examiner's conclusion that the same gun fired both projectiles. William A. Tobin & Peter J. Blau, *Hypothesis Testing of the Critical Underlying Premise of Discernible Uniqueness in Firearms-Toolmarks Forensic Practice*, 53 Jurimetrics J. 121, 123–24 (2013) [hereinafter *Hypothesis Testing*].

As our Supreme Court noted in its landmark *McGrady* decision, one factor that may bear upon the trial court's assessment of whether an expert's testimony is the product of reliable principles or methods, applied reliably to the facts, is the "known or potential rate of error"

for the particular technique or method. *McGrady*, 368 N.C. at 891, 787 S.E.2d at 9; *see also id.* at 891, 787 S.E.2d at 10 (noting that "[t]he federal courts have articulated additional reliability factors that may be helpful in certain cases, including . . . [w]hether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give" (citation omitted)).

"Technique" or "method error" is error that is attributable to the inherent limitations of a method. Angi M. Christensen et al., *Error and its Meaning in Forensic Science*, 59 J. Forensic Sci. 123, 124 (2014) [hereinafter *Error and its Meaning*]. "The known rate of error produces a scientific measure of a method's validity, and that is likely why it was incorporated as part of the *Daubert* guidelines." *Id.*

In firearms analysis, for example, the rate of method error is strongly affected by the degree of variability or overlap of markings among individual guns. Joan Griffin & David J. LaMagna, Daubert *Challenges to Forensic Evidence: Ballistics Next on the Firing Line*, 26 Champion 20, 58 (2002) ("While there is still some variation due to manufacturing and individual wear patterns, variation due to manufacturing methods has been and continues to be minimized by modern manufacturing processes."); *cf. Strengthening Forensic Science* at 155 ("A fundamental problem with toolmark and firearms analysis is the lack of a precisely defined process."). Such limitations necessarily affect the method's probative value, and thus, an expert's ability to provide testimony establishing the reliability of the method under Rule 702. Methods with low error rates exhibit high validity, and vice versa. *See* John Song et al., *Estimating Error Rates for Firearm Evidence Identifications in Forensic Science*, 284 Forensic Sci. Int'l 15, 28–29 (2018) ("Because of the inherent variability of the firing process, we do not expect evidence from firearms to exhibit the extremely low error rates that are characteristic of DNA evidence.").

Here, the State's expert testified, both on voir dire examination and on cross examination before the jury, that there is no established error rate for the field as a whole, but that her *personal* error rate was "zero percent." She also testified that firearms can leave "unique" toolmarks similar to fingerprints. Finally, the expert witness testified, without "any doubt[ ]" as to her opinion, that all eight of the cartridge casings—which were recovered from two separate locations—were fired by the same unknown gun.

This testimony may have been misleading to the jury. First, while individual characteristic toolmarks do not appear in an entirely random manner, neither have they been scientifically established as "unique" to

a particular firearm. *See Ballistic Imaging* at 3 ("A significant amount of research would be needed to scientifically determine the degree to which firearms-related toolmarks are unique or even to quantitatively characterize the probability of uniqueness."). "The notion of uniqueness in forensic science is probabilistic and impossible to prove in a scientific sense, and this form of logic follows inductive reasoning." *Error and its Meaning* at 125.

Moreover, practitioner error differs from method error: despite this expert's stated proficiency, a lack of information regarding the frequency of the occurrence of certain toolmarks on firearms projectiles would prevent *any* firearms analyst from claiming a zero-error rate.[1] *See Hypothesis Testing* at 123–24. More importantly, for the expert to offer her opinion to this level of certainty—without any basis for doing so—risks misleading the jurors as to the appropriate weight and confidence to accord the expert's testimony or the weight to a declared match. *Cf.* Simon A. Cole, *More than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. Crim. L. & Criminology 985, 1049 (2005) ("The potential to mislead a fact-finder by saying, 'My methodological error rate is zero, and my practitioner error rate is negligible,' is extremely high.").

"A rule governing the admission of expert testimony necessarily strikes a balance between competing concerns since the testimony can be both powerful and quite misleading to a jury because of the difficulty in evaluating it." *McGrady*, 368 N.C. at 892, 787 S.E.2d at 10 (citation and internal quotation marks omitted). Nonetheless, the trial court possesses the authority to determine whether, and to what extent, a proposed expert's testimony would be of value at trial:

> Whether expert testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides pursuant to Rule 104(a). In answering this preliminary question, the trial judge is not bound by the rules of evidence except those with respect to privileges. To the extent that factual findings are necessary to answer this question, the trial judge acts as the trier of fact. The court must find these facts by the greater weight of the evidence. As with other

1. Even DNA analysis has a non-zero error rate. Jessica Gabel Cino, *Tackling Technical Debt: Managing Advances in DNA Technology that Outpace the Evolution of Law*, 54 Am. Crim. L. Rev. 373, 383 (2017); *see also Error and its Meaning* at 125 ("[T]here is always a nonzero probability of error, and to claim an error rate of zero is inherently unscientific.").

> findings of fact, these findings will be binding on appeal unless there is no evidence to support them.

Id. at 892–93, 787 S.E.2d at 10–11 (internal citations and quotation marks omitted).

But Rule 702(a) "does not mandate particular procedural requirements for exercising the trial court's gatekeeping function over expert testimony." *Id.* at 893, 787 S.E.2d at 11 (citation and internal quotation marks omitted). "The trial court has the discretion to determine 'whether or when special briefing or other proceedings are needed to investigate reliability.' " *Id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 143 L. Ed. 2d 238, 252–53 (1999)).

For example,

> [a] trial court may elect to order submission of affidavits, hear voir dire testimony, or conduct an *in limine* hearing. More complex or novel areas of expertise may require one or more of these procedures. In simpler cases, however, the area of testimony may be sufficiently common or easily understood that the testimony's foundation can be laid with a few questions in the presence of the jury.

Id. (internal citations omitted). Whatever the circumstances require, the trial "court should use a procedure that . . . will secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." *Id.* (citation and internal quotation marks omitted).

In the case *sub judice*, the trial court's gatekeeping authority included the power to determine the appropriate scope of the firearm-identification expert's opinion, most notably with regard to the degree of certitude that the witness was permitted to express.

Before the jury, the State's expert testified as follows concerning the lack of a known error rate in the field of firearm identification, generally:

> [DEFENSE COUNSEL:] Well, in firearm and tool mark identification, is it fair to say that the error rate is not zero?
>
> [MS. CLARDY:] We actually don't know what the error rate is in firearms identification. That is something that's currently being investigated by science. There's many, many different studies that are being run currently, and have been run in the past, about what a true error rate for our discipline would be.

The expert then specified that "[w]e don't currently have an error rate within our discipline, but . . . our error rate is measured on an individual basis. And how we do that is through proficiency testing. . . . And my personal error rate I do know, which is zero percent."

The State's expert essentially opined, then, that her individual examinations are *more* reliable than those of her field as a whole, given that "the error rate . . . in firearms investigation . . . [is] currently being investigated by science." This testimony "likely . . . shrouded [her opinion] with an aura of near infallibility." *State v. Ward*, 364 N.C. 133, 146, 694 S.E.2d 738, 746 (2010) (citation and internal quotation marks omitted).

It is the trial court's duty to "strike[ ] a balance between" allowing testimony that will assist the jury and exercising its gatekeeping authority to exclude testimony that "can be both powerful and quite misleading to a jury because of the difficulty in evaluating it." *McGrady*, 368 N.C. at 892, 787 S.E.2d at 10 (citation and quotation marks omitted). And as Justice Scalia observed in his concurrence to *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238 (1999), the trial court's authority to select the manner for investigating an expert's reliability under Rule 702

> is not discretion to abandon the gatekeeping function. . . . [I]t is not discretion to perform the function inadequately. Rather, it is discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky. Though . . . the *Daubert* factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion.

Kumho, 526 U.S. at 158–59, 143 L. Ed. 2d at 256–57 (Scalia, J., concurring).

By permitting the State's expert to opine that her personal error rate was "zero percent" without any testimony regarding the general error rate in the field, the trial court failed to exercise its gatekeeping authority and, in doing so, admitted testimony of questionable reliability. For these reasons, I conclude that the trial court abused its discretion by admitting testimony from the State's expert in forensic firearms examination.

I respectfully dissent.

STATE v. PEREZ

[275 N.C. App. 860 (2020)]

STATE OF NORTH CAROLINA
v.
JUAN ANTONIO PEREZ

No. COA19-1057

Filed 31 December 2020

1. Satellite-Based Monitoring—lifetime—reasonableness—balancing of factors

The imposition of lifetime satellite-based monitoring (SBM) was an unconstitutional warrantless search in violation of the Fourth Amendment, as applied to defendant, who pled guilty to multiple offenses including second-degree rape, second-degree kidnapping, and assault by strangulation. Defendant's privacy interests and the intrusive nature of SBM were not outweighed by the State's interest in monitoring defendant, which could be accomplished through mandatory post-release supervision, where the State failed to present any evidence that lifetime SBM was an effective method for serving a legitimate interest.

2. Costs—N.C.G.S. § 7A-304—two criminal judgments—costs assessed in each—duplicative

In a prosecution for multiple offenses including second-degree rape, second-degree kidnapping, and assault by strangulation, the trial court erred by assessing costs in each of the resulting two judgments, because all the charges arose from the same underlying event and therefore constituted one "criminal case" pursuant to N.C.G.S. § 7A-304. The duplicative entry of court costs was vacated and the matter remanded for entry of a new judgment.

Judge TYSON dissenting.

Appeal by Defendant from judgments entered 8 November 2018 by Judge Paul Jones, order entered 13 November 2018 by Judge Robert Hobgood, and order entered 4 March 2019 by Judge Rebecca Holt in Superior Court, Alamance County. Heard in the Court of Appeals 11 August 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara M. Van Pala, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel K. Shatz, for Defendant-Appellant.

McGEE, Chief Judge.

Juan Antonio Perez ("Defendant") appeals from judgments entered upon his guilty pleas to second-degree rape and forcible sex offenses, second-degree kidnapping, assault on female, assault by strangulation, obstruction of justice, and intimidating a witness. Defendant appeals by writ of certiorari the trial court's imposition of lifetime satellite-based monitoring ("SBM"). We hold that the SBM order is unconstitutional as applied to Defendant, and we reverse the trial court's order imposing lifetime SBM. Defendant also appeals by writ of certiorari the trial court's imposition of duplicative court costs and we reverse the trial court's imposition of court costs in one of the judgments against Defendant.

I. Factual and Procedural History

At trial, D.M.[1] testified that she and Defendant lived together for around nine months while engaged in a dating relationship. D.M. testified that after an argument on the morning of 28 May 2016, D.M. tried to leave their apartment and asked Defendant for her car keys. Defendant "chucked" the keys at D.M.'s face, which caused a bruise on her cheek. Defendant then restrained D.M. and strangled her until she lost consciousness. After Defendant lightened his grip on her throat, D.M. screamed for help, which caused Defendant to intensify the attack by grabbing her hair and pinning her to the floor. Defendant threatened D.M. and repeatedly banged her head against the floor holding her car key against her neck.

Defendant then ordered D.M. to stay in the bedroom, and removed all of the electronics out of the room that could access the internet. Defendant went into the living room and returned hourly to check whether D.M. had moved. D.M. struggled to breathe and felt "a crackling" in her neck, and asked Defendant to go to the emergency room. On the way to the hospital, Defendant told D.M. that "if she show[ed] any indication that it was him, he would kill [her] in front of everyone at the hospital." At the Alamance Regional Hospital emergency room, Defendant told the nurse D.M. was walking "up the stairs of my apartment and tripped on the steps and landed on the metal rail and fell directly on [her] neck." A CT scan showed damage to the soft tissue of D.M.'s trachea. Defendant remained with D.M. throughout her time at the hospital. D.M. was given pain medication at the hospital and was prescribed

1. To protect her privacy, we refer to the complainant as "D.M." *See State v. Gordon*, 248 N.C. App. 403, 404, 789 S.E.2d 659, 661, fn1 (2016).

additional pain medication. After D.M. was released from the hospital, Defendant and D.M. returned to the apartment.

Defendant awoke D.M. and gave her an additional dosage of pain medication and she returned to sleep. Several hours later, Defendant awoke D.M. and raped D.M. vaginally and anally for over five hours. After Defendant left for work on 31 May 2016, D.M. called the police and sought medical help.

Defendant was arrested and indicted for second-degree forcible rape, second-degree forcible sexual offense, second-degree kidnapping, obstruction of justice, intimidating a witness, assault by strangulation, and assault on a female. Defendant was tried during the 5 November 2018 Criminal Session of Superior Court, Alamance County.

In addition to D.M.'s testimony, the State presented evidence in the form of letters and phone call recordings that Defendant sought to persuade both D.M. and Defendant's ex-wife from testifying for the State. After four days of trial, Defendant pled guilty to all charges on 8 November 2018.

A. Sentencing Hearing on 8 November 2018

The trial court consolidated the charges of second-degree kidnapping, obstruction of justice, intimidating a witness, assault by strangulation, and assault on a female, imposing an active sentence of 24 to 41 months and entering $7,642.50 in court costs in Case No. 16 CRS 052718. The trial court consolidated the second-degree forcible rape and second-degree forcible sexual offense charges and imposed a consecutive term of 80 to 156 months with $2,062.50 in court costs in Case No. 16 CRS 052719. The trial court ordered that Defendant submit at reasonable times to warrantless searches by a probation officer, meaning "post conviction supervision for purposes specified by [the trial court] and reasonably related to post release supervision or by [the trial court]."

B. Sex Offender Registration Hearing on 13 November 2018

The trial court held a hearing on 13 November 2018 and ordered Defendant to register as a sex offender for the remainder of his natural life. At the hearing, Defendant's trial counsel gave the following oral notice of appeal:

> And, Your Honor, after the trial and plea, we -- the judge did make those rulings and we left the court. My client did want, and we're still within our ten days, just to give notice

> of appeal. But that's just a matter I wanted to put on the record, that he's giving notice of appeal . . . .

The trial court also scheduled a SBM hearing.

C. SBM Hearing on 4 March 2019

The trial court held a hearing on the reasonableness of SBM under the Fourth Amendment on 4 March 2019. At the SBM hearing, the State presented testimony from Brady Cox ("Cox"), a probation and parole officer who worked with sex offenders in Alamance County. Cox testified to the operation of the SBM equipment, specifically the ET-1 tracker and bracelet, and his understanding of the SBM program. He stated that the ET-1 tracker is worn on an offender's ankle and comes with a beacon located at the offender's residence. Cox explained that the tracker communicates with satellites and cellular towers to track an offender's movements within 100 feet, is waterproof up to ten or twelve feet, and is about an inch and one-half wide, three inches tall, and two inches thick. Cox also testified that the tracker requires a total of two hours recharging time per day.

With respect to the nature of the SBM monitoring, Cox testified that the supervising officer would receive an alert if an offender enters a restricted zone, which includes schools, nurseries, and day care facilities. Upon receiving an alert that an offender was in a restricted area or that the tracking device went into error mode, Cox testified that a supervising officer may call the offender to determine what they were doing at the time of the alert or error message, or dispatch a probation officer to check on the offender in person. He also stated that some probationers on the sex offender registration are not subject to SBM monitoring.

Cox further testified that he performed a STATIC-99 assessment for Defendant, explaining that the STATIC-99 "determines the risk for reoffending of an offender based on a ten question scale." Cox testified that Defendant scored a 4 on the assessment, which ranks as an above average risk of reoffending.

In closing, the State addressed the reasonableness of the SBM search under the totality of the circumstances under *Grady v. North Carolina* ("*Grady I*"), 575 U.S. 306, 191 L. Ed. 2d 459 (2015). The State argued that "we've proven that the factors on the hardship the monitoring represents, [Defendant] can do any, pretty much anything except go below 12 feet of water[,]" and that the monitoring program did not infringe on Defendant's right to privacy. The trial court directed the State to address "how the monitoring either helps prevent recidivism or

allows the public interest in basically having that information available to law enforcement[.]" The State declined to speak on the issue, apart from citing *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007), in stating "the monitoring system has a deterrent effect on would-be reoffenders."

Defendant's trial counsel argued that while there was a public interest for safety "to prevent individuals from going out and doing it again," the imposition of SBM was not mandatory for every individual convicted of a sexual offense. Defendant's trial counsel referenced Cox's testimony that some individuals that are not subject to SBM are still monitored periodically to ensure compliance. Because Defendant had already been ordered to lifetime sex offender registration, Defendant's trial counsel argued that Defendant should not be subject to lifetime SBM.

The trial court found that the State had presented evidence related to the effect and obtrusiveness of SBM monitoring through use of an ankle monitor, and that it did not restrict the activities of the wearer, except with regard to a long period of submerging under water. The trial court further found that there was a strong interest in protecting the public from recidivism, and that the restriction of wearing an ankle monitor was not an unreasonable search and did not violate the Fourth Amendment when considered against the public interest. Accordingly, the trial imposed a requirement of lifetime SBM.

II. Analysis

Defendant asserts that the trial court erred in ordering that Defendant enroll in lifetime SBM upon his release from prison because the State failed to meet its burden of proving the imposition of lifetime SBM is a reasonable search under the Fourth Amendment. *See Grady I*, 575 U.S. at 310, 191 L. Ed. 2d 459.

Additionally, Defendant contends that the trial court erred by entering duplicative court costs. Defendant gave oral notice of appeal at the 13 November 2018 hearing but did not specifically raise the issue of court costs, nor did he later file a written notice of appeal.

A. Petition for Writ of Certiorari

Defendant filed a petition for a writ of certiorari on 27 January 2020 seeking review of the order imposing lifetime enrollment in SBM, as well as the imposition of alleged duplicative court costs.

Because of the civil nature of SBM hearings, a defendant must file a written notice of appeal from an SBM order, pursuant to N.C. R. App. P. 3(a). *State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206

(2010) (holding that oral notice of appeal from an SBM order does not confer jurisdiction on this Court). This Court, however, is authorized to issue a writ of certiorari "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 the present case, because Defendant's oral notice of appeal was insufficient to confer jurisdiction on this Court under Rule 3, in our discretion, we allow Defendant's petition for writ of certiorari to review the lifetime SBM order.

As to the issue of court costs, N.C. R. App. P. 4(a) provides that a defendant may appeal from an order or judgment in a criminal action by (1) "giving oral notice of appeal at trial," or (2) "filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]" Defendant concedes that the oral notice of appeal at the 13 November 2018 hearing was legally ineffective because it was not given *at trial*. As proper and timely notice of appeal is jurisdictional, we must dismiss Defendant's appeal. *In re I.T.P-L.*, 194 N.C. App. 453, 459, 670 S.E.2d 282, 285 (2008). Defendant's right to appeal was lost through no fault of Defendant but rather due to the failure of Defendant's trial counsel to give proper notice of appeal. We therefore exercise our discretion under Rule 21(a)(1) to grant Defendant's petition for writ of certiorari, and proceed to address the merits of Defendant's arguments. *See State v. Holanek*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 232 (2015) (allowing certiorari review after noting oral notice of appeal given in open court six days after trial was not notice given "at trial" for purposes of Rule 4 and was therefore ineffective).

B. Lifetime SBM

[1] This case is another in a series of appeals from SBM orders since the United States Supreme Court held in *Grady I* that the imposition of SBM constitutes a warrantless search within the meaning of the Fourth Amendment and necessitates an inquiry into reasonableness under the totality of the circumstances. 575 U.S. at 310, 191 L. Ed. 2d at 462. Our Supreme Court has since addressed the question in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*"), holding that the imposition of mandatory lifetime SBM "is unconstitutional in its application to all individuals in the same category as [the] defendant—specifically, individuals who are subject to mandatory lifetime SBM based solely on their status as a statutorily defined 'recidivist' who have completed their prison sentences and are no longer supervised by the State[.]" *Id.* at 522, 831 S.E.2d at 553. Although our Supreme Court limited the facial aspect

of its holding to that singular category of recidivist defendants, it did so after engaging in a reasonableness analysis under the totality of the circumstances as required by the United States Supreme Court in *Grady I*.

Since our Supreme Court's holding in *Grady III*, this Court has applied the reasonableness analysis under the totality of the circumstances to non-recidivists in SBM appeals in accordance with *Grady I*. *See State v. Gordon*, 270 N.C. App. 468, 840 S.E.2d 907 (applying the reasonableness analysis employed in *Grady III* to a defendant convicted of an aggravated offense and subject to lifetime SBM as a result), *temp. stay allowed*, 374 N.C. 430, 839 S.E.2d 351 (2020); *State v. Griffi*n, 270 N.C. App. 98, 840 S.E.2d 267 ("*Grady III* offers guidance as to what factors to consider in determining whether SBM is reasonable under the totality of the circumstances."), *temp. stay allowed*, 374 N.C. 267, 838 S.E.2d 460 (2020) ("*Griffin II*"). Although our Supreme Court has issued temporary stay orders for *Gordon* and *Griffin II*, this Court's reasoning in those cases remains instructive as the most recent published decisions of this Court addressing *Grady III*'s application to defendants convicted of an aggravated offense and outside the recidivist context.

Defendant is an aggravated offender subject to mandatory lifetime SBM following his release from incarceration, placing his circumstances outside of the limited facial holding of *Grady III*. Accordingly, as this Court did in *Griffin II*, we employ *Grady III* as a roadmap, "reviewing Defendant's privacy interests and the nature of SBM's intrusion into them before balancing those factors against the State's interests in monitoring Defendant and the effectiveness of SBM in addressing those concerns." *Griffin II*, 270 N.C. App. at 106, 840 S.E.2d at 273.[2]

1. Privacy Interest

Because the trial court ordered Defendant to submit to lifetime sex offender registration and post-release supervision upon his release from prison, Defendant has a diminished expectation of privacy in some respects. But despite the lessened expectation in the privacy of his address or matters material to his voluntary participation in certain activities, Defendant's expectation of privacy "is not

2. We note that although Defendant did not object at the SBM hearing to the imposition of SBM, the reasonableness of the search under the Fourth Amendment is preserved for appellate review where, as here, the State initiated consideration of a constitutional issue and the trial court addressed it. *State v. Lopez*, 264 N.C. App. 496, 515, 826 S.E.2d 498, 510 (2019) (holding that where "the State initiated the *Grady* discussion and argued imposition of SBM on [the d]efendant was a reasonable Fourth Amendment search[,]" the *Grady* issue was preserved for appellate review, despite the defendant's failure to object).

automatically and forever 'significantly diminished' under the Fourth Amendment for all purposes." *Grady III*, 372 N.C. at 534, 831 S.E.2d at 561. Although the length of post-release supervision is unclear based on the record, Defendant's "constitutional privacy rights, including his Fourth Amendment expectations of privacy, [will] have been restored" at some point before the end of the lifetime SBM order. Accordingly, Defendant will enjoy "appreciable, recognizable privacy interests that weigh against the imposition of SBM for the remainder of" Defendant's lifetime. *Griffin II*, 270 N.C. App. at 107, 840 S.E.2d at 274.

2. Intrusive Nature of SBM

Grady III made several observations concerning the intrusive nature of SBM, and those same observations generally apply here. For example, the physical qualities of the monitoring device used in this case appear largely similar to those in *Grady III*, and thus meaningfully conflict with Defendant's physical privacy rights. *Grady III*, 372 N.C. at 535-37, 831 S.E.2d at 562-63. As recognized in *Grady III*, SBM's ability to track Defendant's location is "uniquely intrusive," *id.* at 537, 831 S.E.2d at 564 (citation and quotation marks omitted), and thus weighs against the imposition of SBM.

In this case, unlike in *Grady III*, "we are unable to consider 'the extent to which the search intrudes upon reasonable privacy expectations' because the search will not occur until Defendant has served his active sentence." *Gordon*, 270 N.C. App. at 475, 840 S.E.2d at 912 (quoting *Grady III*, 372 N.C. at 527, 831 SE.2d at 557). Additionally, the State has not presented any evidence regarding "the level of intrusion as to the information revealed under the satellite-based monitoring program, nor has it established that the nature and extent of the monitoring that is currently administered, and upon which the present order is based, will remain unchanged by the time that Defendant is released from prison." *Id.* at 475, 840 S.E.2d at 912-13.

3. State's Interest

Our Supreme Court held in *Grady III* that "the extent of a problem justifying the need for a warrantless search cannot simply be assumed; instead, the existence of the problem and the efficacy of the solution need to be demonstrated by the government." *Grady III*, 372 N.C. at 540-41, 831 S.E.2d at 566. "The State has the burden of coming forward with some evidence that its SBM program assists in apprehending sex offenders, deters or prevents new sex offenses, or otherwise protects the public." *Id.* at 543-44, 831 S.E.2d at 568. "The State's failure to produce any evidence in this regard 'weighs heavily against a conclusion

of reasonableness.' " *Griffin II*, 270 N.C. App. at 109, 840 S.E.2d at 275 (quoting *Grady III*, 372 N.C. at 543, 831 S.E.2d at 567 (brackets omitted)).

During the SBM hearing, the trial court directed the State to address "how the monitoring either helps prevent recidivism or allows the public interest in basically having that information available to law enforcement[.]" The State declined to speak on the issue, apart from citing *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007) in stating "the monitoring system has a deterrent effect on would-be reoffenders." However, these statements are not evidence, and the arguments advanced by the State at the hearing were simply conclusory legal arguments untethered to facts or documentary evidence. *See State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996) (explaining that "it is axiomatic that the arguments of counsel are not evidence").

As explained above, the State's interest in monitoring Defendant by SBM during post-release supervision is already accomplished by a mandatory condition of post-release supervision imposing that very thing. *See* N.C. Gen. Stat. § 15A-1368.4(b1)(7). The State failed to carry its burden to produce evidence that the lifetime SBM imposed in this case is effective to serve legitimate interests.

4. Reasonableness of SBM Under the Totality of the Circumstances

Defendant has appreciable privacy interests in his person, his home, and his movements—even if those interests are diminished for the period of post-release supervision while he is also subject to SBM. Those privacy interests are substantially infringed by the SBM order imposed in this case. Taken together, these factors weigh strongly against the conclusion that the warrantless search for the remainder of Defendant's life is reasonable, and they are not outweighed by evidence of a legitimate interest served by monitoring Defendant given the State's failure to show the efficacy of lifetime SBM in serving the State's legitimate interests. Under the totality of the circumstances, the order of lifetime SBM in this case constitutes an unreasonable warrantless search in violation of the Fourth Amendment. We therefore hold, consistent with the balancing test employed in *Grady III*, that the imposition of SBM as required by the trial court's order is unconstitutional as applied to Defendant and must be reversed.

C. Duplicative Court Costs

[2] This Court reviews Defendant's disputed Criminal Bill of Costs under the writ of certiorari pursuant to N.C. Gen. Stat. § 15A-1444(g). Defendant's argument presents a question of statutory interpretation

under N.C. Gen. Stat. § 7A-304 that this Court reviews *de novo*. *State v. Rieger*, 267 N.C. App. 647, 649, 833 S.E.2d 699, 700 (2019).

In *Rieger*, the defendant was stopped for driving too closely and police noticed "various illegal drugs and drug paraphernalia." *Id.* at 647, 833 S.E.2d at 700. The defendant was arrested for and convicted of possession of marijuana and possession of marijuana paraphernalia. *Id.* The trial court entered two separate judgments and assessed court costs in each judgment. *Id.* at 648, 833 S.E.2d at 700. This Court held that when multiple criminal charges arise from the same underlying event or transaction and are adjudicated together in the same hearing or trial, they are part of a single "criminal case" for the purposes of N.C. Gen. Stat. § 7A-304(a). *Id.* This holding was centered on this Court's belief that "the intent of the General Assembly when it chose to require court costs 'in every criminal case' was to have those costs be proportional to the costs that this 'criminal case' imposed on the court system." *Id.* at 652, 833 S.E.2d at 703.

In the present case, all of Defendant's charges arose from the same underlying event and were adjudicated together at the same trial, making them part of a single "criminal case" for the purposes of N.C. Gen. Stat. § 7A-304(a). As shown by the itemized bills of cost, duplicative assessments of several categories of court costs were imposed in Case Nos. 16 CRS 052718 and 16 CRS 052719. This duplicative assessment of costs was error. In accordance with this Court's reasoning in *Rieger*, including the determination that the General Assembly's intent was to require costs proportional to the costs imposed on the court system, we vacate the duplicative entry of court costs in 16 CRS 052719.

III. Conclusion

For the foregoing reasons, we hold that the State has failed to meet its burden of establishing that lifetime SBM of Defendant following Defendant's release from prison is a reasonable search, and we therefore reverse the trial court's order. We further hold that the trial court erred by assessing duplicative court costs and we vacate the imposition of costs in Case No. 16 CRS 052719 and remand for entry of a new judgment that does not include court costs.

REVERSED IN PART; VACATED AND REMANDED IN PART.

Judge COLLINS concurs.

Judge TYSON dissents with separate opinion.

TYSON, Judge, dissenting.

Defendant failed to preserve or to carry his burden on appeal to show reversible error occurred during his *Grady* hearing or in his criminal bill of costs in both judgments against him. Defendant failed to file a notice of appeal from the imposition of SBM as is required under North Carolina Rule of Appellate Procedure 3 to invoke this Court's appellate jurisdiction and review. *See State v. Brooks*, 204 N.C. App. 193, 693 S.E.2d 204 (2010) (requiring written notice of appeal filed under N.C. R. App. P. 3 for review of SBM orders). As such, his challenge to the imposition of SBM is properly dismissed.

Defendant filed a petition for writ of certiorari to invoke this Court's jurisdiction and to seek appellate review of the civil order imposing his lifetime enrollment in SBM. To trigger this Court's discretion to allow the petition and issue the writ, our Supreme Court has held Defendant's "petition for the writ [of certiorari] must show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). I respectfully dissent from the majority opinion's allowing Defendant's no merit petition for writ of certiorari and their analysis of the SBM order.

Defendant's criminal bill of costs contained costs duly assessed from judgments that were not a part of a "single criminal case." *State v. Rieger*, 267 N.C. App. 647, 648, 833 S.E.2d 699, 700 (2019) (internal quotation marks omitted). I also respectfully dissent from the majority opinion's allowing Defendant's petition for writ of certiorari and its analysis of the purported duplicative costs.

I. No Preservation of Constitutional Error

Appellate Rule 10 mandates that in order for Defendant to "preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1).

It is undisputed Defendant failed to raise any constitutional challenge or otherwise preserve this constitutional claim in violation of Appellate Rule 10 at any point during his sentencing hearing. Asserted constitutional errors not raised, argued, and ruled upon before the trial court cannot be raised for the first time on appeal. Defendant's challenge is no different from any "other defendants whose constitutional arguments were barred on direct appeal because they were not preserved for appellate review." *State v. Bishop*, 255 N.C. App. 767, 769-70,

805 S.E.2d 367, 369 (2017); *see State v. Garcia*, 358 N.C. 382, 410-11, 597 S.E.2d 724, 745 (2004) (capital murder); *State v. Roache*, 358 N.C. 243, 274, 595 S.E.2d 381, 402 (2004) (capital murder); *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003) (capital murder).

The majority's opinion asserts the reasonableness of the search under the Fourth Amendment is preserved for appellate review pursuant to *State v. Lopez*, 264 N.C. App. 496, 515, 826 S.E.2d 498, 510 (2019), because "the State initiated the *Grady* discussion and argued the imposition of SBM on [the d]efendant was a reasonable Fourth Amendment search." The majority opinion's reliance on *Lopez* is misplaced. The opinion in *Lopez* and reliance thereon violates this Court's binding precedent from our Supreme Court and this Court.

This Court is bound by the opinions and precedents of our Supreme Court. *See Mahoney v. Ronnie's Road Service*, 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996) ("it is elementary that we are bound by the rulings of our Supreme Court"), *aff'd per curiam*, 345 N.C. 631, 481 S.E.2d 85 (1997). "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). "We are without authority to overturn the ruling of a prior panel of this Court on the same issue." *Poindexter v. Everhart*, 270 N.C. App. 45, 51, 840 S.E.2d 844, 849 (2020) (citation omitted).

In *State v. Hart*, our Supreme Court warned of potential dire consequences if our State's courts do not uniformly apply the Rules of Appellate Procedure:

> Fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority. Furthermore, inconsistent application of the Rules may detract from the deference which federal habeas courts will accord to their application. Although a petitioner's failure to observe a state procedural rule may constitute an adequate and independent state ground[] barring federal habeas review a state procedural bar is not adequate unless it has been consistently or regularly applied. Thus, if the Rules [of Appellate Procedure] are not applied consistently and uniformly, federal habeas tribunals could potentially conclude that the Rules are not an adequate and independent state ground barring

> review. Therefore, it follows that our appellate courts must enforce the Rules of Appellate Procedure uniformly.

State v. Hart, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007) (internal citations and quotation marks omitted).

II. No Showing of Merit

Defendant's arguments and status does not fall within the category of defendants at issue in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*"), recidivists who have completed their sentence and are no longer under any State supervision.

Defendant was sentenced to post-release supervision. As reasoned in *Grady III*, such a search is reasonable during post-release supervision because a defendant has a diminished expectation of privacy during this period. *Id.* at 522, 831 S.E.2d at 553 (declining to "address the application of SBM" beyond "individuals who are subject to mandatory lifetime SBM based solely on their status as a statutorily defined 'recidivist' who have completed their prison sentences and are no longer supervised by the State through probation, parole, or post-release supervision"); *see State v. Hilton*, 271 N.C. App. 505, 508, 845 S.E.2d 81, 84 (2020) ("the imposition of SBM *during* the period of his post-release supervision is reasonable. During this period, Defendant's expectation of privacy is very low.") (emphasis original).

By striking the entire order, the majority's opinion improperly extends *State v. Griffin*, 270 N.C. App. 98, 840 S.E.2d 267, *temp. stay allowed*, 374 N.C. 265, 838 S.E.2d 460 (2020). In *Griffin*, the defendant challenged his order of SBM following *completion* of his court ordered post release supervision. *Id.* at 100, 840 S.E.2d at 270. *Griffin* properly recognizes SBM as a special needs search during this period of lowered expectations of privacy. *Id.* at 107, 840 S.E.2d at 274 (rights are "appreciably diminished during his [] term of post-release supervision, that is not true for the remaining [term] of SBM imposed [following the termination of post-release supervision]").

