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1. Effective 1 January 2021, the Supreme Court of North Carolina adopted a universal parallel citation form. *Administrative Order Concerning the Formatting of Opinions and the Adoption of a Universal Citation Form*, 373 N.C. 605 (2019). Unpublished cases appear in *Italics*.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

HOLLIS L. BATSON AND CAROL D. BATSON, LAWRENCE F. BALDWIN AND ELIZABETH C. BALDWIN, BALDWIN-BATSON OWNERS' ASSOCIATION, INC., PETITIONERS
v.
COASTAL RESOURCES COMMISSION AND NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENTS

No. COA21-110

Filed 1 March 2022

1. Attorney Fees—against state agency—judicial review—civil action—gatekeeping decision—prevailing party

Where petitioner landowners prevailed in a judicial review of a decision by the Coastal Resources Commission—which in its statutory gatekeeping role under N.C.G.S. § 113A-121.1 had denied as frivolous petitioners' request for a regulatory challenge to a bridge replacement—the trial court had authority to award attorney fees to petitioners under N.C.G.S. § 6-19.1. The judicial review proceeding challenging the agency's gatekeeping decision was a civil action contesting State action, and petitioners were the prevailing party in that proceeding regardless of the outcome of the administrative challenge to the underlying permitting decision.

2. Attorney Fees—against state agency—substantial justification for agency decision—sufficiency of findings

Where petitioner landowners' request for a regulatory challenge to a bridge replacement was denied as frivolous by the Coastal Resources Commission in its statutory gatekeeping role under

N.C.G.S. § 113A-121.1 and the trial court awarded attorney fees to petitioners under N.C.G.S. § 6-19.1 after petitioners successfully challenged the gatekeeping decision, the order of attorney fees was vacated and remanded for further proceedings. Because the order was unclear as to whether the agency knowingly applied the wrong standard, further findings were needed to support the conclusion that the agency acted without substantial justification.

Judge TYSON dissenting.

Appeal by respondent from order entered 23 September 2020 by Judge Charles H. Henry in Carteret County Superior Court. Heard in the Court of Appeals 17 November 2021.

Davis Hartman Wright PLLC, by I. Clark Wright, Jr., for petitioners-appellees.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary L. Lucasse, for respondent-appellant Coastal Resources Commission.

DIETZ, Judge.

¶ 1 This appeal concerns the Coastal Resources Commission's conduct in a permit challenge to the Harkers Island Bridge replacement. By statute, the Commission must screen requests from third parties seeking to challenge this sort of permitting decision and deny requests that the Commission determines to be frivolous.

¶ 2 The Commission denied Petitioners' request for a regulatory challenge as frivolous, and Petitioners sought judicial review in the trial court. The court rejected the Commission's reasoning and remanded for an administrative proceeding. The court later awarded attorneys' fees against the Commission, and the Commission appealed that award.

¶ 3 As explained below, we hold that the trial court had the authority to award attorneys' fees for this type of agency decision. But we remand the case for additional findings with respect to whether the Commission acted without substantial justification. On remand, the trial court may make additional findings on the existing record or conduct any further proceedings the court deems necessary in the interests of justice.

Facts and Procedural History

¶ 4 In 2019, the North Carolina Division of Coastal Management issued a permit to the North Carolina Department of Transportation for construction of a new bridge to replace the aging bridges connecting Harkers Island to the mainland of our State.

¶ 5 Petitioners are nearby landowners who believed there were issues with DOT's permit. By law, third parties impacted by this type of permitting decision may challenge the regulatory decision through a contested case proceeding. But the General Statutes also impose a gatekeeping role on the Coastal Resources Commission. Under N.C. Gen. Stat. § 113A-121.1, a third party "who is dissatisfied with a decision to deny or grant a minor or major development permit may file a petition for a contested case hearing only if the Commission determines that a hearing is appropriate." N.C. Gen. Stat. § 113A-121.1(b). The Commission's determination "shall be based on whether the person seeking to commence a contested case: (1) Has alleged that the decision is contrary to a statute or rule; (2) Is directly affected by the decision; and (3) Has alleged facts or made legal arguments that demonstrate that the request for the hearing is not frivolous." *Id.*

¶ 6 Petitioners submitted a one-page request for authorization to pursue a contested case challenging the permit, and the Commission denied the request. The Commission concluded that Petitioners failed to demonstrate "that the Request for a hearing is not frivolous."

¶ 7 Section 113A-121.1 permits judicial review of the Commission's decision and Petitioners promptly sought judicial review in the trial court. After a hearing, the trial court rejected the Commission's determination and remanded the matter to the Office of Administrative Hearings for a contested case proceeding. Relevant to this appeal, the trial court found that the Commission's repeated determinations that Petitioners' claims were frivolous "are not supported by the record, or the plain meaning of the words 'not frivolous' as used in N.C.G.S. §113A-121.1(b)(3)." The Commission did not appeal the trial court's order.

¶ 8 Petitioners later requested an award of attorneys' fees and costs against the Commission under N.C. Gen. Stat. § 6-19.1. The trial court granted the request in a written order with findings of fact and conclusions of law and awarded $89,444.36 in attorneys' fees to Petitioners. The Commission timely appealed.

Analysis

I. Trial court authority to award fees under N.C. Gen. Stat. § 6-19.1

¶ 9 **[1]** The Commission first challenges the authority of the trial court to award attorneys' fees under N.C. Gen. Stat. § 6-19.1. The Commission contends that the statute does not apply to its actions in its statutory gatekeeping role under N.C. Gen. Stat. § 113A-121.1.

¶ 10 A trial court may award attorneys' fees only as authorized by statute. *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972). This Court reviews whether particular statutory language authorizes an award of attorneys' fees *de novo*. *Applewood Props., LLC v. New S. Props., LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013).

¶ 11 This case is governed by Section 6-19.1(a) of our General Statutes, which permits an award of attorneys' fees against a State agency by a prevailing party who is contesting state action and demonstrates that the agency acted without substantial justification in pressing its claim:

> § 6-19.1. Attorney's fees to parties appealing or defending against agency decision.
>
> (a) In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150B-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

N.C. Gen. Stat. § 6-19.1(a).

¶ 12 Our Supreme Court has held that the purpose of this statute mirrors the federal Equal Access to Justice Act, with which it shares "similar language." *Crowell Constructors v. State ex rel. Cobey*, 342 N.C. 838, 843, 467 S.E.2d 675, 679 (1996). That purpose is to ensure private parties effectively can participate in the court process when facing the government—whose resources substantially outweigh ordinary citizens—by permitting recovery of litigation expenses when the government acts unreasonably. *See*, *e.g.*, *Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132, 138 (4th Cir. 1993).

¶ 13 The Commission presents several reasons why it believes its action in this case cannot meet the statutory criteria of Section 6-19.1(a). First, the Commission argues that its "gate-keeper decision is not a civil action nor is an appeal of the Commission's gate-keeper decision." But it is now well-settled that a petition for judicial review is "a civil action." *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 733, 843 S.E.2d 207, 212 (2020). So, for example, when a State agency denied an administrative request for rulemaking and the applicant later petitioned for judicial review and secured an order commanding the agency to commence the rulemaking, we held that the judicial review proceeding was a civil action. *Table Rock Chapter of Trout Unlimited v. Envtl. Mgmt. Comm'n*, 191 N.C. App. 362, 363–64, 663 S.E.2d 333, 335 (2008). Similarly here, Petitioners sought permission to begin an administrative proceeding, but the Commission declined to grant that permission. The applicable statute expressly provides that the Commission's "determination that a person may not commence a contested case is a final agency decision and is subject to judicial review under Article 4 of Chapter 150B of the General Statutes." N.C. Gen. Stat. § 113A-121.1(b). That judicial review proceeding, under settled law, is a civil action. *Winkler*, 374 N.C. at 733, 843 S.E.2d at 212; *Table Rock*, 191 N.C. App. at 363–64, 663 S.E.2d at 335.

¶ 14 Moreover, as our Supreme Court observed in *Winkler*, the General Assembly excluded certain agency decisions subject to judicial review from the scope of Section 6-19.1. 374 N.C. at 733, 843 S.E.2d at 212. Had our legislature intended to insulate the Commission's gatekeeper decisions from the statute as well, "the legislature could have explicitly excepted" the Commission's decisions as it did those other agency decisions. *Id.* Accordingly, we hold that a judicial review proceeding challenging the Commission's gatekeeper decision under N.C. Gen. Stat. § 113A-121.1 is a civil action contesting State action that falls within the language of N.C. Gen. Stat. § 6-19.1.

¶ 15 Our dissenting colleague raises his own issues with the trial court's order, none of which are advanced by the Commission, and for good

reason. First, the dissent argues that the trial court lacked subject matter jurisdiction over this fee petition because "Petitioners did not submit a request for attorney's fees initially to the Commission, in their petition for judicial review, or to the OAH at any time."

¶ 16 This argument ignores both the language of the statute and settled case law. Petitioners were not required to assert their fee request before the Commission or in their initial petition for judicial review to confer subject matter jurisdiction on the trial court. Section 6-19.1 provides that the "party shall petition for the attorney's fees within 30 days following final disposition of the case." N.C. Gen. Stat. § 6-19.1. Filing the petition within 30 days of final disposition is the "jurisdictional prerequisite to the award of attorney's fees." *Daily Express, Inc. v. Beatty*, 202 N.C. App. 441, 446, 688 S.E.2d 791, 796 (2010).

¶ 17 This "final disposition" occurs "*after* the decision has become final and it is too late to appeal." *Whiteco Indus., Inc. v. Harrelson*, 111 N.C. App. 815, 818, 434 S.E.2d 229, 232 (1993) (emphasis in original). Thus, to confer jurisdiction over a fee request under Section 6-19.1, a petitioner must file the petition within 30 days after the expiration of any time to appeal the trial court's order. *Daily Express*, 202 N.C. App. at 446, 688 S.E.2d at 796. Here, as Petitioners explained in their petition, the trial court entered its order rejecting the Commission's final agency decision on 27 April 2020. The time for the Commission to appeal expired 30 days after entry of that order. Petitioners filed their petition for attorneys' fees on 17 June 2020. That petition was timely filed within 30 days after the expiration of the time to appeal the trial court's order and thus within 30 days after "final disposition" of the matter. *Id.*

¶ 18 Our dissenting colleague next asserts that the trial court, in a judicial review proceeding, sits as "an appellate court" and thus the superior court "could not find the requisite facts to award the attorney's fees." This is wrong. Our appellate courts repeatedly have held that trial courts, sitting in their "appellate" role in judicial review proceedings, have the authority to later award attorneys' fees under Section 6-19.1 and to make the corresponding fact findings necessary to support that award. *See, e.g.*, *Winkler*, 374 N.C. at 733–35, 843 S.E.2d at 212–13.

¶ 19 Our dissenting colleague also contends that the "superior court divested jurisdiction when the 27 April 2020 judicial review remand order was entered." Again, this is wrong. As discussed above, Section 6-19.1's "plain language requires a prevailing party seeking recovery of attorney's fees to 'petition' for them." *Hodge v. N.C. Dep't of Transp.*, 161 N.C. App. 726, 729, 589 S.E.2d 737, 739 (2003). The petition must be filed

within 30 days after final disposition of the matter. *Id.* The reason why this attorneys' fees request must be made in the form of a petition is that, in most cases, once there is a final disposition and the time to appeal is exhausted, the trial court will no longer have jurisdiction over the underlying case. The use of a *petition* for attorneys' fees within the 30-day window acts as a "jurisdictional prerequisite" that confers subject matter jurisdiction on the trial court to address the request for attorneys' fees, notwithstanding that the court no longer has jurisdiction over the matter that gave rise to the fee request. *Id.*

¶ 20 Our dissenting colleague also argues that a provision in Chapter 150B authorizing administrative law judges to award attorneys' fees in contested case proceedings preempts N.C. Gen. Stat. § 6-19.1 in this case. Again, this is not an argument advanced by the Commission because this argument is precluded by controlling case law that repeatedly has interpreted Section 6-19.1 to permit an award of attorneys' fees in matters that stem from administrative proceedings under Chapter 150B. *See, e.g.*, *Kelly v. N.C. Dep't of Env't & Nat. Res.*, 192 N.C. App. 129, 142, 664 S.E.2d 625, 634 (2008).

¶ 21 Our colleague's argument also is flatly inconsistent with the text of N.C. Gen. Stat. § 6-19.1, which states that "the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency . . . ." N.C. Gen. Stat. § 6-19.1(a). This portion of the statute was added in a bill whose title explains that it is an act "to authorize the courts to award reasonable attorney's fees for administrative hearings." 2000 N.C. Sess. Laws 190. Thus, there is no principled basis to assert that the attorneys' fees provision in Chapter 150B, even if it applied in this case, is a bar to an award under Section 6-19.1.

¶ 22 We must add "even if it applied in this case" here because, of course, Petitioners are not seeking attorneys' fees for any portion of the Chapter 150B contested case proceeding challenging the State's permitting decision. The General Assembly chose to confer on the Coastal Resources Commission the power to act as a gatekeeper and prevent parties from initiating contested case challenges to certain permitting decisions. N.C. Gen. Stat. § 113A-121.1. But the General Assembly also chose to make the Commission's ruling a "final agency decision" and give the courts the power to review that decision: "A determination that a person may not commence a contested case is a final agency decision and is subject to

judicial review under Article 4 of Chapter 150B of the General Statutes." *Id.* § 113A-121.1(b).

¶ 23 Thus, in this case, Petitioners challenged a final agency decision, prevailed in court, and then sought attorneys' fees for the costs of bringing that challenge to the final agency decision in the court system. Their fee request against the Commission has nothing to do with the separate contested case proceeding that they later pursued.

¶ 24 The Commission next argues that Section 6-19.1 does not apply because the petitioners were not "prevailing parties" under the statute. This Court has "adopted the merits test as the proper standard for awarding attorney's fees to 'prevailing' parties pursuant to N.C. Gen. Stat. § 6–19.1." *H.B.S. Contractors, Inc. v. Cumberland Cty. Bd. of Educ.*, 122 N.C. App. 49, 57, 468 S.E.2d 517, 522–23 (1996). Under that test, "persons may be considered prevailing parties for the purposes of attorney's fees if they succeeded on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing the suit." *Id.* at 517, 468 S.E.2d at 523.

¶ 25 Here, Petitioners fall squarely into the definition of a prevailing party under the merits test. The Commission exercised its gatekeeper authority and denied Petitioners the right to challenge the underlying regulatory action in an administrative proceeding on the ground that Petitioners' challenge was frivolous. As noted above, this was a final agency decision. Petitioners then sought judicial review in the courts, and the trial court rejected the Commission's determination and ordered that Petitioners could pursue their administrative challenge to the permit. Under the merits test, Petitioners were the prevailing parties in that judicial review proceeding because they succeeded in the relief they sought when they petitioned for judicial review. *Id.*

¶ 26 The Commission and our dissenting colleague respond by arguing, in essence, that this was not the end of the case but merely the beginning. They argue that the trial court's order sent the case back to begin an administrative proceeding, and thus Petitioners cannot claim to be "prevailing parties" because the administrative process is far from over at that stage. But this argument misses the point—the challenged state action was the Commission's final agency decision that Petitioners' request to begin an administrative review process was frivolous. This, in turn, prevented Petitioners from pursuing any administrative claims at all. Petitioners challenged that state action in court and prevailed, ending the court's role on that question. Thus, they are prevailing parties

under the merits test, regardless of whether they ultimately prevailed in the administrative challenge to the permitting decision.

¶ 27 In sum, we hold that the trial court properly determined that it had authority to award attorneys' fees to Petitioners under N.C. Gen. Stat. § 6-19.1.

II. Substantial justification for agency decision

¶ 28 **[2]** The Commission next argues that, even if the trial court had authority to award attorneys' fees under Section 6-19.1, the court abused its discretion when it determined that the Commission's position was not substantially justified.

¶ 29 The trial court's overall decision to award attorneys' fees under N.C. Gen. Stat. § 6-19.1 is reviewed for abuse of discretion. *Winkler*, 374 N.C. at 734, 843 S.E.2d at 213. But the determination of whether an agency "acted without substantial justification is a conclusion of law." *Early v. Cty. of Durham, Dep't of Soc. Servs.*, 193 N.C. App. 334, 346, 667 S.E.2d 512, 522 (2008). Substantial justification means "justified to a degree that could satisfy a reasonable person." *Williams v. N.C. Dep't of Env't & Nat. Res.*, 166 N.C. App. 86, 89–90, 601 S.E.2d 231, 233 (2004). "In order to show it acted with substantial justification, the burden is on the agency to demonstrate that its position, at and from the time of its initial action, was rational and legitimate to such a degree that a reasonable person could find it satisfactory or justifiable in light of the circumstances then known to the agency." *Id.* at 90, 601 S.E.2d at 233.

¶ 30 Here, the Commission explained its reasons for denying Petitioners' request for administrative review in a lengthy, written agency decision. The trial court rejected that reasoning and found it to be wrong. But the Commission's stated reasons—although wrong—on their face are ones that a reasonable person could find satisfactory or justifiable. Specifically, the Commission thoroughly analyzed each conceivable ground asserted in Petitioners' one-page request for administrative review and determined repeatedly that it would be "frivolous to hold a contested case hearing in OAH" with respect to those claims because there was no administrative jurisdiction or Petitioners could not prevail on the claims.

¶ 31 Still, this case is more complicated because the term "frivolous" is a term of art with a settled meaning in the context of legal or administrative claims. Importantly, frivolous does not mean unlikely to succeed or meritless. Instead, a claim is generally viewed as "frivolous" only if its "proponent can present no rational argument based upon the evidence

or law in support of it." *Philips v. Pitt Cty. Mem'l Hosp., Inc.*, 242 N.C. App. 456, 458, 775 S.E.2d 882, 884 (2015).

¶ 32 Petitioners contend that the Commission, although purporting to consider whether the claims were frivolous in its gatekeeping analysis, instead was examining whether it believed the claims had any merit or were likely to succeed. Petitioners assert that the Commission used this approach to readily deny administrative review of their claims, as the Commission has done with nearly all third-party requests for administrative review in recent years. Petitioners presented evidence concerning the Commission's practices including the final agency decision in this case; an affidavit discussing the origin of the "not frivolous" language in the statute; evidence that the Commission denied the vast majority of all third-party requests for administrative review as frivolous; and evidence that a Commission decision *after* the trial court in this case granted the petition for judicial review now clearly describes and applies the correct definition of the term "frivolous."

¶ 33 It is unclear from the trial court's order whether the trial court, too, found that the Commission knowingly applied the wrong standard in order to deny administrative review to Petitioners and other third-party claimants. In its order awarding fees, the trial court found that the central issue before the court in the proceeding was the Commission's "interpretation and application of the phrase 'not frivolous' as set forth in N.C.G.S. § 113A-121.1(b)(3)." But the trial court did not make a specific finding that the Commission's erroneous analysis was an intended practice by the Commission, as opposed to a reasonable error in applying law to facts in its analysis in this case.

¶ 34 This is a critical fact question because, if the trial court found that the Commission knowingly was applying the wrong legal standard, that would constitute a lack of substantial justification. *Tay v. Flaherty*, 100 N.C. App. 51, 56, 394 S.E.2d 217, 220 (1990). In *Tay*, for example, this Court held that the Guilford County Department of Social Services was not substantially justified in terminating the petitioner's benefits—despite evidence that reasonable people could view the agency's actions as justified, such as affidavits from the trial judge and attorneys practicing in this subject matter area stating that they believed DSS acted appropriately—because there was evidence that DSS *knew* the applicable law did not support its position. *Id.*

¶ 35 Ordinarily, a trial court is not required to make any fact findings in awarding attorneys' fees under N.C. Gen. Stat. § 6-19.1 except for those addressing the reasonableness of the requested attorneys' fees. *Early*,

193 N.C. App. at 347, 667 S.E.2d at 522–23. However, because the trial court made fact findings concerning the Commission's conduct in this case, but did not make a finding concerning the Commission's knowledge of the appropriate test for assessing frivolous claims, we are reluctant to impute that finding to the trial court. This Court is permitted to review the record to assess whether competent evidence supports implied findings by a trial court, but we cannot find facts ourselves. *Pharr v. Atlanta & C. Air Line Ry. Co.*, 132 N.C. 418, 423, 44 S.E. 37, 38 (1903) ("It is well settled that this court cannot find facts."). Thus, we believe the appropriate course is to remand to the trial court to provide an opportunity for the court to make additional fact findings that reflect the trial court's intent with respect to its ruling.

¶ 36 Accordingly, we vacate the trial court's order and remand for further proceedings. On remand, the trial court may enter a new order based on the existing record or may conduct any further proceedings necessary to resolve this matter in the interests of justice.

¶ 37 Because we are vacating the order and remanding for additional findings, we need not address the Commission's remaining challenges to the attorneys' fees award at this time. Likewise, we need not address our dissenting colleague's discussion of the amount of attorneys' fees awarded. But because our dissenting colleague suggests that the case should be remanded to determine whether the attorneys' fees reported by Petitioners' counsel are a violation of the Rules of Professional Conduct, we conclude by noting that the courts have concurrent jurisdiction over the professional conduct of attorneys appearing before them. *Boyce v. N.C. State Bar*, 258 N.C. App. 567, 576, 814 S.E.2d 127, 133 (2018). The trial court reviewed the attorneys' fees request, including the invoices and accompanying affidavits, and made a fact finding that the fees were "fair and reasonable." To avoid any uncertainty on this question, we hold that the attorneys' fee request does not raise any ethical concerns under the Rules of Professional Conduct.

Conclusion

¶ 38 We vacate the trial court's order and remand for further proceedings.

VACATED AND REMANDED.

Judge GRIFFIN concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

¶ 39 North Carolina follows the "American Rule" prohibiting or restricting awards of attorney's fees against an opposing party in an action. *Ehrenhaus v. Baker*, 243 N.C. App. 17, 27-8, 776 S.E.2d 699, 705-06 (2015). Under the "American Rule," each party is responsible to pay its own attorney's fees, whether they win, lose, settle, or draw in the underlying litigation. *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972). Our Supreme Court has also held a trial court may award attorney's fees only if and when strictly authorized by statute, narrowly construed. *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972). *See Stillwell Enters., Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 290, 266 S.E.2d 812, 815 (1980) (Lease provision "allowing the lessor reasonable attorneys' fees should the lease obligation be collected by an attorney after maturity, can be enforced only to the extent that the same is expressly allowed by statute.").

¶ 40 Petitioners submitted a one-page request for authorization to pursue a contested case under North Carolina Administrative Procedure Act ("NCAPA"), N.C. Gen. Stat. § 150B (2021) to challenge a DOT highway bridge replacement permit the Commission had issued. Petitioners asserted "the bulkhead is to be constructed adjacent to our riparian / littoral properties."