Our General Assembly enacted N.C. Gen. Stat. § 14-208.40A(c), which made the legislative findings and policy decision to mandate defendants convicted of sexually violent offenses or aggravated offenses be subjected to Satellite Based Monitoring. N.C. Gen. Stat. § 14-208.40A(c) (2019). This legislative policy and statute has been tested and survived constitutional scrutiny. *Grady v. North Carolina*, 575 U.S. 306, 310, 191 L. Ed. 2d 459, 462 (2015).

Here, the trial court properly found the repetitive and aggravated offenses to which Defendant plead guilty, second degree rape and forcible

sex offenses, are reportable convictions pursuant to N.C. Gen. Stat. § 14-208.6 (2019). Without any argument or objection by Defendant, while in open court and in the presence of the Defendant and his counsel, the trial court made the following findings of fact under the statute, to comply with the statutory mandate:

> [The Court]: In this case, the State has presented evidence related to the effect and obtrusiveness or unobtrusiveness of satellite based monitoring which includes the size of the anklet that's worn, the fact that it can be covered with a pair of pants, the fact that it does not restrict the activities of the wearer
>
> . . . .
>
> The Court does note that, that the person wearing it is not restricted from performing any number of activities, that there are not jobs that would be restricted just by virtue of the fact that the person is wearing a anklet.
>
> That, and I do find that the public has a strong interest in the, protecting the public from recidivism, and that the restriction of wearing an ankle bracelet or ankle monitor is not such that it violates the Fourth Amendment when considered, the restrictiveness when considered against the public interest.

Neither Defendant nor Defendant's counsel asserted any objections or raised constitutional challenge in response to the State's showing and arguments or to the trial court's findings at any point during this hearing. Defendant's counsel questioned witnesses concerning problems with tracking, asking what activities a monitored individual could and could not do, and how often the bracelet had to be recharged.

Defendant's counsel filed no motion, objection, or asserted any argument the SBM imposed upon Defendant was an unlawful search. Having failed to object at his sentencing hearing, Defendant unlawfully attempts to raise a constitutional violation for the first time on appeal. *Bishop*, 255 N.C. App. at 770, 805 S.E.2d at 370. Defendant has failed to demonstrate any prejudice to merit issuance of the writ. *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9.

Even if the trial court failed to hold an extended *Grady* hearing to make further "reasonableness" findings of lifetime SBM for Defendant *ex mero moto*, that decision is not fatal to vacate the SBM order. In the absence of any demand or objection from Defendant or showing

of merit, both his petition for writ of certiorari to invoke jurisdiction to remediate his failure to comply with Appellate Rule 3, or to invoke Appellate Rule 2 to excuse Defendant's failure to comply with Appellate Rule 10 are both wholly without merit and properly denied. *See Bishop*, 255 N.C. App. at 770, 805 S.E.2d at 370; *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017).

III. Improper Disposition

The majority's opinion also erroneously reverses the trial courts SBM order. Under *State v. Bursell*, presuming the merits of Defendant's assertions were properly reached, and the lawful disposition was to vacate, our Supreme Court held the correct disposition is to vacate the order without prejudice to allow the State to refile another SBM application. *State v. Bursell*, 372 N.C. 196, 201, 827 S.E.2d 302, 306 (2019). *Bursell* controls the proper disposition upon remand when an SBM order is vacated.

IV. Court Costs

The majority's opinion erroneously concludes the charges arose from the same underlying event and were adjudicated together at the same trial, making them part of a single "criminal case" for the purposes of N.C. Gen. Stat. § 7A-304(a) (2019). In *Rieger*, cited in the majority's opinion, our Court held:

> [W]hen criminal charges are separately adjudicated, court costs can be assessed in the judgment for each charge—even if the charges all stem from the same underlying event or transaction. This is so because adjudicating those charges independently creates separate costs and burdens on the justice system. . . . When multiple criminal charges arise from the same underlying event or transaction and are adjudicated together in the same hearing or trial, they are part of a single "criminal case" for purposes of N.C. Gen. Stat. § 7A-304. In this situation, the trial court may assess costs only once, even if the case involves multiple charges that result in multiple, separate judgments.

Rieger, 267 N.C. App. at 652-53, 833 S.E.2d at 703.

In *Rieger*, the defendant's vehicle was stopped for driving too closely and police noticed "various illegal drugs and drug paraphernalia" therein. *Id.* at 647, 833 S.E.2d at 700. The defendant was arrested for and convicted of possession of marijuana and possession of marijuana paraphernalia. *Id.* The defendant's charges in *Rieger*, stemmed from

the same temporal and an unbroken sequence of events from the initial stop. *Id.* at 647-48, 833 S.E.2d at 700.

The reasoning in *Rieger* is inapposite here. Defendant's indictments for intimidating a witness and obstruction of justice prior to trial, directed towards two separate victims almost five months after the four continuous days of violence in May 2016, are too far attenuated. These charges are not a part of a "single criminal case." *Id.* at 652, 833 S.E.2d at 703. Defendant's petition fails to show any prejudice or, why if granted, how the result would change upon remand. Defendant's petition for writ of certiorari shows no merit. This court should deny Defendant's petition for a writ of certiorari regarding court costs.

V. Conclusion

Defendant cannot raise constitutional arguments for the first time on appeal. *Bishop*, 255 N.C. App. at 770, 805 S.E.2d at 370. Defendant's petition for writ of certiorari to avoid Rule 3 and invoke jurisdiction is without merit and is properly denied. *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9. His argument for this Court to exercise our discretion to invoke Rule 2 to overcome his failure to comply with Rule 10 is also without merit. *Campbell*, 369 N.C. at 603, 799 S.E.2d at 602.

Defendant's failure to appeal from or to preserve his purported challenge to his SBM order on constitutional grounds mandates dismissal. His constitutional challenge was neither presented, preserved, nor ruled upon by the trial court. Multiple binding precedents hold Defendant is barred from raising constitutional issues for the first time on appeal. *See Bishop*, 255 N.C. App. at 769-70, 805 S.E.2d at 369; *Garcia*, 358 N.C. at 410-11, 597 S.E.2d at 745; *Roache*, 358 N.C. at 274, 595 S.E.2d at 402; *Haselden*, 357 N.C. at 10, 57 S.E.2d at 600.

Defendant's criminal bill of costs contained costs duly assessed from judgments that were not a part of a "single criminal case." *Rieger*, 267 N.C. App. at 652, 833 S.E.2d at 703. Defendant's petitions for writ of certiorari are without merit and multiple precedents mandate dismissal. On the merits, the trial court's judgments and orders are properly affirmed. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
BENNY RAY ROBINSON

No. COA19-1149

Filed 31 December 2020

1. Evidence—expert testimony—vouching for victim's credibility—use of word "disclosure"—rape and sexual offense

In a trial for first-degree rape, first-degree sexual offense, and taking indecent liberties with a child, no plain error resulted from the State's expert witness referring to the child victim's statements regarding what defendant did to her as a "disclosure." Based on the context in which the expert and counsel used that word or similar variants, the use of those terms did not constitute impermissible vouching for the victim's credibility where they were used to describe the interview method or as a shorthand reference to the information collected from the victim.

2. Satellite-Based Monitoring—lifetime—reasonableness—no evidence showing effectiveness in reducing recidivism

Following defendant's convictions for first-degree rape, first-degree sexual offense, and taking indecent liberties with a child, for which he was sentenced to twenty to twenty-four years of imprisonment, the imposition of lifetime satellite-based monitoring (SBM) violated defendant's constitutional right to be free from unreasonable searches where the State presented no evidence showing how SBM would reduce recidivism.

Appeal by defendant from judgment entered 6 June 2019 by Judge Charles H. Henry in Superior Court, Sampson County. Heard in the Court of Appeals 11 August 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamika L. Henderson, for the State.

Mark Montgomery, for defendant-appellant.

STROUD, Judge.

Defendant Benny Ray Robinson appeals from his convictions for first degree rape, first degree sexual offense, and taking indecent liberties

with a child. He also challenges a civil order requiring him to enroll in lifetime satellite-based monitoring ("SBM"). Defendant argues the trial court committed plain error by allowing an expert witness to vouch for truthfulness by using the word "disclosure" during her testimony. Defendant failed to show that the use of the term "disclosure" by the expert witness was plain error. However, we agree with Defendant that the SBM order is unconstitutional, and we reverse the order imposing lifetime SBM to begin at least 20 years after release from imprisonment.

I. Background

At trial, the State's evidence tended to show that in 2007 and 2008 Defendant sexually assaulted Katy[1] while she was in first grade. Defendant was the cousin of Katy's mother's girlfriend, and Defendant would do drugs with Mother and her girlfriend. Katy testified that her mother would often leave the house and Defendant was alone with Katy and her brothers. Katy testified on one occasion that she was asleep on the couch and Defendant put his penis in her vagina. Katy also testified that on another occasion while her mother was not home, Defendant brought a pie to their house before pulling her pants down and inserting a finger in her vagina. Katy told no one about what happened until June 2017, when she was asked if she had ever been raped during the intake process for juvenile detention. The allegation of rape was reported to the New Hanover County DSS office, and Katy was referred to the Child Advocacy Center where she underwent a forensic interview.

Defendant was charged with first degree rape of a child, first degree sex offense with a child, and taking indecent liberties with a child. Following a jury trial in Superior Court, Sampson County, Defendant was found guilty of all three charges. Defendant was sentenced to 240 months minimum and 297 months maximum. Following his trial, Defendant gave notice of appeal in open court, and then a *Grady* Hearing was held to determine the reasonableness of SBM. The trial court found Defendant committed "an offense against a minor under G.S. 14-208.6(1m)," "rape of a child G.S. 14-27.23, or sexual offense with a child, G.S. 14-27.28," "has not been classified as a sexually violent predator under the procedure set out in G.S. 14-208.20," "is not a recidivist," "is an aggravated offense," and "did involve the physical, mental, or sexual abuse of a minor." Upon his release from imprisonment, Defendant was ordered to register as a sex offender for life and to enroll in SBM for life.

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

II. "Disclosure" and Vouching

[1] Defendant argues the trial court committed plain error by allowing the State's expert witness to describe Katy's claim she was raped as a "disclosure." He contends "[w]ithout the vouching the jury would probably have doubted her." We disagree.

Because Defendant did not object to the use of the word "disclosure" at trial, we review this issue for plain error. N.C. R. App. P. 10(a)(4). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Our Supreme Court has held,

> In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

State v. Stancil, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (citations omitted). "[E]xpert witnesses may not vouch for the credibility of victims in child sex abuse cases when there is no evidence of physical abuse. Our Supreme Court 'has found reversible error when experts have testified that the victim was believable, had no record of lying, and had never been untruthful.' " *State v. Betts*, 267 N.C. App. 272, 280, 833 S.E.2d 41, 46 (2019) (citation omitted) (quoting *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988)). We review on a fact-specific basis whether expert testimony amounted to improper vouching for a witness. *See State v. Chandler*, 364 N.C. 313, 318-19, 697 S.E.2d 327, 331 (2010) ("Whether sufficient evidence supports expert testimony pertaining to sexual abuse is a highly fact-specific inquiry. Different fact patterns may yield different results. . . . Before expert testimony may be admitted, an adequate foundation must be laid." (citations omitted)).

Defendant argues the dictionary definition of the word "disclose" is "to make known (as information previously kept secret)," and the General Assembly has used the word "disclose" in various statutes with the same meaning: "*See, e.g.*, N.C. Gen. Stat. § 14-190.5A ('Disclosure of Private Images'); N.C. Gen. Stat. § 15A-904 ('Disclosure by the State Certain Information Not Subject to Disclosure'); N.C. Gen. Stat. § 20-71.4 ('Failure to Disclose damage to a vehicle shall be a misdemeanor.')[.]" Defendant is correct that the word "disclose" may have the connotation of exposing previously hidden but truthful information, but we must consider the use of the word in this particular case in context. When we consider the testimony of Shannon Barber, the director of the Sampson County Child Advocacy Center, and the use of the word "disclose" by counsel and Ms. Barber, it simply does not have the connotation of exposing a previously hidden truth as argued by Defendant.

Previous cases have considered the use of the word in the context of the evidence in the particular case, and the published case Defendant cites to support his position is not analogous to this case. In *State v. Crabtree* the expert witness expressed an opinion on whether sexual abuse occurred. 249 N.C. App. 395, 402-03, 790 S.E.2d 709, 715 (2016), *aff'd*, 370 N.C. 156, 804 S.E.2d 183 (2017) ("In contrast, St. Claire's testimony did include impermissible vouching. We find no fault with St. Claire's description of the five-tier rating system that the clinic uses to evaluate potential child sexual abuse victims based on the particularity and detail with which a patient gives his or her account of the alleged abuse. However, her statement that '[w]e have sort of five categories all the way from, you know, we're really sure [sexual abuse] didn't happen to yes, we're really sure that [sexual abuse] happened' and her reference to the latter category as 'clear disclosure' or 'clear indication' of abuse, in conjunction with her identification of that category as the one assigned to L.R.'s 23 December 2013 interview, crosses the line from a general description of the abuse investigation process into impermissible vouching. Likewise, St. Claire's testimony that her team's 'final conclusion [was] that [L.R.] had given a very clear disclosure of what had happened to her and who had done this to her' was an inadmissible comment on L.R.'s credibility." (alterations in original)). There is no per se rule that using the word disclosure is vouching. *See Betts*, 267 N.C. App. at 281, 833 S.E.2d at 47 ("There is nothing about use of the term 'disclose', standing alone, that conveys believability or credibility.").

Here, Ms. Barber performed a forensic interview on Katy and testified about Katy's interview. Her first use of the word "disclosure" was as part of the *title* of the forensic interview technique she had used:

> Q. And what is a forensic interview?
>
> A. A forensic interview is a research-based, best practice model that is recognized nationally. We call it the RADAR method. It is recognized nationally as a way to interview children that have alleged abuse.
>
> Q. And what is the RADAR method?
>
> A. RADAR stands for Recognizing Abuse Disclosure types and Responding. And there are several steps to that method.

This use of the word "disclosure" was simply as part of the description of the interview method and was not "vouching" for the truth of what an alleged victim reveals.

In her testimony regarding the details of the sexual abuse, Ms. Barber used the word "disclosed" only once, when referring to when Katy reported the abuse to the detention center:

> Q. What, specifically, did [Katy] tell you happened to her?
>
> A. [Katy] talked about that she was here at the Child Advocacy Center that day to talk about something that happened to her when she was younger. She said that she *disclosed* this when she was in Wilmington, and they -- at the detention center, and they asked her if she had been raped. She said she told them there that she had, but she did not give them details.
>
> She's told me she had never told her parents, they did not even know why she was at the Center that day. She still had not told them. She states that she was living with her mom, and mom was doing drugs, and that mom's friend, Benny, raped her. She told me that she was asleep on the couch and that when mom does drugs, that she would – she would always sleep on the couch and they would do drugs in the bedroom. She said that mom left, but she doesn't know where she went. She said that she woke up to Benny pulling her underwear down and whispering to her not to tell anyone.
>
> She reports that he fondled her vagina with his hand on the outside of her vagina only. She reports that he stuck his penis inside of her vagina and was moving. She said that he did not wear a condom, and she does not

> remember if anything came out of his penis. She did not know how long it lasted. She said she was crying and telling him to stop. She said he eventually stopped because she started crying louder. She states that she was wearing one of mom's shirts when this happened. She said that she went in to tell her mom the next morning what happened but the suspect was in mom's room with her, so she decided not to tell.
>
> Then she said there was another incident that occurred approximately two weeks after the first incident. She said that the suspect came over and brought a piece – or brought pecan pie. She said her brother, Quan, was in the bedroom playing his video game. She states that she was in the kitchen, suspect carried her to the back door, and fondled her vagina again. He did insert his finger inside of her vagina on this occasion.
>
> She states her mom was not home. She was wearing pants and a shirt when this happened. Both of these incidents occurred when she was living at Indian Town Road in Clinton with mom. She did not remember exactly how old she was, but states that she was going to L. C. Kerr at the time of the incidents.
>
> She reports that school was in, but it was warm outside when this happened. She never told anyone what had happened because she felt like she would be judged. She said she did end up telling Lexi Lee who lives behind dad in Garland when she was 14 years old. She never told anyone else about the incident.
>
> She told me the suspect works at the gas station across from KFC in Clinton and that she still sees him occasionally but tries to ignore and avoid him. She denies anyone else ever doing anything like this to her. There was no other information gathered.

(Emphasis added.)

In her testimony on direct examination, Ms. Barber primarily used verbs other than "disclose" to refer to Katy's statements about the alleged sexual abuse, such as "reports," "states," "said," "shared" or "told." The words "disclosed" or "disclosure" were used primarily during cross examination, mostly in questions by Defendant's counsel or by Ms. Barber as a reference to the information Katy provided in her interview with Ms. Barber. The word "disclosure" or some variant (disclosed,

disclose) was used far more in counsel's questions, both by the State and for Defendant, in questioning Ms. Barber than in her answers. The word appears only twice during Ms. Barber's testimony on direct examination by the State.

Counsel for both the State and Defendant, as well as Ms. Barber, used the word "disclosure" (or some variant of "disclose") primarily as a short-hand way of referring to the information Katy had provided to Ms. Barber during her forensic interview when she reported the allegations of abuse. For example, on cross-examination, Defendant's counsel questioned Ms. Barber regarding the absence of various factual details in the forensic interview, such as the layout of the home or other people who may have been present during the alleged abuse:

> Q. Okay. And was she giving you specific details about the incident?
>
> A. *What she disclosed whenever I interviewed her that was played earlier are the things that she said, the details that she gave.*
>
> Q. What were the details?
>
> A. That he pulled her -- she woke up, he was pulling her pants down, he whispered in her ear not to tell anyone, he touched her vagina with his hand, he stuck his penis inside of her vagina, and was moving.
>
> Q. And did she give you any details about where she lived?
>
> A. She said she lived on Indian Town Road.
>
> Q. No. Did she give you any details about her environment, her home?
>
> A. She just told me she lived on Indian Town Road.
>
> Q. Did she give you any information that she lived in a trailer?
>
> A. No, sir. She only referenced living at that location.
>
> Q. Oh, okay. She didn't tell you anything about the fact that the trailer had two bedrooms, a living room, a kitchen? She never mentioned any of that?
>
> A. I didn't ask her what type of home it was. She didn't share that information.

Q. Might it not have some relevance?

A. It did not that day. My job was to get her account of what happened.

Q. You [sic] job was to get her to tell about the alleged sexual incident?

A. Right. My job was to get her side of story.

Q. Okay. Her side of story but, nevertheless, wouldn't the environment of the alleged victim have at least some moderate connection to what they were telling you?

A. It did not to me that day. She told me she was on the couch in the living room and that mom –

. . . .

Q. Okay. So if the environment was in a trailer with two bedrooms, a living room, a kitchen, reasonable minds could say that was a small area, wouldn't we?

A. I'm assuming so.

Q. Okay. And so if one, in a small area was to encounter this type of situation, might not it be relevant to the story they're telling you if they said that it happened, they cried, and they cried louder, and they were in an environment that involved two bedrooms, a living room, and a kitchen, in a trailer, might not it be relevant as to the plausibility and the reliability of the information you're getting the sort of physical environment where this took place?

A. *I didn't think so because she said there was no one else hom*e.

Q. *That's what she told you?*

A. *She did not disclose anyone else being there.*

Q. Have you been here the whole while?

. . . .

A. I have.

Q. You didn't hear her testify that usually her three brothers were there with her?

A. I did hear her say that, *but I'm testifying on her forensic interview, not what she said today.*

Q. Okay. But you did hear her say that her three brothers were there?

A. I heard her say that her three brothers are normally home.

Q. Okay. And so wouldn't that have some relevance as to whether or not what she was telling you might have a twinge of truth to it?

A. On that day, she did not share information that her brothers were in the home.

Q. On that day, she did not share information that her brothers were home, correct?

A. Yes.

Q. My question to you was: As a person with a Bachelor's degree in psychology, don't you think that might have had some relevance to the story being told that there were three other people in the house, in the trailer?

A. *The only time she disclosed someone being home was the second incident. She did not disclose there were people in the home the first incident.*

Q. *Okay. Third and final try, she did not disclose that there were others at home*? She did not tell you about the others being home, understood. I'll ask and try to articulate the question. Do you think, based on your experience and knowledge about recognizing what children are telling you, that there might have been some connection between there being three other people in the house at the time this allegedly took place?

A. No.

Q. Do you understand my question?

A. She said there was no one else in the home.

Q. I understand that.

A. So I didn't ask her any questions about the layout of the home in the event someone may have heard her.

> Q. I am – that's not the question I'm asking. I'm just asking for a simple – I'm asking your opinion, based on your experience and knowledge, the fact that there may have been three other people in the house at the time. Wouldn't that be relevant to the story?
>
> A. It was not relevant that day. No.
>
> Q. In your opinion?
>
> A. No, it was not.
>
> Q. Okay. Why not?
>
> A. Because she did not disclose there being people in the home.
>
> MR. HEIGHT: Well isn't it possible that if there were three other people in the house and she was crying out that they would have heard her?
>
> . . . .
>
> THE WITNESS: Absolutely, if there were people in the home.
>
> Q. All right. I'll move on. And you went on to testify that she did not disclose this information, according to her statements to you, is because of what?
>
> A. She – I'll go back and see what she said. Seems like she said that she was afraid of being judged. She reports she did not tell anyone what had happened because she felt like she would be judged.

(Emphases added.)

Defendant's counsel also asked Ms. Barber about her opinion on Katy's truthfulness, and she testified that she was not stating any opinion as to whether Katy was telling the truth:

> Q. And in your questions that you asked, are there certain questions that give you a perspective which allows you to determine the truth or veracity of the information that you're being given?
>
> A. My job is not to determine if she's telling the truth or telling a lie. My job is strictly to get information from her and make sure she's okay.

Thus, in context, the use of the word "disclosure" or a variant did not carry a suggestion of any opinion as to the truth of what Katy had stated regarding the sexual abuse. In addition, the word "disclosure" was used primary by counsel in questioning and not as part of Ms. Barber's substantive testimony regarding what Katy had reported. In this context, she did not vouch for Katy's truthfulness. This argument is overruled.

III. Petition for Writ of Certiorari and Rule 2

The transcript shows that Defendant's counsel gave notice of appeal before the trial court started the *Grady* Hearing, and did not object on constitutional grounds nor give notice of appeal from the civil SBM order. Because Defendant did not object to the imposition of lifetime SBM on constitutional grounds, he has waived the ability to argue it on appeal. *State v. Bursell*, 372 N.C. 196, 199-200, 827 S.E.2d 302, 305 (2019); N.C. R. App. P. 10(a)(1).

"To prevent manifest injustice to a party" this Court may "suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative[.]" N.C. R. App. P. 2. "A court should consider whether invoking Rule 2 is appropriate 'in light of the specific circumstances of individual cases and parties, such as whether "substantial rights of an appellant are affected." ' " *Bursell*, 372 N.C. at 200, 827 S.E.2d at 305-06 (quoting *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017)). This Court has previously held that

> [a]n order requiring a defendant to participate in the State's lifetime SBM program per N.C. Gen. Stat. § 14-208.40A(c) (2019) effects a search triggering the Fourth Amendment's protection from unreasonable searches and seizures. *Grady v. North Carolina*, 575 U.S. at 308-309, 135 S.Ct. 1368, 191 L. Ed. 2d at 461. This is a substantial right that warrants our discretionary invocation of Rule 2.

State v. Graham, 270 N.C. App. 478, 497, 841 S.E.2d 754, 769, *review allowed in part, denied in part*, 375 N.C. 272, 845 S.E.2d 789 (2020).

Here, we conclude that based on the circumstances of this case a substantial right of Defendant's is affected. In our discretion, we invoke Rule 2 to prevent a manifest injustice and grant Defendant's petition to review the constitutionality of his SBM order. *See* N.C. R. App. R. 21.

IV. SBM

[2] Defendant argues, "the trial court erred by ordering lifetime SBM in the absence of any evidence from the state that lifetime SBM was a reasonable Fourth Amendment Search of [Defendant]." (Original in all caps.) "We review a trial court's determination that SBM is reasonable *de novo*." *State v. Gambrell*, 265 N.C. App. 641, 642, 828 S.E.2d 749, 750 (2019).

Although the holding of *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*"), does not directly apply to Defendant in this case, who was not classified as a "recidivist," the analysis of the issue described in *Grady III* does apply to this case.[2] *See State v. Griffin*, 270 N.C. App. 98, 106, 840 S.E.2d 267, 273 (2020) ("Although *Grady III* does not compel the result we must reach in this case, its reasonableness analysis does provide us with a roadmap to get there. As conceded by the State at oral argument, *Grady III* offers guidance as to what factors to consider in determining whether SBM is reasonable under the totality of the circumstances. We thus resolve this appeal by reviewing Defendant's privacy interests and the nature of SBM's intrusion into them before balancing those factors against the State's interests in monitoring Defendant and the effectiveness of SBM in addressing those concerns. (citing *Grady III*, 372 N.C. at 527, 534, 538, 831 S.E.2d at 557, 561, 564.")).

Here, following Defendant's trial, the State acknowledged the need to have a *Grady* Hearing to determine the reasonableness of SBM. The State presented no additional evidence to support the reasonableness of SBM and made the following argument:

> As the Court's aware, the monitoring does not prohibit him from traveling, working, or otherwise enjoying the ability to move about as he wishes. And this would, of course, be effective once he's released from the Department of Corrections. Instead, it just records where he's traveling to ensure he's complying with the terms of his probation, if any, and the state laws. Of course, there's a strong public interest in the benefit of monitoring those

2. "[F]ollowing the Supreme Court's orders temporarily staying this Court's decisions in both *Griffin* and *Gordon*, the precedential value of those decisions is in limbo. While they are not controlling, neither have they been overturned. They are instructive as the most recent published decisions of this Court addressing *Grady III's* application outside the recidivist context[.]" *State v. Hutchens*, 272 N.C. App. 156, 161, 846 S.E.2d 306, 311 (2020).

> convicted of sex offenses and it would outweigh any minimal impact on his privacy interest.
>
> Of course, the only expectation of privacy the law requires the Court to honor is the one that society is required to recognize is reasonable. His address and record would be made public record. The monitor would not reveal his activities, just his location, and the fact it could also be used alternatively to either implicate or exonerate him in a subsequent crime.
>
> Similar searches in the form of hidden cameras and traffic lights and undercover officers in drug areas have been found to be reasonable. Ultimately, I would ask the Court to conclude that any infringement on his right to privacy is slight, and the value to society for monitoring outweighs that infringement on his right to privacy. I would ask the Court to take judicial notice in that, "The United States Supreme Court has long recognized the dangers of recidivism in cases of sex offenders." That's Smith versus Doe, 538 U.S. 84. In McKune versus Lile, 536 U.S. 24.
>
> "The essence of the satellite-based monitoring system is generally accepted by the Courts." And that's Doe versus Dresden, 507 F.3d. 998.
>
> "It is within the purview of the state government to recognize and to reasonably react to a known danger in order to protect its citizens." And that's Samson versus California, 547 U.S. 843.

The trial court ordered Defendant, upon his release from prison, to enroll in SBM "for the rest of his natural life."

We are unable to distinguish the factual situation of this case, where Defendant will not be released from prison for twenty to twenty-four years, from *State v. Gordon*, 270 N.C. App. 468, 840 S.E.2d 907 (2020), where the defendant was not eligible to be released from prison for fifteen to twenty years, and *State v. Strudwick*, 273 N.C. App. 676, 849 S.E.2d. 891 (2020), where the defendant was not a recidivist and was not eligible to be released from prison for thirty to forty-three years.

Here, the State presented *no evidence* showing how SBM will *reduce recidivism*.

> [T]he State's ability to demonstrate reasonableness is hampered by a lack of knowledge concerning the unknown

> future circumstances relevant to that analysis. For instance, we are unable to consider "the extent to which the search intrudes upon reasonable privacy expectations" because the search will not occur until Defendant has served his active sentence. The State makes no attempt to report the level of intrusion as to the information revealed under the satellite-based monitoring program, nor has it established that the nature and extent of the monitoring that is currently administered, and upon which the present order is based, will remain unchanged by the time that Defendant is released from prison.

Gordon, 270 N.C. App. at 475, 840 S.E.2d at 912-13 (citation omitted). "Accordingly, we necessarily conclude that the State has failed to meet its burden of establishing that lifetime satellite-based monitoring following Defendant's eventual release from prison is a reasonable search in Defendant's case. We therefore reverse the trial court's order." *State v. Strudwick*, 273 N.C. App. at 681, 849 S.E.2d. at 895 (quoting *State v. Gordon*, 270 N.C. App. at 477, 840 S.E.2d at 914). Because we are reversing Defendant's SBM order, we do not reach Defendant's alternative ineffective assistance of counsel claim.

V. Conclusion

We find no error in Defendant's trial and conviction but reverse the trial court's order imposing lifetime SBM for Defendant.

NO ERROR IN PART; REVERSED IN PART.

Judges BRYANT and BROOK concur.

STATE v. STEPHENS

[275 N.C. App. 890 (2020)]

STATE OF NORTH CAROLINA
v.
CHARLES STEPHENS, DEFENDANT

No. COA19-425

Filed 31 December 2020

Assault—with a deadly weapon inflicting serious injury—jury instructions—self-defense

In a trial for assault with a deadly weapon inflicting serious injury and discharging a weapon into an occupied dwelling—charges arising from an altercation that escalated to defendant and the victim exchanging gunfire—the trial court improperly denied defendant's request for an instruction on self-defense. Taking the evidence in the light most favorable to defendant, substantial evidence was presented on the elements of perfect self-defense, including that defendant had a reasonable belief that deadly force was necessary to protect himself from death or great bodily harm, that he was not the aggressor, and that he did not use excessive force. Assuming defendant was the initial aggressor, defendant was still entitled to a self-defense instruction because the evidence showed that defendant withdrew from the altercation as provided in N.C.G.S. § 14-51.4(2)(b) before being re-engaged by the victim.

Judge TYSON concurring in a separate opinion.

Appeal by Defendant from judgments entered 19 September 2018 by Judge Jeffery K. Carpenter in Stanly County, Superior Court. Heard in the Court of Appeals 3 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Teresa M. Postell, for the State.

Goodman Carr, PLLC, by W. Rob Heroy and Dan Roberts, for Defendant-Appellant.

McGEE, Chief Judge.

Charles Stephens ("Defendant") appeals from judgments entered 19 September 2018 finding him guilty of assault with a deadly weapon inflicting serious injury and discharging a weapon into an occupied

dwelling. Defendant contends the trial court erred by (1) denying his jury instruction on self-defense, (2) limiting his cross-examination about a witness's prior felony conviction, and (3) denying him the opportunity to present evidence about an after-the-fact encounter.

I. Factual and Procedural History

Joel Drye ("Mr. Drye") and Defendant lived in Albemarle, North Carolina, about a mile apart in an area locally known as Palestine in 2017. As Mr. Drye slept in his bedroom on the morning of 29 September 2017, Debra Drye ("Ms. Drye"), Mr. Drye's wife, allowed one of the family's dogs outside to relieve itself and started doing laundry. However, after Ms. Drye opened the door to allow the first dog to go out, the door did not close all the way. Before Ms. Drye realized the back door was not closed, the family's other dog escaped.

A little after 10:30 a.m., Defendant knocked on the Dryes' back door. When Ms. Drye answered the door, Defendant, a man Ms. Drye had seen before but did not know, said "[y]our dogs killed my cat[,] [m]y wife called me and told me your dogs killed my cat." Ms. Drye attempted to apologize, but Defendant demanded to speak with Mr. Drye. Ms. Drye went to the bedroom and awakened Mr. Drye, telling him, "[t]he dogs got out this morning and there's a man out here and he said our dogs killed his cat."

Mr. Drye got out of bed and met Defendant at the back door to talk. Mr. Drye testified Defendant was standing "just beyond [his] back steps." Mr. Drye said he stepped down to the bottom step and Defendant said "your g..d… dogs killed my cat" and "[w]hy aren't you out getting your dogs. They've killed some more of my pets."

This was not the first time the Dryes' dogs had gotten loose and killed a neighbor's pet. Mr. Drye, like Ms. Drye, acknowledged and apologized for Defendant's loss of his cat. Mr. Drye told Defendant, "I'm sorry. We will do what we need to do . . . [about] the cat." Mr. Drye offered to "pay any damages," but that only made Defendant angrier. Defendant testified at trial that "we're just back and forth about the dogs, why aren't you getting them? That is my big thing. And, you know, people's children, there's people's children in the neighborhood."

In frustration, Defendant called Mr. Drye a "g..d… son of a b….." Mr. Drye told Defendant that he does not allow the use of vulgarities in his house and asked Defendant to stop "using God's name in vain." Defendant asked Mr. Drye, "[w]hat you going to do about it, you g..d… son b….."

As the argument escalated, Mr. Drye grabbed a piece of lumber, a photo of which was introduced into evidence, and which was described as a "2-inch by 2-inch stick." Defendant drew his 9mm Smith & Wesson pistol, for which he has a concealed-carry permit. At this point, Defendant's and Mr. Drye's stories diverge.

Defendant claims he drew his weapon after Mr. Drye beat him with the piece of lumber. Even then, Defendant claims he never aimed the weapon at Mr. Drye, but instead, laid the pistol across his stomach as a warning. Defendant testified as follows:

> [Mr. Drye] hit me in the arm and across the shoulder with the stick, because when I was turning, he hit me on this side. And you can tell by the wound, it's a square object that hit me. And then the bruise on my shoulder. And that's when I pulled [the pistol] out and put it on my stomach because he had already -- I was walking away from him after our discussion was over, and that's when he throwed the stick down and run in the house. And his wife was right on his heels[.]

Defendant contends that Mr. Drye emerged from the house with a .45 caliber firearm and began shooting at him. Defendant testified that Mr. Drye "grazed me with a round[,]" and offered photographic evidence of his torn shirt and scratch on his side. Defendant testified that he returned fire, shooting Mr. Drye in self-defense.

The State contends Mr. Drye never raised the piece of lumber to beat Defendant. Instead, the State argued at trial that Defendant drew his weapon as soon as Mr. Drye grabbed the stick, pointed the gun in Mr. Drye's face, and threatened Defendant as "pick up that stick, I'll kill you g..d… a..." The State contends that only after Defendant's initial threat did Mr. Drye run into his house to grab his pistol and a magazine. Ms. Drye testified that she was "hollering" "[n]o, no, no, no, no, [Mr. Drye], no, no," "because [she] was hoping that [Mr. Drye] didn't come back out [of the house with his gun]," "because [she] wanted him to stay safe in the house."

Defendant allegedly waited in the driveway for Mr. Drye to return, while pointing his gun at the front and back door, "[m]oving the gun back and forth." The State concedes that Mr. Drye was the first to shoot when he returned from his house with a gun. Ms. Drye testified that Mr. Drye "fired up in the air and he said, 'Go in the house, Debbie. Go call the law.' " Ms. Drye went inside the house to call 911.

In total, Mr. Drye fired at least ten bullets at Defendant, and Defendant fired seven bullets at Mr. Drye, one of which struck Mr. Drye in the leg. Mr. Drye testified that he was shot from behind while fleeing. Ms. Drye called 911 a second time to report her husband's injury. Defendant got in his car and drove home where he, too, called 911.

The Stanly County Sheriff's Office responded to both 911 calls and issued a warrant for Defendant's arrest on 2 October 2017. Defendant was indicted on one count of assault with a deadly weapon inflicting serious injury and discharging a weapon into an occupied dwelling on 13 November 2017. Almost a year later, a jury convicted Defendant of both offenses and the trial court sentenced Defendant to two presumptive consecutive sentences of 20 to 33 months on 19 September 2018. Defendant's sentences were suspended with supervised probation for 36 months and special conditions that Defendant serve 30 days in jail, have no contact with the Dryes, and pay restitution. Defendant appeals.

II. Analysis

Defendant raises three questions on appeal: (1) whether the trial court erred in failing to instruct the jury on self-defense based on an incorrect application of North Carolina law; (2) whether the trial court erred in prohibiting him from cross-examining Mr. Drye about his felonious possession of a firearm where it was relevant to Mr. Drye's incentive to cooperate with the State; and (3) whether the trial court erred in denying Defendant the opportunity to present evidence of an after-the-fact encounter between Defendant and Mr. Drye, in which Mr. Drye acknowledged blame for the encounter.

At trial, Defendant argued for a jury instruction on self-defense, but the trial court denied Defendant's requested instruction. Defendant argues the trial court erred in denying the jury instruction because a factual dispute existed of whether he was the aggressor. Alternatively, he argues he was entitled to a jury instruction on self-defense because a factual dispute existed of whether he withdrew and regained the right to self-defense under N.C. Gen. Stat. §§ 14-51.4(2)(a) and (b) (2019).

The trial court is required to instruct the jury on all substantial features of a case. *State v. Cook*, 254 N.C. App. 150, 152, 802 S.E.2d 575, 577 (2017), *aff'd*, 370 N.C. 506, 809 S.E.2d 566 (2018). "Any defense raised by the evidence is deemed a substantial feature of the case[.]" *State v. Hudgins*, 167 N.C. App. 705, 708, 606 S.E.2d 443, 446 (2005) (citation omitted). "For a particular defense to result in a required instruction, there must be substantial evidence of each element of the defense when

viewing the evidence in a light most favorable to the defendant." *State v. Brown*, 182 N.C. App. 115, 118, 646 S.E.2d 775, 777 (2007) (citation omitted). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Burrow*, 248 N.C. App. 663, 666, 789 S.E.2d 923, 926 (2016) (quoting *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000)).

"When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to [the] defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citations omitted). " 'Whether evidence is sufficient to warrant an instruction on self-defense is a question of law; therefore, the applicable standard of review is *de novo*.' " *State v. Edwards*, 239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015) (citations omitted).

The law of self-defense is well-established in North Carolina:

> The right to act in self-defense rests upon necessity, real or apparent, and a person may use such force as is necessary or apparently necessary to save himself from death or great bodily harm in the lawful exercise of his right of self-defense. A person may exercise such force if he believes it to be necessary and has reasonable grounds for such belief. The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to the accused at the time. . . . However, the right of self-defense is only available to a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so.

State v. Martin, 131 N.C. App. 38, 44, 506 S.E.2d 260, 264–65 (1998) (internal citations and quotation marks omitted).

"North Carolina law recognizes both 'perfect' and 'imperfect' self-defense." *Id.* at 44, 506 S.E.2d at 265 (citation omitted). Only perfect self-defense is available for charges of felony assault and discharging weapons into occupied property. *State v. Richardson*, 341 N.C. 658, 668–69, 462 S.E.2d 492, 499 (1995).

> Perfect self-defense requires the existence of all four of the following elements:

(1) It appeared to defendant and he believed it to be 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 the 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.

Imperfect self-defense is available when elements (1) and (2) listed above are met, but either the defendant "was the aggressor or used excessive force."

State v. Juarez, 369 N.C. 351, 354, n.1, 794 S.E.2d 293, 297, n.1 (2016) (citations and brackets omitted). Defendant advances three arguments that he was entitled to an instruction on self-defense: (1) his "brandishing" of a handgun did not "provoke" lethal force, and he was therefore not the aggressor; (2) "Mr. Drye provoked the use of deadly force by attacking [Defendant] with a wooden club"; and (3) assuming Defendant was an aggressor, he nevertheless regained his right to use deadly force in self-defense under N.C.G.S. § 14-51.4(2)(b).

A. Whether Defendant Was the "Aggressor"

Defendant first argues he is entitled to a jury instruction on self-defense. In order to be entitled to the instruction on this ground, Defendant must show substantial evidence of all four of the elements of perfect self-defense. *See id.* Taken in the light most favorable to Defendant, we hold substantial evidence tends to show Defendant could establish the elements for perfect self-defense and was therefore entitled to an instruction on self-defense. First, the evidence shows Defendant believed the use of deadly force against Mr. Drye was necessary, by returning fire with his firearm. Moreover, the jury could find this belief was reasonable. Third, the use of deadly force by returning fire is not excessive when it is used to meet deadly force. The ultimate

issue, then, is whether Defendant was the aggressor—that is, whether Defendant "aggressively and willingly enter[ed] into the fight without legal excuse or provocation." *Id.*

Defendant argues he was not the aggressor because, when taken in the light most favorable to Defendant, substantial evidence tends to show, "while he was upset, he peacefully confronted [Mr.] Drye and urged him to collect his dogs before they killed any other animals or possibly a child"; "he had not threatened [Mr.] Drye, brandished a firearm, or had been ordered off the property when [Mr.] Drye struck him with the lumber"; and "[i]t was at that point, combined with telling [Mr.] Drye, 'don't hit me with it again,' that [Defendant] demonstrated he was armed." Defendant's evidence shows "[h]e did not point the weapon at [Mr.] Drye or state that he would use the weapon." Instead, Mr. Drye went inside, retrieved his handgun gun, and came out firing, at which point Defendant returned fire. The State, in turn, argues that Defendant was the aggressor because

> he not only approached [Mr. Drye] with a gun, he did so at the back door of [Mr. Drye]'s home; while seeking to vent his angry complaints, although he admittedly could not have obtained any response that would have pleased him at that point; he repeated his complaints multiple times and with increasing volume and vulgarity; and he removed the gun from where he had it concealed, to display it, purposely to create imminent fear of deadly consequences.

Taking the evidence in the light most favorable to Defendant, we must assume Defendant's version of events is correct and Defendant did not fire at Mr. Drye first, which the State conceded, and he only brandished his firearm after Mr. Drye struck him twice with the piece of lumber.

Defendant contends that brandishing the firearm was not "provocation" of serious or deadly force and that he was therefore entitled to a self-defense instruction. The State in turn argues, relying on *State v. Holloman*, 369 N.C. 615, 799 S.E.2d 824 (2017), that merely brandishing the firearm made Defendant the aggressor. *Holloman* is distinguishable, however, as the defendant entered onto the property of the victim with his gun drawn, "by his side," unlike in this case. *Id.* at 618, 799 S.E.2d at 827. More fundamentally, however, *Holloman* involved the question of whether, under the applicable statute, a person previously determined to be the aggressor nevertheless could regain the right to use force when "the person provoked responded by using such significant force that the aggressor was placed in imminent danger of death or serious bodily

harm, the aggressor did not have a reasonable opportunity to retreat, and the aggressor c[ould] only protect himself or herself from death or serious bodily harm by using defensive force." *Id.* at 624–25, 799 S.E.2d at 831. Our Supreme Court held the defendant could not. *Id.* at 629, 799 S.E.2d at 833. In *Holloman*, unlike here, the jury was able to consider whether the defendant was entitled to self-defense and whether he or the victim was the aggressor, thus he was not an aggressor as a matter of law. *See id.* at 629, 799 S.E.2d at 833–34.

Defendant cites to other cases supporting his contention that brandishing a weapon does not, as a matter of law, rise to the use of force. *See State v. Spaulding*, 298 N.C. 149, 155, 257 S.E.2d 391, 395 (1979) (defendant armed with knife was not aggressor so long as he did not use it until it became necessary for self-defense); *State v. Vaughn*, 227 N.C. App. 198, 203, 742 S.E.2d 276, 279 (2013) (decision to arm herself did not make defendant aggressor); *State v. Tann*, 57 N.C. App. 527, 531, 291 S.E.2d 824, 827 (1982) (defendant who armed himself in anticipation and failed to avoid fight was not aggressor). It is unnecessary to decide whether brandishing a weapon is sufficient as a matter of law to constitute "provocation" of use of deadly force, because, assuming "brandishing" a gun constitutes the use of serious or deadly force, when taken in the light most favorable to Defendant, there is a preceding question as to whether Mr. Drye, by brandishing and hitting Defendant with a two-inch by two-inch piece of lumber, provoked the use of deadly force by his own use of serious or deadly force.

"A dangerous or deadly weapon is 'any article, instrument or substance which is *likely* to produce death *or* great bodily injury.' " *State v. Young*, 317 N.C. 396, 417, 346 S.E.2d 626, 638 (1986) (citation omitted). " 'Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . is one of law, and the Court must take the responsibility of so declaring.' " *Id.* at 416–17, 346 S.E.2d at 638 (citation omitted).

The State argues whether the piece of lumber used by Mr. Drye is a deadly weapon is a question for the Court, and not the jury, because "a single swing of the stick to [D]efendant's arm and shoulder resulting in a bruise supported only the conclusion it was not used in a manner likely to cause death or serious bodily injury, thus the trial court did not err." The State cites to the previous passage from *Young* and *State v. Smith*, 187 N.C. 469, 121 S.E. 737 (1924), in support of this proposition, but in our view, both cases demand the opposite conclusion.

In *Young*, our Supreme Court held the trial court did not err in giving an instruction that a pocket knife was a dangerous or deadly weapon when pocket knives have long been held to be a deadly weapon in North Carolina as a matter of law and the uncontroverted evidence was that the defendant apparently inflicted injury on the victim. *Young*, 317 N.C. at 417, 346 S.E.2d at 638. This case is distinguishable, however. For the deadly nature of a weapon to be a question of law for the Court and not a question of fact for the jury, both the " 'alleged deadly weapon *and* the manner of its use' " must be " 'of such character as to admit of but one conclusion[.]' " *Id.* at 416–17, 346 S.E.2d at 638 (citation omitted). Here, although the State argues the manner of Mr. Drye's use of the two-inch by two-inch piece of lumber in striking Defendant was not serious or deadly, we cannot conclude as a matter of law that the " 'alleged deadly weapon . . . [is] of such character as to admit of but one conclusion[.]' " *Id.* Moreover, the State here, like the defendant in *Young*, argues that the actual use of the weapon did not produce serious bodily injury. But, as in *Young*, that argument "misses the point. In order to be characterized as a 'dangerous or deadly weapon,' an instrumentality need not have actually inflicted serious injury." *Id.* at 417, 346 S.E.2d at 638.

State v. Smith also supports giving the question to the jury. In *Smith*, the defendant killed the victim "by striking him on the head with a baseball bat[,]" and the Supreme Court held that "a baseball bat should be similarly denominated [as a deadly weapon], if viciously used, as under the circumstances of this case." *Smith*, 187 N.C. at 470, 121 S.E.2d at 737. In its ruling, the Supreme Court cited the following rules:

> Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly within the foregoing definition is one of law, and the Court must take the responsibility of so declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury.

Id. (internal citations omitted).

The piece of lumber Mr. Drye used here was not unlike the baseball bat our Supreme Court held to be a deadly weapon as a matter of law in *Smith*. *See id.* The State essentially asks us to instead hold it is *not* a deadly weapon as a matter of law. This we decline to do. Following the reasoning of *Smith*, we note a piece of lumber "may or may not be likely

to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed," thus "its alleged deadly character is one of fact to be determined by the jury." *Id.*

The trial court in this case did not submit the question of whether Defendant's displaying of a handgun was use of a "deadly weapon" to the jury. Instead, the trial court seems to have so concluded as a matter of law. In such circumstances, this Court has held the question of whether the use of such deadly force was justified is for the jury. *See State v. Whetstone*, 212 N.C. App. 551, 563, 711 S.E.2d 778, 787 (2011) (holding that, "in those cases where the weapon is not a deadly weapon *per se*, but the question of whether the weapon is a deadly weapon is not submitted to the jury because the trial judge concludes on the evidence of the case that the weapon used was a deadly weapon as a matter of law, the jury should be instructed that the assault would be excused as being in self-defense only if the circumstances at the time the defendant acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from death or great bodily harm[]").

In this case, taking the evidence in the light most favorable to Defendant, the jury could have determined that Defendant was permitted to brandish his firearm because he had a reasonable belief it was necessary to protect himself from death or great bodily harm and because Mr. Drye was the initial aggressor and provoked him through the use of serious or deadly force in striking him with a piece of lumber. The trial court's denial of Defendant's requested jury instruction on self-defense constituted reversible error.[1] *See State v. Marsh*, 293 N.C. 353, 355, 237 S.E.2d 745, 747 (1977) ("[T]here was competent evidence which would permit, but not require, the jury to find that defendant did not voluntarily and aggressively enter into an armed confrontation with [the victim], but used only such force as was necessary, or appeared to him to be necessary in order to save himself from death or great bodily harm. It is for the jury to decide whether or not defendant's belief was reasonable.").

B. Regaining the Right to Self-Defense

Assuming, *arguendo*, Defendant was the aggressor because he provoked the use of serious or deadly force by brandishing his handgun, we further hold the jury could nevertheless find Defendant regained the right to use force in self-defense under N.C.G.S. § 14-51.4(2)(b). N.C.G.S.

1. The State is also entitled to an "aggressor instruction." *See, e.g.*, *State v. Mumma*, 372 N.C. 226, 240, 827 S.E.2d 288, 297 (2019).

§ 14-51.4(2)(b) states that a person who is the initial aggressor regains the right of self-defense where:

> The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force.

N.C.G.S. § 14-51.4(2)(b).

Taken in the light most favorable to Defendant, the evidence shows Defendant retreated toward his vehicle from Mr. Drye's house. Specifically, Defendant testified that, when Mr. Drye went inside to retrieve his handgun, Defendant "started to make [his] way back to [his] vehicle," and it was only as he was leaving the driveway and passing Mr. Drye's "yellow truck" that Mr. Drye began firing on him, and striking Defendant. Taking these facts as true, Defendant withdrew by walking toward his vehicle, clearly announcing his intent to withdraw by actually leaving. It was Mr. Drye, who resumed the use of deadly force by firing on Defendant as he was walking toward his vehicle. *Holloman*, upon which the State relies, is distinguishable from these circumstances because, in that case, the defendant did not attempt to withdraw. *See Holloman*, 369 N.C. at 618, 799 S.E.2d at 827.

Taking the evidence in the light most favorable to Defendant, substantial evidence tended to show that, even if Defendant was the initial aggressor, he nevertheless regained his right to use force in self-defense under N.C.G.S. § 14-51.4(2)(b) by leaving and walking toward his truck. Therefore, as an alternative basis, Defendant was entitled to a jury instruction on self-defense because the evidence supports a finding that he withdrew from the dispute.

III. Conclusion

We hold the trial court prejudicially erred in failing to give a jury instruction on self-defense because: (1) substantial evidence supported finding Defendant had perfect self-defense because a jury could find that Mr. Drye initially provoked the use of force by using deadly force of his own; and (2) assuming, *arguendo*, Defendant was the initial aggressor, substantial evidence showed he regained his right to self-defense by withdrawing from the dispute under N.C.G.S. § 14-51.4(2)(b).

Because we hold the trial court erred by denying the self-defense instruction, we do not address Defendant's arguments that the trial court erred in prohibiting Defendant's counsel from cross-examining

Mr. Drye about his felonious possession of a firearm where it was relevant to Mr. Drye's incentive to cooperate with the State; and that the trial court erred in denying Defendant the opportunity to present evidence of an after-the-fact encounter between Defendant and Mr. Drye, in which Mr. Drye acknowledged blame for the encounter. We reverse the judgment of the trial court and remand for a new trial consistent with this decision.

NEW TRIAL.

Judge STROUD concurs.

Judge TYSON concurs in separate opinion.

TYSON, Judge, concurring.

I fully concur with the majority's opinion on the issues it reaches and resolves. Defendant raised additional issues on appeal: (1) the trial court's limiting Defendant's cross-examination about Drye's prior felony conviction and his possession of a firearm on the day of the events; (2) whether the trial court erred in preventing inquiry of some undisclosed transaction or agreement reached between Drye and the State in exchange for his testimony against Defendant; and, (3) whether the trial court erred denying Defendant the opportunity to present testimony concerning an after-the-fact encounter between Drye and Defendant, where the men purportedly reconciled. These unaddressed issues may arise again at any new trial.

I. Standard of Review

Under Rules of Evidence 401-403, "[t]he admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (citation and quotation marks omitted).

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401(2019). "All relevant evidence is admissible, except as otherwise provided[.]" N.C. Gen. Stat. § 8C-1, Rule 402 (2019).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen.

Stat. § 8C-1, Rule 403 (2019). If relevant evidence is excluded by the trial court as more prejudicial than probative, "[w]e review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (citations omitted). "[A]s long as the procedure followed by the trial court demonstrates that a Rule 403 balancing test was conducted, a specific finding is not required." *State v. Harris*, 149 N.C. App. 398, 405, 562 S.E.2d 547, 551 (2002).

II. Excluding Relevant Evidence

Regarding admission of evidence of prior criminal convictions, Rule 609 provides: "[E]vidence that the witness has been convicted of a felony . . . shall be admitted . . . during cross-examination." N.C. Gen. Stat. § 8C-1, Rule 609(a) (2019). "Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction." N.C. Gen. Stat § 8C-1, Rule 609(b). Defendant asserted Drye's prior conviction was relevant for impeachment purposes.

Pursuant to Rule 609, Defendant gave proper notice to the State of his intent to use Drye's prior 1979 felony to impeach him during trial and, but for the conviction having occurred more than 10 years prior, Defendant would have been entitled to use Drye's prior conviction to impeach him. N.C. Gen. Stat. § 8C-1, Rule 609(a)-(b).

The trial court applied the balancing test and found, "the danger of unfair prejudice and confusion of the issues or misleading the jury would substantially outweigh the probative value. Therefore, it would be inadmissible under Rule 403." Defendant has failed to show any abuse of discretion in the trial court excluding evidence of Drye's prior felonious assault conviction pursuant to Rule 609.

III. Denied Cross-Examination

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2019). "[T]he main purpose of impeachment is to discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony." *State v. Mendoza*, 206 N.C. App. 391, 397, 698 S.E.2d 170, 175 (2010) (citation and internal quotations omitted).

"[A]lthough cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court." *State v. Larrimore*, 340 N.C. 119, 150, 456 S.E.2d 789, 805 (1995) (citations omitted); *see also* N.C. Gen. Stat. § 8C-1, Rule 611(a) (2019).

"In general, we review a trial court's limitation on cross-examination for abuse of discretion." *State v. Bowman*, 372 N.C. 439, 444, 831 S.E.2d 316, 319 (2019). "If the trial court errs in excluding witness testimony showing possible bias, thus violating the Confrontation Clause, the error is reviewed to determine whether it was harmless beyond a reasonable doubt." *Id.* at 444, 831 S.E.2d at 319.

Drye was previously convicted of felonious assault with a deadly weapon with intent to inflict serious injury in 1979. The record does not reflect whether Drye's citizenship rights to possess a firearm have been restored. Drye may have been subject to charges for possession of a firearm by felon and a potentially new assault with a deadly weapon with the intent to inflict serious injury of Defendant. Drye responded twice during *voir dire*, "I don't recall," to the question of whether there was a discussion with the district attorney of his potential criminal charges.

Defendant's counsel requested to "inquire of [Drye] not about his old conviction, which we understand is 30 years in the past, but that we be allowed to inquire as to his felon status and the fact that he was not legally allowed to own a gun or possess a gun in his residence."

In *State v. Murray*, 27 N.C. App 130, 133, 218 S.E.2d 188, 191 (1975), this Court held it was error when a trial court refused to allow a defendant to provide evidence of the witness's "motive and interest in testifying against the defendant." The Court found the error was particularly significant where "[t]he State's entire case depended solely upon [the witness's] testimony." *Id.*

In the pretrial conference, Defendant argued he should be permitted to impeach Drye based upon *State v. Rankins*, 133 N.C. App. 607, 610, 515 S.E.2d 748, 750 (1999). In *Rankins*, this Court ordered a new trial in a case where the trial judge had excluded testimony regarding whether the State insinuated a threat of an enhanced sentence to a witness. This Court also noted failure to make a specific offer of proof was not fatal to review of defendant's claim. *Id.*

The trial court provided a summary of its reasoning prior to its ruling under Rule 609, but did not analyze potential admissibility of Drye's underlying bad acts under Rule 404(b). N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019). Upon remand, the trial court should examine and rule upon the admissibility of Drye's prior bad acts pursuant to Rule 404(b). This rule allows "[e]vidence of other crimes, wrongs, or acts . . . may . . . be admissible for . . . proof of motive, opportunity, intent . . . knowledge." N.C. Gen. Stat. § 8C-404(b).

Defendant clearly stated he sought to use Drye's underlying prior bad acts for impeachment purposes to show knowledge, preparation, absence of mistake, and plan. Counsel argued: "Mr. Drye was *aware* that he had a prior felony . . . through Mrs. Drye's testimony [] she saw her husband come through the house . . . *obtained* a weapon, and that he *knew* [he] was not able to have that weapon." (emphasis supplied). Counsel clearly stated, "[w]e're not offering it as character evidence. We're not offering it as propensity evidence. We're offering it as impeachment evidence."

Defendant's counsel also argued the jury should be aware "the prosecutor's office has failed to charge Mr. Drye with (sic) in this case." Counsel continued, "whether they spoke to him about it, whether it's been implied, whether it's been discussed, whether it's been promised . . . the thing that has been ruled can be inquired to by the defense." Following a *voir dire* examination of Drye, the trial court forbade the defense from questioning Drye on the issue and admonished counsel not to object in front of the jury.

Drye's testimony and credibility were central issues in the State's case-in-chief. Drye's answers were arguably evasive during *voir dire* where: (1) Drye may have been dishonest about whether or not he knew he had previously been convicted of felony assault with a deadly weapon with intent to inflict serious injury; (2) Drye based his understanding that he could possess a firearm not on the judge's order or restored rights, but upon statements from his lawyer who convinced him to accept the plea bargain in 1979; and, (3) Drye's inability to recall whether or not the State had indicated to him that he could be prosecuted for his firearm possession or assault on Defendant. Prejudice from the exclusion to Defendant is apparent, as Drye was the primary complaining witness and the other individual involved in the shootout, who fired multiple shots at Defendant.

Upon remand, the trial court should determine whether Defendant should have the opportunity to cross-examine Drye about whether he had engaged in a prior assault with a deadly weapon with the intent to injure another, his illegal possession of a handgun, and his initial statements to law enforcement and whether or not the State had incentivized his testimony.

IV. After-the-Fact Encounter

Defendant also sought to present evidence of an after-the-fact encounter with Drye in which Drye had apologized and offered Defendant a hug after a relative's funeral. The testimony, if believed by the jury, was relevant to Defendant's and Drye's credibility.

Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant subject, to but *one exception*[.]" *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Rule 404(b) has been applied to permit admission of evidence of other interactions between a defendant and victim, which are relevant to the "complete story" in *State v. Agee*, 326 N.C. 542, 547, 391 S.E.2d 171, 174 (1990).

In *Agee*, this Court held that other interaction between a victim and a defendant is relevant evidence "if it forms part of the history of the event or serves to enhance the natural development of the facts." 326 N.C. at 547, 391 S.E.2d at 174 (internal citations and quotations omitted). This Court described admission under the rule as a "complete story" or "chain of circumstances." *Id.* at 548, 391 S.E.2d at 174.

At trial, Defendant sought admission of an after-the-fact direct encounter between himself and Drye. Defendant was not permitted to testify on the issue but made an offer of proof. Defendant's proffer tended to show sometime after the shooting incident Defendant and Drye met and shook hands. Both men apologized for their actions. They expressed love for one another, and both admitted the incident was "stupid." Drye then embraced Defendant and they hugged.

Defendant argued the encounter was relevant: "Both parties got out of control . . . It goes to self-defense." Defense counsel continued, "the emotional response after . . . can corroborate the events that took place prior."

The State responded the evidence only showed the parties had "kissed and made up." The State continued, arguing the prejudicial effect of admission outweighed any probative value. The State failed to explain what, if any, prejudicial effect the admission of the evidence would have caused.

The trial court sustained the objection and noted its trouble "connecting the dots" and found no probative value. The trial court also noted the evidence would prejudicially affect Defendant but did not state what prejudice would occur.

Applying the plain language of the rule, the proffered testimony fits the definition of relevant evidence: "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. 8C-1, Rule 401. Even if this testimony carried potential emotional appeal, it also carried the tendency to show Defendant's version of the events was credible.

Under the "complete story" or "chain of circumstances" rule, Defendant may be entitled to present a fuller scope of the interactions between the parties concerning the incident. *See Agee*, 326 N.C. at 547, 391 S.E.2d at 174. While the facts in *Agee* involved before-the-fact interaction, the rule is not limited to either before-the-fact or after-the-fact encounters.

If the jury believed Drye and Defendant later admitted to acting "stupid" during the incident and reconciled, that evidence "forms part of the history of the event," and "serves to enhance the natural development of the facts." *Id*. Under our Courts' interpretation of Rule 404(b) as a "rule of inclusion," the evidence should have been admitted based upon its probative value and lack of prejudice. *Coffey*, 326 N.C. at 278, 389 S.E.2d at 54.

V. Conclusion

The trial court failed to allow relevant and probative evidence to be admitted for the jury's consideration and resolution. In light of this Court's unanimous holdings on Defendant's right to instructions on self-defense and the aggressor doctrine, upon remand the trial court should address and rule on: (1) whether Defendant may cross-examine Drye regarding the underlying facts of his assault with a deadly weapon with intent to inflict serious bodily injury; (2) whether Defendant may question whether Drye illegally possessed a firearm; (3) whether any conversations, deferrals, and agreements for Drye's testimony by the State: and, (4) whether Defendant should be permitted to testify about the after-the-fact encounter, wherein both parties apologized and recognized the acts were "stupid."

I fully concur with the majority's opinion on the issues it reaches and resolves. Defendant's remaining issues should be addressed and resolved as they are likely to re-occur at Defendant's new trial.

STATE v. TRIPP

[275 N.C. App. 907 (2020)]

STATE OF NORTH CAROLINA
v.
MICHAEL DEVON TRIPP, DEFENDANT

No. COA18-1286

Filed 31 December 2020

1. Search and Seizure—warrantless search of person—on property adjacent to one being searched—"occupant" of searched premises—real threat

In a trial for multiple drug charges, where an officer detained defendant while executing a warrant to search the property next door—a property that was associated with defendant, whose sale of heroin to a confidential informant the previous day resulted in the warrant being issued, but only as to the property—the trial court erred by denying defendant's motion to suppress evidence seized from his person. Defendant was not an "occupant" of the premises to be searched where there was no evidence he posed a real threat to the safe and efficient execution of the search warrant as set forth in *Michigan v. Summers*, 452 U.S. 692 (1981). Although the officer knew defendant had a criminal history, he did not know about the previous day's heroin sale, and defendant was located sixty yards away on his grandfather's property, was leaning against a rail, and did not exhibit suspicious behavior. Further, defendant's detention did not meet the standards for a *Terry* investigatory stop, and there was insufficient evidence to support admissibility of the seized evidence under the inevitable discovery doctrine.

2. Judgments—criminal—clerical errors—forms inconsistent with sentences rendered in open court

Where defendant was sentenced in open court to six offenses that were consolidated into two separate judgments by date of offense, with the sentences to run consecutively, but the trial court's written judgment and commitment forms conflicted with the sentences announced in court (because one offense from each date appeared on the other judgment form), the errors amounted to clerical errors that required correction on remand.

Judge STROUD concurring in part and dissenting in part.

Appeal by Defendant from order entered 8 June 2018 by Judge Charles H. Henry in Craven County Superior Court. Heard in the Court of Appeals 13 November 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristine M. Ricketts, for the State.

Patterson Harkavy, LLP, by Paul E. Smith, for Defendant.

BROOK, Judge.

Michael Devon Tripp ("Defendant") appeals the trial court's order denying his motion to suppress evidence seized from a search of his person as well as to correct the judgment and commitment forms entered below. On appeal, Defendant argues that the search and seizure were impermissible because he was not an "occupant" of the premises for which law enforcement officers possessed a valid search warrant. Defendant further argues that there are clerical errors on his judgment and commitment forms. For the following reasons, we reverse the order of the trial court, vacate Defendant's convictions for trafficking heroin under file number 17CRS051205 and possession with intent to sell or deliver fentanyl under file number 17CRS000467, and remand for correction of clerical errors in the judgment and commitment forms.

I. Factual and Procedural History

A. Factual Background

Around 25 April 2017, the Craven County Sheriff's Office received complaints of "bad heroin" coming from 8450 U.S. Highway 17 ("8450") in Vanceboro, North Carolina, a property associated with Defendant. After receiving this information, Investigator Jason Buck, a member of the narcotics unit, arranged a controlled buy of heroin between a confidential informant and Defendant on 25 April 2017. The exchange occurred at 8450. Based on that transaction, Investigator Buck obtained a search warrant for the residence and vehicles connected to Defendant—the warrant did not authorize a search of Defendant.

Prior to the execution of the warrant, Investigator Buck led a pre-search operation planning meeting with the officers who would be involved in the search. Lieutenant John Raynor, who oversees the narcotics unit at the Craven County Sheriff's Office and who attended the briefing, testified that at every "preplanning meeting" he makes sure that the following policy is implemented during the execution of a warrant:

> all persons on scene or in proximity to our scenes that we believe to be a threat are dealt with, which means that we will detain them briefly, pat them down for weapons, make sure they're not a threat to us and then one of the

> narcotics investigators on scene will make a determination if that person can leave or not.

He testified that those who pose "a threat" are

> [a]nyone with a prior history with us, with violent history, known to carry guns, any known drug dealers that we have past history with. By nature, generally drug dealers are considered violent and by nature a majority carry guns in one nature or another, so everybody inside of a known narcotics residence or on the scene there we deal with for our safety purposes, then deem whether or not they're suspect at that point to continue further.

Lt. Raynor also testified that no decision had been made as to whether they were going to arrest Defendant for the prior day's sale of heroin, explaining that the "[d]etermination of whether or not we charge for the buy is made once we execute the search warrant."

Around 6:00 p.m. on 26 April 2017, Investigator Buck executed the warrant, accompanied by Investigator Josh Dowdy, an officer with the Craven County Sheriff's Office, and nine other law enforcement officers. The officers arrived in four vehicles. Investigator Buck testified that the operation plan "was to clear the residence [and] detain any individuals that were there on the property[.]" Investigator Buck clarified that the "property" referred to 8450. When Investigator Buck arrived, he saw several people standing at the neighboring residence, which belonged to Defendant's grandfather, but was not able to identify who they were. During the search of 8450, officers encountered two individuals in the building along with marijuana, drug residue, and drug paraphernalia. It was not until Investigator Buck had completed the search of the residence and walked outside that he learned Defendant had been detained.

When Investigator Dowdy got out of his car, he identified Defendant —about "50, 60 yards" away—leaning against a wheelchair ramp on the front porch of his grandfather's house. Instead of searching 8450, Investigator Dowdy walked directly over to Defendant, who he testified "was the target of Investigator Buck's search warrant" and whom he believed there existed a warrant to search.

Investigator Dowdy testified that he was familiar with Defendant from prior domestic violence-related incidents: in 2011 Defendant had allegedly brandished a firearm at his wife, and in 2013 Defendant was arrested after shooting a shotgun in the air during an argument with his wife to scare her. These incidents occurred at Defendant's residence,

8420 U.S. Highway 17, not 8450. In 2012, Investigator Dowdy arrested Defendant at his grandfather's house for an assault on a female warrant.

When Investigator Dowdy arrived at Defendant's grandfather's house, he noticed for the first time that Defendant was also accompanied by his grandfather and another person. Investigator Dowdy testified that Defendant did not run away or make any furtive movements with his hands, nor did Defendant, his grandfather, or the other individual "take any action to raise any suspicion of criminal activity on their part[.]" However, Investigator Dowdy ordered Defendant to put his hands on the ramp and patted him down for weapons "[b]ecause of [his] past experiences . . . [and f]or my safety." He also testified that it was office policy to "always pat down for weapons" whenever an officer has "contact with" somebody on a search warrant "[f]or our safety, for their safety, so nobody gets hurt."