¶ 41 The Commission reviewed the request and concluded Petitioners had failed to demonstrate "that the Request for a hearing is not frivolous" and properly denied their request. I agree the superior court's order must be reversed or vacated and remanded. Upon remand, Petitioners' motion for attorney's fees must be dismissed. I respectfully dissent.

I. Appellate Judicial Review

¶ 42 The superior court acted as a reviewing appellate court and was without jurisdiction to enter an award for attorney's fees because: (1) Petitioners did not seek or raise the issue of attorney's fees before the Commission or the Office of Administrative Hearings ("OAH") prior to dismissal of its contested case; (2) an appellate court cannot find facts to support an award of attorney's fees; and, (3) the superior court was divested of jurisdiction in this contested upon remand to the OAH.

¶ 43 Presuming the superior court had retained or possessed jurisdiction, upon remand Petitioners' motion must be dismissed because it does not allege any statutory basis to award attorney's fees. The superior court lacked any authority to award Petitioners' attorney's fees under these facts.

II. Lack of Jurisdiction of Superior Court

A. No Jurisdiction to Award Attorney's Fees

¶ 44 Appeals from the Commission to superior court are governed by N.C. Gen. Stat. §§ 113A-121.1(b) and -123(a) (2021). In reviewing the Commission's decision under this statute "the superior court sits as an appellate court, and no longer sits as the trier of fact." *Johnson v. Robertson*, 227 N.C. App. 281, 286, 742 S.E.2d 603, 607 (2013). The review of a superior court sitting as an appellate court "is based solely upon the record from the prior proceedings." *N.C. Dep't of Transp. v. Davenport*, 108 N.C. App. 178, 181, 423 S.E.2d 327, 329 (1992) (citing *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 662 (1990)).

¶ 45 Contrary to the majority's opinion, this Court as "an appellate court has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*." *Xiong v. Marks*, 193 N.C. App. 644, 652, 668 S.E.2d 594, 599 (2008) (citations omitted). "A jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co. LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) (citation omitted).

¶ 46 "[I]t is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel." *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956) (citations omitted).

¶ 47 Our Appellate Rules require parties to preserve issues for appellate review by "present[ing] to the [lower court] a timely request, objection or motion[.]" N.C. R. App. P. 10(a)(1). Petitioners did not submit a request for attorney's fees initially to the Commission, in their petition for judicial review, or to the OAH at any time before or after the Petitioners and the North Carolina Department of Transportation ("DOT") settled and the contested case before the OAH was dismissed.

¶ 48 Petitioners also failed to preserve the right to petition for payment of attorney's fees in the Settlement Agreement, Release and Covenant Not to Sue or in the Jane's Creek Improvements Agreement between the DOT, the North Carolina Coastal Federation, and Petitioners. The issue of attorney's fees was never properly asserted before any tribunal nor preserved prior to dismissal of the contested case.

¶ 49 In order to award attorney's fees, a court must find facts "to support the court's conclusion that this was a reasonable fee such as the time and labor expended, the skill required to perform the legal services

rendered, the customary fee for like work, or the experience and ability of the attorney." *Morris v. Bailey*, 86 N.C. App. 378, 387, 358 S.E.2d 120, 125 (1987) (citations omitted). A superior court sitting as an appellate court cannot make these factual findings when no motion and findings were made below. *See Davenport*, 108 N.C. App. at 181, 423 S.E.2d at 329.

¶ 50 The majority's opinion cites *Daily Express, Inc. v. Beatty*, and asserts: "Petitioners were not required to assert their fee request before the Commission or in their initial petition for judicial review to confer subject matter jurisdiction on the trial court." This conclusion is contrary to the holding in Daily Express. *Daily Express, Inc. v. Beatty*, 202 N.C. App. 441, 456, 688 S.E.2d 791, 802 (2010). In that case, the petitioners had appealed to the superior court for *de novo* review pursuant to N.C. Gen. Stat. § 20-91.1, and not under N.C. Gen. Stat. §§ 113A-121.1(b) or the NCAPA under § 150B. *See id.* at 449, 688 S.E.2d at 798.

¶ 51 In *Daily Express*, the petitioners had requested attorney's fees in the complaint and in the motion for summary judgment. The trial court awarded fees in its order of summary judgment and without a formal petition. *Id.* at 447, 688 S.E.2d at 797.

¶ 52 The trial court entered an order "granting Petitioner's motion for summary judgment; denying Respondent's motion for summary judgment; ordering Respondent to refund to Petitioner the full amount of the civil penalty assessed in the amount of $24,208.00 plus interest and ordering Respondent to pay to Petitioner its reasonable attorney's fees." *Id.* at 441-42, 688 S.E.2d at 793-94 (internal quotation marks and alterations omitted).

¶ 53 Here, the superior court's order on judicial review remanded the case, divesting jurisdiction, as established below. The superior court, sitting as an appellate court, could not find the requisite facts to award the attorney's fees, nor could it make such a conclusion on an issue not preserved in the settlement agreement or raised at any time before the Commission or the OAH. *Davenport*, 108 N.C. App. at 181, 423 S.E.2d at 329; N.C. R. App. P. 10(a)(1).

B. Superior Court Divested of Jurisdiction upon Remand

¶ 54 "[A] court loses jurisdiction over a cause after it renders a final decree[.]" *Wildcatt v. Smith*, 69 N.C. App. 1, 11, 316 S.E.2d 870, 877 (1984) (citations omitted). By order entered 27 April 2020, the superior court granted Petitioners' Petition for Judicial Review and remanded the case to allow Petitioners to file a contested case petition before the OAH. On

17 June 2020, Petitioners filed a "Corrected Petition for Fees and Costs Pursuant to N.C.G.S. § 6-19.1" in the superior court.

¶ 55 The parties entered mediated settlement talks on 28 July 2020. On 31 July 2020, the superior court held a hearing on Petitioners' motion for attorney's fees. The parties filed the Settlement Agreement, Release and Covenant Not to Sue and the Jane's Creek Improvements Agreement between the DOT, the Coastal Federation, and Petitioners with the OAH on 25 September 2020.

¶ 56 The majority's opinion cites *Hodge v. N.C. Dep't of Transp.*, 161 N.C. App. 726, 589 S.E.2d 737 (2003) for the proposition the trial court's remand disposition did not divest it of jurisdiction. This notion is contrary to the holding of *Hodge*. In *Hodge*, an employee challenged his dismissal before "the Office of Administrative Hearings, the State Personnel Commission, the Wake County Superior Court, . . . this Court," before our Supreme Court held the employee had been improperly classified as "policymaking exempt" and terminated. *Id.* at 727, 589 S.E.2d at 738.

¶ 57 The employee was reinstated and awarded back pay. *Id.* Seventeen months after the Supreme Court had entered its decision, the employee petitioned in superior court for attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1. *Id.* This Court reversed the superior court's award of attorney's fees because the petition was filed seventeen months after the Supreme Court's decision, which occurred well after the "jurisdictional prerequisite." *Id.* at 729, 589 S.E.2d at 739. *Hodge* does not provide any guidance or binding precedent for a trial court retaining jurisdiction over attorney's fees following a jurisdictionally-divesting remand. *Id.*

¶ 58 The superior court's award of attorney's fees is not related to the court's ability to "correct or enforce its judgment." *Id.* The superior court divested jurisdiction when the 27 April 2020 judicial review remand order was entered. The parties had invoked jurisdiction under the NCAPA, and had begun to hold §150B contested case proceedings with the OAH. The superior court's award of attorney's fees is properly vacated. *See Alexander v. N.C. State Bd. of Elections*, 281 N.C. App. 495, 503, 2022-NCCOA-52, ¶ 28, 869 S.E.2d 765, 772 (2022) (Three judge panel was without jurisdiction to award attorney's fees where trial court retained jurisdiction over as applied challenges.).

III. Statutory Authority to Award Fees

¶ 59 The Commission also correctly argues N.C. Gen. Stat. § 6-19.1 does not apply to its actions in its statutory gatekeeping role under N.C. Gen. Stat. § 113A-121.1 (2021), or thereafter to this contested case under N.C. Gen. Stat. § 150B.

¶ 60 N.C. Gen. Stat. § 6-19.1(a) expressly exempts attorney's fees to a petitioner contesting an agency decision, "(a) In any civil action . . . brought by a party who is contesting State action pursuant to G.S. 150B-43 [Right to Judicial Review] or any other appropriate provisions of law." N.C. Gen. Stat. § 6-19.1(a) (2021).

¶ 61 When interpreting the parties' arguments, we must first determine the relative applicability of N.C. Gen. Stat. § 150B-33(b) and N.C. Gen. Stat. § 6-19.1. In reviewing these statutes, we are guided by several well-established principles and precedents of statutory construction.

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

¶ 63 "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) (citations, internal quotation marks, and ellipses omitted). "[S]tatutes *in pari materia* must be read in context with each other." *Cedar Creek Enters. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976) (citation omitted).

¶ 64 "[W]hen two statutes arguably address the same issue, one in specific terms and the other generally, the specific statute controls." *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 322, 735 S.E.2d 300, 305 (2012) (citations omitted). Our Supreme Court further held: "when that specific statute is clear and unambiguous, we are not permitted to engage in statutory construction in any form. [Our Courts] may not construe the statute in pari materia with any other statutes, including those that treat the same issue generally." *Id.*

¶ 65 Further, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)).

¶ 66 In *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 730, 843 S.E.2d 207, 210 (2020), cited in the majority's opinion, our Supreme Court interpreted N.C. Gen. Stat. § 6-19.1(a) in the context of a superior court awarding attorney's fees in a disciplinary action by a licensing board. The Supreme Court held the "words and punctuation used in N.C.G.S. § 6-19.1" are ambiguous. *Id.*

¶ 67 Our Supreme Court also held the purpose of the amendment in N.C. Gen. Stat. § 6-19.1 was to "curb unwarranted, ill-supported *suits initiated by State agencies*" that occur "when a State agency . . . press[es] a *claim against [a] party 'without substantial justification*.' " *Crowell Constructors v. State ex rel. Cobey*, 342 N.C. 838, 844, 467 S.E.2d 675, 679 (1996) (emphasis supplied).

¶ 68 The State neither "initiate[d]" nor "press[ed]" a claim against the Petitioners "without substantial justification" to satisfy the statute. *Crowell Constructors*, 342 N.C. at 844, 467 S.E.2d at 679; N.C. Gen. Stat. § 6-19.1(a). Ignoring the more specific provisions of N.C. Gen. Stat. § 150B-33(b)(11), any reliance upon N.C. Gen. Stat. § 6-19.1 under these facts and procedural history is reversible error.

¶ 69 The NCAPA contains a specific attorney's fees provision that is applicable to agency actions and "contested cases" and pre-empts N.C. Gen. Stat. § 6-19.1(a) in this case. Under the NCAPA for an "aggrieved party":

> an administrative law judge may: Order the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved in contested cases decided under this Article where the administrative law judge finds that the State agency named as respondent has substantially prejudiced the petitioner's rights and has acted arbitrarily or capriciously or under Chapter 126 where the administrative law judge finds discrimination, harassment, or orders reinstatement or back pay.

N.C. Gen. Stat. § 150B-33(b)(11) (2021).

¶ 70 The requirements of N.C. Gen. Stat. § 113A-121.1(b) outline and delineate Petitioners' action to challenge the Commission's DOT bridge replacement permit:

> A *person other than a permit applicant* or the Secretary who is dissatisfied with a decision to deny or grant a minor or major development permit *may*

> *file a petition for a contested case hearing only if the Commission determines that a hearing is appropriate.* A request for a determination of the appropriateness of a contested case hearing shall be made in writing and received by the Commission within 20 days after the disputed permit decision is made. *A determination* of the appropriateness of a contested case shall be made within 30 days after a request for a determination is received and *shall be based* on whether *the person seeking to commence a contested case*:
>
> (1) Has alleged that the *decision is contrary* to a statute or rule;
>
> (2) Is *directly affected* by the decision; *and*
>
> (3) *Has alleged facts or made legal arguments that demonstrate that the request for the hearing is not frivolous.*

N.C. Gen. Stat. § 113A-121.1(b)(2021) (emphasis supplied).

¶ 71 All three of these elements are stated in the conjunctive and must be satisfied by Petitioner. *Id.*; *see Lithium Corp. of Am. v. Town of Bessemer City*, 261 N.C. 532, 535, 135 S.E.2d 574, 577 (1964) ("Ordinarily, when the conjunctive 'and' connects words, phrases or clauses of a statutory sentence, they are to be considered jointly.") (citation omitted).

¶ 72 The Commission denied Petitioners' request for a contested case hearing under N.C. Gen. Stat. § 150B, based upon Petitioners' failure in its one-page petition to carry its burden to allege evidence or to assert legal arguments to demonstrate the DOT bridge replacement permit violated any "statute or rule." N.C. Gen. Stat. § 113A-121.1. The Commission's threshold gate-keeping standard of review under this statute correctly places the burden on Petitioners to meet all statutory requirements. *Id.*

¶ 73 This "burden on Petitioners" is an even lower standard for a court to uphold the Commission than the standard of review under a Rule 12(b) motion, which places the burden on the movant and deferentially reviews the non-movant's pleadings. *Id.*; *see Holton v. Holton*, 258 N.C. App. 408, 416, 813 S.E.2d 649, 655 (2018) ("The scope of our review is 'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.' ") (citation omitted).

¶ 74 Under either this "only if the Commission determines" statutory standard, under N.C. Gen. Stat. § 113A-121.1, or under a Rule 12(b) standard, Petitioners are not a "prevailing party." The reviewing court made no decision on the underlying merits, if any, of Petitioners' claims asserted in its *de minimis* one-page petition, other than it was "not frivolous." *See* N.C. Gen. Stat. § 113A-121.1(b)(3). Respondent correctly argues Petitioners cannot meet the definition of being a "prevailing party" since the interlocutory remand order only allowed Petitioner *to file* a contested case and is not a final determination on any merits.

¶ 75 No final determination on the underlying issues or merits of their one-page assertions was *ever* reached because Petitioners settled with DOT, after mediation, without the Commission being a party thereto.

¶ 76 After Petitioners filed their contested case petition in Office of Administrative Hearings, the parties mediated. The parties agreed the DOT would request a modification of the permit at issue and settled the case. The Commission was not present or a party to the mediated settlement agreement. "[T]he mere fact that plaintiffs obtained a settlement does not automatically transform them into prevailing parties for purposes of an award of attorney's fees." *House v. Hillhaven, Inc.*, 105 N.C. App. 191, 195, 412 S.E.2d 893, 896 (1992).

¶ 77 The Commission correctly argues its "gatekeeping" and threshold determination under the statute was not the end of the case, but was merely the beginning, similar to the court's denial of a Rule 12(b) dismissal motion. The Commission also correctly contends the superior court's order was interlocutory and merely sent the case back *to begin* an administrative contested case proceeding under N.C. Gen. Stat. § 150B.

¶ 78 Petitioners cannot claim to be "prevailing parties" because the administrative review on a contested case was just beginning at that stage. Upon *de novo* review, the superior court's conclusion of law that "[t]he petitioners, therefore were the prevailing party" is erroneous, prejudicial, and is properly vacated.

¶ 79 Contrary to the majority's notion, our Supreme Court's interpretation and holding in *Winkler* is neither applicable nor controlling to the facts or procedural history *sub judice*. In *Winkler*, the Court recognized "a disciplinary action does not become a civil action until either party petitions for judicial review of the decision of the board or commission, and the matter becomes a contested case before a judge." *Winkler*, 374 N.C. at 733, 443 S.E.2d at 212.

¶ 80 The Supreme Court merely held the General Assembly had shown no intent to prohibit a superior court from awarding attorney's fees in a disciplinary action by a licensing board. *Id*. at 734, 843 S.E.2d at 213. Despite this *dicta*, the Court's final holding in *Winkler* was to *deny* the award of attorney's fees. *Id*. at 736, 843 S.E.2d at 214. Nothing in the facts nor procedural history of this case remotely resembles the facts or procedural posture that was present in *Winkler*.

IV. Presuming Statutory Authority to Award

¶ 81 Even if the trial court could have considered the Petitioners' motion for attorney's fees at this point *under any statutory authority or legal theory*, Petitioners' motion should be remanded for the eight findings under Rule 1.5 regarding fees under the State Bar's statutory authority stated in N.C. Gen. Stat. § 84-23 (2021):

> (a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

27 N.C. Admin. Code 2.1.05 (Supp. 2021). These eight factors must be satisfied by the claimant and found conjunctively. *See Lithium Corp. of Am.*, 261 N.C. at 535, 135 S.E.2d at 577.

¶ 82 In 2007, the State Bar issued Formal Ethics Opinion 13 under Rule 1.5 and ruled an attorney must: (1) "establish a reasonable hourly rate for his services *and for the services of his staff*" to insure honest billing predicated on hourly charges; (2) "disclose the basis for the amounts charged[;]" (3) "avoid wasteful, unnecessary, or redundant procedures[;]" and (4) "ensure the total cost to the client is *not clearly excessive*." 2007 Formal Ethics Opinion 13 (emphasis supplied).

¶ 83 A superior court must make findings addressing the reasonableness of the requested fees prior to awarding attorney's fees. *Early v. County of Durham, Dep't of Soc. Servs.*, 193 N.C. App. 334, 347, 667 S.E.2d 512, 522–23 (2008). This Court exercises authority to review the record *de novo* to assess whether competent evidence supports the trial court's findings and whether its finding support the *de novo* review of its application and conclusions of laws. *Pharr v. Atlanta & C. Air Line Ry. Co.*, 132 N.C. 418, 423, 44 S.E. 37, 38 (1903).

¶ 84 Returning to *Winkler*, the Supreme Court "adopted a middle-ground objective standard to require the agency to demonstrate that its position, at and from the time of its initial action, was rational and legitimate to such degree that a reasonable person *could* find it satisfactory or justifiable in light of the circumstances then known to the agency." *Winkler*, 374 N.C. at 735, 843 S.E.2d at 213.

¶ 85 The Supreme Court concluded: "Despite failing to prevail on the merits of its claim, the Board was substantially justified in contending that Winkler engaged in the type of conduct the Board was authorized to discipline." *Id.* The Supreme Court held, "the trial court erred in awarding Winkler attorney's fees, pursuant to N.C.G.S. § 6-19.1, because there was substantial justification for the Board's claims." *Id.*

¶ 86 The Commission clearly explained its threshold denial of Petitioners' request for a contested case administrative review under N.C. Gen. Stat. § 150B in a lengthy, written agency decision. The Commission thoroughly analyzed each conceivable ground Petitioners had asserted in their one-page request for administrative review.

¶ 87 The Commission repeatedly determined that it would be "frivolous to hold a contested case hearing in OAH" under N.C. Gen. Stat. § 150B with respect to those claims because no administrative jurisdiction existed under N.C. Gen. Stat. § 113A-121.1(b) and Petitioners had failed to carry their burden and demonstrate a threshold showing of any basis to prevail on the claims. Although the superior court rejected that reasoning, the Commission's bases as stated on their face, as in *Winkler*, are

ones which a "reasonable person could find" satisfactory or justifiable. *Id.* at 736, 843 S.E.2d at 214.

¶ 88 Presuming N.C. Gen. Stat. § 6-19.1(a) has applicability to these facts and procedural posture, the reviewing court cannot enter *any award* of fees until:

> (1) The court finds that the *agency acted without substantial justification in pressing its claim* against the party; and
>
> (2) The court finds that there are *no special circumstances that would make the award of attorney's fees unjust.* The party *shall petition* for the attorney's fees within 30 days *following final disposition of the case.* The petition shall be supported by an affidavit setting forth the basis for the request.

Id. (emphasis supplied).

¶ 89 Petitioners' motion for attorney's fees asserts reimbursement and payment for 194.3 hours, all billed at one rate of $475.00 per hour, and seeks over $90,000 in taxpayer funds. The motion contains no delineation of partners, associates, or paralegal hours spent or rates billed, only one set hourly rate. *See* 27 N.C. Admin. Code 2.1.05; 2007 Formal Ethics Opinion 13.

¶ 90 The Commission also asserts it is unjust to award fees for work performed when the invoices do not support the claim and Petitioners fail to differentiate between the hours their attorney spent pursuing an injunction against DOT and those spent working on the petition for judicial review of the Commission's permit.

¶ 91 The superior court's finding of fact 11 confirms the Commission's arguments as follows:

> 11. Beginning on June 1, 2019 and continuing through April 30, 2020, attorney Wright *and his staff* provided to the petitioners 194.2 hours of valuable legal services in connection with the judicial review *and injunctive relief proceedings* before the court. Using a fair and reasonable hourly rate of $475.00, the appropriate reasonable attorney's fee recoverable by petitioners for these legal services totals $92,245.00. The petitioners also incurred during that time reasonable costs of $2,248.36. The court incorporates the affidavit of

> attorney Wright and the detailed invoices generated by him that *described his legal work*. These invoices were sent to his clients who have paid $53,000.00 of the billed total. The court finds that these invoices provide adequate and reasonable documentation of the time expended in the representation of the petitioners. (emphasis supplied).

¶ 92 The superior court's conclusion of law number 4 states, in part, that "[t]he [Commission's] conclusion that the claims and allegations of CAMA permitting violations raised by the petitioners were frivolous and groundless was not supported by the record." Conclusion of law number 8 states, in part, that "[t]he petitioners are to be awarded $89,444.36 in attorney's fees and costs." These conclusions of law are erroneous, prejudicial, and are properly vacated or reversed.

V. Conclusion

¶ 93 The superior court, as a reviewing appellate court, remanded jurisdiction for Petitioners to file a petition for a contested case under the NCAPA. That court's jurisdiction ended, and no authority remained for it to consider Petitioners' pre-emptory motion for attorney's fees. Neither Petitioners' petition for judicial review, nor the settlement agreement with DOT, nor the dismissal of the contested case before the OAH preserved Petitioners' right to seek attorney's fees. Petitioners also failed to file any motion for attorney's fees before the Commission under N.C. Gen. Stat. § 113A or before the OAH pursuant to N.C. Gen. Stat. § 150B-33(b)(11).

¶ 94 As the Supreme Court held in *Winkler*, under *de novo* review, the Commission, "[d]espite failing to prevail on the merits of its claim, . . . was substantially justified in" concluding Petitioners' one-page petition failed to carry its burden and to comply with N.C. Gen. Stat. § 113A-121.1(b). "[T]he trial court erred in awarding [Petitioners'] attorney's fees, pursuant to N.C.G.S. § 6-19.1, because there was substantial justification for the [Commission's reasoned decision]." *Winkler*, 374 N.C. at 736, 843 S.E.2d at 214; *see Crowell Constructors*, 342 N.C. at 844, 467 S.E.2d at 679 (N.C. Gen. Stat. § 6-19.1 was intended to "curb unwarranted, ill-supported *suits initiated by State agencies*" that occur "when a State agency . . . press[es] a *claim against [a] party 'without substantial justification*.' ") (emphasis supplied).