As Investigator Dowdy patted Defendant down, he saw a plastic baggie in Defendant's right pocket because they were "so baggy" and testified that he felt a hard lump in Defendant's right pocket. Based on his training and experience, Investigator Dowdy believed the plastic baggie contained narcotics and, when he removed the baggie from Defendant's pocket, he noted that it contained an off-white powdery substance. The State Crime Lab later identified the substance to be fentanyl.

B. Procedural History

Based on the above-described events, on 26 April 2017 Defendant was charged with trafficking heroin, possession with intent to sell or deliver fentanyl, manufacturing cocaine, possession with intent to sell or deliver marijuana, maintaining a dwelling to keep or sell a controlled substance, and possession with intent to use drug paraphernalia. On 3 May 2017, Defendant was charged with possession with intent to sell or deliver fentanyl and possession with intent to sell or deliver heroin—these charges were unrelated to the 26 April 2017 offenses—and receiving stolen goods.

Defendant filed a motion to suppress evidence related to the 26 April 2017 search of his person—specifically for the charges of trafficking heroin, trafficking fentanyl, manufacturing cocaine, possession with intent to sell or deliver marijuana, and possession with intent to sell or deliver fentanyl—which the trial court denied by written order on 8 June 2018. The trial court made the following findings of fact and conclusions of law:

> 1. Investigator Jason Buck, a sworn law enforcement officer with the Craven County Sheriff's Office and a

member of the Coastal Narcotics Enforcement Team, utilized a confidential informant which he found to be reliable to make a controlled purchase of heroin from the defendant, Michael Tripp, on April 25, 2017. The informant was equipped with video and audio equipment from which law enforcement could monitor the transaction. The defendant, who was known by law enforcement as a drug dealer in the Vanceboro area by reputation and criminal history, was identified by the informant and later verified by the recordings as the defendant and the seller of a quantity of heroin to the informant. The sale was made from within the defendant's residence . . . in Vanceboro, North Carolina.

2. As a result of that investigation, Deputy Buck obtained on April 26, 2017 a search warrant for that residence and several motor vehicles associated with that address from Superior Court Judge Benjamin Alford.

3. At approximately 6:00 p.m. on April 26, 2017 eleven officers with the Craven County Sheriff's Office and Coastal Narcotics Enforcement Team executed that search warrant for that residence.

4. Prior to the execution of the search warrant an operation plan meeting was held by the officers conducting the operation. The plan was to clear the residence and detain all who were present. The residence to be searched was on a dirt road contiguous to homes resided in by other members of the defendant's family. The officers utilized four unmarked vehicles to get to that location. The officers had not obtained an arrest warrant for the defendant prior to the operation.

5. Deputy Josh Dowdy, a nine year veteran of the sheriff's office and a trained member of the Coastal Narcotics Enforcement Team, participated in the execution of the search warrant. Dowdy understood that the target of the search was the defendant. He knew the defendant from at least three other inter[actions] with the defendant. In 2011 and 2013 he had been called to the defendant's residence due to domestic disturbances in which the defendant had been brandishing a firearm. In 2012 he had arrested the defendant for an assault on a female. At the time of that arrest, he was at his grandfather's house which is located

about 60 yards from the residence being searched pursuant to the April 26, 2017 search warrant.

6. The Craven County Sheriff's Office had a policy described by Lt. John Raynor that required that all people who are "on scene" or "in proximity to our scene" whom they believe to be a threat or had previously dealt with be detained and briefly patted down for weapons to make sure they are not a threat to any of the narcotics officers. The policy provided that anyone who had a prior violent history, [was] known to carry firearms, or sold narcotics were deemed to be threats.

7. When the narcotics officers arrived at [the residence] in Vanceboro, North Carolina, the defendant was outside at his grandfather's house within sixty yards of the residence to be searched and had a direct line of sight to it and the officers on scene.

8. As Deputy Dowdy was getting out of his motor vehicle he observed the defendant to his right near the front porch of the defendant's grandfather's house. Because of his past experiences with the defendant, his previous firearm possessions, and the reasons that brought law enforcement to this residence, Dowdy asked him to put his hands on the railing of a handicap ramp attached to his grandfather's house so he could "pat" him down for weapons. It was the policy and normal procedure of the Sheriff's Office for the safety of the officers and those present to pat down all individuals with whom they made contact while executing a search warrant. The defendant complied.

9. The defendant was wearing baggy jogging pants. While patting him down Dowdy could feel what he thought was money in his left pocket. Because his pants were so "baggy[,]"[ ] Dowdy could see, without manipulating the garment, a plastic baggie in his right pants pocket, and while patting him down he felt a large lump associated with that baggie. His training and experience allowed him to reasonably conclude that the plastic baggie in the defendant's pocket contained narcotics. As a result Dowdy removed the bag and its contents. Dowdy had concluded that the plastic baggie was consistent with how narcotics are carried and packaged. He was also

acutely aware of the reasons that they were searching the defendant's residence.

10. The baggie contained a white powdery substance which Dowdy concluded was a controlled substance. The defendant was handcuffed and detained and walked over to his residence. He would be later charged with multiple counts of trafficking in heroin and felonious possession of fentanyl and marijuana. The search of the defendant resulted in the seizure of 7.01 grams of schedule I heroin and the schedule II opiate, fentanyl. The search of [the] residence resulted in the seizure of drug paraphernalia and marijuana.

Based upon the foregoing the court concludes as a matter of law that:

1. That there was probable cause on April 26, 2017 for the issuance of the search warrant for [the address identified in the search warrant] on U.S. Highway 17 in Vanceboro, N.C.

2. Deputy Dowdy was unaware there existed probable cause to arrest the defendant without a warrant for the previous day's felonious sale of heroin to Deputy Jason Buck's confidential informant. N.C. Gen. Stat. §15A-401(b)(2)(a).

3. Under the circumstances then existing, Deputy Dowdy conducted a limited "frisk" or search for weapons of the defendant which was reasonable and constitutional. *State v. Long*, 37 N.C App. 662, 668-69, 246 S.E.2d 846, 851 (1978).

4. Dowdy had reasonable suspicion and was justified from the totality of the circumstances and his previous experience with the defendant in believing that the defendant, who was the subject of multiple narcotics sale investigations, was armed and could pose a danger to those law enforcement officers who were conducting the search of the defendant's residence. *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

5. Because the defendant had made a sale of heroin to an undercover informant the previous day and was the occupant of the premises searched, it was likely he was going to be detained while the search was conducted. An

officer executing a warrant directing a search of premises not open to the public may detain any person present for such time as is reasonably necessary to execute the warrant. If the warrant fails to produce the items named the officer may then search any person present at the time of the officer's entry to the extent reasonably necessary to find the property described in the warrant. N.C. Gen. Stat. §15A-256. The defendant, even if the narcotics had not been uncovered by Dowdy, would have faced such a search under that statute or pursuant to his arrest [for the] sale of heroin and for what was found in the residence. The search of the residence did not apparently result in finding any appreciable amount of heroin.

6. The bag containing heroin had been located in the defendant's baggy pants pocket which Deputy Dowdy could see into when he frisked the defendant. At that time Dowdy had legal justification to be at the place and in the position he was when he saw the baggie in plain view. Its discovery was inadvertent as it was discovered during the pat down. The baggie was immediately apparent to Dowdy to be evidence of a container for illegal narcotics and would warrant a man of reasonable caution in believing the defendant was in possession of drugs and was hiding evidence which would incriminate him. The plain view doctrine was applicable in this case and all the elements were present. *State v. Peck*, 305 N.C. 734, 743, 291 S.E. 2d 637, 642 (1982).

7. After Dowdy observed the baggie and had felt the pocket during his pat down for weapons, because of the totality of the circumstances known to him at the time, he had probable cause to seize the baggie and its contents and later place him under arrest.

On 2 July 2018, in exchange for dismissal of the remaining charges, Defendant pleaded guilty to four of the April offenses—trafficking heroin, possession with intent to sell and deliver fentanyl, maintaining a dwelling, and receiving stolen goods—and the two May offenses—possession with intent to sell or deliver fentanyl and possession with intent to sell and deliver heroin—preserving his right to appeal the denial of his motion to suppress. That same day, the trial court consolidated the two May offenses into a single active sentence of 8 to 19 months and consolidated the four April offenses into an active sentence of 70 to 90 months, to run consecutively.

After entry of the judgment, Defendant gave oral notice of appeal in the following exchange:

> [DEFENSE COUNSEL]: Thank you, Judge, and on behalf of [Defendant] on the record, I would like to announce that he's going to give notice of appeal to the Court's judgment.
>
> THE COURT: Okay. Previous order that I referred to will be entered.[1]

II. Analysis

On appeal, Defendant argues that the trial court erred in denying his motion to suppress evidence seized during the search of his person because he was not an "occupant" of the premises to be searched. Defendant further argues that the judgment and commitment forms contain clerical errors requiring remand and correction. We consider each argument in turn.

A. Motion to Suppress

[1] We first turn to whether the trial court erred in denying Defendant's motion to suppress. Defendant challenges several findings of fact and argues that Investigator Dowdy lacked the right to detain him under either *Michigan v. Summers* or *Terry v. Ohio*. The State argues that the detention was permissible pursuant to *Summers* and, even if it was impermissible, evidence seized from Defendant's person would have been admissible under the inevitable discovery doctrine.

i. Standard of Review

Our review of a trial court's denial of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "In addition, the trial court's unchallenged findings of fact are binding on appeal." *State v. Ramseur*, 226 N.C. App. 363, 366, 739 S.E.2d 599, 602 (2013). "This Court reviews conclusions of law stemming from the denial of a motion to suppress *de novo*. . . . Under a *de novo* review, the court considers the matter anew

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1. Defendant filed a petition for writ of certiorari for this Court to allow review of all the counts to which he pleaded guilty in the event we were to determine his notice of appeal was defective. We dismiss Defendant's petition as moot because his oral notice of appeal was adequate to notice appeal of all counts since the trial transcript makes clear that the notice applied to his entire guilty plea.

and freely substitutes its own judgment for that of the lower tribunal." *State v. Borders*, 236 N.C. App. 149, 157, 762 S.E.2d 490, 498-99 (2014) (citation omitted).

ii. Findings of Fact

Defendant challenges several of the trial court's findings of fact as not supported by competent evidence. We assume without deciding that each of the challenged findings is supported by competent evidence because, even if so, they cannot support Defendant's detention pursuant to either *Summers* or *Terry*.

iii. *Summers* Detention

In *Michigan v. Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 2595, 69 L. Ed. 2d 340, 351 (1981), the United States Supreme Court held "for Fourth Amendment purposes . . . a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." In *Bailey v. United States*, 568 U.S. 186, 201, 133 S. Ct. 1031, 1042, 185 L. Ed. 2d 19, 33 (2013), the Supreme Court "[l]imit[ed] the rule in *Summers* to the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant[.]" This constraint "ensures that the scope of the detention incident to a search is confined to its underlying justification. Once an occupant is beyond the immediate vicinity of the premises to be searched, the search-related law enforcement interests are diminished and the intrusiveness of the detention is more severe." *Id.*

Our Supreme Court in *State v. Wilson*, 371 N.C. 920, 924, 821 S.E.2d 811, 815 (2018) (internal marks, alterations, and citations omitted), identified three parts to the *Summers* rule: "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain (1) the occupants, (2) who are within the immediate vicinity of the premises to be searched, and (3) who are present during the execution of a search warrant[.]" "These three parts roughly correspond to the 'who,' 'where,' and 'when' of a lawful suspicionless seizure incident to the execution of a search warrant." *Id.* The *Wilson* Court focused on defining who qualifies as an "occupant" and ultimately concluded that "a person is an occupant for the purposes of the *Summers* rule if he poses a real threat to the safe and efficient execution of a search warrant." *Id.* at 925, 821 S.E.2d at 815 (citation and marks omitted).

Applying this three-part test, the Court held that a defendant was lawfully detained where he had penetrated a police perimeter when law

enforcement was in the process of actively securing a home in order to execute a search warrant. *Id.* at 921, 821 S.E.2d at 812-13. The defendant walked past one officer and attempted to pass another, claiming he had to retrieve his moped from the home. *Id.* at 925, 821 S.E.2d at 815. Officers detained and frisked him and recovered a firearm. *Id.* at 921, 821 S.E.2d at 813. Since the defendant was seized during the execution of a search warrant and he "was seized within the immediate vicinity of the premises being searched[,]" the Court held he clearly met the "when" and "where" prongs of *Summers*. *Id.* at 924-25, 821 S.E.2d at 815 (noting the "defendant was well within the lawful limits of the property containing the house being searched" and "could easily have accessed the house" had he not been stopped). As to the "who" prong, the Court held that the defendant was an occupant of the premises to be searched. *Id.* at 925-26, 821 S.E.2d at 815-16. Because "[h]e approached the house being swept, announced his intent to retrieve his moped from the premises, and appeared to be armed[,]" he posed "a real threat to the safe and efficient execution of" the search warrant. *Id.* "[S]tated another way, defendant would have *occupied* the area being searched if he had not been restrained." *Id.* at 925, 821 S.E.2d at 815.

In *State v. Thompson*, 267 N.C. App. 101, 832 S.E.2d 510 (2019), on remand from our Supreme Court in light of its decision in *Wilson*, *see State v. Thompson*, 372 N.C. 48, 822 S.E.2d 616 (2019) (per curiam), this Court further clarified who constitutes an "occupant" for purposes of the *Summers* rule. Law enforcement officers arrived at an apartment in Charlotte to execute a search warrant of a woman and encountered the defendant, who was cleaning his car in the street adjacent to the apartment. *Thompson*, 267 N.C. App. at 102, 832 S.E.2d at 511. He told officers that he did not live in the apartment, but his girlfriend did. *Id.* After searching the apartment, officers searched the defendant's car and found marijuana, drug paraphernalia, and a firearm in the trunk. *Id.* at 103, 832 S.E.2d at 511.

Concluding that there was "no question" that the defendant was detained during the execution of a search warrant and granting that it was "arguable that the circumstances [ ] satisfied the second prong—the 'where'—of the *Summers* rule[,]" this Court nonetheless concluded that the defendant was not an occupant of the searched premises. *Id.* at 108, 832 S.E.2d at 515.

> At no point did [the d]efendant attempt to approach the apartment. Nor did he exhibit nervousness or agitation, disobey or protest the officers' directives, appear to be armed, or undertake to interfere with the search. . . . Quite

> simply, there were no circumstances to indicate that [the d]efendant would pose "a real threat to the safe and efficient execution" of the officers' search.

Id. at 108-09, 832 S.E.2d at 515 (internal citations, marks, and footnotes omitted). Our Court based its decision, as our Supreme Court did in *Wilson*, on whether the defendant " 'pose[d] a *real* threat to the safe and efficient execution of the officers' search[,]' " not whether he *could* have posed a threat. *Id.* (emphasis added) (marks omitted) (quoting *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815); *see also Bailey*, 568 U.S. at 201, 133 S. Ct. at 1042 (considering the same).

Our Court also emphasized the importance of distinguishing between the first and second prongs of the *Summers* rule, noting that "an individual's presence within the immediate vicinity of a search" cannot operate categorically to pose "a threat to the search's safe and efficient execution." *Thompson*, 267 N.C. App. at 109, 832 S.E.2d at 516. In other words, focusing the occupant inquiry on a defendant's proximity to the house being searched risks conflating the "where" with the "who" inquiry outlined in *Wilson*. As our Court noted, this "would [ ] boundlessly subject to detention any grass-mowing uncle, tree-trimming cousin, or next-door godson checking his mail, merely based upon his 'connection' to the premises and hapless presence in the immediate vicinity." *Id.* at 110, 832 S.E.2d at 516.

Here, "there is no question" that the "when" prong is satisfied because officers detained Defendant during their lawful execution of a warrant. *Id.* at 108, 832 S.E.2d at 515. And we assume without deciding that "the circumstances here satisf[y] the second prong—the 'where'—of the *Summers* rule."[2] *Id.* The critical inquiry in this case, as in *Wilson*

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2. Defendant was at his grandfather's neighboring property approximately 60 yards away from the premises to be searched. The State has repeatedly claimed in its brief and at oral argument that, based on the testimony of Lt. Raynor, the 60 yards between 8450 and Defendant's grandfather's house was a "five to six second walk," putting Defendant within the "immediate vicinity" of 8450.

Olympian and 11-time world champion Usain Bolt, widely considered to be the greatest sprinter of all time and the fastest human in recorded history, ran the 40-yard dash in 4.22 seconds in 2019. *See Usain Bolt: Biography*, https://www.biography.com/athlete/usain-bolt (last visited 14 December 2020); Andrew Dawson, *Usain Bolt Ties NFL Record in 40-Yard Dash*, *Runner's World* (4 February 2019), https://www.runnersworld.com/news/a26074900/usain-bolt-40-yard-dash/. Given that the fastest man on Earth could not *sprint* 60 yards in six seconds, it stands to reason that Defendant could not *walk* this distance more quickly.

Nonetheless, as we stressed in *Thompson*, even if Defendant was in the "immediate vicinity" of the premises to be searched, that does not mean he was an "occupant" as defined by our Supreme Court in *Wilson*.

and *Thompson*, is whether Defendant posed a threat to the safe and efficient execution of the warrant. We conclude that he did not.

The trial court did not make findings sufficient to support the conclusion that Defendant posed a real threat to the execution of this search warrant. Unlike the defendant in *Wilson*, Defendant made no attempt to penetrate the police perimeter nor did he evince an intent to enter the premises or appear to be armed. The trial court further did not find that Defendant appeared nervous or agitated, made any furtive movement, or disobeyed police commands. *See Thompson*, 267 N.C. App. at 108, 832 S.E.2d at 515 (same factors also absent). By Investigator Dowdy's own admission, Defendant was "simply leaning up against the rail" and did "not take any action to raise any suspicion of criminal activity on his part[.]" In fact, his behavior was so unremarkable that none of the other 10 officers executing the warrant sought to interact with, let alone detain, Defendant until after Investigator Dowdy did so.

Though the trial court and the dissent reason that Defendant was an occupant because of his "criminal history, his history of use of guns, and his proximity to the house being searched," *Tripp*, *infra* at 931 (Stroud, J., concurring in part and dissenting in part), this reasoning transgresses controlling precedent in three related ways.

First, focusing the occupant inquiry on Defendant's "proximity to the house being searched" conflates the "where" with the "who" inquiry. In determining the defendant in *Wilson* occupied the premises subject to the search warrant, our Supreme Court did not consider "even in part [ ] either the defendant's 'connection' to the premises or his proximity thereto" despite the fact that "both factors were present[.]" *Thompson*, 267 N.C. App. at 110, 832 S.E.2d at 516 (citing *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815).

Second, as discussed below, Defendant's criminal history, standing alone, does not support a *Terry* stop, which, like a *Summers* detention, is concerned with officer safety.[3] *See State v. Rinck*, 303 N.C. 551, 559, 280 S.E.2d 912, 919 (1981) ("If upon detaining the individual, the officer's personal observations confirm that criminal activity may be afoot and suggest that the person detained may be armed, the officer may frisk him

3. This is not to say the *Terry* and *Summers* tests are the same; it is merely to show that the dissent's arguments could not even serve to clear the relatively low bar of reasonable suspicion. *See State v. Smathers*, 232 N.C. App. 120, 123, 753 S.E.2d 380, 382-83 (2014) ("Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. The standard is satisfied by some minimal level of objective justification." (citation omitted)).

as a matter of self-protection."); *see also United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013) ("A prior criminal record is not, standing alone, sufficient to create reasonable suspicion." (brackets and citation omitted)); *United States v. Sandoval*, 29 F.3d 537, 543 (10th Cir. 1994) ("If the law were otherwise, any person with any sort of criminal record—or even worse, a person with arrests but no convictions—could be subjected to a *Terry*-type investigative stop by a law enforcement officer at any time without the need for any other justification at all."); *State v. Bouknight*, 252 N.C. App. 265, 797 S.E.2d 340, 2017 N.C. App. LEXIS 150, at *6 n.6 (2017) (unpublished) ("[R]easonable suspicion cannot rest on the basis of prior criminal activity *alone*.").

All of which points to the dissent's central flaw: failing to grapple with whether Defendant, in this "particular circumstance[,] . . . posed a *real* threat to the safe and efficient execution of the search warrant." *Thompson*, 267 N.C. App. at 110, 832 S.E.2d at 516 (emphasis added) (citation and marks omitted). While it is no doubt true that Defendant could have posed a threat if he had a gun, the trial court's findings do not suggest he was armed on the evening in question, that he had ever been armed around law enforcement, or even that he was known to regularly carry firearms.[4]

Taken to its logical end, the dissent's reasoning would not only hollow out *Summers*, *Wilson*, and *Thompson* but also justify nearly any detention. Particular to this situation, the dissent seems to understand the rule from *Summers* and its progeny as follows: if law enforcement knows an individual has ever used a firearm for allegedly untoward ends, then that person is an "occupant" so long as he or she is within a firearm's range of the warrant execution. But that is not the law. Were there any support for such a capacious reading of the controlling cases, we suspect the dissent would note it. More broadly, the dissent also leans ever so slightly on the Craven County Sheriff Department's warrant execution policy (which cannot establish compliance with constitutional obligations), subtly endorsing the detention and search of "all persons . . . in proximity to our scenes[,]" "with a prior history with us[,]" or "with [a] violent history[.]" *But see Bailey*, 568 U.S. at 197, 133 S. Ct. at 1034

4. While arguing we go beyond our mandate as an appellate court by re-weighing evidence (without ever specifying how), the dissent goes further by disregarding unchallenged (and therefore) binding findings. Seeking to bolster its rickety "true threat" conclusion, the dissent suggests that Investigator Dowdy approached Defendant in part because he knew he "had made a sale of heroin in that same residence to an undercover agent the previous day." *Tripp*, *infra* at 932 (Stroud, J., concurring in part and dissenting in part). This is flatly contrary to the trial court's unchallenged finding that Investigator Dowdy was not aware "of the previous day's felonious sale of heroin to [the] confidential informant."

("A general interest in avoiding obstruction of a search . . . cannot justify detention beyond the vicinity of the premises to be searched."). But, again, *Bailey*, *Wilson*, and *Thompson* teach that whether a person poses a "threat" turns on the particular circumstances as well as the particular individual's conduct during the execution of the warrant, not whether the "grass-mowing uncle, tree-trimming cousin, or next-door godson checking his mail . . . in the immediate vicinity" got into a fistfight years ago.[5] *Thompson*, 267 N.C. App. at 110, 832 S.E.2d at 516.

Here, the particular circumstances show that Defendant did not pose a threat to the safe and efficient execution of the search warrant. Thus, Defendant's detention cannot be justified on the grounds that he was an occupant of the premises during the lawful execution of the search warrant.

iv. *Terry* Investigatory Stop[6]

Defendant next argues that his detention was not a permissible *Terry* stop.

To justify a *Terry* stop, a law enforcement officer must act upon "specific and articulable facts" giving rise to a reasonable suspicion that an individual "was, or was about to be, engaged in criminal activity and . . . was armed and presently dangerous." *State v. Butler*, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992) (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968)). And, as detailed in the above discussion of *Summers*, *Bailey*, and their progeny, a search warrant for a place associated with a person does not, in and of itself, provide reasonable suspicion to search that person.

In an unchallenged mixed finding of fact and conclusion of law, the trial court found and concluded that Investigator Dowdy, who detained Defendant, "was unaware there existed probable cause to arrest the defendant without a warrant." More particularly, Investigator Dowdy was not aware "of the previous day's felonious sale of heroin to [the]

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5. Our point is not that Defendant is the same as the grass-mowing uncle who got into a fistfight years ago; he is not. It is instead to point out the dissent's break with precedent by moving the goalposts from a "real" threat to something far more ephemeral. In so doing, the dissent sweeps up not only Defendant but also the grass-mowing uncle.

6. The State does not argue before our Court that Defendant's detention and frisk is justified by *Terry*. The *Terry* rationale for Defendant's detention and frisk is thus arguably not before us. *State v. Hardy*, 242 N.C. App. 146, 152 n.2, 774 S.E.2d 410, 415 n.2 (2015) (citing N.C. R. App. 28(a) (2015)) (treating as abandoned issue the State did not raise on appeal). But, given that the trial court's suppression order references *Terry*, we address this issue out of an abundance of caution.

confidential informant" and indeed conceded that Defendant did "not take any action to raise any suspicion of criminal activity on his part[.]" And, again, there were no findings to suggest Defendant was armed on the evening in question. Investigator Dowdy therefore had no basis for a *Terry* investigatory stop of Defendant.

v. Inevitable Discovery

Finally, the State argues that even if evidence was unconstitutionally obtained from Defendant, it would have been admissible under the inevitable discovery doctrine because probable cause existed to arrest Defendant for the prior day's sale of heroin.

Under the inevitable discovery doctrine,

> evidence which would otherwise be excluded because it was illegally seized may be admitted into evidence if the State proves by a preponderance of the evidence that the evidence would have been inevitably discovered by the law enforcement officers if it had not been found as a result of the illegal action.

State v. Pope, 333 N.C. 106, 114, 423 S.E.2d 740, 744 (1992). "The State need not prove an ongoing independent investigation; we use a flexible case-by-case approach in determining inevitability." *State v. Larkin*, 237 N.C. App. 335, 343, 764 S.E.2d 681, 687 (2014).

"Courts have previously considered a discovery of evidence as 'inevitable' where the police have sufficient identifying information about the specific item sought and where it appears that in the normal course of an investigation, the item would have been discovered even without the information that was obtained illegally." *Id.* at 345, 764 S.E.2d at 688. In *State v. Vick*, 130 N.C. App. 207, 219, 502 S.E.2d 871, 879 (1998), during the execution of the warrant, police detained the defendant and asked him, "If we were looking for drugs[,] where would we look[?]" *Id.* at 213, 502 S.E.2d at 875. The defendant replied, "[T]he refrigerator." *Id.* Despite any alleged *Miranda* violation, this Court held the discovery of the cocaine inevitable because officers had a search warrant for narcotics in defendant's home, and the cocaine was "blatantly laying [sic] in the refrigerator." *Id.* at 218, 502 S.E.2d at 878.

Again in *State v. Harris*, 157 N.C. App. 647, 654, 580 S.E.2d 63, 67 (2003), this Court held the discovery of evidence admissible despite any alleged *Miranda* violation when law enforcement asked the defendant "if he had any keys" to open a locked toolbox, the defendant gave the keys to officers, and they opened the box and found cocaine. *Id.* at 650,

580 S.E.2d at 65. Given there was "no dispute that the officers had a search warrant specifically authorizing them to search defendant's person[,]" this Court held the discovery of the keys (which were located in the defendant's front jeans pocket) was inevitable. *Id.* at 654, 580 S.E.2d at 68.

But in *State v. Wells*, 225 N.C. App. 487, 490-91, 737 S.E.2d 179, 181-82 (2013), this Court rejected an inevitable discovery argument when no evidence was introduced regarding "common practices of the [law enforcement agency] for inventorying [ ] belongings or through testimony regarding continued search efforts in [the] case, indicating that investigating officers would have located" the evidence at issue. *Id.* at 490-91, 737 S.E.2d at 181-82. Though it seemed "entirely logical that the police would search [the location where the evidence was found] and discover" it, "there [was] no evidence in the record to support this assumption." *Id.* at 490, 737 S.E.2d at 181.

Here, unlike in *Vick* and *Harris*, there was no warrant to search or arrest Defendant for the prior day's sale of heroin. Nor were there findings or evidence consistent with concluding that the narcotics "would have been discovered even without the information that was obtained illegally." *Larkin*, 237 N.C. App. at 345, 764 S.E.2d at 688. Lt. Raynor testified that law enforcement had not decided whether they were going to charge or arrest Defendant for the sale on the day that they executed the warrant, explaining that the decision was going to be made *after* the execution of the warrant. Though Investigator Buck arguably had probable cause to arrest Defendant given his knowledge of Defendant's earlier sale of heroin to a confidential informant, *see* N.C. Gen. Stat. § 15A-401(b)(2)(a) (2019), the trial court found and concluded that Investigator Dowdy detained, searched, and arrested Defendant without that knowledge. Accordingly, the State has not met its burden of showing that it was "more likely than not" that an arrest based on the 25 April 2017 sale of heroin—and a subsequent search of his person—was inevitable. *See Vick*, 130 N.C. App. at 218, 502 S.E.2d at 878; *see also Larkin*, 237 N.C. App. at 346, 764 S.E.2d at 689 (evidence would have been inevitably discovered where search warrant contained a description of the item sought and testimony established that the officer "would have searched for the [item], no matter the location"). Based on Lt. Raynor's testimony, it would be mere speculation to hold otherwise.

B. Clerical Errors on Judgment and Commitment Forms

[2] Lastly, Defendant argues, and the State concedes, that the judgment and commitment forms contain clerical errors.

"When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' " *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702 (2009) (citation and marks omitted). "A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *Id.* (marks, alterations, and citations omitted).

Here, the trial court sentenced Defendant for six offenses: four related to the 26 April 2017 incident that were consolidated into a single 70- to 93-month sentence, and the remaining two related to the 3 May 2017 incident that were consolidated into a separate judgment for 8 to 19 months. The sentences were to run consecutively. However, the trial court entered two judgment and commitment forms that were inconsistent with these oral rulings. The first form includes only three of the four 26 April 2017 convictions and includes one of the 3 May 2017 offenses, possession with intent to sell and deliver fentanyl, as the fourth count. The second form consolidates the 26 April 2017 conviction for receiving stolen goods with the 3 May 2017 charge for possession with intent to sell and deliver heroin.

The forms entered by the trial court therefore conflict with the sentence rendered in open court, and since this is merely a clerical error, we remand to the trial court for entry of a corrected judgment to match that which was announced in court. *See State v. Allen*, 249 N.C. App. 376, 379, 790 S.E.2d 588, 591 (2016) ("If the alleged sentencing error is only clerical in nature, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." (marks and citation omitted)).

III. Conclusion

For the reasons stated above, we hold that the trial court erred in denying Defendant's motion to suppress and vacate Defendant's convictions for possession with intent to sell or deliver fentanyl and trafficking heroin. We further hold that the judgment and commitment forms contain clerical errors. On remand, the trial court shall resentence Defendant and correct the judgment and commitment forms consistent with this opinion.

VACATED IN PART; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Judge MURPHY concurs.

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

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

I concur with the majority's opinion as to remand for correction of clerical errors in the judgments. But I must respectfully dissent from the remainder of the majority's opinion reversing the trial court's order denying Defendant's motion to suppress and vacating his convictions for trafficking heroin under file number 17CRS051205 and possession with intent to sell or deliver fentanyl under file number 17CRS000467. I would affirm the trial court's order on the motion to suppress because the trial court's findings of fact are supported by the evidence and those findings demonstrate that Defendant "posed a real threat to the safe and efficient completion of the search." *State v. Wilson*, 371 N.C. 920, 921, 821 S.E.2d 811, 813 (2018) (citing *Bailey v. United States*, 568 U.S. 186, 200-01, 133 S.Ct. 1031, 1041-42, 185 L. Ed. 2d 19 (2013)). And thus, Defendant is included in the definition of an "occupant" based on the totality of the circumstances under *State v. Wilson*, 371 N.C. at 924, 821 S.E.2d at 815.

I. Standard of Review

The majority opinion notes that "Defendant challenges several of the trial court's findings of fact as not supported by competent evidence," but "assum[es] without deciding that each of the challenged findings is supported by competent evidence because, even if so, they cannot support Defendant's detention pursuant to either *Summers* or *Terry*."

> "Appellate courts are bound by the trial court's findings if there is *some* evidence to support them, and may not substitute their own judgment for that of the trial court even when there is evidence which could sustain findings to the contrary." "[A]n appellate court accords great deference to the trial court in this respect [.]"

State v. Ingram, 242 N.C. App. 173, 180, 774 S.E.2d 433, 439 (2015) (alterations in original) (citations omitted).

If the trial court's findings of fact are supported by the evidence or unchallenged by the Defendant, this Court may then determine *de novo* if those findings of fact support the conclusions of law:

> When reviewing a trial court's ruling on a motion for appropriate relief, the appellate court must "determine

> whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." "If no exceptions are taken to findings of fact [made in a ruling on a motion for appropriate relief], 'such findings are presumed to be supported by competent evidence and are binding on appeal.' " In such a case, the reviewing court considers only "whether the conclusions of law are supported by the findings, a question of law fully reviewable on appeal."

State v. Mbacke, 365 N.C. 403, 406-07, 721 S.E.2d 218, 220 (2012) (alteration in original) (citations omitted).

The majority opinion recites the correct standard of review, citing to *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982), but it did not apply this standard. Instead, the majority essentially considered all of the issues *de novo*. Using the proper standard of review, I would affirm the trial court's order.

II. Findings of Fact

The trial court made detailed findings of fact and Defendant raised several arguments as to the findings. Since the majority opinion assumes without deciding that the findings of fact are supported by the evidence, it does not address Defendant's arguments regarding the findings. Although the majority opinion states that it assumed the trial court's findings of fact are supported by the record, its analysis reweighs and reconsiders the evidence and tacitly rejects some of the trial court's findings. Most relevant to the issues on appeal is its determination that "[t]he trial court did not make any findings consistent with, nor does the record reveal, that Defendant posed a real threat to the execution of this search warrant." The trial court did make findings addressing the real threat to the execution of the search warrant. Findings 4 through 8 address the reasons Deputy Dowdy determined Defendant posed a threat to the execution of the warrant. The majority takes a different view of the evidence than the trial court, but this Court's role is not to re-evaluate the evidence; we are only to determine if the findings of fact are supported by the evidence and if those findings support the conclusions of law. *See State v. Mbacke*, 365 N.C. at 406-07, 721 S.E.2d at 220.

Upon detailed review of the Defendant's arguments regarding the findings of fact, I would find that all are supported by competent evidence, except for a portion of Finding No. 5. I will therefore address that finding. I will also address Findings No. 7 and 8 as the majority's opinion

interprets the evidence regarding the proximity of the two houses differently than the trial court.

A. Finding of Fact 5

> 5. Deputy Josh Dowdy, a nine year veteran of the sheriff's office and a trained member of the Coastal Narcotics Enforcement Team, participated in the execution of the search warrant. Dowdy understood that the target of the search was the defendant. He knew the defendant from at least three other interventions with the defendant. In 2011 and 2013 he had been called to the defendant's residence due to domestic disturbances in which the defendant had been brandishing a firearm. In 2012 he had arrested the defendant for an assault on a female. At the time of that arrest, he was at his grandfather's house which is located about 60 yards from the residence being searched pursuant to the April 26, 2017 search warrant.

Defendant challenges whether "Deputy Dowdy was 'a trained member of the Coastal Narcotics Enforcement Team[.]' " Deputy Dowdy testified that he is an investigator with the Craven County Sheriff's Office. Finding of fact 5 is not based on competent evidence to the extent it states Deputy Dowdy was a "member" of the Narcotics Enforcement Team, but Defendant does not challenge the remainder of this finding.

B. Finding of Fact 7

Defendant challenges whether he "had a direct line of sight to [the building to be searched] and the officers on scene." (Alteration in original.) Defendant argues there is no evidence to support this finding, and "photographs introduced into evidence instead show that there was a large amount of foliage between the two buildings."

Defendant's brief includes a photograph labeled "Def. Trial Ex. 1." The photograph shows the house to be searched, Defendant's grandfather's house, and some plants, perhaps bushes or small trees, in the area between the buildings. The photograph shows a view from the front of the houses, far enough away to show both of them. Defendant argues the bushes between the houses would have blocked the view from one to the other. But Defendant's argument presents an issue of the credibility of Deputy Dowdy and the weight of the evidence. Deputy Dowdy agreed that Defendant's Exhibit 1 depicted the houses where the search occurred, but he was not asked any other questions about his exact position, Defendant's position, where he was when he saw defendant,

or the lines of sight between various locations. From the angle in the photograph, it is impossible to see if there are gaps within the planted area, even assuming the leaves were the same on the date of the photograph as on the date of the search. The photograph does not necessarily refute Deputy Dowdy's testimony, and even if it did, this Court generally defers to the trial court's determination on conflicts in the evidence when reviewing denial of a motion to suppress. *See State v. Malone*, 373 N.C. 134, 145, 833 S.E.2d 779, 786 (2019) ("A trial court has the benefit of being able to assess the credibility of witnesses, weigh and resolve any conflicts in the evidence, and find the facts, all of which are owed great deference by this Court." (citing *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619-20 (1982))). The presence of bushes or trees between the buildings does not refute Deputy Dowdy's testimony that he could see Defendant standing on the wheelchair ramp at his grandfather's house. Investigator Buck also testified that he observed several people at Defendant's grandfather's house before entering the building to be searched. In addition, Investigator Buck later observed Deputy Dowdy walking toward the property to be searched from Defendant's grandfather's house. The trial court's finding regarding Defendant's line of sight to the residence and the officers on scene is supported by competent evidence.

C. Finding of Fact 8

"Defendant challenges [Finding of Fact 8] to the extent it is inconsistent with Deputy Dowdy's concession that he believed he was searching Mr. Tripp pursuant to the search warrant." Defendant does not challenge this finding as unsupported by competent evidence, but rather argues it is not consistent with Deputy Dowdy's testimony. Finding of Fact 8 states:

> As Deputy Dowdy was getting out of his motor vehicle he observed the defendant to his right near the front porch of the defendant's grandfather's house. Because of his past experiences with the defendant, his previous firearm possessions, and the reasons that brought law enforcement to this residence, Dowdy asked him to put his hands on the railing of a handicap ramp attached to his grandfather's house so he could "pat" him down for weapons. It was the policy and normal procedure of the Sheriff's Office for the safety of the officers and those present to pat down all individuals with whom they made contact while executing a search warrant. The defendant complied.

"The trial court's findings of fact on a motion to suppress 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012) (quoting *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994)). Deputy Dowdy acknowledged he thought Defendant was a subject of the search warrant. However, based upon Deputy Dowdy's testimony and the trial court's findings of fact, he searched Defendant to secure the safety of the scene, due to his prior encounters with Defendant, and his knowledge of Defendant's criminal history. This finding is supported by competent evidence.

III. Conclusions of Law

Since all of the trial court's findings of fact are supported by the evidence except for the one minimal challenged portion of Finding of Fact 5, I will address Defendant's arguments that the trial court's conclusions of law are not supported by the findings of fact.

A. Conclusion of Law 5

Defendant argues he was not an occupant of the "premises searched," and "[t]o the extent this is a finding of fact, defendant challenges it as unsupported by the record."

This Court does "not base our review of findings of fact and conclusions of law on the label in the order, but rather, on the substance of the finding or conclusion." *State v. Johnson*, 246 N.C. App. 677, 683, 783 S.E.2d 753, 758 (2016). To the extent Defendant challenges that he was not an "occupant" of the premises searched, the trial court's findings address the fact that the property was his residence, at least part of the time, as he also spent time at another residence in a trailer park. But in the context of a search warrant, the term "occupant" has a different meaning than someone who lives in a particular residence.

> Our Supreme Court in *Wilson* identified three prongs to the rule: "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain (1) the occupants, (2) who are within the immediate vicinity of the premises to be searched, and (3) who are present during the execution of a search warrant." "These three parts roughly correspond to the 'who,' 'where,' and 'when' of a lawful suspicionless seizure incident to the execution of a search warrant."

State v. Thompson, 267 N.C. App. 101, 106, 832 S.E.2d 510, 513–14 (2019) (citation omitted) (quoting *State v. Wilson*, 371 N.C. 920, 924, 821 S.E.2d

811, 815 (2018)). "The Court ultimately concluded that a person is an 'occupant' for purposes of the rule 'if he poses a real threat to the safe and efficient execution of a search warrant.' " *Id.* at 107, 832 S.E.2d at 514. This determination is a conclusion of law. *See id.*

At trial, Lt. Raynor testified about the policy:

> Q. And can you tell the Court what that [policy] is?
>
> A. My policy-- execution of search warrants, all persons on scene or in proximity to our scenes that we believe to be a threat are dealt with, which means that we will detain them briefly, pat them down for weapons, make sure they're not a threat to us and then one of the narcotics investigators on scene will make a determination if that person can leave or not. If they're gonna stay due to the fact they're in the residence where narcotics are found or if at that point when they're no longer deemed a threat to us, they can be released from the scene and can go.
>
> Q. And what types of things do you consider as far as whether someone who'd be deemed a threat to you when you're executing a search warrant?
>
> A. Anyone with prior history with us, with violent history, known to carry guns, any known drug dealers that we have past history with. By nature, generally drug dealers are considered violent and by nature a majority carry guns in one nature or another, so everybody inside of a known narcotics residence or on the scene there we deal with for our safety purposes, then deem whether or not they're suspect at that point to continue further.

Certainly, the law enforcement policy alone does not eliminate any constitutional objections to the application of the policy. The fact that a person has used a firearm in the past, taken in isolation, would not make a person an "occupant" subject to a detention or search. In this case, many factors relevant to the potential threat to the officers executing the warrant were present and noted in the trial court's findings. And an officer's violation of the policies of his law enforcement agency could be a factor weighing in favor of a defendant's challenge to a search. But in this case, Deputy Dowdy's frisk of Defendant fell within the requirements of the policy. Even though Defendant was approximately sixty yards away from the house being searched, there were eleven officers conducting the search, and Deputy Dowdy saw Defendant on his grandfather's porch after parking his vehicle in front the residence being

searched. In addition, Defendant was clearly close enough to the search and the officers to pose an immediate threat if he had a gun. Based upon Defendant's criminal history, his history of use of guns, and his proximity to the house being searched, Defendant was an "occupant" because "he pose[d] a real threat to the safe and efficient execution of a search warrant." *Id.* at 107, 832 S.E.2d at 514.

The majority opinion focuses on a few facts—such as how far a person could possibly run within five or six seconds—in determining that Defendant did not pose a "real threat to the safe and efficient execution" of the search warrant. I agree Defendant was not capable of walking, or running, sixty yards within five or six seconds. But the typical bullet from any type of handgun or rifle travels this distance in a fraction of a second. If Defendant had a gun, the law enforcement officers executing the warrant could have been in peril; Defendant would not have to run faster than Usain Bolt to endanger their lives. And Deputy Dowdy's concern was *not* that Defendant would run to the house being searched; his concern was the possibility Defendant may have a gun, based upon his extensive past experience with Defendant. *See Michigan v. Summers*, 452 U.S. 692, 702-03, 101 S. Ct. 2587, 2594 (1981) ("Less obvious, but sometimes of greater importance, is the interest in minimizing the risk of harm to the officers. . . . [T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.").

Deputy Dowdy testified he had responded to three prior calls involving Defendant. In 2011, he responded to a call from Defendant's mother, who reported a domestic dispute where Defendant was "waving a firearm around." The officers did not find the firearm where Defendant's mother had reported, but Defendant then told the officers where it was, and they found it "under the pillow where a baby was also on the bed" and "seized it for safekeeping." In 2012, Deputy Dowdy "arrested [Defendant] at his grandfather's house for an assault on a female warrant." In 2013, Deputy Dowdy responded to a report that Defendant was "walking down the road with a shotgun." This report was from the "same address with same two parties," at the residence "down the path from 8420." When the officers arrived, they walked "down the path towards where [Defendant] was going to, which was his grandfather's house." They ultimately found the gun at "[Defendant's] residence back at 8420." Defendant told Deputy Dowdy that he "shot a shotgun in the air to scare her," after an altercation.

I agree with the majority that " 'an individual's presence within the immediate vicinity of a search' cannot operate categorically to pose 'a threat to the search's safe and efficient execution.' " But in this situation, the majority holds that law enforcement officers should have assumed Defendant posed no threat to their safety, even though his own residence was being searched, a day after he had made a sale of heroin in that same residence to an undercover agent the previous day,[1] and even though they knew he had previously possessed guns and fired guns in domestic disputes. Defendant was simply not comparable to "any grass-mowing uncle, tree-trimming cousin, or next-door godson checking his mail" who was searched "merely based upon his 'connection' to the premises and hapless presence in the immediate vicinity." *Thompson*, 267 N.C. App. at 110, 832 S.E.2d at 516. Neither *Summers* nor *Wilson* requires the law enforcement officers to wait until a person near the scene of a search attempts to enter the residence or displays a weapon before they are considered a "real threat to the safe and efficient execution of a search warrant." *See id.* at 108-10, 832 S.E.2d at 515-16.

B. Conclusion of Law 6

Defendant argues, "[t]o the extent this is a finding of fact, it is unsupported by the record to the extent it implies Dowdy believed the baggie contained narcotics based solely on his initial visual observation, for the reasons stated above." As noted above, the majority has taken all of the findings of fact as supported by the record, and I would conclude the challenged portion of this mixed finding of fact and conclusion of law is supported by competent evidence.

IV. Detention

Defendant does not challenge a specific conclusion of law on this issue but argues his detention by Deputy Dowdy was unlawful:

> Deputy Dowdy's decision to detain Mr. Tripp violated the Fourth Amendment and the North Carolina Constitution. It is unclear whether the trial court considered Mr. Tripp's detention an investigatory stop under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), or a detention under *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587 (1981). Regardless, Dowdy was not permitted to detain Mr. Tripp under either line of cases.

---

1. The trial court found that Deputy Dowdy chose to approach Defendant in part due to "the reasons that brought law enforcement to this residence[.]"

I review this conclusion of law *de novo*, but this review must be based upon the trial court's findings of fact. *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

In *Michigan v. Summers*, the United States Supreme Court concluded "for Fourth Amendment purposes, we hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705, 101 S. Ct. at 2595 (footnotes omitted). The United States Supreme Court further defined the spatial constraints of a detention subject to a search warrant in *Bailey v. United States*:

> A spatial constraint defined by the immediate vicinity of the premises to be searched is therefore required for detentions incident to the execution of a search warrant. The police action permitted here—the search of a residence—has a spatial dimension, and so a spatial or geographical boundary can be used to determine the area within which both the search and detention incident to that search may occur. Limiting the rule in *Summers* to the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant ensures that the scope of the detention incident to a search is confined to its underlying justification. Once an occupant is beyond the immediate vicinity of the premises to be searched, the search-related law enforcement interests are diminished and the intrusiveness of the detention is more severe.

568 U.S. 186, 201, 185 L. Ed. 2d 19 (2013).

> Our Supreme Court in *Wilson* identified three prongs to the rule: "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain (1) the occupants, (2) who are within the immediate vicinity of the premises to be searched, and (3) who are present during the execution of a search warrant." "These three parts roughly correspond to the 'who,' 'where,' and 'when' of a lawful suspicionless seizure incident to the execution of a search warrant."
>
> Our Supreme Court in *Wilson* applied the *Summers* rule and rejected the defendant's challenge to the trial court's denial of his motion to suppress. In that

case, the defendant had arrived on the scene while the Winston-Salem Police Department was in the process of actively securing a home in order to execute a search warrant. The defendant penetrated the perimeter securing the scene, walked past an officer, and announced that he was going to retrieve his moped. After disobeying the officer's command to stop, the defendant proceeded down the driveway toward the home, at which point officers detained and frisked him. Officers recovered a firearm, and the defendant was charged with possession of a firearm by a felon.

In determining whether the defendant had been lawfully seized under the *Summers* rule, our Supreme Court noted that the application of the second and third prongs was "straightforward," and thus focused its inquiry on the first prong, i.e., whether the defendant's brief detention was justified on the ground that he was an "occupant" of the premises during the execution of a search warrant.

The United States Supreme Court adopted the *Summers* rule based in part upon the rationale that "[i]f the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search [her] home." Our Supreme Court noted, however, that beyond enumerating the governmental interests that combine to justify a *Summers* detention, the United States Supreme Court had yet to "directly resolve[ ] the issue of who qualifies as an 'occupant' for the purposes of the . . . rule."

In attempting to answer this question, the *Wilson* Court examined the various rationales underlying the *Summers* rule. The Court ultimately concluded that a person is an "occupant" for purposes of the rule "if he poses a real threat to the safe and efficient execution of a search warrant." Thus, under this formulation of the rule, our Supreme Court noted that although a defendant may not be "an occupant of the premises being searched in the ordinary sense of the word," the defendant's "own actions" may nevertheless "cause[ ] him to satisfy the first part, the 'who,' " of a lawful *Summers* detention.

> Applying this definition, although the defendant was not inside the premises when the officers arrived to execute the search warrant, our Supreme Court concluded that the defendant's own actions had nevertheless rendered him an "occupant," thereby subjecting him to a suspicionless seizure incident to the lawful execution of the search warrant.

State v. Thompson, 267 N.C. App. at 106-07, 832 S.E.2d at 513-14 (alterations in original) (citations omitted).

When officers arrived at Defendant's property to execute the search warrant, Defendant was watching from approximately sixty yards away at his grandfather's house. He was close enough to be "within the immediate vicinity of the premises to be searched." *Id.* at 106, 832 S.E.2d at 513. Based on the specific facts of this case, I would hold Defendant was within the area that "poses a real threat to the safe and efficient execution of a search warrant." *Id.* at 107, 832 S.E.2d at 514. Accordingly, Defendant was lawfully detained by Deputy Dowdy.

V. Frisk

Defendant argues that [e]ven if Deputy Dowdy's seizure of Mr. Tripp was justified, his frisk was not." "Before Dowdy could frisk Mr. Tripp, he was required to have some specific, articulable facts suggesting Mr. Tripp was armed and presently dangerous. Because Dowdy knew of no such facts, all evidence discovered through the frisk must be suppressed even if Mr. Tripp's detention were lawful."

> In *Terry v. Ohio*, the Supreme Court determined that a brief stop and frisk did not violate a defendant's Fourth Amendment rights when "a reasonably prudent man would have been warranted in believing [the defendant] was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior." In other words, an officer may constitutionally conduct what has come to be called a *Terry* stop if that officer can "reasonably . . . conclude in light of his experience that criminal activity may be afoot." "The reasonable suspicion standard is a 'less demanding standard than probable cause' and 'a considerably less [demanding standard] than preponderance of the evidence.' " To meet this standard, an officer "must be able to point to specific and articulable facts" and to "rational inferences from those facts" justifying the search or seizure at issue. "To determine whether

> reasonable suspicion exists, courts must look at 'the totality of the circumstances' as 'viewed from the standpoint of an objectively reasonable police officer.' "

State v. Wilson, 371 N.C. 920, 926, 821 S.E.2d 811, 812 (alterations in original) (citations omitted).

Here, Deputy Dowdy testified about three prior interactions with Defendant, and the trial court made findings noting these interactions. On one of these occasions, Defendant told Deputy Dowdy that he fired a shotgun in the air to scare his partner, and on a separate occasion officers retrieved a firearm from Defendant's residence for safekeeping, and the trial court's Finding of Fact 5 references these interactions:

> He knew the defendant from at least three other interventions with the defendant. In 2011 and 2013 he had been called to the defendant's residence due to domestic disturbances in which the defendant had been brandishing a firearm. In 2012 he had arrested the defendant for an assault on a female.

The trial court found Deputy Dowdy's past experiences in addition to his safety and the sheriff's office policy to be relevant to his decision to frisk Defendant:

> 8. As Deputy Dowdy was getting out of his motor vehicle he observed the defendant to his right near the front porch of the defendant's grandfather's house. Because of his past experiences with the defendant, his previous firearm possessions, and the reasons that brought law enforcement to this residence, Dowdy asked him to put his hands on the railing of a handicap ramp attached to his grandfather's house so he could "pat" him down for weapons. It was the policy and normal procedure of the Sheriff's Office for the safety of the officers and those present to pat down all individuals with whom they made contact while executing a search warrant. The defendant complied.

Here, the sheriff's office was conducting a search at a location where the previous day, Defendant had sold drugs in a controlled buy at the residence to be searched. Deputy Dowdy was aware of Defendant's reputation in the community as a drug dealer, and he had personal experience with calls involving domestic violence and firearms in some of those instances. Defendant was close enough to the officers conducting the search to pose a threat to them, particularly if he had a gun. Based

on the totality of the circumstances, I would conclude that "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry v. Ohio*, 392 U.S. 1, 27, 20 L. Ed. 2d 889 (1968).

VI. Plain View Doctrine

Defendant makes two arguments in support of his position that, "the seizure of narcotics from [Defendant's] pocket was not justified by the 'plain view' doctrine." "First, Dowdy did not see or feel the bag "from a place where he has legal right to be[.]" (Alteration in original.) And second, "even if Dowdy had been allowed to enter the neighboring yard and seize [Defendant], Dowdy never claimed that upon seeing the bag, it was 'immediately apparent' it contained narcotics. Instead, he testified he saw the bag, and that while patting [Defendant] down, he felt an associated lump that made him believe the bag contained narcotics."

"Under the plain view doctrine, a warrantless seizure is lawful if (1) the officer views the evidence from a place where he has legal right to be, (2) it is immediately apparent that the items observed constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause, and (3) the officer has a lawful right of access to the evidence itself." *State v. Alexander*, 233 N.C. App. 50, 55, 755 S.E.2d 82, 87 (2014) (citing *State v. Nance*, 149 N.C. App. 734, 740, 562 S.E.2d 557, 561-62 (2002)).

Here the trial court found:

> 9. The defendant was wearing baggy jogging pants. While patting him down Dowdy could feel what he thought was money in his left pocket. Because his pants were so "baggy", Dowdy could see, without manipulating the garment, a plastic baggie in his right pants pocket, and while patting him down he felt a large lump associated with that baggie. His training and experience allowed him to reasonably conclude that the plastic baggie in the defendant's pocket contained narcotics. As a result Dowdy removed the bag and its contents. Dowdy had concluded that the plastic baggie was consistent with how narcotics are carried and packaged. He was also acutely aware of the reasons that they were searching the defendant's residence.

As to Defendant's first argument, because I would hold that Defendant was within the area that "poses a real threat to the safe and efficient execution of a search warrant," *State v. Thompson*, 267

N.C. App. at 107, 832 S.E.2d at 514, I would conclude Deputy Dowdy was in a place he had the legal right to be. Defendant's second argument is that because Deputy Dowdy saw the bag and then felt it before determining it to be consistent with narcotics, it was not "immediately apparent" as narcotics. I disagree and would conclude that even though Deputy Dowdy did not himself use the words "immediately apparent," his actions and testimony make it clear that this is a situation where it was "immediately apparent that the items observed constitute evidence of a crime, [or] are contraband . . . ." *State v. Alexander*, 233 N.C. App. at 55, 755 S.E.2d at 87. Deputy Dowdy's warrantless seizure of the drugs in Defendant's pocket was subject to the plain view doctrine. *See Minnesota v. Dickerson*, 508 U.S. 366, 375, 124 L. Ed. 2d 334, 346 (1993) ("If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons[.]")

VII. Additional Arguments

Because I would hold the trial court did not err by denying Defendant's motion to suppress, I need not address Defendant's argument regarding inevitable discovery.

VIII. Conclusion

For the foregoing reasons, I would hold the trial court did not err in denying Defendant's motion to suppress. However, there are clerical errors on Defendant's judgment and commitment forms, and I concur in the majority opinion as to remand for correction of the clerical errors.

TOWNES v. PORTFOLIO RECOVERY ASSOCS., LLC

[275 N.C. App. 939 (2020)]

PIA TOWNES, PLAINTIFF
v.
PORTFOLIO RECOVERY ASSOCIATES, LLC, DEFENDANT

No. COA20-78

Filed 31 December 2020

1. Creditors and Debtors—debt collection—Consumer Economic Protection Act—itemization requirements—charges and fees

In an action to recover penalties under the Consumer Economic Protection Act of 2009 (Act) filed after defendant debt buyer obtained a default judgment in its suit to collect on plaintiff's credit card debt and plaintiff successfully moved to have the default judgment set aside, the Court of Appeals determined that defendant violated the Act by failing to submit a proper itemized accounting pursuant to the Act's provisions. Defendant was required to submit an itemization of the charge-off balance that separately identified both the total creditor-assessed charges and total creditor-assessed fees that contributed to the charge-off balance pre-suit and at default judgment.

2. Creditors and Debtors—debt collection—Consumer Economic Protection Act—heightened pleading requirements—chain of ownership

In a debt collection matter under the Consumer Economic Protection Act of 2009 (Act) in which defendant debt buyer obtained a default judgment in its suit to collect on plaintiff's credit card debt, plaintiff successfully moved to have the default judgment set aside, and then plaintiff sued to recover penalties under the Act, summary judgment was improperly granted to defendant on plaintiff's claim that defendant failed to comply with the Act's heightened pleading requirements in N.C.G.S. § 58-70-150. Defendant's documentation accompanying its complaint to collect the debt did not include a full chain of ownership of plaintiff's debt.

3. Creditors and Debtors—standing—injury in fact—violation of consumer protection law

Plaintiff had standing to seek penalties under the Consumer Economic Protection Act of 2009 (Act) for violations of the Act committed by the debt buyer of her credit card debt where the debt buyer's unfair practices, against which the Act was designed to protect and for which the Act provided a recovery mechanism, resulted in plaintiff suffering an injury in fact.

Appeal by Plaintiff from an order entered 16 August 2019 and judgment entered 7 October 2019 by Judge Robert C. Ervin in Superior Court, Mecklenburg County. Appeal and cross-appeal by Defendant from same and an additional order entered 7 October 2019 by the same judge in the same court. Heard in the Court of Appeals 22 September 2020.

J. Jerome Hartzell and North Carolina Justice Center, by Jason A. Pikler, Carlene McNulty, and Emily P. Turner, for Plaintiff-Appellant/Cross-Appellee.

Ellis & Winters LLP, by Jon Berkelhammer, Joseph D. Hammond, and Michelle A. Liguori, for Defendant-Appellee/Cross-Appellant.

Center for Responsible Lending, by William R. Corbett, and Legal Aid of North Carolina, Inc., by Celia Pistolis, amici curiae.

Smith Debnam Narron Drake Saintsing & Myers, LLP, by Caren D. Enloe, for amicus curiae North Carolina Creditors Bar Association.

McGEE, Chief Judge.

Pia Townes ("Plaintiff") appeals and Portfolio Recovery Associates, LLC, ("PRA") cross-appeals from a partial summary judgment order holding PRA liable for two violations of North Carolina's Consumer Economic Protection Act of 2009, 2009 N.C. Sess. Laws 1603, 1603, ch. 573, § 1 *et seq*. (the "Act"), and dismissing Plaintiff's remaining claims under the same. Both parties appeal the trial court's final judgment awarding Plaintiff $500 for each of the two violations, and PRA appeals another order denying its motion to dismiss all of Plaintiff's claims for lack of standing. We affirm in part and reverse in part the partial summary judgment order and vacate in part the final judgment. We also affirm the order denying PRA's motion to dismiss.

I. FACTUAL AND PROCEDURAL HISTORY

A. Statutory Background

Resolution of the appeals in this case requires examination and interpretation of the Act's numerous statutory requirements imposed on debt buyers who seek to collect debts through litigation and the subsequent entry of default judgments. Given the specific and specialized nature of the statutes at issue, a brief overview of the pertinent provisions of the Act is beneficial.

The Act was passed in 2009 in a period of recession and amended previously existing consumer protection statutes to impose additional debt collection requirements on debt buyers. 2009 N.C. Sess. Laws at 1604-09, ch. 573, §§ 4.(a)-9. These amendments included an expansion of what constitutes an unfair practice in debt collection, *id.* at 1604-05, ch. 573, § 5, and required debt buyers, prior to "bringing suit . . . or otherwise attempting to collect on the debt[,]" to possess "(i) valid documentation that the debt buyer is the owner of the specific debt instrument or account at issue and (ii) reasonable verification of the amount of the debt allegedly owed by the debtor." N.C. Gen. Stat. § 58-70-115(5) (2019). "Reasonable verification[,]" as statutorily defined, "shall include . . . an itemized accounting of the amount claimed to be owed, including all fees and charges." *Id.* The amendments also newly required a debt buyer to "giv[e] the debtor written notice of the intent to file a legal action at least 30 days in advance of filing[,]" which also "shall include . . . an itemized accounting of all amounts claimed to be owed." 2009 N.C. Sess. Laws at 1604-05, ch. 573, § 5; N.C. Gen. Stat. § 58-70-115(6) (2019).

In addition to these prerequisites to collection by suit, the Act imposed new protections in the form of heightened pleading standards. 2009 N.C. Sess. Laws at 1608, ch. 573, § 8. These included a requirement that debt buyers enclose with their complaint:

> A copy of the assignment or other writing establishing that the plaintiff is the owner of the debt. If the debt has been assigned more than once, then each assignment or other writing evidencing transfer of ownership must be attached to establish an unbroken chain of ownership. Each assignment or other writing evidencing transfer of ownership must contain the original account number of the debt purchased and must clearly show the debtor's name associated with that account number.

N.C. Gen. Stat. § 58-70-150(2) (2019). In seeking a default judgment on such a complaint, the Act mandates debt buyers "file evidence with the court to establish the amount and nature of the debt." N.C. Gen. Stat. § 58-70-155(a) (2019). It then clarifies that:

> The only evidence sufficient to establish the amount and nature of the debt shall be properly authenticated business records that satisfy the requirements of Rule 803(6) of the North Carolina Rules of Evidence. The authenticated business records shall include at least all of the following items:

. . . .

(4) An itemization of charges and fees claimed to be owed.

(5) The original charge-off balance, or, if the balance has not been charged off, an explanation of how the balance was calculated.

(6) An itemization of post charge-off additions, where applicable.

. . . .

N.C. Gen. Stat. § 58-70-155(b) (2019).

As for enforcement of the above provisions, the Act makes debt buyers civilly liable to debtors for both the actual damages incurred and "a penalty in such amount as the court may allow, which shall not be less than five hundred dollars ($500.00) for each violation nor greater than four thousand dollars ($4,000) for each violation." N.C. Gen. Stat. § 58-70-130(b) (2019). The Act establishes such violations as "unfair or deceptive acts or practices," but prohibits trebling of the civil penalty. N.C. Gen. Stat. § 58-70-130(c) (2019).

B. Facts in This Appeal

Plaintiff opened a credit card account with HSBC Bank Nevada, N.A./GM, ("HSBC Nevada") in 2006. Six years later, HSBC Holdings PLC ("HSBC"), through its wholly-owned subsidiaries and affiliates, sold its credit card business to Capital One Financial Corporation ("Capital One"). Capital One continued to use HSBC's logo and name by permission in servicing these credit card accounts.

Plaintiff stopped paying her credit card debt in June, 2012; in six months, Capital One charged-off her account. PRA later purchased a number of accounts from Capital One, N.A. and Capital One Bank (USA), N.A. in 2013. According to electronic records purportedly provided to PRA by Capital One, N.A., Plaintiff's charged-off account was among the accounts purchased by PRA at that time.

PRA sought to recover on the credit card debt owed by Plaintiff, mailing her a notice of intent to file legal action on 8 April 2014. When it received no response, PRA filed suit in District Court, Mecklenburg County, on 27 January 2015 seeking payment of the debt in the amount of $1,866.90. PRA attached to its complaint the following documents: (1) Plaintiff's original credit card application; (2) an account statement for the period of 26 April to 27 May 2012 showing Plaintiff's last partial

payment on the account; (3) an account statement for the period of 26 November to 27 December 2012 showing a final balance of $1,866.90; (4) a notice of assignment and several documents from the United States Securities and Exchange Commission showing Capital One's purchase of HSBC's credit card business; (5) bills of sale for the purchase of several undisclosed accounts by PRA from Capital One, N.A., and Capital One Bank (USA), N.A.; and (6) a spreadsheet printed from electronic records provided by Capital One, N.A. to PRA stating Plaintiff's account was among the accounts sold to PRA. The spreadsheet showed that Plaintiff's account was first delinquent on 26 June 2012, was delinquent for 180 days, and was still delinquent as of 26 December 2012. It also listed a charge-off amount of $1,354.65 and final statement balance on 27 December 2012 of $1,866.90.[1]

Plaintiff did not answer PRA's complaint, leading PRA to seek and obtain a default judgment on 1 April 2015. Plaintiff eventually moved to have the default judgment set aside and, on 8 June 2016, the district court granted Plaintiff's motion. The court concluded that PRA failed to comply with several provisions of the Act governing attempts by debt buyers to pursue default judgments. Specifically, the court concluded that PRA's default judgment was void as a matter of law because PRA failed: (1) to introduce into evidence an itemization of the charges and fees as required by N.C. Gen. Stat. § 58-70-155(b)(4); and (2) to properly authenticate any account statements or other business records necessary to establish the amount and nature of the debt as required by N.C. Gen. Stat. § 58-70-155. PRA later voluntarily dismissed its collection action.

Plaintiff brought suit against PRA on 18 September 2018 under N.C. Gen. Stat. § 58-70-130(b) of the Act, which authorizes debtors to recover a statutory penalty of between $500 to $4,000 for each violation of the Act by a debt collector. Plaintiff's complaint identified several violations of the Act by PRA, including its: (1) failure as a debt buyer to reasonably verify the amount of the alleged debt with "an itemized accounting of the amount claimed to be owed, including all fees and charges," prior to attempting collection and filing suit as required by N.C. Gen. Stat. § 58-70-115(5); (2) failure to include "an itemized accounting of all amounts claimed to be owed" in the notice of intent to file a legal action sent to Plaintiff prior to suit as required by N.C. Gen. Stat.

1. The spreadsheet lists this information in abbreviated format as follows: "DEL AS OF 20121226," "# DAYS DEL 180," "DT 1ST DEL 20120626," "CHG_OFF 1354.65," "STMTDATE 20121227," and "STMTBAL 1866.90."

§ 58-70-115(6); (3) failure to attach to its complaint adequate documentation "establish[ing] an unbroken chain of ownership" for the debt as required by N.C. Gen. Stat. § 58-70-150(2); and (4) failure to file the "properly authenticated business records" required by N.C. Gen. Stat. § 58-70-155 prior to entry of default judgment, namely "[a]n itemization of charges and fees claimed to be owed . . . [and] [t]he amount of interest claimed and the basis for the interest charged" as required by N.C. Gen. Stat. §§ 58-70-155(b)(4) and (8).

Following discovery, Plaintiff moved for summary judgment on liability as to all claims. After a hearing on the matter, the trial court entered partial summary judgment on liability for Plaintiff on her claims under N.C. Gen. Stat. §§ 58-70-115(6) and -155 and granted summary judgment for PRA on Plaintiff's claims under N.C. Gen. Stat. §§ 58-70-115(5) and -150. PRA thereafter filed a motion to dismiss for lack of subject matter jurisdiction, asserting Plaintiff lacked standing because she suffered no actual injury from PRA's violations of the Act. The trial court denied that motion by order entered 7 October 2019. To avoid the expense of trial, the parties then stipulated that PRA should pay a $500 statutory penalty for the two violations for which it was held liable at summary judgment, and the trial court entered a final judgment to that effect later that day. Plaintiff filed her notice of appeal on 21 October 2019, and PRA filed its notice of appeal and cross-appeal four days later.

II. ANALYSIS

These appeals center largely on four questions of statutory interpretation: (1) does a statement listing only the charge-off amount, without further detail as to what debts make up the charge-off balance, constitute an "itemized accounting of the amount claimed to be owed, including all fees and charges," in satisfaction of the Act's pre-collection verification requirement in N.C. Gen. Stat. § 58-70-115(5); (2) does that same charge-off statement constitute "an itemized accounting of all amounts claimed to be owed" in satisfaction of the Act's intent to file legal action notice requirement found in N.C. Gen. Stat. § 58-70-115(6); (3) does that statement amount to an "[a]n itemization of charges and fees claimed to be owed" necessary for a debt buyer to pursue a default judgment under N.C. Gen. Stat. § 58-70-155(b)(4); and (4) did the documents attached to PRA's complaint showing a transfer of Plaintiff's debt from HSBC to PRA as its eventual owner "establish an unbroken chain of ownership" as required by N.C. Gen. Stat. § 58-70-150(2). We address these statutory concerns before turning to PRA's appeal of the order denying its motion to dismiss for lack of standing, applying a *de novo* standard of review throughout. *See Swauger v. Univ. of N. Carolina at Charlotte*,

259 N.C. App. 727, 728, 817 S.E.2d 434, 435 (2018) ("The standard of review for an appeal based on subject matter jurisdiction is *de novo*. Issues of statutory interpretation are also subject to *de novo* review." (citations omitted)).