¶ 95 The superior court's order is properly vacated and remanded for dismissal of Petitioners' motion for attorney's fees under any and all of the grounds shown above. I respectfully dissent.

CARMELA BLACKWELL, EMPLOYEE, PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION/BUNCOMBE COUNTY SCHOOLS, EMPLOYER, SELF-INSURED (SEDGWICK CMS, ADMINISTRATOR), DEFENDANT

No. COA20-829

Filed 1 March 2022

Workers' Compensation—disability award—conversion from periodic payments to lump sum—uncertain number of future payments—calculation

The Industrial Commission erred by denying plaintiff's request to have her workers' compensation award be converted from weekly payments to a lump-sum award under a misapprehension of law. Under N.C.G.S. § 97-44, although a lump sum award may not exceed the uncommuted value of future periodic installments, there was no prohibition against a lump-sum award merely because the number of payments, which in this case were to last for the rest of plaintiff's life, could not be ascertained with certainty. On remand, the Commission was directed to determine whether plaintiff's request was an "unusual case" pursuant to section 97-44 to make a lump-sum award appropriate and, if so, to consider evidence—including the mortality table in N.C.G.S. § 8-46—to determine the number of installments plaintiff was expected to receive in order to calculate the amount of the lump sum.

Appeal by Plaintiff from Opinion and Award entered 7 August 2020 by Chair Philip A. Baddour, III, for the North Carolina Industrial Commission. Heard in the Court of Appeals 7 September 2021.

Thomas F. Ramer for the Plaintiff.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Patrick S. Wooten, for the State.

DILLON, Judge.

¶ 1 This case concerns an injured employee seeking to convert her workers' compensation disability award of periodic payments to a lump-sum award.

I. Background

¶ 2 Plaintiff is a former high school teacher who was injured while on the job breaking up a fight. She was diagnosed with numerous physical and mental injuries.

¶ 3 The Full Commission found Plaintiff to be permanently and totally disabled and awarded her weekly benefits. Some time later, Plaintiff requested that her award be converted into a single, lump-sum payment, as allowed by N.C. Gen. Stat. § 97-44 (2018).

¶ 4 The Deputy Commissioner denied her request. Her request was likewise denied on appeal at the Full Commission. Plaintiff timely appealed to our Court.

II. Standard of Review

¶ 5 "[T]he full Commission is the sole judge of the weight and credibility of the evidence, [and] appellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Commission's findings of fact are conclusive on appeal if supported by competent evidence, and its conclusions of law are reviewed *de novo*. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982).

III. Analysis

A. Lump Sum Award

¶ 6 The Commission denied Plaintiff's request based on its belief that a lump-sum award was not allowed in any situation where the number of future payments was not certain, as is the case here. Specifically, Plaintiff is eligible to receive weekly benefits for the rest of her life, however long that might be.

¶ 7 Plaintiff argues that the Commission misapprehended the law. As explained below, we agree and remand the matter to the Commission for reconsideration of Plaintiff's request.

¶ 8 Our Workers' Compensation Act allows the Commission to allow future benefits to be paid in a lump-sum:

> Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, in unusual cases, where the Industrial Commission deems it to be to the best interest of the employee

> or his dependents, or where it will prevent undue hardships on the employer or his insurance carrier, without prejudicing the interests of the employee or his dependents, be redeemed, in whole or in part, by the payment by the employer of a lump sum which shall be fixed by the Commission, *but in no case to exceed the uncommuted value of the future installments which may be due under this Article.*

N.C. Gen. Stat. § 97-44 (2021) (emphasis added).

¶ 9 The Commission based its denial of Plaintiff's motion on the clause italicized above (the "Uncommuted Value Clause"). The Commission reasoned this clause prohibits any lump-sum award which would exceed the sum of the future installments that are being replaced. And, here, the number of future installments due Plaintiff is unknowable, as her weekly compensation may be terminated upon death or upon a showing that she is capable of returning to suitable employment. *See* N.C. Gen. Stat. § 97-2(22). Accordingly, the Commission reasoned, it was not allowed to make a lump-sum award as any such award *could* exceed the amount Plaintiff would have otherwise received had she continued receiving her benefits in weekly installments, something that the Uncommuted Value Clause prohibits.

¶ 10 Our Court, however, has recognized that "[a]wards for permanent disability may be paid in weekly installments or in one lump sum." *Freeman v. Freeman*, 107 N.C. App. 644, 654, 421 S.E.2d 623, 628 (1992). Our Court has also upheld a lump-sum award under Section 97-44, in *Harris v. Lee Paving*, 47 N.C. App. 348, 267 S.E.2d 381 (1980), granted to the surviving spouse of an employee killed during employment. Though not expressly noted in that opinion, the number of future installments due that spouse was unknowable, as the surviving spouse could have died before all future installments she may have been eligible for would have been paid, or she could have remarried. *See* N.C. Gen. Stat. § 97-38 (compensation payable to surviving spouse to continue "during her . . . lifetime or until remarriage"). Our Court has never, otherwise, interpreted the Uncommuted Value Clause to restrict lump-sum awards only in those instances where the number of future installments is certain.

¶ 11 Accordingly, we conclude that the Commission has the authority in unusual cases to award a lump-sum, even where the sum of future benefits is not certain, if there is competent evidence tending to show how long the plaintiff was reasonably likely to have received future benefits. For instance, if the Commission appropriately determines that a

lump-sum is warranted, it may consider competent evidence concerning Plaintiff's life expectancy. Our General Assembly, for example, has provided a mortality table—an aid for calculating an individual's life-expectancy—that may be used for lump-sum award calculations:

> Whenever it is necessary to establish the expectancy of continued life of any person from any period of the person's life, whether the person is living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence[.]

N.C. Gen. Stat. § 8-46 (2021). As with other cases involving permanent disability where the plaintiff's life expectancy is an issue, *see Gillikin v. Burbage*, 263 N.C. 317, 327, 139 S.E.2d 753, 761 (1965), the Commission may consider this statutory table as evidence in determining one's life expectancy in the context of a workers' compensation proceeding.

¶ 12 Our Court in *Harris* did hold that the phrase "uncommuted value of future installments" means that expected future installments may, *but need not*, be "commuted to its present value" by the Commission in calculating a lump-sum award. 47 N.C. App. at 352, 267 S.E.2d at 384.

¶ 13 However, where a lump-sum award is deemed appropriate, the Commission *should* discount the sum of expected future benefits when there is competent evidence available to set an appropriate discount rate. Indeed, there is a "time value of money," where a dollar today is worth more than a dollar tomorrow (or next year). Therefore, a plaintiff would receive a windfall if she were to receive today the same amount that she was to receive in the future over time. Accordingly, it could be viewed as an abuse of discretion when the Commission does not discount the value of expected future benefits in calculating a lump-sum award where competent evidence is available to establish an appropriate discount rate.

¶ 14 Of course, the Commission's first task is to determine whether a lump-sum award is even appropriate in this case. Indeed, Section 97-44 provides that a lump-sum award may only be awarded "in unusual cases" where, relevant to this case, the award of a lump-sum is in "the best interest of the employee." The phrase "the best interest of the employee" is to be construed very narrowly. One might argue many reasons why it would be in the best interest for an employee to have control over the money sooner than later. But the plain language of the statute requires that the reason must be based on something peculiar in the employee's case making it "unusual." For example, one could argue that it is in an

employee's best interest to have her benefits up-front so she can pay off high-interest credit cards. However, this reason would not necessarily be "unusual" as contemplated by Section 97-44.

¶ 15 Further, in determining the appropriateness of a lump-sum award, the Commission must be cognizant that the goals of the "Workers' Compensation Act [are] best accomplished through periodic payments" and an award of periodic payments is preferred "to prevent the employee [ ] from dissipating the means for [her] support and thereby becoming a burden on society." *Harris*, 47 N.C. App. at 349, 267 S.E.2d at 383. The fact that the sum of Plaintiff's future benefits is unknown cuts against making a lump-sum award as Plaintiff could outlive her life expectancy and, therefore, run out of money for her care, even if properly invested.

IV. Conclusion

¶ 16 The Commission erred in concluding that a lump-sum award under Section 97-44 is never allowed where the sum of future installments is uncertain. We vacate the decision of the Commission and remand for reconsideration of Plaintiff's request.

¶ 17 On remand, the Commission must first determine whether Plaintiff has shown her situation to be an "unusual case."

¶ 18 Should the Commission deem that Plaintiff has met her burden in this regard, the Commission may consider any competent evidence, including the table codified in Section 8-46, to determine the number of installments that Plaintiff is expected to receive under her current award. In calculating the lump-sum award, the Commission may discount the expected future installments to a present value.

VACATED AND REMANDED.

Chief Judge STROUD and Judge TYSON concur.

DISMAS CHARITIES, INC. v. CITY OF FAYETTEVILLE

[282 N.C. App. 29, 2022-NCCOA-124]

DISMAS CHARITIES, INC., PETITIONER
v.
THE CITY OF FAYETTEVILLE, NORTH CAROLINA, RESPONDENT, AND
CYNTHIA DOVE AND HUSBAND, EARLEST DOVE, RESPONDENT-INTERVENOR

No. COA20-914

Filed 1 March 2022

1. Zoning—special use permit—denied by city council—standard of review by superior court

Where a city council denied petitioner charity organization a special use permit to build a halfway house on the basis that the charity did not meet its burden of production to show that its proposed use met a certain standard in the city's ordinance, the superior court on appeal erred by applying the whole record test rather than conducting a de novo review of whether petitioner had, in fact, met its burden of production.

2. Zoning—special use permit—prima facie showing by applicant—authority of city to deny permit

A city council erred by denying petitioner charity organization a special use permit to build a halfway house where, contrary to the city council's determination, the charity met its burden of production to show that its proposed use met a certain standard in the city's ordinance—that the proposed use "allows for the protection of property values and the ability of neighboring lands to develop the uses permitted in the zoning district"—and further, where no competent, material, substantial evidence was presented to counter petitioner's evidence.

Appeal by Petitioner from order entered 3 August 2020 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 22 September 2021.

Womble Bond Dickinson (US) LLP, by Amy C. Crout and John C. Cooke, and The Michael Porter Law Firm, by Michael R. Porter, for the Petitioner-Appellant.

Poyner Spruill LLP, by Chad W. Essick and Nicolas E. Tosco, and Fayetteville City Attorney's Office, by Karen M. McDonald, for the Respondent-Appellee.

Ragsdale Liggett PLLC, by Amie C. Sivon and Benjamin R. Kuhn, for the Respondent-Intervenor-Appellee.

DILLON, Judge.

¶ 1 Petitioner Dismas Charities, Inc. ("Dismas") appeals an order of the superior court affirming the decision of Respondent City of Fayetteville (the "City") denying the issuance of a special use permit for the construction of a halfway house in downtown Fayetteville. The City denied the permit based on its conclusion that Dismas did not meet its burden of production to show that its use met a certain standard in the City's ordinance (hereinafter "Standard 7"), which requires a showing that the special use sought "allows for the protection of property values and the ability of neighboring lands to develop the uses permitted in the zoning district." We conclude that (1) the superior court should have conducted a *de novo* review, rather than applying the whole record test, to determine whether Dismas met its burden of production; (2) based on our *de novo* review, Dismas did meet its burden of production; (3) there was no competent, material, substantial evidence offered to counter Dismas' evidence; and (4) therefore, the City Council was required to approve Dismas' permit application. Accordingly, we reverse the decision of the superior court and remand with instructions to remand to the City Council to approve Dismas' permit request.

I. Background

¶ 2 Like most cities, the City is divided into zoning districts. Its zoning ordinance dictates the land uses allowed in each zoning district. For each district, the ordinance spells out which uses are permitted *as of right*; which uses are *explicitly prohibited*; and which uses, called "special uses", *might be permitted*. As our Supreme Court has described, a use deemed a "special use" is permitted in a zoning district "upon proof that certain facts and conditions detailed in the ordinance exist." *PHG Asheville v. City of Asheville*, 374 N.C. 133, 158, 839 S.E.2d 755, 771 (2020). That is, the zoning ordinance spells out the conditions which must be met for a special use to be permitted. Relevant to this case, under the City's zoning ordinance, the issuance of a special use permit requires a showing that the proposed special use meets eight specific standards. *See* Fayetteville, N.C., Code of Ordinances, UDO § 30-2.C.7.e.7.

¶ 3 Dismas owns a vacant lot in the City in an area designated as an "Office and Industrial" ("O&I") zoning district. Dismas desires to construct a halfway house (the "Facility") on its lot. A halfway house is a

residential facility for recently released prisoners transitioning back into society and is considered a "special use" in an O&I district. Accordingly, Dismas applied to the City for a special use permit.

¶ 4 The City's zoning commission recommended approval of the permit. The matter was then brought before the elected City Council for a final determination.

¶ 5 After the public hearing on the matter concluded, the City Council voted to deny Dismas a special use permit, by a 5-4 vote, concluding that Dismas failed to present sufficient evidence that the Facility satisfied one of the eight standards, specifically Standard 7. The denial was memorialized in a written Order.

¶ 6 Dismas appealed the City's Order to the superior court. That court affirmed the City's Order denying the permit. Dismas timely appealed to our Court.

II. Analysis

¶ 7 **[1]** In this appeal, we review whether the superior court erred in affirming the City's denial of Dismas' application for a special use permit. The issue on appeal concerns whether Dismas put forth sufficient evidence to show that its use satisfies Standard 7.

¶ 8 Our Supreme Court recently discussed in detail the law relating to the consideration of a special use permit in *PHG*, instructing as follows:

¶ 9 First, *the city council* (or other city board, as designated by the ordinance) must determine whether the applicant has met its initial burden of production to show that its proposed special use meets each standard in the ordinance. 374 N.C. at 149, 839 S.E.2d at 765-66 (stating that the city council first "must determine whether an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a use permit"). The Court equated the burden of production in this context "to the making of the showing necessary [by a plaintiff in a civil trial] to overcome a directed verdict motion[.]" *Id.* at 152, 839 S.E.2d at 767.

¶ 10 If the applicant meets its burden of production with respect to each standard *and* if there is "the absence of competent, material, and substantial evidence tending to support [a denial]," then the city council "lack[s] the authority to deny" the application. *Id.* at 155, 839 S.E.2d at 769. That is, our Supreme Court instructs that *unlike* a plaintiff in a civil trial, an applicant for a special use permit who has met its burden of *production* automatically wins if no contrary evidence is offered.

¶ 11 Accordingly, where no contrary evidence is presented, a city council's decision rests on whether an applicant has met its burden of production. In such case, the job of a reviewing *superior court* is to determine whether the city council correctly determined whether the applicant, indeed, met its burden. In making this determination, the superior court reviews the record *de novo*, as this determination is "directed toward the sufficiency of the evidence . . . and [therefore] involves a legal, rather than a factual, determination." *Id.* at 152, 839 S.E.2d at 767.

¶ 12 Where, however, contrary evidence is produced to rebut an applicant's evidence, the issuance of the special use permit is no longer automatic. In such case, the city council *must weigh the evidence* to determine whether to grant the permit. On appeal, the superior court does not review the matter *de novo*, but rather reviews the "whole record" to determine whether the city council's decision is supported by "substantial evidence." *Id.* at 150-51, 839 S.E.2d at 766-67.

¶ 13 *Our* Court's duty, in either case, is to review the superior court's order for errors of law by first "determining whether the trial court exercised the appropriate scope of review," and next "deciding whether the court did so properly." *Id.* at 151, 839 S.E.2d at 767.

¶ 14 In this case, the City concluded that Dismas did not meet its initial burden of production regarding Standard 7 and, therefore, never considered whether any contrary evidence was presented. Accordingly, it was the superior court's job to conduct a *de novo* review to determine whether Dismas, in fact, did meet its burden of production. The superior court, however, conducted a "whole record test" review. This was error.

¶ 15 **[2]** But since the issue regarding the sufficiency of Dismas' evidence is a question of law, we need not remand to the superior court to conduct a *de novo* review. We can make this determination in the first instance. *See Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 15, 565 S.E.2d 9, 18 (2002). And based on our review of the record, we conclude that Dismas did meet its burden of production regarding Standard 7 for the reasoning below.

¶ 16 In our analysis, we first consider the text of Standard 7. Standard 7 requires a special use permit applicant to put forth sufficient evidence tending to show that

> The special use allows for the protection of property values and the ability of neighboring lands to develop the uses permitted in the zoning district.

¶ 17 The City argues that the language in Standard 7 should be construed similarly to ordinances construed in other cases, such as *Kenan v. Board of Adjustment*, 13 N.C. App. 688, 187 S.E.2d 496 (1972), which requires that the proposed special use not "substantially injure the value of adjoining or abutting property." Our Supreme Court in *PHG* has instructed that this "substantially injure" language requires a showing that the proposed use not cause the values of nearby properties *to decrease* substantially. 374 N.C. at 155, 839 S.E.2d at 770.

¶ 18 However, the phrase "allows for the protection of property values" found in Standard 7 differs from the "substantially injure adjoining or abutting property" language found in other ordinances in at least two ways. First, whereas *Kenan*-type ordinances are concerned specifically with the impact on values of "*adjoining or abutting* properties," Standard 7 is concerned with "property values" generally. *See*, *e.g.*, *State v. Jones*, 305 N.C. 520, 530, 290 S.E.2d 675, 681 (1982) (stating that an ordinance requiring a degree of aesthetics in a development may be valid where it provides "corollary benefits *to the general community* such as protection of property values" (emphasis added)). The only specific concern regarding *nearby* properties in Standard 7 is the impact the proposed special use will have on the ability of the nearby property owners to use their properties consistent with their zoning.

¶ 19 Second, Standard 7 does not contain the "substantially injure" language, but merely requires the applicant to show that its use "allows for the protection of" property values. Our Supreme Court has held that aesthetics-type development ordinances, such as ordinances dealing with "environmental protection, control of pollution, and prevention of unsightliness" provide for the "protection of property values." *Id*. at 529-30, 290 S.E.2d at 680. And our Court has held that an ordinance prohibiting a certain type of lower quality construction allows for the "protection of property values." *Duggins v. Walnut*, 63 N.C. App. 684, 688, 306 S.E.2d 186, 189 (1983).

¶ 20 Merriam Webster defines the phrase "to allow for" as "to think about" or "to consider (something) when one makes a calculation." Merriam-Webster, https://www.merriam-webster.com/dictionary/allow%20for (visited Jan. 11, 2022).

¶ 21 We, therefore, conclude that the language in Standard 7 does *not* require an applicant to show that its special use will not cause nearby property values to decrease significantly. Rather, Standard 7 requires that an applicant show that it has incorporated "reasonable" elements in its planned special use which provide the benefit of the protection of

property values generally. *See Jones*, 305 N.C. at 530-31, 290 S.E.2d at 681 (holding an ordinance requiring certain aesthetics considerations to be satisfied is valid where the ordinance is "reasonable").

¶ 22 We have reviewed the record and conclude that Dismas did meet its burden of production regarding Standard 7. It is true that Dismas did not offer expert testimony from appraisers (or any other expert) regarding the effect its Facility would have on adjacent property values. However, unlike a *Kenan*-type ordinance, Standard 7 does not speak to the effect of a special use on nearby property values.

¶ 23 And in this matter, the record before the City Council did contain evidence of elements that will be incorporated in the Facility which our courts have stated provide for the protection of property values. In its application, which was before the City Council, Dismas stated as follows:

> Dismas Charities constructs attractive, high-quality commercial grade buildings and maintains them to the highest standards. The facilities are operated 24 hours per day/7 days per week by professional, well-trained staff. Residents are closely monitored & supervised and are classified as "community custody level" which is the lowest custody level in the Federal Corrections system. The Dismas Charities facility would be an asset to the community and would not negatively affect values or development potential of neighboring properties as permitted within the zoning district. *See Exhibit F-3D Rendering of Proposed Facility Design.*

Other portions of the application and other evidence provided pertinent information tending to show as follows: (1) environmental pollution will be low; (2) the building will be only one-story, to make it compatible with adjacent structures; (3) the building is located behind the building setback lines; (4) the building will be screened from adjacent residential zones with landscape buffers; and (5) the parking area will be fenced and private and will be planted and screened with a commercial screening buffer. The evidence also tended to show that the Facility would not limit how neighboring property owners could legally use their property.

¶ 24 We further conclude that no contrary competent, material, substantial evidence came before the City Council to counter Dismas' evidence. It is true that citizens came before the City Council expressing their desire not to have a halfway house in their neighborhood. However, none

produced testimony or evidence tending to show that Dismas' evidence was not credible; that there were other reasonable steps Dismas could take to protect property values generally; or that the Facility would limit the way they could use their properties. And there is nothing in the record tending to show that a member of the City Council had specialized knowledge to counter Dismas' evidence. *See PHG*, 374 N.C. at 156-57, 839 S.E.2d at 770 (recognizing that the city council members may "rely upon [their] special knowledge").

¶ 25 Dismas produced more than "a scintilla" of evidence that they satisfied Standard 7. *See id.* at 152, 839 S.E.2d at 767 ("substantial evidence is more than a mere scintilla").

III. Conclusion

¶ 26 The City's zoning ordinance allows Dismas to use its O&I tract as a hospital, a community center, a fraternity house, a motel, a fire station, or a police station, among other uses *without* a special use permit. The neighboring property owners were on notice of these use rights. The ordinance also allows Dismas to use its property as a halfway house, provided that Dismas shows that this use meets eight standards set forth in the ordinance.

¶ 27 The City Council denied Dismas a special use permit to develop the Facility, solely on the basis that Dismas did not meet its burden of production regarding Standard 7. The superior court erred in applying the whole record test in evaluating the City Council's determination and should have reviewed the matter *de novo*. Based on our *de novo* review, we conclude that Dismas did meet its burden of production. We further conclude that no competent, material, substantial evidence was offered to counter Dismas' evidence.

¶ 28 We, therefore, conclude that the City Council was required to issue Dismas' permit. Accordingly, we reverse the order of the superior court and remand with instructions to remand the matter to the City Council for the issuance of the special use permit.

REVERSED AND REMANDED.

Judges COLLINS and WOOD concur.

DUNHILL HOLDINGS, LLC, Plaintiff/ Counterclaim Defendant
v.
TISHA L. LINDBERG, Defendant/ Counterclaim Plaintiff

TISHA L. LINDBERG, Third-Party Plaintiff
v.
GREG LINDBERG, Third-Party Defendant

No. COA20-384

Filed 1 March 2022

1. Appeal and Error—interlocutory orders—issuing sanctions—immediately appealable as final orders—law of the case

In litigation between a separated husband and wife regarding real estate and funds held by a company owned by the husband, discovery orders imposing sanctions under Civil Procedure Rule 37(b) were immediately appealable as final judgments where the only arguments, with one exception, targeted the sanctions themselves and not the underlying discovery orders. Regarding the exception, which involved the trial court's order of a forensic examination of electronic devices, that issue could be addressed under the law of the case, where, in a prior appeal that was dismissed by the Court of Appeals, the issue was referred to the current panel in order for the discovery order and sanctions order to be decided together.