A. The Act's Itemization Requirements

[1] Plaintiff argues that the various provisions of the Act requiring "itemizations" of the debt pre-suit and at default judgment require a debt buyer seeking to collect a charged-off debt to possess and provide the trial court with an itemized accounting of the purchases, interest, fees, and other charges that make up that charged-off amount. PRA disagrees and contends instead that the charge-off balance is a single item under the plain language of these statutes; thus, when a debt buyer seeks to collect a debt that consists only of the charge-off balance, the itemization is accomplished through an account statement listing that singular charge-off amount without further detail. We hold that PRA, to avoid committing an unfair practice in collecting the charged-off amount, was required to verify, transmit to Plaintiff, and later introduce into evidence an itemization of the charge-off balance that identified the total creditor-assessed charges and total creditor-assessed fees that contributed to the charge-off balance pre-suit and at default judgment.

In reviewing these statutes, "[a]s with any question of statutory interpretation, the intent of the legislature controls." *Gyger v. Clement*, 375 N.C. 80, 83, 846 S.E.2d 496, 499 (2020) (citation omitted). We begin with the letter of the law and, "in interpreting a statute, a court must consider the statute as a whole and determine its meaning by reading it in its proper context and giving its words their ordinary meaning." *City of Asheville v. Frost*, 370 N.C. 590, 592, 811 S.E.2d 560, 562 (2018) (citation omitted). Where the statute involves repeated terminology, "[o]rdinarily it is reasonable to presume that words used in one place in the statute had the same meaning in every other place in the statute." *Campbell v. First Baptist Church of City of Durham*, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979) (citations omitted). We may refer to the title of the Act, as "even when the language of a statute is plain, 'the title of an act should be considered in ascertaining the intent of the legislature.' " *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 8, 727 S.E.2d 675, 681 (2012) (quoting *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 812, 517 S.E.2d 874, 879 (1999)). Our Supreme Court has also stated that "[w]hen the legislature . . . use[s] a term which had acquired a settled meaning through judicial construction, . . . that construction bec[o]me[s] a part of the law. In the absence of anything which clearly indicates a contrary intent, the legislature is presumed to have used the

statutory term under consideration in its judicially established meaning." *Simms v. Stores, Inc.*, 285 N.C. 145, 157, 203 S.E.2d 769, 777 (1974) (citations omitted).

Turning to the language of the specific statutes at issue here, the word "itemize" has a common meaning: *Black's Law Dictionary* defines the word as "[t]o list in detail; to state by items," *Itemize*, *Black's Law Dictionary* (9th ed. 2009), while Merriam-Webster offers a similar definition, "to set down in detail or by particulars." *Itemize*, Merriam-Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/itemize (last visited 28 November 2020). Thus, the phrases "itemized accounting of the amount claimed to be owed, including all fees and charges" as used in N.C. Gen. Stat. § 58-70-115(5), "itemized accounting of all amounts claimed to be owed" as used in N.C. Gen. Stat. § 58-70-115(6), and "itemization of the charges and fees" as used in N.C. Gen. Stat. § 58-70-155(b)(4) require the detailed listing of each particular item constituting the total amount subject to said itemization.

This common definition is consistent with earlier decisions of this Court. We considered the meaning of an "itemized statement of . . . account" used to verify a debt in *Bramco Elec. Corp. v. Shell*, 31 N.C. App. 717, 230 S.E.2d 576 (1976), and held that a document listing various outstanding balances was not an "itemized statement of the account" under N.C. Gen. Stat. § 8-45 (1975), because it failed to identify all of the charges that made up those balances. *Id.* at 719, 230 S.E.2d at 577-78. We later applied this same statutory language to hold a credit card invoice showing an unexplained previous balance was not an "itemized statement" of the credit card debt because "[t]here [was] no itemization of credit extended to cover individual transactions." *Unifund CCR Partners v. Dover*, 198 N.C. App. 406, 681 S.E.2d 565, 2009 WL 2180672, *3 (2009) (Unpublished).

With the above definition in mind, and reading the provisions together in context, we hold that PRA failed to abide by the Act's itemization requirements at issue here. The charge-off statement relied upon by PRA itemizes some late fees and interest charges but includes an unexplained prior balance of $1,799.87. While some portion of the charge-off balance is itemized, PRA acknowledged in discovery that it could not fully state what portion of the balance constituted purchases, interest charges, or fees based on the charge-off statement.[2] Because

2. PRA rightly points out that the charge-off statement attached to its complaint demonstrates that Plaintiff's account had accrued a total of $340 in fees and $328.68 in interest for the year of 2012. That information does not, however, disclose what unpaid

the charge-off statement does not break out and list the total charges and total fees that contribute to the charge-off balance, that document does not constitute an "itemized accounting of the amount claimed to be owed, including all fees and charges" required by N.C. Gen. Stat. § 58-70-115(5),[3] an "itemized accounting of all amounts claimed to be owed" required by N.C. Gen. Stat. § 58-70-115(6), or an "itemization of charges and fees claimed to be owed" required by N.C. Gen. Stat. § 58-70-155(b)(4). To be clear, we do not read the Act to require debt buyers to fully itemize every discrete interest charge, fee, or purchase made with the credit card since the account was opened or the debt was last paid in full. Instead, we hold a debt buyer must be able to document and separate the total creditor-assessed charges and total creditor-assessed fees from the total charge-off balance. In separating out those charges and fees, the remaining portion of the charge-off balance will necessarily represent the unpaid sum of the debtor's cash advances and purchases made with the card.

PRA aptly and ably offers several arguments urging this Court to hold otherwise; each, however, is unavailing. PRA initially contends that the various evidentiary requirements of N.C. Gen. Stat. § 58-70-155(b) demonstrate that a "charge-off balance" is a particularized item that need not be further explained. It supports this argument by pointing out that N.C. Gen. Stat. § 58-70-155(b)(5) requires a debt buyer seeking a default judgment to introduce into evidence "[t]he original charge-off balance, or, *if the balance has not been charged off, an explanation of how the balance was calculated.*" (Emphasis added). Under PRA's reading, this requirement that the calculation of a non-charged-off debt be explained discloses that the charge-off balance need not be itemized.

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fees and interest assessed in prior years went into the charge-off balance, or whether some portion of those interest charges and fees were paid off through a possible complete payment of the credit card balance in the first half of 2012 prior to Plaintiff incurring additional debt, her subsequent non-payment, the assessment of interest, and the eventual charging off of her account.

3. PRA offers a specific argument as to this subsection, contending that it requires only a "reasonable" itemization. This misreads the statute. N.C. Gen. Stat. § 58-70-115(5) requires a debt buyer to perform a "reasonable verification of the amount of the debt allegedly owed by the debtor." It then specifically defines what is reasonable, which includes the necessary itemization: "For purposes of this subsection, reasonable verification shall include . . . an itemized accounting of the amount claimed to be owed, including all fees and charges." *Id.* Thus, a debt buyer reasonably verifies a debt *through* "an itemized accounting of the amount claimed to be owed, including all fees and charges," and not a "reasonable"—but incomplete—itemization.

An itemization, however, is not strictly equivalent to a "calculation;" an itemization is a listing of specific constituent parts, whereas a calculation details how those parts are mathematically combined or otherwise manipulated to constitute the whole. *See Calculate*, Merriam-Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/calculate (last visited 28 November 2020) ("to determine by mathematical processes"). The phrasing of the statute itself acknowledges a distinction between these terms. *Compare* N.C. Gen. Stat. § 58-70-155(b)(4) (requiring production of "[a]n itemization of charges and fees claimed to be owed" to obtain default judgment), *and* N.C. Gen. Stat. § 58-70-155(b)(6) (requiring "[a]n itemization of post charge-off additions, where applicable" to obtain same), *with* N.C. Gen. Stat. § 58-70-155(b)(5) (requiring "an explanation of how the balance was calculated" at default judgment if the debt has not been charged-off). We therefore do not agree that subsection (b)(5) demonstrates a charge-off balance is not subject to itemization when that balance is the amount a debt buyer seeks to collect.

PRA next argues that the "itemization of charges and fees claimed to be owed" and "amount of interest claimed and the basis for the interest charged" necessary to obtain a default judgment under subsections (b)(4) and (b)(8), respectively, must refer only to costs imposed *after* charge-off. PRA's argument assumes, however, that a charge-off balance need not be itemized based on their preferred reading—rejected above—of subsection (b)(5). Setting aside this flawed premise, the argument has an additional infirmity; the Act already requires a debt buyer to produce "[a]n itemization of post charge-off additions, where applicable," to obtain a default judgment. N.C. Gen Stat. § 58-70-155(b)(6). To hold that subsections (b)(4) and (b)(8) applied only to amounts added to the debt after charge-off would impermissibly render subsection (b)(6) superfluous. *See Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) ("It is well established that a statute must be considered as a whole and construed, if possible so that none of its provisions shall be rendered useless or redundant.").

PRA further argues that requiring an itemization of the charge-off balance under the provisions of the Act at issue would produce an absurd result, as it would task debt buyers with producing, and trial courts with reviewing, years of account statements. Again, it is not necessary for the debt buyer to identify with particularity each individual purchase, cash advance, interest charge, or late fee. It is only necessary that the debt buyer possess, review, and introduce enough account information to adequately separate out and list (1) the total creditor-assessed charges and (2) total creditor-assessed fees that, together with the remaining

unpaid amount attributable to purchases and cash advances, constitute the charge-off balance sought for collection. Requiring a debt buyer to produce, and a trial court to review, such documentation is not an absurd result, especially when the title and provisions of the Act make clear that the requirement is designed to protect the debtor from debt buyers in particular by tasking them with itemizing the debt subject to collection, including fees and charges under N.C. Gen. Stat. §§ 58-70-115(5) and -155(b)(4). *See* 2009 N.C. Sess. Laws at 1603, ch. 573, § 1 (titling the Act the "Consumer Economic Protection Act of 2009"); *see*, *e.g.*, *id.* at 1605-06, ch. 573, § 5 (amending existing law to provide new unfair practices specific to debt buyers, including itemization requirements).

We are similarly unconvinced by PRA's contention that our holding renders compliance with the Act impossible based on the fact that credit card companies are only required to keep transaction histories for two years under federal law. *See* 12 C.F.R. § 1026.25(a) (2019) (requiring credit card issuers to retain various records, including account statements, for two years). Credit card companies are free under the law to retain such statements for longer than the federally mandated minimum[4] and, even if they do not, debt buyers can still seek to collect the amounts they are able to itemize through documentation. Nor is documentation of every transaction for the life account necessarily required to comply with our holding, as debt buyers need only be able to accurately document the total creditor-assessed fees and total creditor-assessed charges contributing to the charge-off balance, separating both from each other and the remaining sum of purchases and cash advances constituting the rest of the charged-off debt. As compliance with the Act is still possible under this reading, PRA's argument is overruled.[5]

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4. It appears that credit card issuers do, in fact, retain credit card transaction histories for longer than two years. *See Citibank, S.D., N.A. v. Bowen*, 194 N.C. App. 371, 671 S.E.2d 596, 2008 WL 5225857, *3 (2008) (Unpublished) (discussing production by a credit card issuer in a collection suit filed in March of 2007 of "all credit card statements for defendant dating back to March 2004"); *First Citizens Bank, NA v. L & M Realty & Inv. Prop., Inc.*, 240 N.C. App. 88, 772 S.E.2d 12, 2015 WL 1201356, *2 (2015) (Unpublished) (dispensing of an appeal from a credit card debt collection action in which the credit card issuer produced three years of credit card statements during discovery).

5. Because we hold that the Act does not require an itemization of the individual purchases and cash advances made with the credit card, but instead a separation of creditor-assessed fees and charges from the extensions of credit to the debtor, we do not address PRA's argument that such transactions are not considered "charges" within the meaning of the Act based on federal law. As for its other argument that some states do not require the itemization called for by our holding, the fact that other states declined to impose such protections for debtors did not preclude our General Assembly from doing so.

Finally, we decline PRA's invitation to either apply the rule of lenity or read into the statute an exception to liability for substantial compliance. The rule of lenity, applicable to penal statues, "is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the 'narrowest meaning'; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers." *State v. Raines*, 319 N.C. 258, 263, 354 S.E.2d 486, 490 (1987) (quoting *U.S. v. Brown*, 333 U.S. 18, 25-26, 92 L. Ed. 442, 448 (1948)). Requiring debt buyers, who are otherwise strangers to the debt, to review and provide to the trial court ample evidence of the amounts actually owed by the debtor—in the interest of protecting the debtor from debt buyers who lack adequate documentation as a result of their late arrival to the creditor-debtor relationship—is "in accord with the manifest intent of the lawmakers" as discussed above. *Id.*

As for substantial compliance, PRA cites no North Carolina case law developing that doctrine in this area, relying instead on: (1) a decision from the Eighth Circuit addressing compliance with the federal Fair Debt Collection Practices Act, *Volden v. Innovative Fin. Sys., Inc.*, 440 F.3d 947 (8th Cir. 2006);[6] and (2) an opinion from our Supreme Court applying the doctrine to the very specific—and very different—context of appeals from adoption of annexation ordinances by municipalities. *Thrash v. City of Asheville*, 327 N.C. 251, 393 S.E.2d 842 (1990). Given the General Assembly's use of the mandatory word "shall" when imposing the itemization requirements of the Act, we decline to recognize a deviation from that plain statutory command based on the cases cited by PRA.

In sum, we hold that (1) the pre-collection verification through itemization under N.C. Gen. Stat. § 58-70-115(5), (2) the itemization in the pre-suit letter to the debtor mandated by N.C. Gen. Stat. § 58-70-115(6), and (3) the itemized evidence necessary to procure a default judgment under N.C. Gen. Stat. § 58-70-155(b), when read together in context and in light of the purposes of the Act, all require a debt buyer to itemize the charge-off balance when seeking to avoid committing an unfair practice in collecting that amount. Such an itemization is accomplished through a listing of the total creditor-assessed unpaid charges and total creditor-assessed unpaid fees that contribute to the charge-off balance, separating them both from each other and the remaining total of unpaid purchases, cash advances, and any other transactions that constitute

6. *Volden* itself recognizes that its application of the substantial compliance doctrine to the Fair Debt Collection Practices Act is in apparent conflict with a decision from another circuit. 440 F.3d at 956.

the rest of the charged-off amount. In the event that a debt buyer is unable to accomplish such an itemization, it is free to collect those amounts that it can so itemize. We therefore affirm the trial court's grant of partial summary judgment to Plaintiff on her claims brought pursuant N.C. Gen. Stat. §§ 58-70-115(6) and -155. We reverse the grant of partial summary judgment to PRA on Plaintiff's claim under N.C. Gen. Stat. § 58-70-115(5) and vacate those portions of the final judgment precluding Plaintiff's recovery on her N.C. Gen. Stat. § 58-70-115(5) claim.

B. Chain of Ownership

[2] The parties also disagree as to whether the trial court properly entered summary judgment for PRA on Plaintiff's claim that PRA failed to comply with the Act's heightened pleading requirements in N.C. Gen. Stat. § 58-70-150. Specifically, Plaintiff argues that PRA failed to comply with the following provision:

> [I]n any cause of action initiated by a debt buyer, . . . all of the following materials shall be attached to the complaint or claim:
>
> . . . .
>
> (2) A copy of the assignment or other writing establishing that the plaintiff is the owner of the debt. If the debt has been assigned more than once, then each assignment or other writing evidencing transfer of ownership must be attached to establish an unbroken chain of ownership. Each assignment or other writing evidencing transfer of ownership must contain the original account number of the debt purchased and must clearly show the debtor's name associated with the account number.

N.C. Gen. Stat. § 58-70-150. Reviewing the statute and the documents attached to PRA's collection complaint, we hold that the trial court improperly granted summary judgment for PRA on this issue.

As detailed in Part I.2., PRA attached the following documents to its complaint to collect on the credit card debt owed by Plaintiff: (1) Plaintiff's original credit card application; (2) a notice of assignment from HSBC to PRA stating that HSBC had sold "certain assets and liabilities related to HSBC Finance's U.S. credit card and retail services business . . . to Capital One Financial Corporation;" (3) excerpts from a form filed by HSBC with the United States Securities and Exchange Commission stating that in August of 2011, HSBC "completed the previously-announced disposition of its Card and Retail Services

business to Capital One Financial Corporation" for approximately $11.8 billion; (4) two of Plaintiff's account statements from 2012 bearing HSBC's name and logo with an explanation that those marks "are registered trademarks of HSBC . . . and are used by Capital One by permission. Capital One is the issuer of this account;" (5) a bill of sale from Capital One, N.A. to PRA and a bill of sale from Capital One Bank (USA), N.A. to PRA evidencing the sale of certain credit card accounts "identified in the Sale File . . . (which may be in electronic form);" and (6) a table printed from a database listing information about Plaintiff's credit card account, including her name and account number, and identified by a notation on the document as "[d]ata printed by [PRA] from electronic records provided by Capital One, N.A., pursuant to the sale of accounts from Capital One, N.A. to [PRA]."

Plaintiff argues that the above documents do not comply with N.C. Gen. Stat. § 58-70-150(2) as they fail to document transfers of ownership between: (1) HSBC Nevada and HSBC Finance; and (2) Capital One Financial Corporation and either Capital One, N.A. or Capital One Bank (USA), N.A. PRA counters with an assertion that "ownership of property held by a wholly-owned subsidiary is imputed to the subsidiary's parent" such that transfers between these entities did not involve any change in ownership.

PRA relies on this Court's decision in *In re Fayette Place, LLC*, 193 N.C. App. 744, 668 S.E.2d 354 (2008), where Durham County appealed from a determination by the North Carolina Property Tax Commission that a parcel of land was exempt from taxation as state-owned because a state body's wholly-owned subsidiaries possessed complete ownership and title to the property. *Id.* at 747, 668 S.E.2d at 357. We affirmed the Commission's determination on the ground that under the statutory and constitutional tax exemptions for state property, "[w]here the state possesses a sufficient interest in the property, such as equitable title to the property, the property is said to belong to the state even where legal title to the property is held by another party." *Id.* This Court has since recognized, however, that this holding was limited to its context:

> *[F]or purposes of tax exemption*, this Court has previously held that "legal title is not determinative as to the question of ownership." *Fayette Place LLC*, 193 N.C. App. at 747, 668 S.E.2d at 357. Instead, "[w]here *[an entity qualifying for a tax exemption]* possesses a sufficient interest in the property, . . . the property is said to belong to [that entity] even where legal title to the property is held by another party."

In re Blue Ridge Hous. of Bakersville LLC, 226 N.C. App. 42, 52, 738 S.E.2d 802, 809 (2013) (first alteration and emphasis added).

Even if we were to assume, *arguendo*, that PRA is correct and *Fayette Place*'s discussion of ownership between parents and wholly-owned subsidiaries may be extended to debt collection actions by debt buyers governed by the Act, PRA has failed to comply with the requirements of N.C. Gen. Stat. § 58-70-150(2), particularly as far as Capital One Financial Corporation, Capital One Bank, N.A., and Capital One Bank (USA), N.A. are concerned. Nothing attached to PRA's complaint shows the existence of a parent and wholly-owned subsidiary relationship between these entities. Thus, no "assignment or other writing evidence[es] [a] transfer of ownership" to Capital One Bank, N.A. or Capital One Bank (USA), N.A.—the two entities from which PRA purchased Plaintiff's account. N.C. Gen. Stat § 58-70-150(2). Without such documentation, PRA has failed pursuant to N.C. Gen. Stat. § 58-70-150(2) to "establish an unbroken chain of ownership" through attachment of "[e]ach assignment or other writing evidencing transfer of ownership" under its own preferred theory. We therefore reverse the trial court's entry of summary judgment for PRA on this count and vacate the portions of the final judgment precluding recovery for this claim.

C. Denial of Motion to Dismiss for Lack of Standing

[3] Lastly, the parties argue whether the trial court correctly denied PRA's motion to dismiss for lack of standing. Specifically, PRA contends that Plaintiff lacks standing to recover for violations of N.C. Gen. Stat. §§ 58-70-115(6) and -155 because Plaintiff admitted owing the amount of the debt PRA seeks to recover and thus suffered no injury in fact.

"As a general matter, the North Carolina Constitution confers standing on those who suffer harm: 'All courts shall be open; [and] every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law.' " *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281 (2008) (quoting N.C. Const. art. I, § 18).[7] This "irreducible constitutional minimum" consists of the following:

> (1) "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or

7. Both parties agree that as a statutory matter, a debtor may recover the civil penalty authorized by the Act absent any actual damages. *See Simmons v. Kross Lieberman & Stone, Inc.*, 228 N.C. App. 425, 431, 746 S.E.2d 311, 316 (2013) ("Plaintiff's failure to allege actual injury does not preclude her from recovering a civil penalty under N.C. Gen. Stat. § 58-70-130(b)[.]").

> imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 364 (1992)). We hold that Plaintiff has demonstrated injury in fact sufficient to satisfy the constitutional standing requirement.

Plaintiff had a legally protected interest against unfair practices by debt buyers. *See* N.C. Gen. Stat. § 58-70-115. Those practices include: (1) seeking to collect a debt without reasonably verifying it through an itemized accounting of the entire amount claimed, N.C. Gen. Stat. § 58-70-115(5); (2) filing a collection action without providing an adequate pre-suit notice with that itemization to the debtor, N.C. Gen. Stat. § 58-70-115(6); and (3) filing a complaint without attaching documents establishing a complete chain of ownership. N.C. Gen. Stat. §§ 58-70-115(7) and -150(2). Plaintiff was thus required to later defend a suit that the Act made unlawful. That harm was furthered when PRA obtained a default judgment that was not supported with evidence to the satisfaction of the law—an injury that was itself an unfair practice. N.C. Gen. Stat. §§ 58-70-115(7) and -155. The Act's provisions, by their very terms, are designed to protect debtors from facing the suit filed and default judgment entered here; thus, Plaintiff suffered concrete and particularized injuries that the Act sought to prevent.[8]

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8. PRA relies on several decisions from federal circuit courts holding violations of the Fair Debt Collection Practices Act's notification requirements and prohibition against misleading statements insufficient to establish an injury in fact necessary for Article III standing. We note, however, that there is a split amongst the circuits on the question. *Compare Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 334 (7th Cir. 2019) (holding no injury in fact where debt collector failed to enclose required notification of debt verification procedures that debtor never intended to pursue), *with Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747, 758 (6th Cir. 2018) (holding plaintiffs suffered an injury in fact for the same violation as in *Casillas* because they "were placed at a materially greater risk of falling victim to 'abusive debt collection practices. . . . [A]s the FDCPA declares, its purpose is to eliminate such abusive practices." (citations omitted)). Further, those cases cited by PRA all involved violations that had no impact on the debtors' actual conduct. *See, e.g.*, *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 994 (11th Cir. 2020) (holding no injury in fact for debt collector's misleading statements when "neither of [the plaintiffs] claim[ed] to have been misled"). Here, and as explained above, at least two of the violations directly impacted Plaintiff's actions, insofar as she had to defend herself from: (1) a collections suit that could not have been filed pursuant to N.C. Gen. Stat. § 58-70-150(2)'s higher pleading standard and; (2) a default judgment that could not have been lawfully granted under N.C. Gen. Stat. § 58-70-155(b)'s evidentiary requirements.

PRA concedes that the violation of an interest a statute seeks to protect constitutes an injury in fact but asserts that the Act is not actually designed to protect Plaintiff from the above practices based on this Court's decision in *Unifund CCR, LLC v. Francois*, 260 N.C. App. 443, 817 S.E.2d 915 (2018). In that case, the trial court denied a debt buyer's motion for default judgment and dismissed the action *sua sponte* for violating the Act's prohibition against filing a collection action when the buyer knows or should know the claim is barred by the statute of limitations. *Id.* at 446, 817 S.E.2d at 916. We held that the trial court erred in denying the default judgment and dismissing the buyer's complaint because the Act did not empower trial courts to act in that manner *sua sponte* and instead provided "a particular enforcement mechanism for this provision—it authorized the debtor and the Attorney General to bring civil claims against violators to recover actual and statutory damages." *Id.* (citing N.C. Gen. Stat. § 58-70-130). Thus, *Francois* simply states that a trial court is not empowered by the Act to *sua sponte* raise an affirmative statute of limitations defense, deny default judgment, and dismiss a buyer's complaint. *Id.* That trial courts lack authorization to act in such a manner does not mean the "Consumer Protection Act of 2009" is not designed to protect debtors from the unfair practices it seeks to prohibit, including suits filed in violation of the Act's statutory provisions and default judgments obtained on legally inadequate evidence. Because PRA filed a lawsuit and obtained a default judgment in violation of the Act, we hold that Plaintiff suffered an injury in fact sufficient to establish standing under North Carolina law.

III. CONCLUSION

The Act seeks to protect debtors from debt buyers who lack the information and evidence required to prosecute collection actions in our courts, including an "itemized accounting of the amount claimed to be owed, including all fees and charges," under N.C. Gen. Stat. § 58-70-115(5), an "itemized accounting of all amounts claimed to be owed" under N.C. Gen. Stat. § 58-70-115(6), and an "itemization of charges and fees claimed to be owed" under N.C. Gen. Stat. § 58-70-155(b)(4). Construing these statutes together and giving their terms their ordinary meaning, the Act tasks debt buyers seeking to collect a credit card charge-off balance with fully itemizing that amount pre-collection, pre-suit, and prior to default judgment. Said itemizations are accomplished through statement of (1) the total creditor-assessed charges and (2) the total creditor-assessed fees that, when taken together with the remaining total representing any unpaid transactions and extensions of credit to the debtor, constitute the unpaid charge-off balance. Further, any complaint to collect on such a debt must be

accompanied by "each assignment or other writing evidencing transfer of ownership . . . establish[ing] an unbroken chain of ownership." N.C. Gen. Stat. § 58-70-150(2). Where a party relies on a parent-subsidiary theory of ownership of the debt and omits any documents disclosing the existence of such a relationship, that requirement is not met. Because PRA violated each of the statutory provisions above, we affirm the trial courts entry of summary judgment for Plaintiff on her claims alleging violations of N.C. Gen. Stat. §§ 58-70-115(6) and -155, and reverse summary judgment for PRA on Plaintiff's claims under N.C. Gen. Stat. §§ 58-70-115(5) and -150(2). To the extent any provisions of the final judgment entered 7 October 2019 prohibit recovery on the latter two claims, those provisions are vacated. Lastly, we affirm the trial court's denial of PRA's motion to dismiss and remand the matter for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART; AND REMANDED.

Judges ZACHARY and ARROWOOD concur.

CHARLES F. WALTER, JR., PLAINTIFF
v.
LAWRENCE JOSEPH WALTER, SR.; LAURIE WALTER; LAWRENCE JOSEPH WALTER, JR.; ANGEL WALTER; THOMAS D. WALTER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LOUISE WALTER; JUDITH WALTER; THE LOUISE M. WALTER TRUST U/T/D FEBRUARY 7, 2000 AS AMENDED THROUGH THOMAS D. WALTER, FIRST SUCCESSOR TRUSTEE; MELANIE WALTER DAY; PATRICK DAY; EDWIN BOYER AS ADMINISTRATOR AD LITEM OF THE ESTATE OF CHARLES WALTER; BARBARA EVERS AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES WALTER, DEFENDANTS

No. COA20-154

Filed 31 December 2020

1. Appeal and Error—denial of motion for summary judgment—appealed after final judgment from trial on merits—not reviewable

In a dispute over ownership of real property, plaintiff's appeal from the denial of his motion for summary judgment was dismissed where plaintiff did not seek review after the motion was denied but raised the issue on appeal from the final judgment rendered after a trial on the merits.

2. Appeal and Error—preservation of issues—grounds for directed verdict—challenge raised on appeal—no objection at trial

In a dispute over ownership of real property, plaintiff's argument on appeal that defendants failed to state specific grounds in their motion for directed verdict as required by Civil Procedure Rule 50(a) was dismissed where plaintiff failed to raise the objection at trial.

3. Statutes of Limitation and Repose—claim to quiet title—underlying theory of relief—authority under power of attorney—action outside maximum limit of ten years

In a dispute over ownership of real property, plaintiff's challenge to the validity of a deed that purported to transfer property from one family member to another was time-barred where he brought suit more than eleven years after he became aware of the deed at issue. Although the parties disagreed as to the nature of the claim and therefore the applicable statute of limitations, the challenge involved the attorney-in-fact's scope of authority to execute the deed, a contractual issue. At most, plaintiff needed to bring suit within ten years pursuant to the "catch-all" statute of limitations contained in N.C.G.S. § 1-56.

4. Appeal and Error—preservation of issues—bench trial after jury sent to lunch—plaintiff left courtroom—no objection lodged

In a dispute over ownership of real property, plaintiff failed to preserve for appeal his argument that the trial court erred by resolving remaining issues in a bench trial after the court granted defendants' motion for directed verdict and sent the jury to lunch. Although defendants indicated they intended to present evidence on the remaining issues and the trial court asked the parties to stay to discuss additional matters, plaintiff left the courtroom and did not raise any objection to the ongoing proceeding.

5. Reformation of Instruments—deed—mutual mistake—findings of fact—evidentiary support

In a dispute over ownership of real property, the trial court properly granted directed verdict for defendants and ordered reformation of a deed due to a mutual mistake of fact between two spouses over whether a trust owned the property and whether a deed purporting to transfer the property was effective to pass title. The trial court was not required to state the burden of persuasion,

its findings of fact were supported by evidence regarding the intent of the spouses to transfer and receive the property, respectively, and the findings in turn supported the court's conclusions. Although the court referenced a mistake of law in its conclusions, which cannot be a basis for deed reformation, the surplus language was not in error where the judgment centered on the mistake of fact.

Appeal by Plaintiff Charles F. Walter, Jr., from judgment entered 7 November 2019 by Judge Tommy Davis in Macon County Superior Court. Heard in the Court of Appeals 20 October 2020.

McKinney Law Firm, P.A., by Zeyland G. McKinney, Jr., for Plaintiff-Appellant.

Kenneth W. Fromknecht, II, for Defendants-Appellants Lawrence Joseph Walter, Sr., Laurie Walter, Lawrence Joseph Walter, Jr., and Angel Walter.

COLLINS, Judge.

Plaintiff Charles F. Walter, Jr., appeals from a final judgment reforming a deed from his mother's trust to his father due to a mutual mistake of fact and denying Plaintiff's claim that his father's attorney-in-fact improperly deeded the land at issue to Plaintiff's brother and nephew. Plaintiff argues that the trial court erred by (1) denying his motion for summary judgment, (2) granting Defendants' motion for directed verdict, (3) proceeding with a bench trial after granting Defendants' motion for directed verdict, (4) concluding that a mutual mistake of fact justified reforming the deed, and that (5) there was sufficient evidence that the attorney-in-fact exceeded her authority by executing the deed. We conclude that Plaintiff's claim that the attorney-in-fact exceeded her authority was time-barred and that the trial court did not err by reforming the deed from Plaintiff's mother's trust. We dismiss Plaintiff's challenges to the trial court's denial of his motion for summary judgment and the bench trial.

I. Procedural History

Plaintiff instituted this action on 23 July 2015 and demanded a jury trial. Defendants[1] answered, raised counterclaims, and also demanded

1. Defendants Lawrence Walter Sr., Lawrence Walter Jr., and Laurie Walter joined in a single brief to this Court. For purposes of our discussion, we refer to them collectively as "Defendants" throughout. The remaining defendants did not file a brief.

a jury trial. Both Plaintiff and Defendants moved for summary judgment. On 19 July 2019, the trial court denied the motions for summary judgment.

At the close of Plaintiff's evidence, all of the defendants, except Melanie Walter Day and Patrick Day, moved for a partial directed verdict. Defendants argued that the statute of limitations and collateral estoppel barred Plaintiff's claims, and that Plaintiff had offered insufficient evidence. Defendant Barbara Evers also argued collateral estoppel. Defendants Thomas and Judith Walter contended that Plaintiff's deed by estoppel theory was inapplicable and joined Defendants' arguments regarding the statute of limitations.

After hearing arguments, the trial court granted Defendants' motion. The trial court then excused the jury for a lunch break and Plaintiff left the courtroom. At that point, the remaining parties purported to waive trial by jury and the trial court proceeded to decide the remaining issue of reformation in a bench trial. The trial court entered final judgment on 7 November 2019 and Plaintiff gave written notice of appeal on 25 November 2019.

II. Factual Background

Charles F. Walter and Louise M. Walter ("Mr. and Mrs. Walter," respectively) were married and had four children: Dr. Charles F. Walter, Lawrence Walter, Melanie Walter Day, and Thomas D. Walter. In January 1969, Mr. and Mrs. Walter were deeded property in Macon County, North Carolina (the "Subject Property").

Mrs. Walter subsequently filed for dissolution of marriage in Florida in February of 2000. On 10 April 2000, Mrs. Walter executed a quitclaim deed (the "Trust's Deed") purporting to transfer any interest she had in the Subject Property to the Louise M. Walter Trust (the "Trust").

Mr. and Mrs. Walter subsequently entered into a Mediated Settlement Agreement on 14 December 2000 (the "Marital MSA"). The Marital MSA provided that Mrs. Walter would execute a quitclaim deed to Mr. Walter, to give him "sole ownership and possession" of the Subject Property. The deed would be held in escrow and released when Mr. Walter paid Mrs. Walter $83,592. On 8 January 2001, the Florida trial court entered an order requiring Mr. and Mrs. Walter to comply with the terms of the Marital MSA and execute the documents required to do so. Mr. Walter took out a cashier's check for the payment required by the Marital MSA on 23 January 2001, and apparently provided the check to Mrs. Walter, but Mrs. Walter did not immediately execute the deed. As a result, on

16 July 2001, Mr. Walter's attorney wrote Mrs. Walter's attorney demanding a deed conveying the property from the Trust and threatening litigation if she did not comply.

Mr. Walter was hospitalized in Florida between February and March 2003 after he fell and injured his hip. After the injury, he executed a durable power of attorney (the "POA") designating Barbara Evers as his agent. The POA authorized Evers, in pertinent part,

> to sell any and every kind of property that I may own now or in the future, real, personal, intangible or mixed, including without being limited to contingent and expectant interests, marital rights and any rights of survivorship incident to joint tenancy or tenancy by the entirety, upon such terms and conditions and security as my Agent shall deem appropriate . . . .

The POA also permitted Evers

> to make gifts, grants or other transfers without consideration either outright or in trust . . . to such person or persons or organizations as [she] shall select; provided, however . . . that [she] shall not make any gifts that are not excluded from gift tax by my federal gift tax annual exclusion . . . .

On 9 June 2003, as trustee of her Trust, Mrs. Walter executed a quitclaim deed ("9 June 2003 Deed") purporting to transfer the Trust's interest in the Subject Property to Mr. Walter.

On 22 August 2003, acting under the POA, Evers executed a warranty deed granting a life estate in the Subject Property to Lawrence Walter, Sr., and the remainder to his son Lawrence Walter, Jr. (the "Lawrence Deed"). The same day, Lawrence Walter Sr. and Jr. executed a promissory note and a purchase money deed of trust ("Deed of Trust") in favor of Mr. Walter in the amount of $50,000.

Mr. Walter died in Florida on 30 August 2003. Though Mr. and Mrs. Walter separated, the two remained married until Mr. Walter's death. Mr. Walter's Will devised the residue of his estate to his four children in equal shares. Mrs. Walter died on 5 February 2005. Her will devised the residue of her estate to the Trust.

During the Florida probate proceeding of Mr. Walter's estate, Plaintiff petitioned the Florida court to partially remove Evers as personal representative of the estate. Plaintiff argued that Evers had a conflict of

interest because the estate included the Subject Property, and she had executed the Lawrence Deed acting as Mr. Walter's attorney-in-fact. The trial court appointed an administrator ad litem for the estate.[2] Plaintiff subsequently moved to remove Evers completely; the Florida trial court denied this request and the Florida appellate court affirmed. Plaintiff testified that no issues concerning the POA or title to the Subject Property were litigated in that proceeding, but the final judgment itself was never entered into evidence.

At the recommendation of the administrator ad litem in the Florida probate proceeding, Lawrence Walter Sr. and Jr. executed a replacement promissory note in the amount of $57,270 ("Replacement Note"). No payment was made on this Replacement Note.

On 26 October 2012, Thomas D. Walter, as trustee of the Trust, executed a deed purporting to transfer the Subject Property to himself personally (the "Thomas Deed").

On 1 March 2013, Lawrence Walter, Sr., Laurie Walter, Lawrence Walter, Jr., and Angel Walter sued Mrs. Walter's Estate, the Trust, Thomas D. Walter, and Thomas's wife, Judith Walter, in Macon County Superior Court. In that suit, Lawrence Walter Sr. and. Jr. claimed title to the Subject Property through the Lawrence Deed. Thomas Walter claimed title to the Subject Property through Mrs. Walter's Will and the Thomas Deed. Plaintiff was not named as a party in this suit and did not seek to intervene.

The parties executed a settlement agreement to resolve that suit on 9 March 2015. That agreement provided that Lawrence Walter Sr. held a life estate in the Subject Property and Lawrence Walter Jr. was entitled to the remainder. The parties agreed that because the 9 June 2003 Deed was executed under a mutual mistake of fact that the Trust owned the Subject Property at the time, the 9 June 2003 Deed should be reformed to reflect Mrs. Walter herself, not the Trust, as the grantor. The parties further agreed that with the 9 June 2003 Deed so reformed, the Lawrence Deed was effective to pass title. Thomas and Judith Walter agreed to execute a quitclaim deed to the Subject Property to Lawrence Walter Sr., for and during his natural life, with the remainder to Lawrence Walter Jr. The parties agreed that the terms of the agreement would be reflected in a final judgment and the entire agreement was contingent on the Deed of Trust either being satisfied or held unenforceable.

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2. Though the administrator ad litem, Edwin Boyer, was named as a defendant in the present case, there is no indication that he was served or appeared in the case.

On 16 March 2018, Plaintiff filed the present action against Lawrence Walter Jr. and his former wife, Angel Walter; Lawrence Walter Sr. and his wife, Laurie Walter; Thomas D. Walter individually, as the personal representative of Mrs. Walter's Estate, and as trustee of Mrs. Walter's Trust; Mrs. Walter's Trust; Melanie Walter Day and her husband, Patrick Day; and Barbara Evers. Plaintiff sought a declaration that the Lawrence Deed was void as well as a judgment quieting title in the Subject Property and holding that he and his sister, Melanie Walter Day, owned the Subject Property in fee simple.

In support of his claim, Plaintiff argued that the Trust's Deed was initially ineffective to pass title because Mr. and Mrs. Walter owned the Subject Property as tenants by the entirety. When Mr. Walter predeceased Mrs. Walter, Mrs. Walter became the sole owner of the property. This, Plaintiff argued, made Mr. Walter's estate the owner of the Subject Property by the Trust's Deed and the 9 June 2003 Deed under a theory of deed by estoppel. Plaintiff further contended that the Lawrence Deed was void because the transfer was a gift which Evers lacked authority to make under the POA. Plaintiff demanded a jury trial.

Defendants responded that Plaintiff (1) failed to bring his action within the statute of limitations; (2) lacked legal standing to assert a claim to the Subject Property; (3) failed to state a claim; (4) prejudicially delayed bringing the suit; (5) had unclean hands; and that (6) the issues raised in the complaint were previously litigated in a Florida lawsuit. Defendants also demanded a jury trial. Defendants agreed that Mr. Walter owned the Subject Property following the execution of the Trust's Deed and the 9 June 2003 Deed, but unlike Plaintiff, contended that a theory of mutual mistake and reformation demanded this outcome. Defendants argued that the statute of limitations barred Plaintiff's claim that the Lawrence Deed was void.

At the close of Plaintiff's evidence, the trial court directed the jury to leave the courtroom while it heard motions. Each of the defendants, except Melanie and Patrick Day, moved for a partial directed verdict. Defendants contended that (1) Plaintiff's challenge to the Lawrence Deed was barred by the statute of limitations, (2) Plaintiff's claims were barred by collateral estoppel, and (3) Plaintiff failed to introduce evidence that the Lawrence Deed was a gift in violation of the POA. Thomas and Judith Walter contended that Plaintiff's estoppel theory was inapplicable to the Trust's Deed and 9 June 2003 Deed and joined Defendants' arguments regarding the statute of limitations. Evers argued that collateral estoppel barred Plaintiff from challenging her authority under the POA to execute the Lawrence Deed.

After hearing arguments by counsel, the trial court granted Defendants' motion for a partial directed verdict. The trial court sent the jury to a lunch break, but asked the parties "to stay because I've got some more discussion." At that time Melanie Walter Day asked the trial court, "Should we leave?" The trial court responded, "That's up to you. You're still in the case if you want to stay. I'll leave it up to you." Plaintiff, Patrick Day, and Melanie Walter Day then left the courtroom and did not return.

The remaining parties waived trial by jury and offered evidence on the issue of reformation. The trial court then entered a final judgment. Based upon the evidence presented, the trial court found that Mrs. Walter intended to transfer the Subject Property to Mr. Walter, Mr. Walter intended to accept the deed, and the two were "under the mistaken belief that [the 9 June 2003 Deed] . . . vested full title to all the property to [Mr. Walter]." In light of the mutual mistake, the trial court held that "the [9 June 2003 Deed]. . . should be reformed to reflect [Mrs. Walter] as an individual and as Trustee of her Trust to [Mr. Walter]," and that the deed as reformed would relate back to 4 August 2003, the date that it was recorded. The trial court further held that because Mr. Walter owned the property, and Lawrence Walter Sr. and Jr. were bona fide purchasers for value, the Lawrence Deed was valid to transfer ownership of the property. Plaintiff timely gave written notice of appeal on 25 November 2019.

III. Discussion

A. Denial of Plaintiff's Motion for Summary Judgment

[1] Plaintiff first argues that the trial court erred by denying his motion for summary judgment.

> The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of a trial when no material facts are at issue. After there has been a trial, this purpose cannot be served. Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury.
>
> The denial of a motion for summary judgment is an interlocutory order and is not appealable. An aggrieved party may, however, petition for review by way of certiorari. To grant a review of the denial of the summary

> judgment motion after a final judgment on the merits, however, would mean that a party who prevailed at trial after a complete presentation of evidence by both sides with cross-examination could be deprived of a favorable verdict. This would allow a verdict reached after the presentation of all the evidence to be overcome by a limited forecast of the evidence. In order to avoid such an anomalous result . . . the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits.

Harris v. Walden, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985) (citations omitted).

Plaintiff does not assert that he petitioned for a writ of certiorari after the trial court denied his motion for summary judgment, and the record before us does not so indicate. After denying Plaintiff's motion, the trial court proceeded to hear the remainder of the case and rendered a final judgment on the merits. As such, Plaintiff's appeal from the trial court's denial of his motion for summary judgment is dismissed.

Plaintiff nonetheless contends that the denial of his motion for summary judgment is reviewable because the trial court ruled on Defendants' motion for a directed verdict "without affording Plaintiff an opportunity to reinstate his motion for summary judgment pursuant to" Rule 50(a). Plaintiff also contends that the trial court "did not have the evidence by defendant-appellee required by Rule 50(a)." Because Rule 50(a) contains no such requirements, these arguments are without merit.

B. Defendants' Motion for Directed Verdict

Plaintiff next argues that the trial court erred by granting Defendants' motion for a directed verdict.

"The standard of review of [a] directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991).

> In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be

> drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke Univ., 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989). "If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict should be denied." *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991). In reviewing a trial court's decision on a motion for a directed verdict, this Court will consider only the specific grounds in support of the motion that the movant presented to the trial court. *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 18, 564 S.E.2d 883, 886 (2002).

We note that although the trial court in this case made findings of fact and conclusions of law, these are neither necessary nor appropriate in granting a motion for directed verdict. *Seven Seventeen HB Charlotte Corp. v. Shrine Bowl of the Carolinas, Inc.*, 182 N.C. App. 128, 133, 641 S.E.2d 711, 714 (2007). Accordingly, we will disregard the trial court's findings and conclusions as they have no legal significance. *Id.*

1. Specific Grounds for Directed Verdict

[2] As a threshold matter, we address Plaintiff's contention that Defendants failed to state specific grounds justifying a directed verdict, as required by N.C. Gen. Stat. § 1A-1, Rule 50(a). "A motion for a directed verdict shall state the specific grounds therefor." N.C. Gen. Stat. § 1A-1, Rule 50(a) (2019). "This requirement is mandatory." *Clary v. Alexander Cnty. Bd. of Educ.*, 286 N.C. 525, 528, 212 S.E.2d 160, 162 (1975). Still, to preserve the issue for appellate review, a party must object at trial to the failure of the motion to include specific grounds. *Johnson v. Robert Dunlap & Racing Inc.*, 53 N.C. App. 312, 315, 280 S.E.2d 759, 762 (1981).

During arguments on the motion for a directed verdict, Plaintiff never objected that Defendants had failed to state the specific grounds for the motion. Because Plaintiff failed to raise this objection at trial, he cannot now raise it on appeal. N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . ."); *Dunlap*, 53 N.C. App. at 315, 280 S.E.2d at 762. Nonetheless, we note that Defendants did advance three specific grounds in support of their motion for a directed verdict: (1) the statute of limitations had run on Plaintiff's claim that the Lawrence Deed was void, (2) Plaintiff's claims were barred by collateral estoppel, and (3) Plaintiff failed to introduce evidence that the Lawrence Deed was a gift in violation of the POA.

2. Statute of Limitations

[3] Plaintiff contends that a directed verdict was inappropriate because the statute of limitations had not run on his challenge to the validity of the Lawrence Deed. Specifically, Plaintiff argues that there was no applicable statute of limitations which could run against his claim to quiet title.

"There is no express statute of limitations governing actions to quiet title under N.C. Gen. Stat. [§] 41-10. It thus is necessary to refer to plaintiffs' underlying theory of relief to determine which statute, if any, applies." *Poore v. Swan Quarter Farms, Inc.*, 79 N.C. App. 286, 289, 338 S.E.2d 817, 819 (1986).

Defendants claim that this is essentially an action for ejectment, and as such, is subject to the seven-year statute of limitations found in N.C. Gen. Stat. § 1-38. An action to quiet title is in essence an ejectment action where the plaintiff seeks to recover possession from defendants in possession. *Poore*, 79 N.C. App. at 290, 338 S.E.2d at 819. Plaintiff "made no specific allegation that [D]efendants were in actual possession at the time of the filing of this action," *see id.*, nor did he seek to recover possession from Defendants in his prayer for relief. Under these circumstances, we cannot find that Plaintiff's action is in essence one for ejectment. *Id.*

Instead, whether Evers exceeded her authority under the POA by executing the Lawrence Deed is, in essence, a matter of contract construction. "Although special rules apply to the fiduciary relationship between a principal and agent, there is, as a general matter, little reason to draw distinctions between powers of attorney and contracts." *O'Neal v. O'Neal*, 254 N.C. App. 309, 312, 803 S.E.2d 184, 187 (2017). We therefore "treat the power of attorney at issue in this case the same as any other contract." *Id.* at 315, 803 S.E.2d at 189.

Plaintiff was permitted, at most, ten years to institute this action. N.C. Gen. Stat. § 1-56 (2019) (establishing a "catch-all" ten-year statute of limitations for actions not specifically enumerated). Plaintiff testified that he learned of the Lawrence Deed in September 2003. *See Pearce v. N.C. State Highway Patrol Voluntary Pledge Comm.*, 310 N.C. 445, 448, 312 S.E.2d 421, 424 (1984) ("In a contract action, the statute of limitations begins to run when the contract has been breached and the cause of action has accrued."). Plaintiff did not institute this action until 23 July 2015. Because more than eleven years had passed, Plaintiff's challenge to the validity of the Lawrence Deed was barred by the statute

of limitations. The trial court did not err by granting Defendants' partial directed verdict on this ground.[3]

C. Bench Trial

[4] Plaintiff next argues that the trial court erred by hearing the remainder of the case in a bench trial after granting Defendants' motion for a directed verdict.[4]

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1).

After the trial court granted Defendants' motion for a directed verdict, Defendants informed the trial court that they intended to present evidence on the remaining issues. At that point, the trial court sent the jury to lunch, but requested that the parties stay because it had matters to discuss. When Melanie Walter Day then asked the trial court, "Should we leave?" the trial court explicitly told her that she remained a party to the case and could stay if she chose to do so. The record reflects that Plaintiff, his trial counsel, and the Days left the courtroom and never returned.

Once Plaintiff, his trial counsel, the Days, and the jury had left the courtroom, the trial court asked the parties who had stayed in the courtroom which issues remained. Defendants' trial counsel responded, "I would prefer to just go ahead and present evidence . . . and get a ruling on title." When the trial court asked whether the remaining parties "want[ed] to waive jury trial to this issue and . . . go ahead and start," all of the remaining parties agreed to do so. The trial court indicated that it would "make findings of fact and conclusions of law on . . . this portion of the testimony" and the remaining parties presented evidence.

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3. Because we conclude that Plaintiff's challenge to the Lawrence Deed was barred by the statute of limitations, we do not reach either Plaintiff's argument that there was sufficient evidence that the Lawrence Deed was an impermissible gift transaction or Defendants' argument that the Florida Probate judgment should be given preclusive effect on the question of the deed's validity.

4. Plaintiff challenges only the trial court's resolution of the remaining issues via a bench trial; he does not challenge the trial court's continuation of proceedings outside of his presence.

Because Plaintiff left the courtroom, despite being on notice that the trial court intended to proceed, he never presented a timely objection to the trial court's resolution of the remainder of the case via a bench trial. The issue is therefore not preserved for our review, and Plaintiff's argument is dismissed. N.C. R. App. P. 10(a).

D. Mutual Mistake

[5] Finally, Plaintiff argues that the trial court erred by holding that the 9 June 2003 Deed should be reformed because there was a mutual mistake of fact and law between Mr. and Mrs. Walter.

> In a bench trial in which the superior court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Hinnant v. Philips, 184 N.C. App. 241, 245, 645 S.E.2d 867, 870 (2007) (citation, quotation marks, and ellipsis omitted).

There are "three circumstances under which reformation [is] available as a remedy: (1) mutual mistake of the parties; (2) mistake of one party induced by fraud of the other; and (3) mistake of the draftsman." *Willis v. Willis*, 365 N.C. 454, 457, 722 S.E.2d 505, 507 (2012). "Mutual mistake is a mistake common to all the parties to a written instrument . . . [which] usually relates to a mistake concerning its contents or its legal effect." *Best v. Ford Motor Co.*, 148 N.C. App. 42, 46-47, 557 S.E.2d 163, 166 (2001) (quotation marks and citation omitted), *aff'd per curiam*, 355 N.C. 486, 562 S.E.2d 419 (2002). "The evidence presented to prove mutual mistake must be clear, cogent and convincing, and the question of reformation on that basis is a matter to be determined by the fact finder." *Smith v. First Choice Servs.*, 158 N.C. App. 244, 250, 580 S.E.2d 743, 748 (2003).

1. Burden of Persuasion

Plaintiff argues that the trial court committed reversible error by failing to state the burden of persuasion it applied to the claim of mutual mistake. In support of this argument, Plaintiff relies on two cases from this Court, *Durham Hosiery Mill Ltd. P'ship v. Morris*, 217 N.C. App. 590, 720 S.E.2d 426 (2011), and *In re Stowers*, 146 N.C. App. 438, 552 S.E.2d 278 (2001). This reliance is misplaced.

In *Morris*, this Court vacated the trial court's judgment in a summary ejectment action not because the trial court failed to state the burden of persuasion, but because the trial court applied the incorrect burden of persuasion. 217 N.C. App. at 597, 720 S.E.2d at 430. In *In re Stowers*, this Court held that the trial court must affirmatively state the applicable burden of proof in an order terminating parental rights. 146 N.C. App. at 441, 552 S.E.2d at 280. This Court's rationale was that the legislature had required trial courts to affirmatively state the burden of proof in the similar context of delinquency, abuse, neglect, and dependency proceedings. *Id.* Plaintiff has therefore failed to cite any controlling authority for the proposition that the trial court was required to enunciate the burden of persuasion it applied to the claim of mutual mistake, and we find no error in its failure to do so.

2. Competency of Evidence of Mutual Mistake

Plaintiff generally complains that the trial court's findings of fact in paragraphs 22 to 27 of its judgment "are not supported by the evidence offered at the trial of this action."[5] Following the bench trial, the trial court found, in pertinent part, as follows:

> 20. . . . [Mr. and Mrs. Walter] acquired the [Subject Property] in 1969; that they acquired the property as tenants by the entireties [sic]; that later Mrs. Louise Walter created a trust; and that she attempted to convey an interest to the property by quitclaim deed to her trust.
>
> 21. Subsequent to that, the parties entered into a separation agreement or marital agreement to divide their property, and in that agreement Mrs. Louise Walter was not only contractually bound, but ordered to transfer her interest in the property to Charles Walter, Sr.
>
> 22. In response to that requirement, she executed as the trustee of her trust a deed for the property to Charles Walter . . . and that the evidence indicates a belief at that time that she mistakenly thought that the trust owned the property.
>
> 23. However, due to the tenants by the entirety status [sic], her deed to the trust had no effect and was contrary to the obligations and the rights under the tenants by entirety [sic].

5. Paragraph 26 is more accurately described as a conclusion of law, and we review it accordingly.

> 24. Despite that mistake, she made a quitclaim deed from the trust to Charles Walter, that her intent was to transfer her interest in the property to Charles Walter.
>
> 25. It was also the intent of Charles Walter to accept a deed from her for that interest, and that both Mrs. Louise Walter and Charles Walter, Sr. were under the mistaken belief that [the 9 June 2003 Deed] satisfied the obligation under the trust and vested full title to all the property to Charles Walter, Sr.
>
> 27. . . . Lawrence Joseph Walter, [Sr.] and his son, Lawrence Joseph Walter, Jr. are bona fide purchasers for value and acquired title to the property from Charles Walter superior to what other interest might exist as there are no other purchasers for value in the chain of title.

In light of these findings of fact, the trial court made the following conclusions of law:

> 26. . . . [A] mutual mistake of fact existed between Charles Walter and Mrs. Louise Walter as well as a mistake of law coupled therewith, and that as a result thereof the [9 June 2003 Deed] signed by Mrs. Louise Walter should be reformed to reflect . . . her as an individual and as Trustee of her Trust to Charles Walter and that the reformed deed should relate back to the original date of recording of the deed, August 4, 2003.
>
> 28. . . . [T]he transaction from Mrs. Barbara Evers to Lawrence Joseph Walter, Sr. and his son, Lawrence Joseph Walter, Jr. is in all respects valid and that the property is now vested in them pursuant to that deed.

Competent evidence supports the finding that both Mr. and Mrs. Walter were mutually mistaken that the Trust owned the Subject Property and that the 9 June 2003 Deed was effective to transfer title to Mr. Walter. Ample evidence demonstrates that Mrs. Walter intended to transfer the Subject Property to Mr. Walter, and Mr. Walter intended to receive it. Both executed the Marital MSA, which required Mrs. Walter to execute a quitclaim deed so that Mr. Walter would have "sole ownership and possession" of the Subject Property. The Florida trial court subsequently entered an order requiring Mr. and Mrs. Walter to comply with the terms of the Marital MSA and execute the documents required to do so. When Mrs. Walter did not do so, Mr. Walter, through his attorney, sent a letter to Mrs. Walter demanding that she transfer the Subject

Property and threatening litigation if she failed to do so. Following the execution of the Marital MSA, the entry of the Florida order, and Mr. Walter's demands, Mrs. Walter executed the 9 June 2003 Deed purporting to transfer the Subject Property from the Trust to Mr. Walter. The attorney who prepared the 9 June 2003 Deed testified that its purpose "was to convey the property described in the legal description to [Mr. Walter]," he did not know at the time that the deed would be ineffective to pass title, and he therefore did not inform Mr. or Mrs. Walter that the deed would be defective.

The trial court's findings of fact also support its conclusion that the deed should be reformed. The trial court found that Mr. and Mrs. Walter were mistaken that the 9 June 2003 would be legally effective to transfer title. Because both parties were mistaken as to the legal effect of the instrument, the trial court did not err by reforming the deed to reflect Mrs. Walter individually as the grantor. *Best*, 148 N.C. App. at 46-47, 557 S.E.2d at 166.

Plaintiff correctly points out that a mistake of law is not grounds for reformation of a deed. *See Mims v. Mims*, 305 N.C. 41, 60, 286 S.E.2d 779, 792 (1982). The trial court did state that "a mutual mistake of fact existed between Charles Walter and Mrs. Louise Walter as well as a mistake of law coupled therewith." In context, however, it is clear that the trial court's reference to a mistake of law was merely superfluous, as the substance of the trial court's judgment focuses on the mistake of fact concerning ownership of the Subject Property and the effectiveness of the 9 June 2003 Deed to pass title.

Because there was competent evidence in support of the trial court's findings of fact, and those findings of fact supported the conclusions of law, we discern no error in the trial court's judgment.

IV. Conclusion

We dismiss Plaintiff's challenge to the trial court's denial of his motion for summary judgment and the trial court's decision to hear the remainder of the case in a bench trial. Because the statute of limitations barred Plaintiff's challenge to the Lawrence Deed, the trial court did not err in granting Defendants' motion for a directed verdict. Nor did the trial court err by finding that there was a mutual mistake of fact between Mr. and Mrs. Walter which justified reforming the 9 June 2003 Deed. The trial court's judgment is affirmed.

DISMISSED IN PART AND AFFIRMED.

Judges ZACHARY and MURPHY concur.

WRIGHT CONSTRUCTION SERVICES, INC., PLAINTIFF
v.
THE HARD ART STUDIO, PLLC, GEORGE W. CARTER, JR., COLLINS STRUCTURAL CONSULTING, PLLC, AND SCOTT A. COLLINS, DEFENDANTS

No. COA19-1089

Filed 31 December 2020

Architects—negligence claims against—by builder who relied on work—licensure defense

A builder's negligence claims against a group of architects and engineers (defendants)—who were hired by the property owner for a construction project and had no other business relationship with the builder—for deficient professional work that prevented the builder from completing the construction project were not barred by the builder's failure to secure a general contracting license prior to bidding on the project (known as the licensure defense). Application of the licensure defense would undermine the defense's purpose of protecting the public, and in fact it would only shield the tortfeasor architects and engineers from liability.

Appeal by plaintiff from order entered 19 June 2019 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 20 October 2020.

Poyner Spruill LLP, by Matthew C. Bouchard and Benjamin T. Buskirk, for plaintiff-appellant.

Gallivan, White & Boyd, P.A., by James M. Dedman, IV, and Tyler L. Martin, for defendants-appellees The Hard Art Studio, PLLC and George W. Carter, Jr.

Allen, Moore & Rogers, LLP, by Joseph C. Moore, III, and Warren Hynson, for defendants-appellees Collins Structural Consulting, PLLC and Scott A. Collins.

DIETZ, Judge.

In North Carolina, architects and engineers performing work on a construction project owe a duty of care to those who reasonably rely on their work, including the builder on the project. This duty applies even if the architect was hired by the property owner and has no other business

relationship with the builder. An architect who breaches this duty—for example, by failing to exercise due care when developing an architectural plan—can be sued for negligence by the builder.

The plaintiff in this case is a builder relying on this negligence claim to sue a group of architects and engineers who worked on a failed construction project. Those defendants responded by asserting what is called the "licensure defense"—a legal defense stemming from a state law requiring builders to obtain a general contracting license before bidding on any project costing $30,000 or more. The licensure defense prevents a builder from recovering under a construction contract if the builder failed to timely secure the required license.

As explained below, the licensure defense does not apply to these negligence claims. These claims are not contract claims masquerading as tort claims. They exist in our jurisprudence because of the special duties imposed on architects and engineers. Those duties arise because others in the construction industry rely on the knowledge and skill that only these professionals possess. The purpose of the licensure defense—protecting the public from incompetent construction work—would not be served, and indeed would be undermined, if the defense barred claims against architects and engineers who were negligent in their professional work.

We therefore hold that, because of the importance of ensuring architects and engineers exercise due care in their respective professions, a builder's claims for negligence against an architect or engineer for deficient professional work on a construction project are not barred by the builder's failure to secure a general contracting license before bidding on the project. Accordingly, we reverse the trial court's entry of summary judgment in this case and remand for further proceedings.

Facts and Procedural History

In 2014, Hillsborough Lofts, LLC developed plans for a mixed-use retail and student housing complex in Raleigh. Hillsborough Lofts hired Olive Architecture as the architect for the project. Olive Architecture contracted with Defendants Collins Structural Consulting and Scott A. Collins to provide structural engineering work and other services. Hillsborough Lofts later directed Olive Architecture to solicit bids for a general contractor to take over the project.

Plaintiff Wright Construction Services, Inc. submitted a bid for the project. During the initial call meeting, Hillsborough Lofts explained that it needed to complete the project by August 2015. Wright Construction

indicated that it could complete the work by that date but also informed Hillsborough Lofts that it was not yet licensed to engage in general contracting in North Carolina. Nevertheless, recognizing the tight timeline for the project and corresponding construction loans, the parties signed a contract before Wright Construction had a general contracting license. The government issued Wright Construction an unlimited general contracting license a few months later.

In May 2015, Hillsborough Lofts terminated Olive Architecture for failure to substantially perform the terms of the parties' contract and hired Defendant The Hard Art Studio, PLLC to take over. As with Olive Architecture before it, Hard Art Studio entered into a contract with Collins Structural Consulting for structural engineering and other services.

Both before and after Hillsborough Lofts hired Hard Art Studio, the project was plagued by delays, including problems with the construction set of drawings, the unexpected discovery of an underground storage tank in the building footprint, and issues with obtaining constructible designs for shaft walls and shear walls.

On 26 August 2015, Hard Art Studio acknowledged numerous design issues that were preventing Wright Construction from completing construction. The firm made a "strong recommendation that we stop work until ALL the design issues are worked out or at a minimum extend the schedule to reasonably address the issues noted." Later that year, Hillsborough Lofts terminated Wright Construction in a letter explaining that Wright Construction failed to complete the work on time.

Hillsborough Lofts and Wright Construction then brought numerous claims and counterclaims against each other in an arbitration proceeding. The defendants in this case—Hard Art Studio, George Carter, Collins Structural Consulting, and Scott Collins—were not named in that arbitration. In August 2017, the arbitrators found that Hillsborough Lofts materially breached the contract by failing to provide Wright Construction with a constructible design, by failing to respond to shop drawings and requests for information, and by interfering with Wright Construction's work on the project. In November 2018, the arbitrators awarded Wright Construction $1,564,668.32 in damages, and the Wake County Superior Court later entered a judgment confirming that award.

In April 2018, Wright Construction brought this negligence action, alleging that Hard Art Studio, George Carter, Collins Structural Consulting, and Scott Collins breached professional duties of care they owed as architects or structural engineers. The defendants later moved

for summary judgment, arguing that the claims were barred by Wright Construction's failure to obtain a general contracting license before beginning work on the project.

After a hearing, the trial court granted summary judgment in favor of all defendants and dismissed Wright Construction's complaint. Wright Construction timely appealed.

Analysis

Wright Construction appeals the trial court's entry of summary judgment in favor of all defendants. We review this issue *de novo*, examining whether the evidence forecast by the parties shows 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); *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

The central issue in this appeal is whether Wright Construction's negligence claims are barred by the so-called licensure defense. To evaluate this issue, we first examine the claims brought by Wright Construction, and then examine the scope of the licensure defense.

The claims alleged by Wright Construction are common law negligence claims. Decades ago, this Court recognized that construction projects in "this commercial age" involve many participants: general contractors, subcontractors, architects, engineers, and so on. *Shoffner Indus., Inc. v. W. B. Lloyd Constr. Co.*, 42 N.C. App. 259, 272, 257 S.E.2d 50, 59 (1979). Some of these participants—architects and engineers in particular—are "professionals" with special knowledge and skill and corresponding professional duties because of that knowledge and skill. *Davidson & Jones, Inc. v. New Hanover Cty.*, 41 N.C. App. 661, 667, 255 S.E.2d 580, 584 (1979).

This, in turn, imposes on an architect or engineer "a duty to those who must reasonably rely upon his professional performance." *Shoffner*, 42 N.C. App. at 271–72, 257 S.E.2d at 59. As is the case with all legal duties, the "violation of that duty is negligence." *Id.* at 265, 257 S.E.2d at 55. So, for example, when a property owner hires an architect to assist with building construction, "a contractor hired by the client to construct a building, although not in privity with the architect, may recover from the architect any extra costs resulting from the architect's negligence." *Id.* at 265–66, 257 S.E.2d at 55.

There are two features of this negligence claim that are critical to its interaction with the licensure defense. First, there is nothing peculiar about these duties—when this Court first recognized them, we described

them as ordinary legal duties arising out of the need for architects and engineers to use due care in the exercise of their skills and abilities to avoid foreseeable harm to others. *Davidson & Jones*, 41 N.C. App. at 667, 255 S.E.2d at 584. Second, these negligence claims are entirely separate from any rights or responsibilities that exist between the property owner and the builder under the construction contract. These are claims "for an economic loss as a result of alleged Property damages" and the legal duty exists because, in the exercise of due care, architects or engineers can ensure that parties who reasonably rely on their work "will not be injured." *Shoffner*, 42 N.C. App. at 271, 257 S.E.2d at 58.

With these principles in mind, we turn to the "licensure defense," a common law doctrine created by our Supreme Court. By statute, a general contractor must obtain a general contracting license before bidding on or working on a construction project costing $30,000 or more. *See* N.C. Gen. Stat. §§ 87-1 *et seq*. In *Bryan Builders Supply v. Midyette*, our Supreme Court explained that this licensing requirement is designed to "protect the public from incompetent builders." 274 N.C. 264, 270, 162 S.E.2d 507, 511 (1968). Thus, the Court reasoned, a contractor who fails to secure the necessary license cannot recover from the property owner for breach of contract:

> When, in disregard of such a protective statute, an unlicensed person contracts with an owner to erect a building costing more than the minimum sum specified in the statute, he may not recover for the owner's breach of that contract. This is true even though the statute does not expressly forbid such suits.

Id.

In short, the licensure defense states that "contracts entered into by unlicensed construction contractors, in violation of a statute passed for the protection of the public, are unenforceable by the contractor." *Brady v. Fulghum*, 309 N.C. 580, 583, 308 S.E.2d 327, 330 (1983). "The unenforceability of such contracts by the contractor stems directly from their conception in the contractor's illegal act." *Id*. at 584, 308 S.E.2d at 330.

Having examined the legal underpinning of the negligence claims in this case and the common law licensure defense, we can now address the dispositive question presented in this appeal: does the licensure defense bar negligence claims by an unlicensed general contractor against architects or engineers who breached their duty of care in their professional work on a construction project?

We hold that the licensure defense does not apply to these negligence claims. First, and most importantly, the purpose of the licensure defense is to protect *the public* from incompetent work on construction projects. *Bryan Builders Supply*, 274 N.C. at 270, 162 S.E.2d at 511. Applying the licensure defense to these types of tort claims would undermine this purpose—it would shield architects and engineers from legal responsibility for their failure to exercise due care in critical aspects of the construction process. The public gains nothing from barring the claims; only the tortfeasor benefits.

We see nothing in our State's licensure defense precedent—all of which deals with contract claims—that would justify applying it to excuse the negligent acts of architects and engineers working on the project. Architects and engineers are not part of "the public" when performing their own professional work on a construction project. Thus, they are simply "not among the class of persons the Legislature intended to protect by enactment" of the general contractor licensing statutes. *Vogel v. Reed Supply Co.*, 277 N.C. 119, 133, 177 S.E.2d 273, 282 (1970).