2. Discovery—sanctions—document production—predicate order

In litigation between a separated husband and wife regarding real estate and funds held by a company owned by the husband, the trial court did not abuse its discretion by determining that the company and the husband (together, sanctioned parties) violated prior discovery orders compelling the production of documents, where the prior orders clearly identified the documents to be produced and overruled numerous objections raised by the sanctioned parties—including those regarding attorney-client privilege—and the sanctioned parties continued not to comply until finally dumping 129,000 pages of documents mere days before depositions were scheduled without indicating to which discovery request each document responded.

3. Discovery—sanctions—depositions—predicate order

In litigation between a separated husband and wife regarding real estate and funds held by a company owned by the husband, the

trial court did not abuse its discretion in ordering sanctions for misconduct committed during depositions of the company's representatives and the husband (including not presenting prepared witnesses per Civil Procedure Rule 30(b)(6) and intentional obstruction), because the order denying those parties' motions for protective orders and the husband's motion for a temporary stay amounted to an order compelling discovery and therefore could serve as the basis for sanctions under Rule 37(b). The trial court identified the predicate orders and the violations with sufficient specificity to support its decision to impose sanctions.

4. Discovery—violations—choice of sanctions—trial court's discretion

In litigation between a separated husband and wife regarding real estate and funds held by a company owned by the husband, after determining that the company and the husband (together, sanctioned parties) had committed repeated and significant discovery violations, the trial court properly exercised its discretion when imposing sanctions, which included striking the sanctioned parties' pleadings and entering default judgment for the wife on all of her claims. The sanctions were authorized by Civil Procedure Rule 37(b)(2), the court explained in detail its consideration and rejection of lesser sanctions before imposing harsher sanctions, and the husband was given sufficient notice of the basis of the sanctions imposed on him. Although the court's order requiring the company and husband to sit for new depositions was generally proper, two paragraphs—failing to limit the company's deposition to damages only as the husband's was, and requiring the husband to answer all questions without objection that could potentially violate his right to various privileges—were vacated and the matter remanded for further proceedings.

5. Appeal and Error—mootness—discovery order—forensic examination of electronic devices—liability issues resolved

In litigation between a separated husband and wife regarding real estate and funds held by a company owned by the husband, a challenge to the trial court's order requiring the company and the husband to submit to a forensic examination of electronic devices was rendered moot by the court's sanctions on both parties based on multiple discovery violations, since those sanctions resolved all issues of liability in favor of the wife, thereby negating the need for the examination.

Appeal by plaintiff/counterclaim defendant and third-party defendant from order entered 1 August 2020[1] by Judge Orlando F. Hudson, Jr. in Superior Court, Durham County. Heard in the Court of Appeals 27 April 2021.

Fox Rothschild LLP, by Matthew Nis Leerberg and Kip D. Nelson, for plaintiff/counterclaim defendant-appellant and third-party defendant-appellant.

Zaytoun Ballew & Taylor, PLLC, by Matthew D. Ballew, Robert E. Zaytoun, John R. Taylor, and N. Cole Williams for defendant/counterclaim plaintiff, third-party plaintiff-appellee.

STROUD, Chief Judge.

¶ 1 Appellants, Dunhill Holdings, LLC ("Dunhill") and Greg Lindberg, appeal from an order imposing sanctions on them for discovery violations and, pursuant to a previous opinion from this Court in this case, from a discovery order requiring them to submit their electronic devices for forensic examination. Because we find the trial court did not abuse its discretion in imposing sanctions and did not err in its choice of sanctions in most respects, we affirm in part. We vacate in part and remand because two paragraphs of the ordered sanctions are inconsistent with the remainder of the order or improperly bar objections, including objections for attorney-client privilege. Finally, since we affirm the relevant parts of the sanctions order, we dismiss the forensic examination issue as moot.

I. Background

¶ 2 This is the second appeal to this Court in this case. The first appeal concerned an order from 27 June 2018 ("June 2018 Order") that, *inter alia*, ordered Appellants to make certain electronic devices available for a forensic examination to determine if any relevant emails were deleted. *Dunhill Holdings, LLC v. Lindberg*, No. COA18-1112, 270 N.C. App. 820, *7, *10–11 [hereinafter "*Dunhill I*"] (unpublished). The prior appeal dismissed the case "without deciding whether the appeal [was] an interlocutory appeal that does not affect a substantial right" and "refer[red the forensic examination issue] to the panel of this Court

1. This 2020 date reflects the file stamp on the order on appeal, but the order was actually rendered in 2019. No party disputes this. We know the date of the order's rendering was 2019 because the original and amended notices of appeal from the order are all from August 2019.

that will decide Dunhill and Greg E. Lindberg's appeals of the discovery order and the sanctions order together." *Dunhill I* at *12. Based upon the prior opinion, this panel must address the sanctions order, and we will also address the discovery order at issue in the prior appeal.[2] *Id.* The prior ruling from this Court is the law of the case and thus binds us. *See, e.g.*, *North Carolina Nat. Bank v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631 ("[O]nce a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case."). We therefore recount the facts and procedural history from *Dunhill I* and only include additional details where necessary to understand the sanctions order that was not before this Court in the prior appeal.

¶ 3 *Dunhill I* summarizes the initiation and pre-discovery occurrences in this lawsuit:

> Dunhill Holdings, LLC ("Dunhill") filed a complaint against Tisha L. Lindberg, as well as four former employees of Dunhill on 24 July 2017.[3] According to Dunhill, the company is owned by Greg E. Lindberg, who is "the founder and sole manager and member of Dunhill." Greg E. Lindberg and Tisha L. Lindberg married on 19 September 2003 and separated on 22 May 2017. In its amended complaint filed 24 August 2017, Dunhill described Tisha L. Lindberg as Dunhill's "Chief Executive Officer"; however, she denied this characterization in her answer, saying that "while [Mr.] Lindberg purported to call [her] the 'C.E.O.' of [Dunhill] on occasion, [Dunhill] never employed [Tisha L.] Lindberg in any capacity and [Dunhill] was merely a vehicle through which [Greg E.] Lindberg funded the personal lifestyle of the parties and their family . . . ."
>
> Dunhill described itself as a "real estate holding company" in its amended complaint and the primary

2. We also note that both Dunhill and Mr. Lindberg specifically incorporated the arguments made in their prior appeal through footnotes in their briefs in this appeal, thereby avoiding any potential preservation issue.

3. In November 2017, the trial court granted each of the four employees' motions to dismiss for failure to state a claim pursuant to Rule of Civil Procedure 12(b)(6). N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2017).

asset owned by Dunhill was the family home of Greg E. Lindberg and Tisha L. Lindberg on Stagecoach Drive in Durham, North Carolina. In its amended complaint, Dunhill claimed Tisha L. Lindberg took funds from Dunhill and it asserted claims against her for breach of fiduciary duty, constructive fraud, civil liability for theft and embezzlement, civil conspiracy, conversion and an action for accounting, in addition to claims for unjust enrichment, disgorgement, and civil conspiracy against the other Defendants.

In her answer, Tisha L. Lindberg moved to dismiss Dunhill's complaint for failure to state a claim for which relief may be granted under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), denying various allegations of Dunhill and asserting affirmative defenses of breach of fiduciary duty by Greg E. Lindberg, fraud, constructive fraud, equitable estoppel, waiver, ratification, actual authority, and laches.

She also filed a third-party complaint against Greg E. Lindberg and counterclaim against Dunhill, seeking "all right, title, and interest in the Key West House" and "all right, title, and interest in the tennis complex" Greg E. Lindberg allegedly promised to give her. Tisha L. Lindberg subsequently filed an amended third-party complaint against Greg E. Lindberg and a counterclaim against Dunhill, asserting breach of fiduciary duty, constructive fraud, indemnity, declaratory relief, abuse of process, malicious prosecution, intentional infliction of emotional distress, spoliation of material evidence, and for a constructive trust over the tennis court.

In her amended third-party complaint and counterclaim, Tisha L. Lindberg alleged Dunhill was merely an "alter-ego" of Greg E. Lindberg and was therefore liable for his actions. Dunhill and Greg E. Lindberg did not file an answer to Tisha L. Lindberg's counterclaim and third-party complaint or her amended counterclaim and third-party complaint, instead filing a motion to dismiss each complaint.

Dunhill I at *2–4. These motions to dismiss were later denied.

¶ 4 Before Appellants' motions to dismiss had been ruled on, Dunhill and Ms. Lindberg proceeded with discovery:

> Dunhill served Tisha L. Lindberg with its first request for production of documents on 24 October 2017 and she replied with objections and responses on 22 December 2017. On 26 February 2018, Tisha L. Lindberg submitted her first set of interrogatories and request for production of documents to Greg E. Lindberg and Dunhill. Dunhill moved to compel discovery on 9 March 2018. Tisha L. Lindberg filed a motion to compel discovery and request for attorney's fees on 21 May 2018.

Dunhill I at *4. In relevant part, Ms. Lindberg's discovery requests included interrogatories, requests for document production, and a request for production for forensic inspection of all electronic storage devices owned by Appellants "that [are] the repository for electronic messaging and communication." Appellants made a series of objections to the discovery requests. In response to the forensic examination request specifically, both parties objected:

> In his responses, Greg E. Lindberg responded as follows to this request:
>
> > Third Party Defendant objects to Request No. 23 on the ground that it is harassing, overly broad, unduly burdensome, not proportional to the needs of this case, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information that is not relevant to the subject matter of the pending action.
> >
> > Third-Party Defendant further objects to Request No. 23 on the ground that, on its face it seeks production of records that are confidential or privileged, including records that are protected by the work product and attorney-client privileges, and violates the privacy rights of third persons who are not parties to this lawsuit.
>
> Dunhill made an identical response to this request.

Dunhill I at *5.

¶ 5 Ms. Lindberg's motion to compel discovery argued the court should reject the objections proffered by Mr. Lindberg and Dunhill. In response to objections to the forensic examination, Ms. Lindberg argued she needed the examination to support her spoliation of evidence claim:

> Upon information and belief, Mr. Lindberg and Dunhill have intentionally attempted to destroy evidence from computers and electronic devices that is relevant to this matter. The spoliation of evidence by Mr. Lindberg and Dunhill was set out in the pleadings in this matter in Mrs. Lindberg's[4] Amended Counterclaims and Third-Party Complaint. For example, upon information and belief, Mr. Lindberg and Dunhill destroyed emails and computer files maintained by Mr. Lindberg's companies soon after Mr. Lindberg took out the *Ex Parte* Domestic Violence Protective Order and restricted her access to email servers. Requests for Inspection 23 and 24 to Dunhill and Requests for Inspection 23 and 24 to Greg Lindberg seek to inspect the computers, drives and devices of Mr. Lindberg and Dunhill, but they have refused to allow for this inspection. Mrs. Lindberg respectfully requests that the Court order such a forensic computer inspection.

Ms. Lindberg's spoliation claim in turn argued, *inter alia*, that Mr. Lindberg had deleted emails showing he gifted the tennis complex to Ms. Lindberg, thereby supporting her third-party claim for a constructive trust over the tennis complex.

¶ 6 The trial court heard the motions to compel from Ms. Lindberg and from Dunhill on 25 June 2018. As of the time of the hearing, neither Dunhill nor Mr. Lindberg had produced "a single document in discovery." Much of the hearing focused on the forensic examination issue, and Ms. Lindberg continued to argue that the forensic examination would support her spoliation claim as well as her claim the tennis complex was a personal gift.

¶ 7 Ms. Lindberg also argued the forensic examination would support her on two other liability issues. First, she argued the forensic

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4. This document and many of the documents from this litigation refer to Appellee Tisha Lindberg as Mrs. Lindberg whereas throughout this opinion we refer to her as Ms. Lindberg. We refer to Tisha Lindberg as Ms. Lindberg because the briefing in this case referred to her with that title.

examination would uncover deleted emails that would prove she did not improperly take funds from Dunhill. Second, Ms. Lindberg argued the deleted emails would support her claim for indemnification from Mr. Lindberg as to a deposit for a yacht vacation that Ms. Lindberg claims she made on behalf of Mr. Lindberg.

¶ 8 On 27 June 2018, the court entered orders compelling discovery by Ms. Lindberg and Appellants, awarding attorney's fees to each side, and ordering the forensic examination. In the order granting relief to Ms. Lindberg, i.e. the June 2018 Order, the trial court rejected all but one of Appellants' objections to Ms. Lindberg's discovery requests, and the one sustained objection is not relevant here. The trial court specifically concluded that, other than the one objection it sustained and the forensic examination objection, "all of the objections raised by Dunhill Holdings LLC and Greg Lindberg lack merit, fail to justify the refusal and failure to produce a single discoverable document as of the date of this hearing, and were interposed for an improper purpose of delay and avoiding any meaningful response." As a result the June 2018 Order required Appellants to "fully and completely reply to each and every Interrogatory and discovery request for production of documents," with the exception of the one for which an objection was sustained, by 1 August 2018. To make clear which documents were covered, the June 2018 Order fully incorporated by reference the requests for discovery and Appellants' responses.

¶ 9 The June 2018 Order also granted Ms. Lindberg's request for a forensic examination with certain limitations:

> In the order, the trial court found as follows:
>
> > As to the request for a forensic examination of certain electronic devices, the Court . . . finds that there are circumstances whereby a forensic examination of the server housing the outlook email accounts used by the parties to this action during the time frame reaching back to the [] period when contested contentions of gifts of real estate valued in excess of one million dollars arose, would be beneficial in the ascertainment of truth. Such a forensic examination would disclose or shed light upon the question of whether or not there exists or existed crucial and relevant documentation that one party contends existed but was "scrubbed" and the other party conten[d]s

> never existed. . . . The Court further finds that considering the resources of the parties, a forensic examination of the server itself would not unduly burden or obstruct Dunhill Holdings LLC in its operations, nor has any credible evidence been presented that it would unduly interrupt or interfere with operations of any of the other LLC entities connected to Dunhill that may have possession of the server used by the parties to this litigation. There is some evidence that the server may be "owned" by a subsidiary, but all of the evidence shows that any other entity having such an interest exists under the control of Mr. Lindberg. . . . The concern about disclosing any confidential or privileged information is unsupported by any credible evidence or argument, and the inquiry in the forensic analysis can be conducted to [sic] a[s] to obviate any prejudice to Dunhill or to Mr. Lindberg should any such attorney-client privileged data be present.

The trial court concluded that:

> The objection to the request for a forensic examination should be overruled for the reasons set forth in the findings [] above. The Court is authorized to order a forensic examination after weighing and balancing the burdens and rights of the parties and the Court finds that the balancing as to those findings clearly show in this case that such an examination is justified, will serve the best interests of both parties, and not pose an undue burden on any party.

The trial court ordered that Dunhill and Greg E. Lindberg "shall make the server or any electronic device housing, hosting, or storing the outlook email account used by the parties available for a forensic examination," limited to the following purposes: (1) whether any emails or text messages between Greg E. Lindberg and Tisha L. Lindberg ever existed, and producing copies of them; (2) whether emails or text messages "dealing with real estate holdings subject to dispute in this lawsuit exist or ever existed, and

producing copies of the same for the parties;" and (3) whether any of those messages "if there were any, have been intentionally deleted, and, if deleted, the circumstances of any deletion and whether or not they can be recovered." In its order, the trial court further provided for the protection of arguably privileged communications as follows:

> Out of an abundance of caution, if there is a contention that a document or communication is a communication exclusively between Greg E. Lindberg and an attorney actually representing him, and the communication does not include any third person for whom the privilege is unavailable, that objection may be renewed provided the specific communication is specifically identified and the basis for the objection and assertion of the privilege is clearly articulated.

Dunhill I at *5–7 (alterations in original).

¶ 10 Dunhill and Mr. Lindberg appealed the June 2018 Order. *Dunhill I* recounts most of the appellate history:

> Dunhill and Greg E. Lindberg filed notice of appeal of the order on 17 July 2018. They also filed a motion for stay with the trial court. Tisha L. Lindberg filed a motion to disregard the notice of appeal and to continue case proceedings with the trial court, along with a response to the motion for stay. The trial court granted Tisha L. Lindberg's motion to disregard notice of appeal and denied Dunhill and Greg E. Lindberg's motion for stay on 24 August 2018. Dunhill and Greg E. Lindberg filed a petition for writ of supersedeas with this Court on 4 September 2018, that was denied in part with certain exceptions on 12 September 2018.

Dunhill I at *7–8.

¶ 11 Following this Court's denial of a petition for writ of supersedeas, Mr. Lindberg and Dunhill filed a Petition for Writ of Supersedeas and Motion for Temporary Stay in the Supreme Court of North Carolina. While that Petition was pending, Ms. Lindberg filed two motions to dismiss the appeal with this Court:

> Tisha L. Lindberg filed a motion to dismiss the appeal on 7 November 2018, arguing the appeal was interlocutory and did not affect a substantial right, and therefore should be dismissed. Dunhill filed a response to the motion arguing the order did affect a substantial right to private information stored on the servers.
>
> Tisha L. Lindberg subsequently filed a "New Motion to Dismiss Based on Withdrawal of Underlying Appellate Issue" ("second motion to dismiss") on 7 December 2018. In the second motion to dismiss, Tisha L. Lindberg argued the appeal should be dismissed as moot because she entered a "Notice of Withdrawal of Forensic Search Request" with the trial court. Dunhill and Greg E. Lindberg filed a response to Tisha L. Lindberg's motion to dismiss the appeal with this Court arguing the appeal was not moot because the withdrawal did not unilaterally dissolve the challenged portion of the order, because Tisha L. Lindberg remained free to seek further forensic examinations and, alternatively, because several exceptions to the mootness doctrine applied.

Dunhill I at *8.

¶ 12 Prior to this Court ruling on those motions, the Supreme Court issued an order denying Mr. Lindberg's and Dunhill's Petition for Writ of Supersedeas and Motion for Temporary Stay on 5 February 2019.

¶ 13 Dunhill's and Mr. Lindberg's first appeal from the forensic order was addressed in this Court's 7 April 2020 opinion in *Dunhill I*. As discussed above, *Dunhill I* did not resolve the forensic examination issue. *See Dunhill I* at *12 (referring to this panel the issues in that appeal). The *Dunhill I* court noted issues surrounding whether the appeal before it was interlocutory or moot:

> Before we can reach the merits of Dunhill and Greg E. Lindberg's arguments in this appeal, however, we note that Tisha L. Lindberg has filed two motions to dismiss the appeal because (1) the appeal is an interlocutory appeal which does not affect a substantial right and (2) the appeal is moot because she has filed a "Notice of Withdrawal of Forensic Search Request" with the trial court, removing the underlying motion

> to compel discovery. In Tisha L. Lindberg's "Objection and Reply in Opposition to Appellants' 'Supplemental Response to New Motion to Dismiss Appeal,' " she also argues that the trial court's imposition of a final sanctions order on 1 August 2019 moots the present appeal because the discovery order will have no further force or effect.

Dunhill I at *11. Given those concerns and "[i]n the interests of judicial economy and efficiency," this Court in *Dunhill I* "refer[red the forensic examination issue] to the panel of this Court that will decide Dunhill and Greg E. Lindberg's appeals of the discovery order and the sanctions order together." *Dunhill I* at *12.

¶ 14 The sanctions order to which *Dunhill I* refers was entered after further proceedings in the trial court. Following the Supreme Court's denial of Mr. Lindberg and Dunhill's Petition for Writ of Supersedeas and Motion for Temporary Stay on 5 February 2019, the trial-level proceedings were no longer stayed. As a result, discovery continued with Mr. Lindberg and Dunhill serving Objections and Second Amended Responses to Ms. Lindberg's discovery requests on 11 February 2019. Finding those responses "woefully lacking," Ms. Lindberg filed a Motion to Compel Compliance with the June 2018 Order on 22 February 2019. Specifically, Ms. Lindberg argued Appellants violated the June 2018 Order by:

> 1. Improperly asserting objections that have already been expressly overruled by the Court;
>
> 2. Engaging in an improper "document dump" in a way that makes it impossible to determine which documents have been produced in response to any particular Requests for Production (In fact, Mr. Lindberg and Dunhill have indicated that every page of every document is being produced in response to every Request for Production.);
>
> 3. Continuing to withhold documents and not respond to certain discovery requests by Mrs. Lindberg, to which they have been expressly Ordered by the Court to respond without objection; and
>
> 4. Continuing to refuse to answer interrogatories and continuing to refuse to verify interrogatory responses.

Ms. Lindberg also raised the specter of Rule of Civil Procedure 37 issues, saying "[t]hese proceedings have now progressed to the point

that an appropriate Rule 37 inquiry is necessary by the court to address" Appellants' failures to comply with earlier discovery orders. Appellants filed a response to Ms. Lindberg's Motion to Compel on or around 7 March 2019.

¶ 15 The trial court held a hearing on Ms. Lindberg's Motion to Compel on 11 March 2019. At that hearing, Appellants' counsel admitted they had not fully complied with the June 2018 Order. Specifically, Appellants' counsel said, "We have gone a long way in complying with that [the June 2018 Order]. *I am not arguing that we are there, Judge*." (Emphasis added). At another point, Appellants' counsel agreed with the trial court that they had not been following the June 2018 Order.

¶ 16 On 26 March 2019, the trial court entered an order granting Ms. Lindberg's Motion to Compel Compliance with Court Order ("March 2019 Order"). The March 2019 Order started by summarizing the June 2018 Order, including a verbatim quote of Appellants' obligations under the June 2018 order. The March 2019 Order then summarized the history of Dunhill's and Mr. Lindberg's appeal from the June 2018 Order and specifically noted the appeal only concerned the issue of the forensic examination ordered therein.

¶ 17 After determining the February 2019 Supreme Court order denying Mr. Lindberg's and Dunhill's petition for Writ of Supersedeas and Motion for Temporary Stay meant "there is no stay over the enforcement" of the June 2018 Order as it relates to document requests and interrogatories, the March 2019 Order proceeded to analyze Appellants' discovery actions. First, the March 2019 Order explained the June 2018 Order required Appellants to respond to the discovery requests without objection and that Appellants had violated the June 2018 Order by improperly reasserting all objections. Then, the March 2019 Order faulted Appellants for failing to organize the 7,000 pages of documents they had produced at that point. The March 2019 Order proceeded to recount all of Appellants' failures to respond to Ms. Lindberg's requests for production and interrogatories in violation of the June 2018 Order. As part of that process, the trial court listed the specific document productions and interrogatories to which Appellants had failed to respond. Relying in part on counsel's admissions at the hearing on the motion to compel included above, the March 2019 Order found Appellants were in violation of the June 2018 Order for the reasons already discussed.