Second, this holding is consistent with the limited set of cases examining the licensure defense outside the context of the contract between the owner and the general contractor. For example, in *Vogel*, the Supreme Court held that, although a general contractor "cannot enforce its contract against the owner by reason of its unlicensed status, it is not precluded on that account from enforcing the subcontract, or recovering damages for breach thereof, against" a subcontractor. *Id.* The Supreme Court reasoned that "no injury to the public is apparent from enforcement of the subcontract between the parties to it." *Id.* at 134, 177 S.E.2d at 282.

Similarly, in *RCDI Constr., Inc. v. Spaceplan/Architecture, Planning & Interiors, P.A.*, a federal district court examined tortious interference and negligence claims brought by an unlicensed general contractor against an architect working on the project. 148 F. Supp. 2d 607, 612–17, 620–22 (W.D.N.C. 2001), *aff'd* 29 F. App'x 120 (4th Cir. 2002). The court held that the tortious interference claim was barred because that claim requires an enforceable contract and the licensure defense rendered the contract unenforceable by the general contractor. *Id.* at 613–17. But the court did not apply the licensure defense to the negligence claim against the architect and instead examined that claim on the merits. *Id.* at 620–21.

Finally, we are not persuaded by Defendants' repeated arguments that our holding will permit general contractors to "end-run" around

the licensure defense by suing "non-owner project members in tort to recover damages that would otherwise be barred if brought as a contract claim against an owner." This argument is a reflection of Defendants' unwillingness to see these negligence claims for what they are—claims that they, as architects and engineers, failed to use due care in the exercise of professional knowledge and skill that only they possess. These are not claims that could be "brought as a contract claim against an owner" because the owner (and the public generally) do not have this specialized knowledge and skill and thus cannot have a duty to exercise reasonable care in this context.

So, to be clear, our holding today does not address claims that could be "brought as a contract claim against an owner." Sophisticated construction projects often include many participants, some of whom may be serving in supervisory or monitoring roles. In those roles, they are more akin to administrative agents of the owner than professionals who are using their own special knowledge and skill. Whether claims against those third parties are barred by the licensure defense is not an issue before this Court today. This case deals exclusively with the common law negligence claims against architects and engineers recognized by our Court in *Shoffner* and *Davidson & Jones*.

Having resolved the central question in this appeal, we decline to address the remaining issues raised in Defendants' briefs, including questions of proximate causation and contributory negligence. Discovery in this case is not complete; the parties apparently agreed to limit discovery to the licensure defense issue, and to present that issue to the trial court for early resolution. Although this Court reviews a grant of summary judgment *de novo*, we are not comfortable ruling on these other, fact-intensive questions when there may be more discovery to be done. We leave it to the trial court, on remand, to manage the discovery process and determine when these other issues are ripe for resolution.

Conclusion

We reverse the trial court's order granting summary judgment and remand for further proceedings.

REVERSED AND REMANDED.

Judges BRYANT and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 31 DECEMBER 2020)

ALICEA v. VAUGHN No. 20-6	Cabarrus (19CVD1813)	Affirmed in Part; Dismissed in Part
ANDERSON v. MYSTIC LANDS, INC. No. 19-801	Swain (15CVS36)	Affirmed in Part and Reversed in Part
ANDERSON v. MYSTIC LANDS, INC. No. 19-802	Swain (15CVS36)	Affirmed
CHISUM CONSTR., LLC v. ELLIOT No. 20-223	New Hanover (12CVS2090)	Reversed and Remanded
DEP'T OF TRANSP. v. CANADY No. 19-716	Cumberland (18CVS4548)	Reversed and Remanded
FULLER v. NEGRON-MEDINA No. 19-492	Vance (15CVS1071)	Affirmed
HOPE v. INTEGON NAT'L INS. CO. No. 20-265	Sampson (19CVS163)	Affirmed in Part, Reversed in Part and Remanded
HORNER v. HORNER No. 19-632	Mecklenburg (16CVD1134)	Affirmed in part, vacated and remanded in part
IN RE C.S. No. 20-230	Cumberland (18JA630)	Affirmed
IN RE K.S. No. 20-271	Cumberland (19JA211)	Affirmed in Part; Reversed in Part and Remanded.
IN RE S.L.N. No. 19-1131	Cabarrus (19JA55)	Affirmed
IN RE WILL OF SABOL No. 20-72	Wake (16E327)	Affirmed in Part; Reversed and Remanded in Part
NEWTON v. NEWTON No. 20-114	Forsyth (19CVS1823)	Affirmed
PENNY v. DILWORTH VENTURES, LLC No. 20-68	Mecklenburg (18CVS5784)	Dismissed

PROVIDENCE VOLUNTEER FIRE DEP'T, INC. v. TOWN OF WEDDINGTON No. 19-203	Union (18CVS757)	AFFIRMED IN PART, REVERSED IN PART, DISMISSED IN PART, AND REMANDED.
REYNOLDS-DOUGLASS v. TERHARK No. 20-112	Wake (17CVD13381)	No Error
STATE v. AMORE No. 20-373	Alamance (17CRS50074) (17CRS809)	Affirmed
STATE v. BAKER No. 19-466	Scotland (13CRS53473-74)	No error in part; remanded in part.
STATE v. CLARK No. 19-318	Montgomery (03CRS50575)	Reversed
STATE v. DELAU No. 19-1030	Buncombe (17CRS2462)	Dismissed in part; New trial.
STATE v. ELLIOTT No. 20-18	Cumberland (17CRS58593) (17CRS58594)	No Error
STATE v. FERNANDEZ No. 20-221	Mecklenburg (17CRS230316)	No Error
STATE v. GARNER No. 20-290	Randolph (17CRS50560)	No error, No plain error
STATE v. INMAN No. 19-561	Mecklenburg (17CRS212837-38) (17CRS212841)	New Trial
STATE v. JOHNSON No. 19-529-2	Wake (17CRS222594)	Affirmed
STATE v. LAKE No. 19-938	Wake (17CR732228)	Reversed and Vacated
STATE v. McNEILL No. 19-819	Carteret (18CRS52039-40) (18CRS52045-46)	Affirmed
STATE v. NYKAMP No. 20-89	Rockingham (18CRS51322)	Vacated and Remanded
STATE v. OWENS No. 19-515	Wake (17CRS201729)	Dismissed

STATE v. POUNCEY No. 19-1024	Mecklenburg (18CRS026399)	Affirmed.
STATE v. TARRANCE No. 20-240	Wake (17CRS216439) (19CRS548)	Remanded.
STATE v. THOMAS No. 19-594	McDowell (15CRS430) (15CRS50498-01) (15CRS50522)	No Error.
STATE v. WESTBROOK No. 18-32-2	Forsyth (16CRS57045)	Reversed
STATE v. WHITE No. 18-39-2	Durham (14CRS56324)	Reversed
STATE v. WHITING No. 19-1085	New Hanover (17CRS60179) (18CRS694-695)	No error in part, remanded for rehearing, dismissed in part
STATE v. WOOLARD No. 19-979	Beaufort (18CRS51043-46)	No error in part; New trial in part; Dismissed in part; Vacated and Remanded in part.
TAYLOR v. BANK OF AM., N.A. No. 20-160	Mecklenburg (18CVS8266)	Affirmed
WEST v. WILLIAMS ELEC. MOTOR REPAIR, INC. No. 19-760	Wake (18CVS9761)	Affirmed
WILLIAMS v. McDONALD No. 20-10	Guilford (18CVD7109)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

purpose of reviewing only one argument regarding the factual basis of his guilty plea to three assault charges. **State v. Robinson, 330.**

Interlocutory appeal—counterclaim pending—motion to take judicial notice of voluntary dismissal—improper method—In an action challenging an airport authority's decision to lease land for a gravel mine, the Court of Appeals denied plaintiffs' motion to take judicial notice of a voluntary dismissal of a counterclaim—which, once dismissed, rendered an otherwise interlocutory order immediately appealable—because the proper method to bring the dismissal to the appellate court's attention was to make a motion to amend the record on appeal. **Umstead Coal. v. Raleigh-Durham Airport Auth., 384.**

Law in effect at time of appellate decision—enacted during pendency of appeal—case on remand from Supreme Court—considered by Court of Appeals—In an action concerning the payments specified in an agreement between the attorney general and meat-processing companies following the contamination of water supplies by swine waste lagoons, a new law passed during the pendency of the appeal (N.C.G.S. § 147-76.1) applied to the funds paid by the companies, since it applied to "all funds received by the State" and appellate courts generally apply the law in effect at the time their decision is rendered. The applicability of the new law was properly before the Court of Appeals on remand from the Supreme Court ("for any additional proceedings not inconsistent with this opinion") because it was a question of law on undisputed facts. **New Hanover Cnty. Bd. of Educ. v. Stein, 132.**

Law in effect at time of appellate decision—enacted during pendency of appeal—different relief than sought in complaint—In an action concerning the payments specified in an agreement between the attorney general and meat-processing companies following the contamination of water supplies by swine waste lagoons, a new law passed during the pendency of the appeal (N.C.G.S. § 147-76.1) applied to the funds paid by the companies, and the Court of Appeals rejected the attorney general's argument that plaintiff was seeking an entirely new claim for relief before the appellate court. Plaintiff's amended complaint, which sought to enjoin the attorney general from distributing the funds to anyone other than the Civil Penalty and Forfeiture Fund, provided sufficient notice for relief under the new law—that all funds be deposited in the State treasury. **New Hanover Cnty. Bd. of Educ. v. Stein, 132.**

Preservation of issues—admissibility of evidence—improper lay opinion—different objection raised at trial—In a prosecution for acting as an unlicensed bondsman or runner, defendant failed to preserve for appellate review his argument challenging the admission of two recorded 911 calls on grounds that they constituted improper lay opinion testimony under Evidence Rule 701 where, at trial, defendant did not raise this argument and instead objected to the evidence on different grounds. Further, defendant was not entitled to plain error review on the Rule 701 issue, which could only be reviewed on appeal for an abuse of discretion (and the plain error rule does not apply to matters falling within the trial court's discretion). **State v. Gettleman, 260.**

Preservation of issues—bench trial after jury sent to lunch—plaintiff left courtroom—no objection lodged—In a dispute over ownership of real property, plaintiff failed to preserve for appeal his argument that the trial court erred by resolving remaining issues in a bench trial after the court granted defendants'

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

Preservation of issues—issue raised in motion and at hearing—issue not abandoned—In an action alleging that plaintiff's termination from the University of North Carolina was retaliatory in violation of the Whistleblower Act, where defendants specifically raised N.C.G.S. § 1-77 in their motion to dismiss and at the hearing before the trial court, plaintiff's contention that defendants waived their argument regarding section 1-77 was meritless. **Semelka v. Univ. of N. Carolina, 683.**

Preservation of issues—not raised at hearing—no automatic preservation—Defendant's argument that the trial court erred by concluding that a police checkpoint complied with N.C.G.S. § 20-16.3A(a)(2a)'s written policy requirement was not preserved for appellate review where she did not make the argument at her motion to suppress (MTS) hearing—and instead pursued a constitutional argument. The trial court's order denying defendant's MTS was based on constitutional grounds, not statutory grounds, and the Court of Appeals rejected defendant's argument that, because the trial court concluded that the checkpoint authorization form complied with the statutory requirement, the issue was automatically preserved because it concerned "whether the judgment is supported . . . by the findings of fact and conclusions of law" (Appellate Rule 10(a)(1)). **State v. Cobb, 740.**

Preservation of issues—swapping horses on appeal—basis for admissibility of testimony—Defendant's argument that a witness's testimony was improperly excluded as hearsay was not preserved for appellate review where defendant argued at trial for the business record exception and vaguely claimed that the testimony was not hearsay but on appeal argued that the testimony was admissible as a direction or command. Defendant could not argue a new ground for the testimony's admissibility on appeal. **State v. Bradsher, 715.**

Record on appeal—amended on appellate court's own motion—Appellate Procedure Rule 9—In an action challenging an airport authority's decision to lease land for a gravel mine, the Court of Appeals opted to amend the record on appeal pursuant to Appellate Procedure Rule 9(b)(5)b to include a voluntary dismissal of a counterclaim, the dismissal of which rendered an otherwise interlocutory order immediately appealable, and dismissed plaintiffs' petition for writ of certiorari as moot. **Umstead Coal. v. Raleigh-Durham Airport Auth., 384.**

Res judicata—collateral estoppel—not raised at trial—dismissal—In an interlocutory appeal involving an action brought by plaintiffs to establish their right to use a roadway that crossed defendant's property, defendant's arguments on appeal that plaintiffs' action was barred based on res judicata and collateral estoppel were dismissed because these arguments had not yet been raised in the trial court and could not be raised for the first time on appeal. **Osborne v. Redwood Mountain, LLC, 144.**

Untimely appeal—petition for writ of certiorari—adjudication of dependency—The Court of Appeals dismissed respondent-mother's appeal from the trial court's orders adjudicating her infant son as dependent and maintaining his custody with the county department of social services where her amended notice of appeal (filed to correct the first notice of appeal's lack of proper signature) was untimely filed. But her petition for writ of certiorari requesting review of the merits was allowed in the court's discretion. **In re Q.M., 34.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

constituted inadmissible hearsay and no other evidence was presented that the child was subjected to grossly inappropriate procedures pursuant to N.C.G.S. § 7B-101. **In re A.J.L.H., 11.**

Abuse—serious physical injury—sufficiency of evidence—There was no clear and convincing evidence to support a trial court's conclusion that a child was abused where the parents' discipline—which consisted of spanking that resulted in temporary marks on the child, making the child stand in a corner for a long time or on one leg while doing homework, or having her sleep on the floor as a punishment—did not constitute serious physical injury pursuant to N.C.G.S. § 7B-101. **In re A.J.L.H., 11.**

Adjudication of neglect and abuse—father's appeal—standing only as to biological daughter—A father had standing to appeal from an order adjudicating his biological daughter as neglected, but not to appeal from the order adjudicating his two stepchildren neglected and abused, since he was not the legal or putative father of either of those children. **In re A.J.L.H., 11.**

Adjudication of neglect and abuse—hearsay—child's out-of-court statement—no exception—findings unsupported—In a child neglect and abuse adjudication matter regarding three children, several of the trial court's findings of fact were not supported by competent evidence to the extent they were based on hearsay consisting of out-of-court statements attributed to one of the children where there was no indication the declarant was unavailable to testify, and the statements were inadmissible pursuant to any hearsay exception. Other findings were erroneous for not being supported by any evidence at all. **In re A.J.L.H., 11.**

Dependency—availability of alternative arrangements—failure to make adequate findings—father's paternity established—The trial court erred by adjudicating respondent-mother's infant son as dependent where a number of the trial court's findings were unsupported by the evidence and the findings failed to adequately address the availability of alternative arrangements for the child. Importantly, the father established paternity after the juvenile petition was filed and expressed interest in having the child placed with him. **In re Q.M., 34.**

Disposition order—complete denial of visitation—abuse of discretion—In an abuse and neglect matter, the trial court abused its discretion in denying respondent-parents any visitation with their three children where the court's adjudication of one child as abused and of all three children as neglected was based on incompetent and inadmissible evidence. The disposition order was vacated and the matter remanded for a new order on visitation. **In re A.J.L.H., 11.**

Neglect—harm or risk of harm—lack of evidence—In a child abuse and neglect case where one child in the home was alleged to have been subjected to inappropriate discipline, the adjudication of the child's two siblings as neglected was reversed for lack of supporting evidence that the children had been harmed or were at risk of being harmed. The trial court was directed to dismiss the petitions and return the two children to their parents' care. **In re A.J.L.H., 11.**

Neglect—order on remand—different judge—new findings—In a juvenile case that was returned to the district court on remand for reconsideration of a neglect adjudication, the substitute trial judge did not improperly resolve an evidentiary conflict in the original evidence when she made findings regarding allegations and recantations of the child's mother about respondent-father's misconduct. The Court of Appeals affirmed the adjudication order where the substitute judge's findings

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

were consistent with those made by the original judge (whose findings were largely upheld on appeal) and supported the adjudication of neglect. **In re J.M., 517.**

Neglect—sufficiency of evidence to support findings—The trial court's adjudication of a child as neglected was vacated where the court's findings were based on inadmissible evidence, including hearsay. The matter was remanded for a new hearing and for the court to make findings of fact based on competent, admissible evidence. **In re A.J.L.H., 11.**

Permanency planning order—findings of fact—unsupported by competent evidence—In a permanency planning order involving two children, in which the trial court eliminated reunification from one child's permanent plan, the Court of Appeals vacated the order after determining that several findings of fact—regarding respondent-mother's delay, compliance with her case plan, and availability to the department of social services—were not supported by competent evidence or were contradicted by record evidence and the trial court's other permanency planning orders. The conclusions of law, including that respondent was unfit and had acted inconsistent with her constitutional right to parent, were also in error where they rested upon the unsupported findings. **In re A.S., 506.**

Permanency planning—cessation of reunification efforts—required statutory findings—In a juvenile proceeding, the trial court erred by ceasing reunification efforts and omitting reunification from the child's permanent plan without making the required statutory findings. The trial court failed to make sufficient findings, as required by N.C.G.S. § 7B-902.6(d), and failed to make the ultimate finding required by N.C.G.S. § 7B-902.6(b)—that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health or safety. **In re D.C., 26.**

CHILD CUSTODY AND SUPPORT

Child support—calculation—extraordinary expenses—residential treatment program—In determining child support obligations, the trial court did not abuse its discretion by ordering both parties to contribute to the extraordinary expenses, as defined by the N.C. Child Support Guidelines, incurred by their youngest son for in-patient treatment and associated costs for transportation and psychological evaluations. The court's unchallenged findings supported its conclusion that defendant father had the ability to pay his portion of the expenses, and the court was not required to make specific findings before making a discretionary adjustment regarding the extraordinary expenses, which was not a deviation from the guidelines. **Madar v. Madar, 600.**

Child support—calculation—unreimbursed and uninsured medical expenses —In determining child support obligations, the trial court did not abuse its discretion by ordering defendant father to pay all of the minor child's unreimbursed/uninsured medical expenses given evidence of the large disparity between the parties' respective incomes, which supported the court's determination that defendant had the ability to pay for those expenses. **Madar v. Madar, 600.**

Child support—increase in parent's income—outside of Child Support Guidelines—The trial court did not abuse its discretion by increasing plaintiff father's child support obligation where the father's income had increased significantly since the previous order and where the court properly considered the parties' estates, earnings, conditions, and the accustomed standard of living of the child and the parties pursuant to N.C.G.S. § 50-13.4(c). The fact that the order awarded almost

CONSTITUTIONAL LAW—Continued

Effective assistance of counsel—immigration consequences of guilty plea—motion for appropriate relief—insufficient findings for appellate review—After defendant—an undocumented immigrant against whom deportation proceedings were initiated after he pleaded guilty to multiple drug-related charges—filed a motion for appropriate relief (MAR) alleging ineffective assistance of counsel where his attorney advised him that a guilty plea "may" result in adverse immigration consequences, the trial court's order denying defendant's MAR was vacated and remanded. The attorney's failure to advise defendant that the guilty plea would make him permanently inadmissible to the United States (8 U.S.C. § 1182(a)(2)(A)(i)(II)) constituted deficient performance; however, further factual findings were necessary to determine whether 8 U.S.C. § 1229b(b)(1) (cancellation of removal) was also available to defendant and whether the attorney's deficient advice prejudiced defendant—that is, whether defendant would have rejected the plea deal but for the attorney's error. **State v. Jeminez, 278.**

Eighth Amendment—juvenile offender—consecutive life sentences with parole—constitutionally permissible—The trial court's imposition of two consecutive life sentences with the possibility of parole on defendant—who was 17 years old when he committed two murders—did not violate defendant's rights under the Eighth Amendment to the U.S. Constitution or Art. I, sec. 27 of the North Carolina Constitution. Although defendant would not be eligible for parole for fifty years, the sentences did not constitute a de facto life sentence without parole because they did not exceed his expected lifespan. **State v. Anderson, 689.**

Fourteenth Amendment—due process—as-applied challenge—domestic violence statute—protection denied to same-sex partners—fundamental rights violated—Adopting the reasoning in *United States v. Windsor*, 570 U.S. 744 (2013), the Court of Appeals held that the application of N.C.G.S. § 50B-1(b)(6) to plaintiff, who was denied a domestic violence protective order because her same-sex relationship did not meet the statutory definition of "personal relationship," violated plaintiff's fundamental liberty rights to personal security, dignity, and autonomy, and therefore violated plaintiff's due process rights under the Fourteenth Amendment of the U.S. Constitution. **M.E. v. T.J., 528.**

Fourteenth Amendment—equal protection—as-applied challenge—domestic violence statute—protection denied to same-sex partners—strict scrutiny—In an as-applied constitutional challenge to N.C.G.S. § 50B-1(b)(6), the statute's application to plaintiff, which served to prevent her from obtaining a domestic violence protective order against her same-sex partner, could not survive strict scrutiny—the heightened standard of review appropriate given the fundamental liberty at stake—where the denial was based on plaintiff's LGBTQ+ status. Plaintiff's right to equal protection under the Fourteenth Amendment of the U.S. Constitution was violated where the statute's protection of opposite-sex couples only was based on an arbitrary classification that bore no reasonable relation to the statute's purpose. **M.E. v. T.J., 528.**

Fourteenth Amendment—equal protection—discrimination based on LGBTQ+ status also based on sex or gender—In an as-applied constitutional challenge to N.C.G.S. § 50B-1(b)(6), under which plaintiff was denied a domestic violence protective order against her same-sex partner, the Court of Appeals determined that the U.S. Supreme Court's definition of "sex" or gender in *Bostock v. Clayton County*, 590 U.S. __ (2020), was relevant to the Fourteenth Amendment equal protection issue of whether section 50B-1(b)(6) discriminated against plaintiff

EMPLOYER AND EMPLOYEE—Continued

taxes owed on its employee payroll, the N.C. Department of Commerce Board of Review's conclusions of law were supported by the findings of fact and a proper application of *Hayes v. Bd. of Trustees of Elon College*, 224 N.C. 11 (1944), and the Board did not err in affirming the assessment. The Board properly applied *Hayes* in determining that the workers were not licensed and had no specialized skills; they worked part-time; appellant instructed the time, place, and person to which they would report; and they received training as to how to perform the work. **State of N.C. ex rel. N.C. Dep't of Com., Div. of Emp. Sec. v. Aces Up Expo Sols., LLC, 170.**

Unemployment taxes—assessment—findings of fact—In its decision affirming a tax assessment issued to appellant-business for unemployment taxes owed on its employee payroll, the N.C. Department of Commerce Board of Review's findings of fact were supported by competent evidence where appellant challenged the findings regarding appellant's control of the manner of work and ability to discharge workers; workers' use of independent knowledge, skill, or licenses; workers being in appellant's regular employ; appellant's provision of tools and equipment; and workers' pay. Although appellant may have established that there was conflicting evidence on the findings, it was the Board's duty to resolve those conflicts. **State of N.C. ex rel. N.C. Dep't of Com., Div. of Emp. Sec. v. Aces Up Expo Sols., LLC, 170.**

EVIDENCE

Cumulative error—exclusion of evidence—challenged on appeal—deed reformation lawsuit—In a deed reformation action, where defendants challenged the trial court's exclusion of myriad evidence concerning the attorney (third-party defendant) who mistakenly drafted the deed, but where the Court of Appeals rejected each challenge on appeal, there was no cumulative, prejudicial error in the trial court's exclusion of the evidence taken as a whole. **Maldjian v. Bloomquist, 103.**

Drug possession—field tests and officer lay testimony identifying heroin—plain error analysis—In a prosecution for possession of heroin, which arose from a phone call to police about defendant's possible overdose in a hotel room, the trial court did not commit plain error by admitting into evidence field test results and officer lay testimony identifying the substance found in the hotel room as heroin. Defendant never objected to this evidence at trial, and even if the court had excluded the test results and lay testimony, the State presented ample other evidence that defendant possessed heroin, including defendant's statement to law enforcement at the scene that she had used heroin and the officers' discovery of a rock-like substance resembling heroin and drug paraphernalia typically used for consuming heroin. **State v. Osborne, 323.**

Expert opinion—forensic firearms analysis—Rule 702—reliability—In a trial for attempted first-degree murder arising from an incident in which defendant's wife was shot twice in a parking lot following a pattern of defendant making threats to kill her, the trial court did not abuse its discretion by admitting the opinion of a forensic firearms expert that the shell casings collected from the scene were an exact match to those belonging to defendant's .22-caliber rifle. Not only was the court's decision a reasoned one, made after a lengthy voir dire of the expert, but even if the decision was erroneous, defendant could not establish prejudice given the overwhelming evidence of his guilt. **State v. Miller, 843.**

Expert testimony—Rule 702—appellate law expert—former justice—In a 42 U.S.C. § 1983 action, there was no abuse of discretion in the trial court's decision to allow an expert on appellate practice and procedure (a former North Carolina

EVIDENCE—Continued

Supreme Court justice) to testify regarding the reasonableness of plaintiff's attorney's fees. Defendants failed to articulate how the admission was an abuse of discretion, since Evidence Rule 702 allows an expert to give an opinion without having firsthand knowledge of a matter, and the opinion given here was within the expert's field of expertise. **Hailey v. Tropic Leisure Corp., 485.**

Expert testimony—video deposition—decision to exclude—trial court's discretion—In an appeal in a 42 U.S.C. § 1983 action, the Court of Appeals found no abuse of discretion in a trial court's decision to exclude defendants' proffered video deposition of the president of the U.S. Virgin Islands Bar Association—regarding the issues of proximate cause and foreseeability in the compensatory damages phase—where defendants failed to articulate why the decision, which the trial court stated was based on lack of foundation, speculation, and irrelevance, constituted an abuse of discretion. **Hailey v. Tropic Leisure Corp., 485.**

Expert testimony—vouching for victim's credibility—use of word "disclosure"—rape and sexual offense—In a trial for first-degree rape, first-degree sexual offense, and taking indecent liberties with a child, no plain error resulted from the State's expert witness referring to the child victim's statements regarding what defendant did to her as a "disclosure." Based on the context in which the expert and counsel used that word or similar variants, the use of those terms did not constitute impermissible vouching for the victim's credibility where they were used to describe the interview method or as a shorthand reference to the information collected from the victim. **State v. Robinson, 876.**

Expert witness testimony—Rule 702—foundation—DNA extraction and analysis—In a prosecution for rape and related charges, the trial court did not plainly err by allowing the admission of expert testimony regarding the DNA profile of a biological sample taken from the six-year-old victim's underwear that matched to defendant, where the expert laid a proper foundation pursuant to Evidence Rule 702(a)(3) regarding the procedures used to extract, analyze, and compare DNA samples. **State v. Coffey, 199.**

Prior bad acts—Rule 404(b)—prior victim—similar acts—In a prosecution for rape, sexual offenses, and kidnapping involving the assault of a six-year-old victim in a church bathroom, the trial court did not plainly err by admitting evidence of a prior incident involving defendant and a nine-year-old girl where there were multiple similarities between that incident and the events for which defendant was charged, and where the trial court gave a limiting instruction restricting the jury's use of the prior bad act to prove defendant's identity, plan, or scheme in accordance with Evidence Rule 404(b). **State v. Coffey, 199.**

Rule 403 analysis—attorney's offer to cover costs through liability insurance—deed reformation lawsuit—In an action to reform a deed, where the parties negotiated for the sale and purchase of twenty-two out of sixty-two acres of land, but the closing attorney (third-party defendant) inadvertently drafted the deed to convey the entire sixty-two-acre tract, the trial court did not abuse its discretion by excluding evidence of the attorney's offer to pay plaintiffs' legal costs through her liability insurance carrier. Even if the evidence were relevant for a collateral purpose under Evidence Rule 411 (to show bias), any probative value was substantially outweighed by the danger of unfair prejudice or confusion under Rule 403 where it was unclear whether the attorney's offer was to fund plaintiffs' litigation (which she never did) or to cover the cost of correcting the deed (which she offered to both plaintiffs and defendants). **Maldjian v. Bloomquist, 103.**

PREMISES LIABILITY—Continued

area where plaintiff was seated was negligently designed, and evidence was presented that plaintiff had sufficient knowledge of the game of baseball to understand the danger foul balls represented to people sitting in the stands. **Mills v. Durham Bulls Baseball Club, Inc., 618.**

PUBLIC OFFICERS AND EMPLOYEES

Termination—tenured university faculty member—improper reimbursement requests—applicable code—Where a tenured University of North Carolina (UNC) faculty member (petitioner) was fired for improperly seeking reimbursements for personal expenses from his department's operating fund, the Court of Appeals rejected his argument that discharge was an excessive discipline and that UNC should have considered less severe discipline. There was no provision in The Code of the Board of Governors of UNC (The Code) requiring consideration of discipline less severe than discharge, and defendant's conduct merited discharge under The Code. **Semelka v. Univ. of N. Carolina, 662.**

Termination—tenured university faculty member—improper reimbursement requests—applicable code—Where a tenured University of North Carolina (UNC) faculty member (petitioner) was fired for improperly seeking reimbursements for personal expenses from his department's operating fund, the Court of Appeals rejected his argument that he did not commit misconduct sufficiently serious to justify discharge under The Code of the Board of Governors of UNC (The Code). A review of the whole record revealed substantial evidence supporting the conclusion that petitioner misrepresented several reimbursement requests and specifically that he misrepresented his reasons for retaining the law firm whose charges he sought reimbursement for, constituting misconduct "sufficiently serious as to adversely reflect on his honesty, trustworthiness or fitness to be a faculty member" under The Code. **Semelka v. Univ. of N. Carolina, 662.**

Termination—tenured university faculty member—improper reimbursement requests—cessation of pay—Where a tenured University of North Carolina (UNC) faculty member (petitioner) was fired for improperly seeking reimbursements for personal expenses from his department's operating fund, UNC violated its own policies—which requires faculty members notified of UNC's intent to discharge to be given full pay until a final decision has been reached—when it ceased petitioner's pay at the date of the Board of Trustees' decision, which was prior to the issuance of the Board of Governors' final decision. **Semelka v. Univ. of N. Carolina, 662.**

Termination—tenured university faculty member—improper reimbursement requests—not unjust and arbitrary—Where a tenured University of North Carolina (UNC) faculty member (petitioner) was fired for improperly seeking reimbursements for personal expenses from his department's operating fund, the Court of Appeals rejected his argument that the decision to discharge him was unjust and arbitrary because UNC set him up and misrepresented the evidence against him. A review of the whole record showed that petitioner's own actions prompted UNC to investigate him and that he did indeed misrepresent the nature of the legal expenses for which he sought reimbursement. **Semelka v. Univ. of N. Carolina, 662.**

Termination—tenured university faculty member—improper reimbursement requests—tenure policy—A tenured University of North Carolina (UNC) faculty member (petitioner) who was fired for improperly seeking reimbursements for personal expenses from his department's operating fund failed on appeal to overcome the presumption that the UNC Board of Governors' (BOG) decision to discharge

SENTENCING—Continued

Juveniles—first-degree murder—eligibility for parole at age 60—Where a 15-year-old defendant pled guilty to the rape and murder of his paternal aunt and was sentenced to 240 to 348 months imprisonment for the rape and a consecutive sentence of life with parole for the murder—under which terms he would not be eligible for parole for at least 45 years, at age 60—his consecutive sentences were not unconstitutional because *Miller v. Alabama*, 567 U.S. 460 (2012), did not hold sentences of life with parole imposed on juveniles to be unconstitutional. Even assuming that de facto life without parole sentences are unconstitutional, the life expectancy for a 15-year-old is 61.7 years (N.C.G.S. § 8-46), and defendant would be eligible for parole before that time. A Court of Appeals opinion holding otherwise had been stayed and granted discretionary review by the N.C. Supreme Court, so it was not binding. **State v. Conner, 758.**

Two life sentences—concurrent versus consecutive—trial court did not exercise discretion—remanded for resentencing—The trial court erroneously determined it lacked discretion to have defendant's two sentences for murder run concurrently, rather than consecutively, at defendant's new sentencing hearing (held after defendant's motion for appropriate relief was granted). Where the trial court resentenced defendant from two consecutive sentences of life without parole to two consecutive sentences of life with the possibility of parole, but indicated it might have chosen a different option if allowed to do so, the matter was remanded for resentencing. There was nothing in the statutes to suggest that N.C.G.S. § 15A-1354(a) (giving trial courts discretion to have multiple sentences run concurrently or consecutively) did not apply to new sentencing hearings under N.C.G.S. § 15A-1340.19B. **State v. Anderson, 689.**

SEXUAL OFFENSES

Sexual offense with a child by an adult—jury instructions—jury also instructed on first-degree sex offense—conviction vacated—In a prosecution for rape, sexual offenses, and kidnapping, the trial court committed prejudicial error by entering judgment on sexual offense with a child by an adult after instructing the jury on the lesser-included offense of first-degree sex offense, where the jury was not instructed on the only element distinguishing the two offenses—that defendant was at least eighteen years old when he committed the crime. Although there was evidence to show that defendant was thirty-three, and his conviction for rape of a child did include an element that he be at least eighteen, defendant's sentence on the greater offense was improper, and the matter was remanded for resentencing on first-degree sexual offense. **State v. Coffey, 199.**

STATUTES

Lease by airport authority—N.C.G.S. § 63-56(f)—N.C.G.S. § 160A-272—applicability—In an action challenging an airport authority's decision to lease land for a gravel mine, the trial court properly determined that the airport authority's decision was not subject to the requirements or limitations contained in N.C.G.S. § 63-56 (governing jointly operated municipal airports) or N.C.G.S. § 160A-272 (governing municipal leasing procedures) where the airport authority was established by a public-local law prior to the enactment of those statutes, and the legislature gave no indication, either expressly or by implication, that it intended for those statutes to repeal any part of the airport authority's charter. Further, section 160A-272 did not apply to the airport authority since it is not a "city" as defined by Chapter 160A. **Umstead Coal. v. Raleigh-Durham Airport Auth., 384.**