¶ 18 The trial court then concluded, in the March 2019 Order, that Appellants had violated the June 2018 Order and laid out its Rule of Civil Procedure 37(b)(2), N.C. Gen. Stat. § 1A-1, Rule 37(b)(2), authority for

actions it could take to compel compliance. The trial court ordered that by 26 March 2019 Appellants had to "answer fully and completely, and without objection" all of Ms. Lindberg's interrogatories and "produce all documents that are being withheld from the document requests identified above." The March 2019 Order further required Appellants to "specifically identify which Request for Production" all of their documents corresponded to, whether the documents were produced before or after the Order. Finally, the March 2019 Order awarded attorney's fees to Ms. Lindberg.

¶ 19 Pursuant to the March 2019 Order, Appellants produced additional documents on 26 March 2019. They also organized the documents based upon the discovery requests to which they were responsive.

¶ 20 As discovery proceeded, Ms. Lindberg noticed a deposition for Dunhill, via Rule of Civil Procedure 30(b)(6), for early May 2019. Dunhill and Mr. Lindberg sought a protective order against the Rule 30(b)(6) deposition in mid-April 2019. Pending a hearing on the protective order, Ms. Lindberg re-noticed the Rule 30(b)(6) deposition to early June 2019. After a hearing on the motion, the trial court entered an order denying the protective order because it concluded "in its discretion, that each deposition topic at issue is proper . . . ." The court's order then required Dunhill to appear for the noticed deposition "and be prepared to testify, through an appropriate company designee, as to all 'matters known or reasonably available to' Dunhill regarding each topic in the notice of deposition." (Quoting N.C. Gen. Stat. § 1A-1, Rule 30(b)(6)).

¶ 21 On the same day that Appellants sought a protective order for Dunhill's deposition, Mr. Lindberg filed a motion for a temporary stay of proceedings until federal criminal charges against him were resolved. On the same day as the trial court denied Dunhill's motion for a protective order, it also issued an order denying Mr. Lindberg's motion for a temporary stay. The trial court found that "none of the claims, counterclaims, or causes of action" in the current case were connected to the then-pending criminal proceedings against Mr. Lindberg. Concurrently, the trial court found neither Mr. Lindberg nor Dunhill would be prejudiced by its order and said Mr. Lindberg could assert, in this suit, his Fifth Amendment privilege against self-incrimination if he believed it was in his best interest. To further protect Mr. Lindberg, the trial court ordered Ms. Lindberg's counsel "shall not be allowed to question Mr. Lindberg at his upcoming deposition in this action regarding the facts contained in the Bill of Indictment . . . ." The trial court's order denying Appellants' motion for a protective order also made it clear that because it was denying Mr. Lindberg's motion for a stay, the trial court

would not entertain the issues in the stay as a basis for granting the protective order.

¶ 22 Based upon those orders, the next discovery proceeding was Dunhill's Rule 30(b)(6) deposition. Days before that deposition, Dunhill and Mr. Lindberg produced another 129,000 pages of documents. At the deposition, Dunhill's designated corporate representatives were "completely unprepared" to address many of the designated topics according to the trial court's later unchallenged Findings of Fact. The document production and deposition led Ms. Lindberg to file a motion, which was subsequently corrected, for sanctions under Rule 37(b). After summarizing the history of the dispute, Ms. Lindberg argued Dunhill's and Mr. Lindberg's actions in producing 129,000 pages of documents mere days before the deposition as well as Dunhill's failure to present prepared designees for its deposition justified sanctions. As a result of that misconduct, Ms. Lindberg requested as sanctions, specifically: that certain facts be established in the action; that Dunhill be barred from supporting its claims; that Dunhill's designees be required to sit again for depositions and fully answer on the noticed topics; and "any further relief [the court] deems just and proper pursuant to Rule 37(b) for violating this Court's prior discovery orders." Dunhill later filed a verified response to Ms. Lindberg's corrected motion for sanctions.

¶ 23 While that motion for sanctions was pending, Ms. Lindberg deposed Mr. Lindberg. Mr. Lindberg, according to unchallenged Findings of Fact made later by the trial court, committed numerous forms of misconduct at his deposition including: repeatedly refusing to answer questions by saying he could not comment; repeatedly refusing to review or answer questions about documents, even ones he or Dunhill produced; making personal attacks on Ms. Lindberg's counsel; extreme time wasting; and improperly asserting attorney-client privilege when there was clearly no communication between lawyer and client. As a result of the deposition, Ms. Lindberg filed, under seal, a supplemental motion for sanctions under Rules 37(a), 37(b), and 41(b). After laying out the facts and law supporting sanctions, Ms. Lindberg requested as sanctions that: all pleadings by Mr. Lindberg and by Dunhill be stricken; all claims asserted by Dunhill be dismissed with prejudice; Ms. Lindberg be allowed to conduct all discovery relevant to her counterclaims; the attorney-client objections asserted at Mr. Lindberg's deposition be overruled; Mr. Lindberg be required to sit for another deposition and answer, without objection, all questions posed that are relevant to Ms. Lindberg's counterclaims and damages claims; neither Mr. Lindberg nor Dunhill be allowed to use any documents in their 129,000 page production on the eve of Dunhill's

deposition; and the trial court grant any further relief it deems just and proper under Rule 37(b) for violating the court's prior discovery orders.

¶ 24 The trial court held a hearing on the motions for sanctions on 15 July 2019. At the hearing, Appellants delineated where the 129,000 pages they produced on the eve of Dunhill's deposition came from as they tried to argue the documents were supplemental rather than a violation of past discovery orders. Specifically 100,000 pages were bank and credit card statements and the remaining were emails from individuals who worked at Dunhill during the relevant time period. The hearing led to an order granting Ms. Lindberg's motions for sanctions on 1 August 2019 ("August 2019 Order").

¶ 25 The August 2019 Order started by summarizing the procedural history and background of the case as we have already laid out. Characterizing the 129,000 page document production on the eve of Dunhill's deposition as a "document dump," the August 2019 Order laid out how the production violated the March 2019 Order because that order had "unequivocally required Dunhill and Mr. Lindberg to produce all discovery materials in its possession by no later than the March 26, 2019 deadline." (Emphasis in original.) The August 2019 Order also recounted "Dunhill's failure to present prepared witnesses for [its] 30(b)(6) deposition in violation of th[e] court's order." (Capitalization altered). Specifically, the August 2019 Order detailed how Dunhill's designees were completely unprepared—and in some cases had not even inquired to try to prepare—to address certain noticed topics including: electronic devices used by Mr. Lindberg at the relevant times; the location of servers that housed relevant emails; and the factual bases for Dunhill's allegations against Ms. Lindberg. Dunhill's designees further quibbled with the meanings of ordinary words in English and indicated Ms. Lindberg's attorneys should find answers by "search[ing] through vague categories of documents" while intentionally not identifying any specific documents. The trial court also made extensive Findings of Fact about the "multiple forms of intentional obstruction and delay repeatedly employed by Greg Lindberg at his deposition," as summarized above. (Capitalization altered.)

¶ 26 After those Findings, the August 2019 Order explained how Dunhill and Mr. Lindberg had jointly violated the court's prior orders and worked together to "intentionally evade" discovery obligations. After summarizing all those factual bases for potential sanctions, the August 2019 Order included a section entitled "Consideration of Lesser Sanctions" where the trial court recounted how it had considered lesser sanctions, including requiring Appellants to sit for new depositions, but did not think they

would deter Appellants from continuing to evade discovery obligations and violate discovery orders.

¶ 27 The August 2019 Order then included pertinent Conclusions of Law. First, the trial court laid out its Conclusions regarding sanctions for Dunhill's and Mr. Lindberg's 129,000 page "document dump" and Dunhill's deposition. (Capitalization altered.) The trial court then justified its sanctions for Mr. Lindberg's deposition misconduct under Rules of Civil Procedure 37(b) and 41(b). The trial court concluded the discussion of sanctions for Mr. Lindberg's deposition misconduct by again justifying harsh sanctions here and, further, overruled all of Mr. Lindberg's assertions of attorney-client privilege from his deposition.

¶ 28 Finally, the August 2019 Order granted both of Ms. Lindberg's motions for sanctions. As sanctions, the trial court first struck all pleadings from Mr. Lindberg and Dunhill. The trial court then ruled in favor of Ms. Lindberg on all liability issues by dismissing Dunhill's claims with prejudice and granting default judgment against Dunhill and Mr. Lindberg on all of Ms. Lindberg's claims; it reserved the issue of damages for trial. To support those sanctions, the trial court barred Dunhill and Mr. Lindberg from opposing any liability issues at trial and designated certain facts be established in Ms. Lindberg's favor. The trial court further allowed Ms. Lindberg to proceed with all discovery relevant to the issue of damages. As part of that process, the trial court allowed Ms. Lindberg to depose Dunhill on "all previously-noticed topics." (Emphasis in original.) The trial court also permitted Ms. Lindberg to depose Mr. Lindberg again and required him "to answer, without objection, all questions posed by Mrs. Lindberg's counsel that are relevant to any of her counterclaims or damages claims," although the trial court confirmed all Mr. Lindberg's previous attorney-client privilege objections had been overruled. Lastly, the August 2019 Order sanctioned Appellants by barring them from using any documents in the 129,000 page production and awarding Ms. Lindberg attorney's fees. Dunhill and Mr. Lindberg both filed written notices of appeal, which they then amended.

II. Grounds for Appellate Review

¶ 29 **[1]** Appellants provide a "Statement of the Grounds for Appellate Review," as provided for in North Carolina Rule of Appellate Procedure 28(b)(4) and argue the sanctions issues are interlocutory but that discovery orders imposing sanctions impact a substantial right and are thus immediately appealable. (Capitalization altered.) We agree that the sanctions orders are immediately appealable, although for slightly different reasons. While Appellants rely on statutes allowing appeals from

interlocutory orders that "[a]ffect[] a substantial right," N.C. Gen. Stat. § 7A-27(a) (2021); *see also* N.C. Gen. Stat. § 1-277 (2021), "an order imposing sanctions under Rule 37(b) is appealable as a final judgment."[5] *Batesville Casket Co., Inc. v. Wings Aviation, Inc.*, 214 N.C. App. 447, 457, 716 S.E.2d 13, 20 (2011) (quoting *Smitheman v. Nat'l Presto Indus.*, 109 N.C. App. 636, 640, 428 S.E.2d 465, 468 (1993)); *see also Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 554–55, 353 S.E.2d 425, 426 (1987) ("[W]hen the order is enforced by sanctions pursuant to N.C. R. Civ. P., Rule 37(b), the order is appealable as a final judgment."); *Ross v. Ross*, 215 N.C. App. 546, 547, 715 S.E.2d 859, 861 (2011) (citing *Walker* in support of proposition that an order compelling discovery is not a final judgment and does not affect a substantial right and therefore is not immediately appealable, unless it imposes sanctions).

¶ 30 Here, the trial court sanctioned both parties under Rule 37(b). Therefore, the sanctions order is "appealable as a final judgment." *Batesville Casket Co.*, 214 N.C. App. at 457, 716 S.E.2d at 20.[6]

¶ 31 To the extent Appellants present arguments concerning the underlying discovery orders on which the sanctions are based, *see* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."), "the appeal tests the validity of both the discovery order and the sanctions imposed." *In re Pedestrian Walkway Failure*, 173 N.C. App. at 262, 618 S.E.2d at 802. With one exception, Appellants' arguments only challenge the sanctions imposed, not the validity of the underlying discovery orders. As for the exception, Appellants both

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5. Appellants' position—i.e. that sanctions affect a substantial right and are therefore immediately appealable despite being interlocutory—also finds support in certain cases from this Court. *See, e.g.*, *Feeassco, LLC v. Steel Network, Inc.*, 264 N.C. App. 327, 331, 826 S.E.2d 202, 206–07 (2019) ("[W]hen a discovery order is enforced by sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 37(b), the order affects a substantial right and is immediately appealable." (citing *In re Pedestrian Walkway Failure*, 173 N.C. App. 254, 262, 618 S.E.2d 796, 802 (2005))). We believe an order imposing sanctions is best described as a final judgment, but ultimately this difference does not impact the case at hand because either route allows for an immediate appeal of the sanctions order. *See* Alan D. Woodlief, Jr., *Statutory exceptions to the finality requirement, generally*, 1 Shuford N.C. Civil Prac. And Pro. With Appellate Advocacy § 86:5 (6th ed. 2020) ("Since the statutory provisions discussed above [N.C. Gen. Stat. §§ 7A-27(d) and 1-277] allow certain interlocutory orders to be appealed immediately, for their purposes the distinction between final and interim orders is less significant.").

6. Our determination that the August 2019 Order was a final judgment aligns with *Dunhill I*'s description of this appeal as one in which "each party appeals not only the *final judgment* of the trial court imposing sanctions, but also again specifically appeals the discovery order at issue in the present [first] appeal." *Dunhill I* at *11 (emphasis added).

incorporate the argument from their prior appeal that, in the words of Appellants, focused on the June 2018 Order's ruling requiring a "forensic examination of all electronic devices that might have relevant information," regardless of party ownership. Therefore, we also review the June 2018 Order's section on the forensic examination of electronic devices as argued in Appellants' previous appeal.

¶ 32 Notably, even if we could not reach that argument under *In re Pedestrian Walkway Failure*, we would still address Appellants' arguments in their prior appeal due to the law of the case. Specifically, the *Dunhill I* Court "refer[red the forensic examination issue] to the panel of this Court that will decide Dunhill and Greg E. Lindberg's appeals of the discovery order and the sanctions order together." *Dunhill I* at *12. As that panel, we are bound by the law of the case to consider Dunhill's and Greg Lindberg's prior appeal as well. *See North Carolina Nat. Bank*, 307 N.C. at 567, 299 S.E.2d at 631–32 (explaining how law-of-the-case doctrine requires a subsequent Court of Appeals panel to follow the decisions of a previous panel in a given case).

III. Standard of Review

¶ 33 Because all the issues between the parties are discovery issues and sanctions stemming therefrom, the same standard of review applies throughout our analysis.

¶ 34 As this Court has previously explained:

> As a general rule, we review the trial court's rulings regarding discovery for abuse of discretion. [Citation] "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). However, if the trial court makes a discretionary ruling based upon a misapprehension of the applicable law, this is also an abuse of discretion. *See State v. Rhodes*, 366 N.C. 532, 536, 743 S.E.2d 37, 39 (2013) ("[A]n abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A [trial] court by definition abuses its discretion when it makes an error of law." (alterations in original) (quoting *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047), 135 L.Ed.2d 392 (1996))). And if the trial court's ruling depends upon interpretation of a statute, we review the ruling *de novo*.

> *Moore v. Proper*, 366 N.C. 25, 30, 726 S.E.2d 812, 817 (2012) ("[W]hen a trial court's determination relies on statutory interpretation, our review is de novo because those matters of statutory interpretation necessarily present questions of law.").

Myers v. Myers, 269 N.C. App. 237, 240–41, 837 S.E.2d 443, 447–48 (2020) (citation omitted as indicated; all other alterations in original).

¶ 35 The same abuse-of-discretion standard applies in the context of sanctions. *See Feeassco*, 264 N.C. App. at 337, 826 S.E.2d at 210 ("According to well-established North Carolina law, a broad discretion must be given to the trial judge with regard to sanctions.") (quoting *Batlle v. Sabates*, 198 N.C. App. 407, 417, 681 S.E.2d 788, 795 (2009)). Applying that standard in the sanctions context specifically, "[a] trial court does not abuse its discretion by imposing a severe sanction so long as that sanction is among those expressly authorized by statute and there is no specific evidence of injustice." *Id.* (quotation marks and citation omitted). While trial courts "must consider the appropriateness of less severe sanctions" before "imposing a severe sanction," *id.*, the ultimate choice of sanctions is still within their discretion. *See In re Pedestrian Walkway Failure*, 173 N.C. App. at 247, 618 S.E.2d at 826 ("[T]he choice of sanctions under Rule 37 is within the trial court's discretion . . . ." (citation and quotations omitted)).

¶ 36 In reviewing the trial court's order under the abuse of discretion standard, any unchallenged findings of fact are binding on appeal. *Feeassco*, 264 N.C. App. at 340, 826 S.E.2d at 211 (citing *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.")). Any challenged findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Baker v. Rosner*, 197 N.C. App. 604, 608, 677 S.E.2d 887, 890 (2009) (quoting *State v. Haislip*, 362 N.C. 499, 500, 666 S.E.2d 757, 758 (2008)). We review each of Appellants' arguments under an abuse of discretion standard.

IV. Sanctions for Document Productions

¶ 37 **[2]** Both Appellants argue the court erred in sanctioning them for their document productions. After setting out law requiring a "predicate violation" of a prior court order to compel discovery, Appellants contend "the fundamental problem with these orders [the sanctions order on appeal] is that there was no predicate violation of a court order." Specifically,

Appellants argue "the March 2019 Order failed to identify any violation of the June 2018 Order," and that the August 2019 Order failed to show a violation of the March 2019 Order. Within each of those arguments, Appellants take issue with certain Findings of Fact in the March and August 2019 Orders and detail why no predicate orders existed. After reviewing the relevant law, we address the alleged issues with the March 2019 and August 2019 Orders in turn.

¶ 38 North Carolina Rule of Civil Procedure 37(b)(2) authorizes "sanctions by [a] court in which action is pending" when a party or certain representatives of a party, *inter alia*, "fail[] to obey an order to provide or permit discovery." N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2021) (capitalization altered). The statute authorizes sanctions "as are just" and explicitly allows, as relevant here:

> a. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence;
>
> c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(a)–(c).

¶ 39 "Generally sanctions under Rule 37 are imposed only for the failure to comply with a court order." *Myers*, 269 N.C. App. at 252, 837 S.E.2d at 454 (quoting *Pugh v. Pugh*, 113 N.C. App. 375, 379, 438 S.E.2d 214, 217 (1994)). Thus, "a party seeking sanctions must first demonstrate a violation of a substantive rule of discovery, based upon Rules 26 through 36, obtain a court order to compel discovery, and *then* Rule 37 sanctions may be imposed." *Id.* (emphasis in original; footnote omitted). This requirement for a violation of a court order compelling discovery is what Appellants term as a requirement for a "predicate violation." Because a sanctions order requires an underlying violation of a court order compelling discovery, the trial court abuses its discretion "if there is no record evidence which indicates that [a party] acted improperly, or if the

law will not support the conclusion that a discovery violation has occurred." *Baker*, 197 N.C. App. at 607, 677 S.E.2d at 890 (quotation and citation omitted).

¶ 40 Here, the parties' dispute does not center on the law requiring an underlying order compelling discovery and a violation of that order. We review the specifics of each of those arguments.

A. March 2019 Order Finding Violations of June 2018 Order

¶ 41 Appellants' argue "[t]here was no violation of the June 2018 Order" and thus the March 2019 Order erred in awarding sanctions under Rule 37(b). Their parallel arguments begin by asserting the March 2019 Order never addressed the key question of "which documents and where designated." (Citing *Willis v. Duke Power Co.*, 291 N.C. 19, 31, 229 S.E.2d 191, 198 (1976)). Then, Appellants contend, "[r]ather than answering that question, in the March 2019 Order the trial court created new requirements and obligations not found in the June 2018 Order." Each Appellant then alleges "there is no evidence to support" certain, listed Findings of Fact from the March 2019 Order. We address Appellants' argument that the trial court did not answer the question of which documents and where designated before turning to their arguments about the challenged Findings of Fact.

¶ 42 Appellants' argument that the trial court did not answer the question of which documents and where designated is misplaced because that question had already been answered. Appellants rely on *Willis v. Duke Power Co.* Appellants' quote from *Willis v. Duke Power Co.* is taken out of context, as the language immediately after the quote on which Appellants rely shows that case is distinguishable. The predicate order in that case required "the defendant to answer the plaintiff's interrogatories and to produce 'the documents therein designated . . . .' The question is which documents and where designated. *At the time of this order no documents had been identified or designated by either party.*" *Willis*, 291 N.C. at 31, 229 S.E.2d at 198–99.

¶ 43 Here, the June 2018 Order required Dunhill and Mr. Lindberg to "fully and completely reply to *each and every* Interrogatory and discovery request for production of documents" with exceptions not relevant here. (Emphasis added.) The June 2018 Order also specifically "fully incorporated herein by reference" the "requests for discovery" that Ms. Lindberg had filed on 26 February 2018. Thus, unlike in *Willis*, 291 N.C. at 31, 229 S.E.2d at 198–99, Ms. Lindberg had designated documents in her discovery requests from February 2018 and the trial court indicated those documents were the ones Appellants needed to provide to comply

with the June 2018 Order. The trial court highlighted that part of the June 2018 Order again for Appellants in its March 2019 Order by specifically reproducing the documents designated. Therefore, the March 2019 Order highlighted the part of the June 2018 Order that answered the very question Appellants now claim the March 2019 Order failed to answer.

¶ 44 Turning to the challenged Findings of Fact from the March 2019 Order, Appellants' arguments fit into three categories: (1) the June 2018 Order did not require them to respond to Tisha Lindberg's requests without objection (challenges to Findings of Fact 18, 19, 22, 28, 31, 32, 34, 37, 38, 42, 43); (2) the June 2018 Order did not require production of documents in a manner that indicated to which discovery request they responded (challenges to Findings of Fact 24, 25); (3) other topics that are not properly argued before us (challenges to Findings of Fact 7, 17, 28, 29, 33, 35, 39, 48).

¶ 45 Taking the categories in order, Appellants first argue the June 2018 Order did not require them to respond to Ms. Lindberg's requests without objection and thus it was an error for the March 2019 Order to find the June 2018 Order did just that. While the June 2018 Order did not specifically state Appellants had to respond to Ms. Lindberg's requests "without objection," the June 2018 Order in its entirety supports this reading. First, the June 2018 Order addressed the specific objections Appellants had raised and then overruled nearly all of them concluding they lacked merit—other than attorney-client privilege, which we address below—and determining they "were interposed for an improper purpose of delay and avoiding any meaningful response." In the June 2018 Order, the trial court had already ruled upon the particular objections Appellants attempted to raise again. This argument, like Appellants repeated attempts to raise the same objections again after the trial court had already rejected them, is without merit.

¶ 46 Further, the June 2018 Order provided a specific procedure for Appellants to renew objections based on a claim of attorney-client privilege. A common canon of statutory construction says "when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list." *E.g.*, *Cooper v. Berger*, 371 N.C. 799, 810, 822 S.E.2d 286, 296 (2018) (quotations and citations omitted). Applying similar logic here, by listing that Appellants could renew objections based on a claim of attorney-client privilege, the June 2018 Order implied Appellants could not renew their other objections. Under the June 2018 Order, Appellants were supposed to respond to the outstanding discovery requests without raising the same objections the trial court had already rejected, so the trial court did not abuse its

discretion in the March 2019 Order by finding Appellants violated the June 2018 Order for reasserting overruled objections.

¶ 47 Appellants also argue they could have reasserted their previously overruled objections because "failure to reassert the objections could be construed as waiver." Both cases upon which Appellants rely involve rules and situations where waiver might follow when a party failed to properly object even once. *See Adams v. Lovette*, 105 N.C. App. 23, 28–29, 411 S.E.2d 620, 623–24 (1992) (laying out rule for implied waiver on an issue where defendant had never stated an objection on the ground argued on appeal); *Golding v. Taylor*, 19 N.C. App. 245, 246, 248, 198 S.E.2d 478, 479–80 (1973) (stating that there is ordinarily a rule that a failure to object to interrogatories within a fixed time constitutes waiver before explaining the party had objected at the first time of asking but just not within the appropriate timeframe). Thus, those cases provide no support for a party needing to reassert meritless objections a second time. Further, Rule of Appellate Procedure 10(a) only requires a party to assert its objection and obtain a ruling from the trial court in order to preserve the issue. Therefore, we reject Appellants' argument that they would have waived their objections to Ms. Lindberg's discovery requests if they failed to reassert them after the June 2018 Order denied nearly all of them.

¶ 48 Turning to the next category, Appellants assert the March 2019 Order erred when it "stated that it was 'improper and in violation of' the June 2018 Order to produce documents without indicating to which particular discovery requests the documents responded." While the June 2018 Order does not specifically say Appellants must indicate to which particular discovery requests the documents respond, reading the Order in its entirety once again supports that requirement. The June 2018 Order mandated Appellants "fully and completely reply to *each and every* Interrogatory and discovery request for production of documents" with one exception not relevant here. (Emphasis added.) The March 2019 Order explicitly quoted that language when summarizing the June 2018 Order. Given that language, we cannot say the March 2019 Order's determination that the June 2018 Order required Appellants to indicate which particular discovery request documents responded to was "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *Myers*, 269 N.C. App. at 240, 837 S.E.2d at 447–48. Therefore, the trial court did not abuse its discretion by finding it was a violation of the June 2018 Order to produce documents without indicating to which request they responded.

¶ 49 Appellants also argue Rule of Civil Procedure 34(b)(1) allows parties to produce documents as they are kept in the usual course of business rather than labeling them in response to a particular document request. Appellants omit the prefatory clause of the rule. The full sentence reads:

> *Unless otherwise stipulated by the parties or ordered by the court*, the following procedures apply to producing documents or electronically stored information:
>
> > (1) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

N.C. Gen. Stat. § 1A-1, Rule 34(b)(2021) (emphasis added). Appellants may have originally had the choice to produce documents in the ordinary course of business, but the June 2018 Order removed that choice by requiring them to label the documents by request.

¶ 50 Turning to the final category, Appellants list many other Findings of Fact they claim "there is no evidence to support" without making any further argument. North Carolina Rule of Appellate Procedure 28(a) requires parties to present and discuss issues or they are deemed abandoned. N.C. R. App. P. 28(a); *see also* N.C. R. App. P. 28(b)(6) (requiring a party to support issues by reason or argument). Failure to follow Rule 28 makes it "difficult if not impossible to properly determine the appeal." *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299 (1999). Furthermore, "[i]t is not the duty of this Court to peruse through the record, constructing an argument for appellant." *Person Earth Movers, Inc. v. Thomas*, 182 N.C. App. 329, 333, 641 S.E.2d 751, 754 (2007).

¶ 51 Here, Appellants abandon any argument of the remaining Findings of Fact they challenge, and it is not our duty to "peruse through the record" to construct their argument for them. *Id.* For example, both Appellants challenge Finding of Fact 48 awarding attorney's fees and making eight specific sub-Findings of Fact, some of which span multiple sentences. Despite that listed challenge, neither Appellant further mentions in their argument the two pages of the record Finding 48 covers, apparently leaving for this Court to determine the specific portions of the Finding Appellants challenge.

¶ 52 As another example, Appellants challenge Findings of Fact 27 and 33, each of which lists approximately twenty five requests for document production Appellants still had not responded to in violation of the June 2018 Order. Appellants provide no evidence or record citations

to support their compliance with those requests. It is not our duty to search the 7,000 pages of documents Appellants produced between the June 2018 and March 2019 Orders—which also do not appear to be in the record—to determine Appellants' compliance with those requests. *Person Earth Movers*, 182 N.C. App. at 333, 641 S.E.2d at 754. Because Appellants have failed to present an argument as to these remaining challenged Findings of Fact, we deem those challenges abandoned. N.C. R. App. P. 28(a), (b)(6).

¶ 53 Finally, Appellants argue the March 2019 Order "failed to even acknowledge that [Appellants] had appealed from the June 2018 Order" and "effectively sought to punish [Appellants] for obtaining stay relief from the appellate courts" because Appellants "promptly served the responses and produced the documents required by the June 2018 Order" once the stay was denied. We cannot reconcile this argument with the record before us. The March 2019 Order acknowledged the initial appeal from the June 2018 Order and the history of that appeal in multiple unchallenged Findings of Fact. The March 2019 Order then specifically found in unchallenged Finding of Fact 15: "As a result of the Supreme Court's February 5, 2019 Order, this matter is not stayed in any way and proceedings at the trial court level must move forward." Thus, contrary to Appellants' argument, the March 2019 Order acknowledged their appeals and the stays involved.

¶ 54 The record also does not support Appellants' argument that they complied with the June 2018 Order once the stay was denied. At the 11 March 2019 hearing that led to the March 2019 Order, Appellants' counsel admitted they had not fully complied with the June 2018 Order. At one point, Appellants' counsel said, "We have gone a long way in complying with that [June 2018 Order]. *I am not arguing that we are there, Judge*." (Emphasis added.) At another point, the following exchange occurred:

> THE COURT: . . . what is before me is you now have an order, after all of this, that Judge Smith entered on June 27th of 2018 that's not being followed.
>
> MR. PACE [Appellants' counsel]: You're exact – *you're correct*. We agree 100 percent it is time to comply with the order.

(Emphasis added.) Thus, a month and six days after the final stay was denied, Appellants still admitted they were not in compliance. Notably, this was roughly the same amount of time the June 2018 Order originally gave them to comply.

¶ 55 Reviewing for abuse of discretion, we reject all of Appellants' arguments that the March 2019 Order improperly found violations of the June 2018 Order. The parties must comply with the order actually entered, regardless of what a party *wishes* the order had required. *See Becker v. Pierce*, 168 N.C. App. 671, 678–79, 608 S.E.2d 825, 830 (2005) (finding no error when defendant produced three letters as required by the previous court order but did not produce a fourth that plaintiffs claimed was covered). What Appellants *wish* the June 2018 Order required is not relevant. What matters is the June 2018 Order *actually identified* the documents to be produced, ordered Appellants to respond without objection, and required Appellants to indicate to which discovery request each document responded. The March 2019 Order further properly took into account Appellants' appeal from the June 2018 Order. Therefore, the trial court did not abuse its discretion by finding, in the March 2019 Order, that Appellants violated the June 2018 Order.

B. August 2019 Order Finding Violations of the March 2019 Order

¶ 56 Similar to their first argument, Appellants contend "[t]here was no violation of the March 2019 Order" and thus the August 2019 Order erred in awarding sanctions under Rule 37(b). As with the previous argument, Appellants challenge listed Findings of Fact and then have arguments, some of which are unconnected to the challenged Findings. We first address the challenges to the Findings before turning to the unconnected arguments.

¶ 57 Appellants both challenge the same Findings of Fact in the August 2019 Order. As with their previous argument, Appellants list certain Findings of Fact that they claim "there is no evidence to support" without making any further argument (Findings 10, 22, 101, 110). Because Appellants have failed to present an argument as to these challenged Findings of Fact, we again deem those challenges abandoned. N.C. R. App. P. 28(a), (b)(6).

¶ 58 The next Finding of Fact Appellants challenge (Finding 21) summarizes the ways in which Appellants, after the final stay was lifted in February 2019, "continued purposefully to withhold discovery and violate the Court's June 27, 2018 Discovery Order . . . ." Of the listed violations in that Finding, Appellants only specifically argue "there was no prohibition against reasserting objections," so we only address that argument. *See* N.C. R. App. P. 28(a), (b)(6) (deeming challenges to be abandoned if not specifically argued). We have already determined above that the June 2018 Order prohibited Appellants from reasserting their objections, and we reject this challenge for the same reason.

¶ 59 The final challenged Finding of Fact (Finding 32) determined Appellants violated the March 2019 Order through their 129,000 page document production in May 2019 because that was after the March 2019 Order's deadline "to produce *all* discovery materials" in Appellants' possession. (Emphasis in original.) Appellants argue the March 2019 Order did not require producing all discovery materials but rather all documents that were being withheld, which Appellants argue they did. Appellants then argue this later production permissibly supplemented their earlier production with "documents [that] were received from third parties and computer servers . . . ." This supplementation argument therefore also contends none of the documents in the 129,000 page production from May 2019 were documents that had previously been withheld.

¶ 60 The record here cannot support Appellants' argument. The March 2019 Order listed numerous requests for document production with which Appellants entirely failed to comply. The March 2019 Order then required Appellants to "produce all documents that are being withheld from the document requests identified above." Thus, the term withholding referred to all documents Appellants had related to those discovery requests.

¶ 61 Despite the fact that Appellants had to provide all documents related to those requests by the 26 March 2019 deadline set in the March 2019 Order, they failed to comply. Instead, Appellants had still not complied by May 2019 because the May 2019 production included many documents responsive to those requests. While we do not have the entire batch of discovery documents before us, Appellants' own admission that these documents were responsive to prior requests puts them in violation of the March 2019 Order, unless all of the documents produced were supplemental.

¶ 62 The record here belies Appellants' contention that all 129,000 pages produced in May 2019 were supplemental. At the July 2019 hearing on Ms. Lindberg's motion for sanctions, Appellants' counsel identified the sources of the 129,000 pages. About a quarter of the documents (29,000 pages) were emails from the accounts of individuals who worked at Dunhill during the relevant time period. Rule of Civil Procedure 34(a) allows a party to obtain production of documents "which are in the possession, custody or control of the party upon whom the request is served." N.C. Gen. Stat. §1A-1, Rule 34(a). Dunhill clearly had possession, custody, or control over the email accounts of its own employees. Thus, the 29,000 pages of emails cannot all be supplemental.

¶ 63 The remaining 100,000 pages were bank and credit card statements, of which we presume at least some were for accounts held by either Dunhill or Mr. Lindberg given the underlying requests focused on those accounts. Appellants do not show these documents were all supplemental. As the terms are used in Rule of Civil Procedure 34(a), "possession, custody, or control of the party" includes documents a party has "the legal right to obtain . . . on demand." *See Pugh*, 113 N.C. App. at 380, 438 S.E.2d at 218 (describing that test as the federal standard then applying it in the case at hand) (quotations and citation omitted).

¶ 64 Dunhill and Mr. Lindberg certainly had the legal right to obtain on demand their own bank and credit card statements. Therefore, they had possession, custody, or control of at least some of those 100,000 pages of records before the March 2019 Order's deadline. To characterize all 129,000 pages in the May 2019 production as supplemental per Appellants' arguments the August 2019 Order faulted them for supplementing their production is incredulous. The trial court did not abuse its discretion in finding, in the August 2019 Order, that the 129,000 page production in May 2019 violated the March 2019 Order.

¶ 65 Finally, Appellants argue they "[a]t the very least . . . made good faith efforts to comply with the trial court's orders," and therefore they should not have been sanctioned. Appellants are correct that Rule 37 requires "a good faith effort at compliance with the court order." *Laing v. Liberty Loan Co. of Smithfield and Albemarle*, 46 N.C. App. 67, 71, 264 S.E.2d 381, 384 (1980). While a party's willful violation of a court order will defeat a finding of good faith, *see Willis*, 291 N.C. at 32–33, 229 S.E.2d at 199 (finding defendant acted in good faith and that there was no evidence of a willful refusal), North Carolina law does not require a party to have willfully violated a court order to justify an award of Rule 37 sanctions. *Henderson v. Wachovia Bank of North Carolina, N.A.*, 145 N.C. App. 621, 629, 551 S.E.2d 464, 470 (2001) ("[T]he plain language of Rule 37 does not require a showing of willfullness. The order of default judgment may be entered against a defendant pursuant to Rule 37(b)(2) for failure to obey a court order whether the failure was willful or not."); *see also* N.C. Gen. Stat. § 1A-1, Rule 37, Comment to the 1975 Amendment (recounting how shift of language to "failure" from "refusal" aimed to make clear that courts do not have to find a willful failure to impose sanctions). Rather, the good faith standard eliminates the threat of sanctions "[i]f a party's failure to produce is shown to be due to inability fostered neither by its own conduct nor by circumstances within its control . . . ." *Laing*, 46 N.C. App. at 71, 264 S.E.2d at 384.

¶ 66 Here, Appellants' failures to comply with the March 2019 Order were due to their own conduct and circumstances within their control.

Considering the entire history of this discovery dispute, the multiple orders addressing Appellants' objections and late and deficient responses, as well as Dunhill's and Mr. Lindberg's deposition testimony, Appellants have not shown good faith in Appellants' responses to the discovery requests. As explained above, Appellants had in their possession, control, or custody or had the legal right to demand all the documents they admitted were part of the May 2019 production. Therefore, Appellants did not act with good faith and were subject to Rule 37 sanctions.

¶ 67 We find the trial court did not abuse its discretion in ruling, in its August 2019 Order, Appellants violated the March 2019 Order. Combined with our previous conclusion about violations of the June 2018 Order, we hold the trial court did not abuse its discretion in sanctioning Appellants for their document production actions and inactions.

V. Sanctions for Depositions

¶ 68 **[3]** In addition to arguing they should not have been sanctioned for their actions and inactions around document production, both Appellants assert the trial court erred in sanctioning them for their depositions. Similar to the document production issue, Appellants both argue "without a predicate order in place, the sanctions" based on their depositions "were inappropriate." Dunhill then presents an additional argument that the trial court "misconstrued Rule 30(b)(6)," the basis for its deposition. We first address the predicate order issue for each Appellant before turning to Dunhill's argument about Rule 30(b)(6).

A. Predicate Order Issue

¶ 69 Both Appellants argue the trial court erred by sanctioning them for their depositions "without a predicate order in place." This argument closely resembles the contentions Appellants had regarding document productions.

¶ 70 Given the similarities in the argument, much of the law governing Appellants' contention is the same here, so we briefly recite it. Rule of Civil Procedure 37(b)(2) permits sanctions when "a party fails to obey an order to provide or permit discovery . . . ." N.C. Gen. Stat. § 1-1A, Rule 37(b)(2). Thus, "[i]n general, 'sanctions under Rule 37 are imposed only for the failure to comply with a court order,' " i.e. failure to comply with a predicate order borrowing Appellants' term. *Lovendahl v. Wicker*, 208 N.C. App. 193, 200, 702 S.E.2d 529, 534 (2010) (quoting *Pugh*, 113 N.C. App. at 379, 438 S.E.2d at 217). Additionally, "[a] motion for a protective order under Rule 26(c) that is denied . . . may end in the same result as a motion to compel discovery under Rule 37(a): an order compelling

discovery." *Id.* This similar result arises directly from the language of Rule 26(c) providing "[i]f the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery." *Id.* (quoting N.C. Gen. Stat. § 1A-1, Rule 26(c)) (alteration in original). As a result, "violation of an order compelling discovery that results from a motion for a protective order may [also] be the basis for sanctions under Rule 37(b)." *Id.* We review the trial court's actions challenged in the predicate order arguments for abuse of discretion. *See Myers*, 269 N.C. App. at 240, 837 S.E.2d at 447 ("As a general rule, we review the trial court's rulings regarding discovery for abuse of discretion."); *Feeassco*, 264 N.C. App. at 336, 826 S.E.2d at 209 (reviewing order granting motion for sanctions for abuse of discretion).

1. Dunhill's Predicate Order Argument

¶ 71 Dunhill argues "without a predicate order in place, the sanctions based on the 30(b)(6) deposition of Dunhill were inappropriate." It also asserts the August 2019 Order "did not even purport to identify a predicate order regarding Dunhill's deposition." While Dunhill acknowledges the order denying its motion for a protective order, it argues that order was not specific enough for Dunhill to be required "to do anything other than provide prepared witnesses." Finally, Dunhill argues the August 2019 Order erred by sanctioning Dunhill for previous misconduct by both it and by Mr. Lindberg.

¶ 72 Taking Dunhill's arguments in turn, it is simply wrong to argue the August 2019 Order failed to identify a predicate order. We have identified four examples of times the August 2019 Order referred to the trial court's previous order denying Dunhill's and Mr. Lindberg's Motion for a Protective Order and said Dunhill violated that previous order by failing to present prepared witnesses at its Rule 30(b)(6) deposition:

> 30. On June 5, 2019, the Court entered a written order denying Dunhill's Motion for Protective Order, and expressly ordered that Dunhill make available for its Rule 30(b)(6) deposition an appropriate company designee for <u>all</u> noticed topics who was prepared to testify "as to 'all matters known and reasonably available to' Dunhill regarding each topic in the notice of deposition." *See* this Court's 6/5/2019 *Order on Dunhill Holdings, LLC and Greg Lindberg's Motion for Protective Order* (*citing* N.C. Gen. Stat. § 1A-1, Rule 30(b)(6)).

> . . .
>
> 42. Dunhill's failure to prepare for its deposition, as it was required to do under Rule 30(b)(6) and this Court's 5 June 2019 Order . . . .
>
> . . .
>
> 47. Brenda Lynch was designated as Dunhill's corporate representative to testify pursuant to Rule 30(b)(6) as to Dunhill's specific knowledge of Topics 1 and 2. Moreover, and as previously discussed above, pursuant to this Court's June 5, 2019 *Order on Dunhill Holdings, LLC and Greg Lindberg's Motion for Protective Order*, Dunhill was ordered by the Court to produce at the deposition an appropriate company designee who is prepared to testify "as to 'all matters known and reasonably available to' Dunhill regarding each topic in the notice of deposition." (citing N.C. Gen. Stat. § 1A-1, Rule 30(b)(6)).
>
> . . .
>
> 51. The Court finds that Ms. Lynch's deposition testimony, given on behalf of Dunhill, represents a failure of Dunhill to adequately testify in response to Topics 1-43, in direct violation of this Court's 5 June 2019 Order on Dunhill and Mr. Lindberg's Motion for Protective Order described above.

(Emphasis in original.) Dunhill does not challenge any of those Findings of Fact, so they are binding on appeal. *See Feeassco*, 264 N.C. App. at 340, 826 S.E.2d at 211 (determining unchallenged findings of fact in a sanctions order were binding on appeal). Based on these binding Findings of Fact, the trial court identified its order denying Appellants' motion for a protective order as the predicate order compelling discovery, which is allowed under *Lovendahl*. 208 N.C. App. at 200, 702 S.E.2d at 534.

¶ 73 Dunhill's failure to recognize the predicate order, upon which the trial court relied, might stem from its related argument that the order denying its motion for a protective order was not specific enough. Dunhill cites no binding precedent to support that argument.[7] However, in *Lovendahl*, this Court ruled an order denying a motion for a protective order was sufficient to justify Rule 37(b) sanctions when the order

7. In fact, Dunhill primarily cites unpublished federal district court opinions. Citation to this Court's own unpublished opinions is "disfavored," N.C. R. App. P. 30(e)(3), so citation to other courts' unpublished opinions at least warrants the same treatment.

merely required the defendant to " 'submit to deposition within forty-five days of the date of this Order.' " 208 N.C. App. at 200–02, 702 S.E.2d at 534–35. Here, the trial court's order denying the motion for a protective order said:

> Accordingly, and pursuant to Rule 30(b)(6) of the North Carolina Rules of Civil Procedure, Dunhill Holdings, LLC shall appear as noticed on June 5 and 6, 2019 for its deposition and be prepared to testify, through an appropriate company designee, as to all "matters known or reasonably available to" Dunhill regarding each topic in the notice of deposition. N.C. Gen. Stat. § lA-1, Rule 30(b)(6).

The trial court's order, specifically directing Dunhill's designee to be prepared to testify to all matters known or reasonably available on each noticed topic, is more specific than the language this Court found acceptable in *Lovendahl*. Therefore, we find the language here was specific enough that a violation of the order denying the motion for the protective order could support sanctions under Rule 37(b).

¶ 74 Turning to its final argument, Dunhill asserts "[t]he trial court erred by assuming it could enter sanctions based on the history of the parties' discovery disputes," especially since Mr. Lindberg is a separate individual according to Dunhill. Dunhill's arguments are unpersuasive. Dunhill quotes a portion of Conclusion of Law 141 that references a long pattern of violations of discovery orders, but that Conclusion appears under the heading "Sanctions Arising from Misconduct During Mr. Lindberg's Deposition." Dunhill seemingly ignores Conclusions of Law 114–28, which recount the basis for sanctions against Dunhill based on its Rule 30(b)(6) "Deposition Misconduct." Those Conclusions and the facts we recounted above detail how Dunhill was sanctioned not for its past misconduct but rather for its new failure to comply with the order compelling discovery that came out of the order denying Dunhill's motion for a protective order. Thus, Dunhill was sanctioned not for its previous misconduct—which was extensive as recounted in our analysis of the document production sanctions above—but rather for its new misconduct in depositions.

The citations here are particularly inapposite because, as explained above, this Court has issued binding precedent on the issue. *See* N.C. R. App. P. 30(e)(3) ("If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case *and that there is no published opinion that would serve as well*, the party may cite the unpublished opinion . . . .") (emphasis added).

¶ 75 Dunhill also contends the trial court improperly conflated it with Mr. Lindberg, arguing "accusations of misconduct against a separate individual (like Mr. Lindberg) should not be part of the analysis." As recounted more fully above, Dunhill was sanctioned for its own failures. For example, unchallenged Finding of Fact 51 faulted *Dunhill* for failing "to adequately testify in response to Topics 1-43, in direct violation of this Court's 5 June 2019 Order on Dunhill and Mr. Lindberg's Motion for Protective Order described above." The underlying premise that Dunhill and Mr. Lindberg are separate is questionable. In unchallenged Findings of Fact, the trial court noted evidence that Dunhill and Mr. Lindberg are not separate in general and specifically "collu[ded]" in their deposition misconduct:

> 100. . . . . In fact, on numerous occasions, the corporate representatives at Dunhill's Rule 30(b)(6) deposition testified that they were not knowledgeable persons to testify regarding the noticed topics, and instead Mr. Lindberg, the sole owner and manager of Dunhill, was in fact the more knowledgeable individual about the noticed topics. [footnote] Counsel for Mrs. Lindberg thereafter reasonably proceeded to ask Mr. Lindberg about many of these same topics at his deposition, only to be met with his repeated refusals to answer relevant questions.
>
> 101. The Court finds that Greg Lindberg's refusal to answer relevant deposition questions, when combined with his sole ownership and control over Dunhill as a corporate entity, amounts to collusion between Dunhill and Greg Lindberg at their respective depositions to intentionally evade their discovery obligations in this matter and to purposefully withhold relevant information from Mrs. Lindberg and her counsel. The Court finds the same is true with respect to Dunhill and Mr. Lindberg's repeated violations of this Court's prior orders compelling them to produce documents and materials in discovery.

(Footnote omitted.) Given Dunhill's own misconduct warranted sanctions and its connection to and collusion with Mr. Lindberg, we also reject this argument.

¶ 76 Thus, reviewing for abuse of discretion, we reject all of Dunhill's arguments about the lack of a predicate order and its related objections.

2. Mr. Lindberg's Predicate Order Argument

¶ 77 Mr. Lindberg's predicate violations argument resembles Dunhill's argument, but Mr. Lindberg also contends he was inappropriately sanctioned for invoking his Fifth Amendment privilege against self-incrimination. Mr. Lindberg first mirrors Dunhill's arguments that no predicate order existed to justify sanctions and that the trial court erred by sanctioning Mr. Lindberg for past misconduct by both him and Dunhill. Then, Mr. Lindberg argues his "reluctance or refusal to answer some questions is not surprising" given that depositions in other litigation between him and Ms. Lindberg resulted in him "obtaining a protective order . . . that required Ms. Lindberg's counsel to remain six feet away from Mr. Lindberg."

¶ 78 Finally, Mr. Lindberg argues that despite the trial court acknowledging his deposition "could be affected by invocation of the Fifth Amendment privilege against self-incrimination" based on a then-pending criminal case, the trial court "[i]ronically . . . then *sanctioned* Mr. Lindberg for refusing to answer questions at his deposition." (Emphasis in original.) Mr. Lindberg contends "the right to discovery must yield to the privilege against compulsory self-incrimination" such that the trial court "erred in sanctioning Mr. Lindberg based on his deposition testimony." We address each of those arguments in turn.

¶ 79 First, Mr. Lindberg's argument that there was no predicate order in place is inaccurate. The trial court's order denying Dunhill's motion for a protective order also denied Mr. Lindberg's motion for a protective order. The trial court clearly denied Mr. Lindberg's motion for a protective order because it separately denied Mr. Lindberg's motion for a stay of proceedings. Thus, the order denying the motion for a protective order in practice relies on the denial of the motion for a stay of proceedings. Since the denial of a motion for a protective order can have the same effect as an order compelling discovery, i.e. creating the requisite predicate order, *Lovendahl*, 208 N.C. App. at 200, 702 S.E.2d at 534, we look to the trial court's denial of the motion for a stay as well to evaluate the adequacy of any predicate order.

¶ 80 The trial court's order denying Mr. Lindberg's motion for a stay indicates Mr. Lindberg sought the stay because of pending criminal charges against him. The trial court's unchallenged Findings of Fact, however, highlight that "none of the claims, counterclaims, or causes of action alleged by the parties in this matter require them to prove facts that share a nexus with, or are substantially similar to, the allegations made against Mr. Lindberg in the separate criminal proceedings against him." Based

on that fact and its subsequent analysis of Mr. Lindberg's prejudice arguments, the trial court denied Mr. Lindberg's motion for a temporary stay of proceedings.

¶ 81 The trial court's unchallenged Findings of Fact indicate it expressly considered Mr. Lindberg's upcoming deposition and rejected Mr. Lindberg's arguments about prejudice caused by allowing that deposition to proceed:

> 9. There is no unfair prejudice to Mr. Lindberg or Dunhill by denying Mr. Lindberg's Motion for Temporary Stay. To the extent Mr. Lindberg believes it in his best interest, he has a right in this civil action to assert his Fifth Amendment rights to not answer questions propounded to him in discovery. Moreover, during the hearing of this motion, Mrs. Lindberg's counsel voluntarily agreed that they would not ask Mr. Lindberg questions at his upcoming deposition about the facts contained in the Bill of lndictment attached as Exhibit 1 to Mr. Lindberg's motion.
>
> 10. Mr. Lindberg argues that he would be prejudiced by potentially having to invoke his Fifth Amendment right to refuse to answer questions at his upcoming deposition. However, the Court finds that no unfair prejudice would occur given the fact that Mr. Lindberg has failed to demonstrate a nexus of substantially similar facts or issues between his criminal proceeding and this civil action. . . .

¶ 82 The trial court also, as Mr. Lindberg highlights, converted into a binding court order the voluntary agreement of Ms. Lindberg's counsel not "to question Mr. Lindberg at his upcoming deposition in this action regarding the facts contained in the Bill of Indictment . . . ." Thus, the trial court knew Mr. Lindberg's deposition would go ahead when it ordered the denial of his motion for a temporary stay and motion for a protective order. It is reasonable to read that sequence of events as the trial court ordering Mr. Lindberg to attend his deposition, so we cannot find the trial court abused its discretion in viewing the denial of the motions for a temporary stay and for a protective order as the equivalent of an order compelling discovery and in sanctioning Mr. Lindberg for violating that order. *See Myers*, 269 N.C. App. 240, 837 S.E.2d at 447–48 ("An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.").

¶ 83 Having determined the trial court did not abuse its discretion by treating the denial of Mr. Lindberg's motions for a protective order and temporary stay as a predicate order, we address Mr. Lindberg's argument he was improperly sanctioned for previous conduct by both him and Dunhill. As with Dunhill's similar argument, Mr. Lindberg's argument fails because he was sanctioned for his own new conduct. Looking just at Conclusion of Law 141 that Mr. Lindberg takes issue with in his brief, the trial court made it clear in the parts Mr. Lindberg omits that his own misconduct during the deposition justified its sanctions:

> 141. The Court further concludes that *Mr. Lindberg personally is subject to sanctions as a result of the many forms of misconduct he repeatedly employed during his personal deposition as described hereinabove*. Mr. Lindberg and Dunhill have engaged in a long pattern of violating the discovery orders of this Court as well as the Rules of Civil Procedure. *Mr. Lindberg's personal deposition obstruction and misconduct* is but the most recent in the long line of both his Dunhill's [sic] repeated prior violations of this Court's discovery orders and the discovery rules.

(Emphasis added.) Unchallenged Findings of Fact 59–98 recount in great detail, across five different subsections of misconduct, the "multiple forms of intentional obstruction and delay repeatedly employed by Greg Lindberg at his deposition." (Capitalization altered.) As just one example, the trial court included a table calculating the "**5 HOURS 47 MINS**" of deposition time "wasted due to Greg Lindberg's repeated tardiness" over two days. (Emphasis in original in first quotation; capitalization altered in second quotation.) Thus, the court sanctioned Mr. Lindberg for his deposition misconduct alone and had ample support for its decision to do so.

¶ 84 Mr. Lindberg's next argument is about his "reluctance or refusal to answer some questions" because of the prior protective order requiring Ms. Lindberg's counsel to remain six feet away from him. Without reaching the issue of whether a protective order about physical distancing from another case could justify refusing to answer any questions in a deposition from this case where the trial court in this case had already denied a substantive motion for a protective order, we note that Mr. Lindberg's deposition here did not even involve the attorney whose actions were the basis for the prior protective order. While the prior protective order covered "Counsel for Plaintiff," which included one of Ms. Lindberg's attorneys who deposed Mr. Lindberg in this case, it is clear

from the prior protective order that the conflict that led to the protective order involved another attorney who was not present at Mr. Lindberg's depositions in this case. Given the relevant attorney from the past conflict was not even present at this deposition, we reject any argument by Mr. Lindberg that this past history in any way impacts how we should view his "reluctance or refusal to answer some questions . . . ."

¶ 85 Finally, we reject Mr. Lindberg's argument that the trial court erred by sanctioning him for refusing to answer questions at his deposition after acknowledging Mr. Lindberg's deposition could be impacted by assertions of his Fifth Amendment privilege against self-incrimination. The key issue with Mr. Lindberg's argument is that he never invoked his Fifth Amendment privilege during his deposition. "The Fifth Amendment privilege against compelled self-incrimination is not self-executing." *Roberts v. U.S.*, 445 U.S. 552, 559, 100 S. Ct. 1358, 1364 (1980). In the case of "the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt," that person must "appear and answer questions truthfully . . . unless he invokes the privilege and shows that he faces a realistic threat of self-incrimination." *Minnesota v. Murphy*, 465 U.S. 420, 427, 104 S. Ct. 1136, 1142 (1984). A person's invocation of the Fifth Amendment privilege must be express. *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 108, 81 S. Ct. 1357, 1416 (1961) ("Nevertheless, it is not and has never been the law that the privilege disallows the asking of potentially incriminatory questions or authorizes the person of whom they are asked to *evade them without expressly asserting that his answers may tend to incriminate him*." (emphasis added)). While "no ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-incrimination," the language of invocation at least needs to be such that a person "may reasonably be expected to understand [it] as an attempt to invoke the privilege." *Emspak v. U.S.*, 349 U.S. 190, 194, 75 S. Ct. 687, 690 (1955). For example, the United States Supreme Court has held language with references to the Fifth Amendment, even without identifying the privilege specifically, is sufficient to invoke the privilege. *Id.*

¶ 86 Here, Mr. Lindberg never expressly invoked the privilege in the required manner. With one exception explained below, nothing related to the Fifth Amendment privilege against self-incrimination even came up in the transcript of Mr. Lindberg's deposition.[8] Rather, Mr. Lindberg instead decided to repeatedly—over 100 times according to

8. We searched the transcript for the following words "fifth"; "5th"; "amendment"; "privilege"; and "incrimination" and found no responses that discussed the Fifth Amendment

the unchallenged Findings of Facts—say he "can't comment on that." The use of the phrase, "I can't comment on that" was not language that a person could "reasonably be expected to understand as an attempt to invoke the privilege" because it does not reference the privilege or even the Fifth Amendment. *Id.* As such, none of those instances can be considered invocations of Mr. Lindberg's Fifth Amendment privilege.

¶ 87 The one time the Fifth Amendment came up in the transcript of Mr. Lindberg's deposition—in response to one of Mr. Lindberg's "I can't comment" answers—, Ms. Lindberg's counsel expressly asked Mr. Lindberg if he was intending to invoke his privilege and Mr. Lindberg's counsel specifically told him he did not have to answer if he was intending to invoke his Fifth Amendment privilege:

> Q. Refuse to answer. Did you not authorize Tisha Lindberg to sign your name on multiple documents?
>
> A. I can't comment on that.
>
> Q. Refuse to answer that question?
>
> A. I can't comment on it.
>
> Q. Well, if you can't comment, that to me means you are refusing to comment or answer.
>
> A. No. Saying I can't comment is a comment.
>
> Q. Why can't you comment? Mr. Lindberg, is the reason – one of the reasons you can't comment on many of these questions is because you intend to plead the Fifth Amendment?
>
> Mr. Pace: Objection. You don't have to answer that.
>
> Mr. Zaytoun: This is a civil case.
>
> Mr. Pace: Yes. And you've already represented to a judge that you wouldn't ask him any questions about that.
>
> By Mr. Zaytoun:
>
> Q. Mr. Lindberg, is it – is it your intention to plead the Fifth Amendment to any of these questions that I've asked you where you said you can't comment?

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privilege against self-incrimination other than the instance discussed in the main text. The search for the word "privilege" revealed numerous references to attorney-client privilege as well as a couple of references to professional-patient privilege, but Mr. Lindberg does not make any arguments about those privileges.

> Mr. Pace: You don't have to answer that. I'll instruct you not to answer.
>
> Mr. Zaytoun: All right. Certify that. On what – would you state for the record the basis upon which you're instructing him not to answer that question.
>
> Mr. Pace: Because you represented to the judge that you would not use this case for discovery of any of the criminal proceedings.
>
> Mr. Zaytoun: No. This has nothing to do with the North Carolina indictment, my question.
>
> Mr. Pace: Oh, you're –
>
> Mr. Zaytoun: It has no- -- has – this has to do with Dunhill.[9]
>
> Mr. Pace: We disagree.

In this case, Ms. Lindberg's counsel, rather than Mr. Lindberg or his counsel, made the reference to the Fifth Amendment privilege. The language Mr. Lindberg and his counsel used cannot be reasonably interpreted as an invocation. Unsurprisingly, as a result, Ms. Lindberg's counsel had to follow-up to clarify if Mr. Lindberg was invoking the privilege only for Mr. Lindberg's counsel to direct Mr. Lindberg not to answer whether he was invoking or not. Thus, Mr. Lindberg, through actions of his counsel, made a choice to not clarify he was expressly invoking his Fifth Amendment privilege as he was required to do to gain the privilege's protection. *Emspak*, 349 U.S. at 194, 75 S. Ct. at 690.

¶ 88 Since Mr. Lindberg never invoked his Fifth Amendment privilege against self-incrimination, the trial court could not have sanctioned him for such invocation, as he now argues. We therefore reject that argument and find the trial court did not abuse its discretion in sanctioning Mr. Lindberg for his deposition conduct.

B. Dunhill's 30(b)(6) argument

¶ 89 In the final argument against the sanctions for deposition conduct, Dunhill contends "the trial court misconstrued Rule 30(b)(6)." (Capitalization altered.) Rule of Civil Procedure 30(b)(6) provides:

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9. In unchallenged Findings of Fact, the trial court found the indictment in question did not mention Dunhill or Ms. Lindberg and did "not refer to facts or issues that create a nexus with, or are substantially similar to, the facts or issues involved in this civil action." Thus, by asking about Ms. Lindberg and Dunhill, Ms. Lindberg's attorney did not run afoul of the court order to not question Mr. Lindberg "regarding facts contained in" the indictment.

> A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. It shall not be necessary to serve a subpoena on an organization which is a party, but the notice, served on a party without an accompanying subpoena shall clearly advise such of its duty to make the required designation. *The persons so designated shall testify as to matters known or reasonably available to the organization*. This subsection (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

N.C. Gen. Stat. § 1A-1, Rule 30(b)(6) (emphasis added). Dunhill's argument focuses on the meaning of the phrase "known or reasonably available" in the second to last sentence. Since this argument involves a review of the trial court's interpretation of a statute, we review it de novo. *Myers*, 269 N.C. App. at 240–41, 837 S.E.2d at 447–48.

¶ 90 After saying "[t]here are no North Carolina appellate opinions regarding the scope of Rule 30(b)(6)," Dunhill proceeds to make five arguments based primarily on analogies to federal law. We reject all of Dunhill's arguments without addressing the scope of Rule 30(b)(6) under North Carolina law. Rather, Dunhill's arguments all fail based on the unchallenged, and therefore binding, Findings of Fact even when applying the law with which it argues. *See Feeassco*, 264 N.C. App. at 340, 826 S.E.2d at 211 (holding unchallenged Findings of Fact are binding on appeal). As a result for each of Dunhill's five arguments, we first present the law on which Dunhill relies directly from its brief and then explain why the facts here do not conform to that law's requirements.

¶ 91 Dunhill's first argument focuses on the preparation of deponents:

> When it comes to preparation for the deposition, the touchstone of this Rule is reasonableness. *See, e.g.*, *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416,

> 432-33 (5th Cir. 2006).[footnote omitted] Recognizing that "an individual cannot be expected to know every possible aspect of the organization's inner workings," courts have invariably acknowledged that the "standard for sanctions in this context is high." *Runnels v. Norcold, Inc.*, No. 1:16-cv-713, 2017 WL 3026915, at *1 (E.D. Va. Mar. 30, 2017) (unpublished) [Add. 84] (citing cases). A designee is not expected to present "a fully reliable and sufficiently complete account of all the bases for the contentions made and positions taken by the corporate party." *Stoneeagle Servs., Inc. v. Pay-Plus Sols., Inc.*, No. 8:13-CV-2240-T33MAP, 2015 WL 12843846, at *2 (M.D. Fla. Apr. 29, 2015) (unpublished) [Add. 88].

(All alterations in original exception noting omission of footnote.) Dunhill then recounts how its witnesses were "well prepared" and "testified for two entire days regarding the requested topics creating more than 700 pages of testimony."

¶ 92 The cases Dunhill presents indicate that reasonableness means that the designated individuals do not have to know everything completely but rather must know a reasonable amount and be reasonably prepared to answer questions. While Dunhill's designees may have testified to some topics, they seemingly lacked any preparation or knowledge as to certain other topics. For example, the unchallenged Findings of Fact indicate one of Dunhill's designees, Mr. Neal, was unable to answer any questions about electronic devices used by Mr. Lindberg and had not even attempted to learn that information prior to his deposition:

> 38. During the questioning of Mr. Neal, he was completely unprepared to address many of his designated topics. Most notably, Mr. Neal was unable to address Topic 49 regarding Mr. Lindberg's electronic devices and computers, which stated:
>
> > All Computers and electronic devices used by Greg Lindberg from January 1, 2014 to the present, including:
> >
> > a. Number, types and locations
> >
> > b. Operating systems with versions, dates of use and upgrade history
> >
> > c. Application software with versions, dates of use and upgrade history.

> 39. Mr. Neal testified at deposition, on behalf of Dunhill, that he did not know this information, he did not learn this information prior to the deposition, nor had he ever attempted to ask Mr. Lindberg personally to identify Mr. Lindberg's computers and devices. Instead, Mr. Neal merely sent an email to two people who work for Mr. Lindberg about Mr. Lindberg's electronic devices, but never received a response to his email and did not follow up. This represents a clear and total failure of Dunhill to testify in response to Topic 49 during its deposition, in direct violation of this Court's 5 June 2019 Order on Dunhill and Mr. Lindberg's Motion for Protective Order described above.
>
> 40. Mr. Neal was also unable to identify the location of the servers that house the parties' emails, which Dunhill was required to be prepared to identify under deposition Topics 44, 60, 67 and 71. Mr. Neal could only identify the third-party email hosting service provider that Dunhill utilizes, but he could not identify the location of any of the servers. When pressed on his inability to provide the location of the email servers, Mr. Neal testified that he was confused about the meaning of the word "location" and thought that it meant something other than its plain English meaning. This, too, represents a failure of Dunhill to adequately testify in response to Topics 44, 60, 67 and 71, in direct violation of this Court's 5 June 2019 Order on Dunhill and Mr. Lindberg's Motion for Protective Order described above.

¶ 93 As the portion about Mr. Neal believing the word "location" had something other than its ordinary meaning indicates, Dunhill also cannot claim the two days and 700 pages of testimony from its witnesses all shows its compliance either. Further to that point, the trial court specifically found Dunhill's other designee, Ms. Lynch, "intentionally and repeatedly gave evasive and longwinded responses to interfere with the deposition time available . . . ." Given these Findings alone, Dunhill cannot credibly claim that its designees were even reasonably prepared to testify as to the designated topics.

¶ 94 Dunhill's second argument is not based on any new law; instead, Dunhill argues that the trial court "summarily found that Dunhill 'did not provide a witness prepared to testify as to the Rule 30(b)(6)

designated deposition topics'—apparently all 73 of them." In making this contention, Dunhill omits the critical opening part of the quote indicating that the trial court was referring to the specific topics it had already discussed:

> *As articulated above*, Dunhill (necessarily acting by and through its sole owner, member, and manager, Mr. Lindberg) did not provide a witness prepared to testify as to the Rule 30(b)(6) designated deposition topics and provide the responsive information known or reasonably available to the organization. Dunhill (and by necessary extension Mr. Lindberg) has, therefore, violated the Court's 5 June 2019 discovery Order and is subject to sanctions for failing to comply with the same pursuant to Rule 37(b).

(Emphasis added.) With the full quote, it is clear the trial court was not saying Dunhill had failed to provide a prepared witness for all 73 topics. The trial court was saying it had not provided a prepared witness for the topics it already discussed, including those it incorporated by reference to the corrected motion for sanctions, above in its Findings of Fact. Thus to the extent Dunhill argues the trial court erred by finding it did not present a prepared witness for all 73 topics, we reject that argument.

¶ 95 Dunhill's final three arguments all are responding to the basis for the trial court's above conclusion, as they "appear[]" to Dunhill. With each of these arguments, Dunhill presents more law justifying its position, and as with the first argument, we reject Dunhill's contentions as their proffered law applies to the facts here.

¶ 96 Dunhill first claims the basis for the sanctions for failure to present a prepared witness was "that the witness referred to documents produced in litigation." For its supporting law, Dunhill stated:

> Referring to documents was proper because "Rule 30(b)(6) is not designed to be a memory contest." *Risinger v. SOC, LLC*, 306 F.R.D. 655, 663 (D. Nev. 2015); *see also Runnels*, 2017 WL 3026915, at *1 [Add. 84] (explaining that organizational representatives "are not expected to be a corporate encyclopedia"). There is no requirement "that a Rule 30(b)(6) witness be able to testify at a deposition without referencing documentation to supplement the testimony." *BreathableBaby, LLC v. Crown Crafts, Inc.*, No. 12-cv-94 (PJS/TNL), 2013 WL 3350594, at *8

> (D. Minn. May 31, 2013) (unpublished) [Add. 25], adopted by 2013 WL 3349999 (D. Minn. July 1, 2013). Thus, the fact that a witness has to review documents before answering questions does not make the witness unfit. *Baker v. St. Paul Travelers Ins. Co.*, 670 F.3d 119, 125 (1st Cir. 2012).

Dunhill then argues its witnesses acted properly because they "repeatedly stated that answers could be found in the documents that had been produced."

¶ 97 Without even relying on our above conclusion affirming the sanctions against Dunhill for its document production on the eve of this deposition, the law Dunhill cites does not help it here. As seen in the last case Dunhill cites, that law is about whether a witness can review documents before answering questions, not whether they can use documents in place of their answer. The latter—i.e. using documents in place of their answer—appears to be what happened here even in the examples Dunhill provides. For example, it cites to a portion of Ms. Lynch's deposition where she indicates a produced document might exist that answers the question:

> Here, the witnesses repeatedly stated that answers could be found in the documents that had been produced. (*See*, *e.g.*, Lynch Depo.(II) 283 ("Q. What specific facts support that . . . allegation? A. There would be bank statements, bank ledgers that would show when the withdrawals were – were made, when items were paid and for what.")).

Here, in addition to the fact that Ms. Lynch is using a document instead of answering, she is not even citing to a specific document but rather says there "would be," i.e. without certainty, support in some documents that presumably were produced. This non-answer does not in any way resemble the acceptable means laid out by Dunhill's proffered law above. Underlining the inadequacy of using a vague reference to potential documents in place of answers, the trial court specifically found that Ms. Lynch "could not identify any specific document or email from the hundreds of thousands of pages of the discovery" to support Dunhill's allegations. For these reasons, we reject this argument.

¶ 98 Turning to its fourth argument, Dunhill contends the trial court improperly concluded its witnesses were not prepared because "the witnesses could not recall certain information, such as the exact date of

events." To support this argument, Dunhill provides the following law and argument:

> Likewise, the witnesses properly testified to the best of their recollection. A witness "cannot be expected to have predicted the exact questions she would face in deposition." *BreathableBaby*, 2013 WL 3350594, at *8 [Add. 25]. Thus, the fact that a witness does not have all information at her fingertips is not surprising. Even an imperfect deposition is not subject to sanctions. *Runnels*, 2017 WL 3026915, at *3 [Add. 85]. This is particularly true when the questions relate to conduct by individuals. (*See*, *e.g.*, Lynch Depo.(II) 370-71 (asking Ms. Lynch about Ms. Lindberg's allegations regarding promises made by Mr. Lindberg)).

Again, Dunhill overlooks the extent to which its designees were completely unprepared as to certain topics. The case law it cites is about whether a witness should be expected to predict the *exact* questions in a deposition and to have *all* the information at its fingertips. Here, Dunhill's deponents did not have *any* information on certain topics, as laid about above. Put another way, this was not an imperfect deposition; as to certain topics on which the designees provided no answers, this deposition in effect did not happen at all.

¶ 99 Dunhill's final argument is that the trial court erred by faulting Dunhill's designees when they "could not comprehensively explain Dunhill's legal theories." To support this contention, Dunhill included the following law and argument:

> Finally, the designees could not have been expected to testify about legal theories beyond their basis for the allegations. (*See* Lynch Depo.(II) 236-38, 246-47, 328-30, 458-59). As the Business Court has recognized, it is "impracticable" for a company "to prepare one or more witnesses to testify about 'all facts' and 'all evidence' that support more than half a dozen claims and defenses." *Addison Whitney, LLC v. Cashion*, 2020 NCBC 48 ¶ 112, 2020 WL 3096793, at *19 (June 10, 2020) (unpublished) [Add. 16]. Yet, that is precisely what Ms. Lindberg's counsel expected.
>
> The 30(b)(6) designees appropriately limited their testimony to facts rather than legal theories. Sanctions

> are improper when the deponent was "able to testify regarding the evidence and facts underlying the allegations." *FTC v. Vylah Tec LLC*, No. 2:17-cv-228-FtM-PAM-MRM, 2018 WL 7361111, at *3 (M.D. Fla. Dec. 18, 2018) (unpublished) [Add. 46]. Indeed, this Court has indicated that a 30(b)(6) witness is not expected to testify about the law at all. *Bullard v. Wake Cty.*, 221 N.C. App. 522, 535, 729 S.E.2d 686, 694 (2012); *see also Snapp v. United Transp. Union*, 889 F.3d 1088, 1104 (9th Cir. 2018) (similar), *cert. denied*, 139 S. Ct. 817 (2019). Thus, Ms. Lindberg's counsel had no basis to complain when he asked "You're really not a very knowledgeable corporate designee, are you . . . about Dunhill if you can't even tell me the basics of what Dunhill is, what an LLC is versus a corporation"? (Lynch Depo.(II) 424).

¶ 100 Dunhill's arguments can be broken down into two. First, as the cite to the North Carolina business court indicates, Dunhill is arguing that a designee cannot be expected to know all facts or evidence to support a number of claims. The problem with that argument, as with similar arguments above, is that Dunhill's designees did not provide *any* evidence. The trial court's unchallenged Finding of Facts indicate that Ms. Lynch "was completely unprepared to provide *any* specific information or knowledge to explain the basis for any of Dunhill's claims or allegation categories listed in topics 1 or 2" (emphasis added), which were the two topics that related to the basis for Dunhill's claims against Ms. Lindberg.

¶ 101 The second piece of Dunhill's argument is that the sanctions improperly faulted its designees for not providing legal theories. Again, this argument does not comport with the August 2019 Order, which specifically faulted the designees for not being able to provide *evidence* rather than legal theories. For example, the trial court found Ms. Lynch could not identify evidence to support any of the claims in the Dunhill lawsuit:

> Importantly, Ms. Lynch was never able to identify a single document, communication, or other piece of evidence that Dunhill knew of or contended was supportive of any of the claims or allegations in the Dunhill lawsuit.

As the trial court noted:

> This is especially troubling given that Dunhill has represented to this Court, through its counsel, that it possesses specific emails, text messages, photographs, and other materials it contends supports Dunhill's claims and allegations against Mrs. Lindberg. *See e.g.* Dunhill's 11 July 2019 *Verified Response to [Corrected] Tisha L. Lindberg's Motion for Sanctions Regarding Deposition of Dunhill Holdings, LLC*, at page 2, in which Dunhill's counsel describes specific "emails," "text messages," "pictures," "bank records," as well as Mrs. Lindberg's "written assurance" and "admissions," all of which Dunhill claims are in its possession and knowledge as supportive of its claims against Mrs. Lindberg in this action.

These findings make it clear Dunhill was sanctioned because its designees could not provide evidence rather than because they failed to supply legal theories.

¶ 102 As we have rejected each of Dunhill's Rule 30(b)(6) arguments, we find the trial court did not err here either. Thus, we find no error by the trial court with regard to any of its sanctions for Appellants' deposition misconduct and failures.

VI. Choice of Sanctions

¶ 103 **[4]** Appellants' final arguments that take issue with the August 2019 Order present a series of alleged errors under the heading, "Even if the court had the authority, the choice of sanctions was improper." (Capitalization altered.) First, both Appellants argue "[t]here is a disconnect between the purported violations and the sanctions imposed." (Capitalization altered.) Both Appellants also contend the August 2019 Order "is internally inconsistent." Finally, Mr. Lindberg presents two arguments on his own that the August 2019 Order "impermissibly allows for disclosure of privileged information" and that "[t]here was not proper notice" as to the basis of sanctions against him. We address each of those arguments in turn.

A. Disconnect Argument

¶ 104 Appellants' first argument about the disconnect between the violations and the sanctions is really a series of arguments that amounts to the contention that the choice of sanctions was improper. First, Appellants

argue the trial court improperly believed that it had "unfettered discretion." Then, Appellants argue discovery sanctions under Rule 37 "must be equitable." As part of this argument, Appellants contend, by relying on federal court cases, default judgment and taking a party's allegations as established are powerful and should only be used in the most extreme circumstances. Appellants further support their equity argument by indicating North Carolina has a policy favoring deciding cases on the merits rather than entry of default judgment. Finally, Dunhill argues the August 2019 Order "is especially problematic because it deemed certain facts 'established' even though they are contrary to the record evidence," particularly on the allegation that Mr. Lindberg is the alter ego of Dunhill.

¶ 105 Appellants' first argument omits a key portion of the sentence that shows the trial court understood its discretion was subject to limits. Specifically, the full sentence in the trial court order says, "[T]he tailoring of sanctions in a particular case is limited only by the judge's imagination *and the possibility of appellate review*." (Emphasis added to show the part omitted by the parties.) Thus, the trial judge knew he did not have unfettered discretion and was subject to appellate review. In fact, looking at the surrounding Conclusions of Law, the trial court explained in detail how it was subject to the abuse of discretion standard on appeal and how "North Carolina appellate courts have routinely affirmed the trial court's decision to impose severe sanctions for discovery abuses and violations of court orders including dismissing actions and claims, and striking pleadings."

¶ 106 The trial court further acted within the discretion described by *Turner v. Duke University*, the case which Appellants highlight as being applied in error, in imposing sanctions. 101 N.C. App. 276, 399 S.E.2d 402 (1991). As Appellants note, *Turner* differentiates between the discretion offered by statutes that do not authorize specific types of sanctions (Rules of Civil Procedure 11 and 26) and statutes that do, such as Rule of Civil Procedure 37(b)(2). *Id.*, 101 N.C. App. at 279–80, 399 S.E.2d at 405. The trial court here followed the strictures of Rule 37. As relevant here, Rule 37(b)(2) authorizes the following types of sanctions:

> a. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses,

> or prohibiting the party from introducing designated matters in evidence;
>
> c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(a)–(c). Rule 37 also authorizes the trial court to order the party failing to obey a court order "to pay reasonable expenses, including attorney's fees" in certain situations. *Id.*, Rule 37(b)(2). Here, all the trial court's sanctions under Rule 37(b)(2) adhered to those categories. The remainder of the sanctions all related to ordering discovery to continue or rejecting certain objections made in discovery, so they fit within Rule 37(a)(2)'s allowance of an order compelling discovery. N.C. Gen. Stat. §1A-1, Rule 37(a)(2). Thus, Appellants incorrectly assert the trial court believed it had unfettered discretion; the trial court understood its discretion was subject to limits, and it stayed within those limits. The trial court did not abuse its discretion.

¶ 107 Turning to Appellants' next argument, both misinterpret what our courts mean when they say sanctions must be just. While the "as just" language comes directly from Rule 37(b)(2), *see* N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (authorizing the court to "make such orders in regard to the failure [to comply with a discovery order] as are just"), our courts have indicated the language refers to the grant of discretion to the trial court. *See Stone v. Martin*, 69 N.C. App. 650, 652, 318 S.E.2d 108, 110 (1984) (citing the language about justness immediately before saying, "The matter *thus* is within the trial court's discretion." (emphasis added)); *Global Furniture, Inc. v. Proctor*, 165 N.C. App. 229, 232, 598 S.E2d 232, 234 (2004) ("The trial court is given broad discretion to 'make such orders in regard to the failure as are just' . . . ." (quoting N.C. Gen. Stat. § 1A-1, Rule 37(b))). As a result, the trial court has only failed to impose sanctions as are just if it has abused its discretion.

¶ 108 As noted above, the trial court only imposed those sanctions specifically authorized by Rule 37(b)(2) and did not abuse its discretion in that manner. Beyond that, generally "[t]he choice of sanction under Rule 37 lies within the court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion." *Routh v. Weaver*, 67 N.C. App. 426, 429, 313 S.E.2d 793, 795 (1984). Before a court imposes severe sanctions, such as dismissing an action with prejudice, it "must consider less severe sanctions." *See Hursey v. Homes by Design, Inc.*,

121 N.C. App. 175, 179, 464 S.E.2d 504, 507 (1995) ("[B]efore dismissing a party's claim with prejudice pursuant to Rule 37, the trial court must consider less severe sanctions.") (citing *Goss v. Battle*, 111 N.C. App. 173, 177, 432 S.E.2d 156, 159 (1993)). Critically, "[t]he trial court is not required to *impose* lesser sanctions, but only to *consider* lesser sanctions." *Global Furniture*, 165 N.C. App. at 233, 598 S.E.2d at 235 (emphasis in original) (citing *Goss*, 111 N.C. App. at 177, 432 S.E.2d at 159).

¶ 109 In determining whether the trial court properly considered lesser sanctions, this Court has noted, "the trial court is not required to list and specifically reject each possible lesser sanctions prior to determining that dismissal is appropriate." *Batlle*, 198 N.C. App. at 421, 681 S.E.2d at 798 (quoting *Badillo v. Cunningham*, 177 N.C. App. 732, 735, 629 S.E.2d 909, 911 (2006)). Language stating the trial court considered lesser sanction but had reason to impose the more severe sanctions is sufficient. In *Batlle*, this Court found the following statements sufficient to determine the trial court had not abused its discretion by failing to consider less severe sanctions:

> The trial court found in the 21 September 2007 order that:
>
> > The Court has considered lesser discovery sanctions, and dismissal of Plaintiff's lawsuit with prejudice is the only just and appropriate sanction in view of the totality of the circumstances of the case, which demonstrate the severity of Plaintiff's disobedience in failing to make discovery in a lawsuit she instituted and her unjustified noncompliance with the mandatory North Carolina Rules of Civil Procedure.
>
> Based upon this finding, the trial court concluded in the 21 September 2007 order that:
>
> > The Court has considered lesser sanctions than dismissal of Plaintiff's lawsuit with prejudice. Lesser sanctions would be unjust and inappropriate in view of the totality of the circumstances of the case, which demonstrate the severity of the disobedience of Plaintiff in refusing to make discovery in a lawsuit she instituted, her unjustified noncompliance with the mandatory North Carolina Rules of Civil Procedure, and untimely response on the day of the hearing.

Id., 198 N.C. App. at 421–22, 681 S.E.2d at 798–99. This Court reached that conclusion because that language was similar to language this Court had previously found acceptable in both *In Re Pedestrian Walkway Failure* and *Cunningham*. *Id.*, 198 N.C. App. at 422, 681 S.E.2d at 798–99; *see also Baker v. Charlotte Motor Speedway, Inc.*, 180 N.C. App. 296, 301, 636 S.E.2d 829, 833 (2006) (finding no abuse of discretion when similar language was used). By contrast, the trial court abuses its discretion when it only considers one option and even admits it did not consider lesser sanctions. *See Global Furniture*, 165 N.C. App. at 234, 598 S.E.2d at 235 (finding abuse of discretion on those facts).

¶ 110 Here, the trial court properly considered lesser sanctions. In a heading entitled "Consideration of Lesser Sanctions," the trial court made nine Findings of Fact recounting how it considered the arguments of Dunhill and Mr. Lindberg for lesser sanctions and ultimately rejected them. Before laying out the fact-specific reasons why lesser sanctions would not be effective here, including the past failures of lesser sanctions to ensure compliance, the trial court said:

> The Court, in its discretion, has considered all available sanctions in light of Dunhill and Mr. Lindberg's actions described herein, including specifically whether sanctions lesser than those requested in Mrs. Lindberg's Motions would be appropriate. The Court, in its discretion, finds that the evidence before it shows that that [sic] lesser sanctions would not be appropriate based on the conduct and repeated discovery abuses of Dunhill and Mr. Lindberg, nor would lesser sanctions achieve the desired effect of correcting and/ or deterring the misconduct of Dunhill and Mr. Lindberg described herein.

This paragraph alone is similar to the paragraph this Court previously found was sufficient in *Batlle*. 198 N.C. App. at 421–22, 681 S.E.2d at 798–99.

¶ 111 In addition to sufficient analysis in the Findings of Fact alone, the trial court included a similarly detailed analysis in its Conclusions of Law under the heading, "Harsh Sanctions are Warranted Here." After recounting the previous misconduct by Dunhill and Mr. Lindberg as well as its discretionary authority to impose harsh sanctions, the trial court indicated again that it had considered all sanctions and gave its reasoning for why lesser sanctions were not enough:

> 162. The Court, in its discretion, has considered all available sanctions in light of Dunhill and Mr. Lindberg's actions described herein, including specifically whether sanctions lesser than those requested in Mrs. Lindberg's Motions would be appropriate. The Court, in its discretion, finds that the evidence before it shows that that [sic] lesser sanctions would not be appropriate nor would they achieve the desired effect of correcting and/ or deterring the misconduct of Dunhill and Mr. Lindberg described herein.
>
> 163. The Court concludes that monetary sanctions are not likely to have any beneficial effect on either Mr. Lindberg or Dunhill in deterring either from furthering their efforts to evade their discovery obligations or from future conduct in clear violation of this Court's discovery orders.
>
> 164. The Court likewise concludes that lesser discovery sanctions such as requiring Dunhill or Mr. Lindberg to sit for additional deposition sessions, or provide additional discovery by a date certain, are not likely to have any beneficial effect on either Mr. Lindberg or Dunhill in deterring either from furthering their efforts to evade their discovery obligations or from future conduct in clear violation of this Court's discovery orders.
>
> 165. In summary, Dunhill and Mr. Lindberg have made it clear that they believe the litigation process is a game, one where they make all the rules, regardless of what this Court orders or the rules of discovery say to the contrary, and, therefore, striking pleadings is the only appropriate remedy to redress their misconduct.

Based on *Batlle*, Conclusion 162 alone was enough for us to conclude that the trial court did not abuse its discretion. 198 N.C. App. at 421–22, 681 S.E.2d at 798–99. Here, the trial court went above and beyond what was required, laying out in detail its reasoning why lesser sanctions were not enough. Given this explanation, the trial court did not abuse its discretion in its choice of sanction.

¶ 112 In their reply briefs, Appellants argue the caselaw requiring a court to consider lesser sanctions misses the point of their argument. They explain their argument is that even if the trial court "had the authority to

enter sanctions, the sanctions imposed were excessive." This argument seemingly relates back to Appellants' arguments that (1) default judgment and taking a party's allegations as established are powerful and should only be used in the most extreme circumstances and (2) North Carolina has a policy favoring deciding cases on the merits rather than entering default judgment. Both of these arguments, while generally true and persuasive, are not controlling here.

¶ 113 The first argument about default judgment only being used in the most extreme circumstances is not persuasive in part because of the authority Appellants use to support it. In making the argument, Appellants rely exclusively on federal caselaw, rather than North Carolina precedents. Federal cases may be persuasive in other areas of interpreting our Rules of Civil Procedure given some overlap in design. *See Harvey Fertilizer & Gas Co. v. Pitt County*, 153 N.C. App. 81, 87, 568 S.E.2d 923, 927 (2002) (looking to federal court decisions for guidance because Rule 24 of the North Carolina Rules of Civil Procedure was "virtually identical" to the federal rule before stating "we are not bound by the interpretation of any particular federal court as to the interpretation of our own rules of civil procedure) (citing, *inter alia*, *Turner v. Duke University*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) for the first point of looking to federal courts for guidance and *State ex rel. Martin v. Preston*, 325 N.C. 438, 449–50, 385 S.E.2d 473, 479 (1989) for the second point of not being bound by the federal courts).

¶ 114 On the issue of choice of sanctions, however, our precedents have explicitly rejected the federal approach. *See Hursey*, 121 N.C. App. at 179, 464 S.E.2d at 507 (summarizing *Fulton v. East Carolina Trucks, Inc.*, 88 N.C. App. 274, 275, 362 S.E.2d 868, 869 as "specifically rejecting plaintiff's argument that North Carolina courts should adhere to the rule adopted in the federal courts that dismissal with prejudice is a last resort and is generally proper only where less drastic sanctions are unavailable"). As this Court explained in *Fulton*:

> Although the federal rule is laudable and best serves the judicial preference in favor of deciding cases on the merits, our courts have not adopted the federal rule. Indeed, this court's precedent all but expressly rejects the notion of progressive sanctions. This court has upheld dismissals in several cases when no previous less stringent sanction was ordered.

88 N.C. App. at 275, 362 S.E.2d at 869 (collection of cases omitted). Thus, we reject Appellants' argument that we should follow federal caselaw indicating default judgment should only be used in the most extreme case.

¶ 115 While Appellants rely upon North Carolina caselaw in arguing this state has a policy favoring deciding cases on the merits rather than entering default judgment, they misunderstand that precedent, which works hand-in-hand with the requirement that courts consider lesser sanctions. By considering lesser sanctions, the trial court is doing the very thing for which Appellants press, ensuring that this case is one where it should impose a harsh penalty in spite of the general policies disfavoring default judgment and favoring trial on the merits. *See Stone*, 69 N.C. App. at 653–54, 318 S.E.2d at 111 (highlighting the law disfavors default judgments so as to allow as many cases as possible to reach trial on the merits); *American Imports, Inc. v. G.E. Emp. Western Region Federal Credit Union*, 37 N.C. App. 121, 124, 245 S.E.2d 798, 800 (1978) (explaining the general purpose of the Rules of Civil Procedure is "to encourage trial on the merits" (quotations and citation omitted)). Here, the trial court did just that; as explained more fully above, the trial court recounted in detail why harsh sanctions were necessary in this case, thereby showing why otherwise disfavored sanctions such as default judgment and dismissal were warranted.

¶ 116 Finally, under the disconnect sub-heading, Dunhill argues the August 2019 Order "is especially problematic because it deemed certain facts 'established' even though they are contrary to the record evidence," particularly on the allegation that Mr. Lindberg is the alter ego of Dunhill. As part of this argument, Dunhill took issue with two facts the trial court ruled established: (1) "that Ms. Lindberg never misappropriated funds from Dunhill and never took advantage of her position," and (2) "that Mr. Lindberg is the alter ego of Dunhill." The problem with both these arguments is that Dunhill provides no support for its claim that the trial court could not deem certain facts established even though they were contrary to some evidence in the record. Rule 37(b)(2) explicitly authorizes a trial court to make an order that "any other designated facts shall be taken to be established for the purposes of the action" without any caveat that those facts must not be contradicted by at least some of the evidence in the record. N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(a). Given the clear statutory authorization of these sanctions, we do not accept Dunhill's argument that the trial court erred because some of the facts it established might conflict with some evidence in the record.

¶ 117 Further, the mere presence of contrary evidence in the record is not surprising because our courts exist to resolve disputes about, among other things, evidence. Rule 37(b)(2)(a) allows certain facts to be designated as a sanction for disrupting discovery, which is part of the process of resolving such disputes. *See King v. Koucouliotes*, 108 N.C. App. 751,

755, 425 S.E.2d 462, 464 (1993) ("The recognized primary purpose of discovery 'is to facilitate the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit *so as to permit the narrowing and sharpening of the basic issues and facts that will require trial*.' " (quoting *Bumgarner v. Reneau*, 332 N.C. 624, 628, 422 S.E.2d 686, 688–89(1992)) (emphasis added)). Thus, parties can comply with discovery and resolve their disputes through the regular mechanisms of our courts; but, if they fail to comply with discovery and are thus subject to Rule 37(b)(2) sanctions, the court can resolve those disputes for the parties by establishing certain facts against the party who failed to follow the normal process. *See* N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(a) (providing that a court can designate certain facts as established as a discovery sanction). As laid out above, the existence of and choice of discovery sanction fell to the trial court because of Dunhill's repeated, significant discovery violations. If Dunhill wanted to argue that the facts in the record supported its contentions, it should have complied with the discovery rules and court orders and thereby participated in the normal methods of dispute resolution our courts offer. As with the other arguments, we reject Dunhill's argument that the trial court abused its discretion by deeming certain facts established when there was some evidence to the contrary in the record.

B. Internal Consistency of the Order

¶ 118 Appellants' other joint argument is that the August 2019 Order "is internally inconsistent." Specifically, Appellants contend the Order is inconsistent because it struck their pleadings, entered default judgment against them, and took facts alleged by Ms. Lindberg as true but then still required them to sit for another deposition. Appellants also each point to the trial court's Finding of Fact that additional deposition sessions are unlikely to deter them from evading discovery obligations.

¶ 119 "Inconsistent judgments are erroneous." *Graham v. Mid-State Oil Co.*, 79 N.C. App. 716, 720, 340 S.E.2d 521, 524 (1986). As such a judgment cannot be supported when it is "actually antagonistic, inconsistent, or contradictory as to material matters." *Lackey v. Hamlet City Bd. Of Ed.*, 257 N.C. 78, 84, 125 S.E.2d 343, 347 (1962). However, courts "endeavor to reconcile" such inconsistencies when it is possible, i.e. when the material matters are not "really inconsistent with each other." *Id.*, 257 N.C. at 84, 125 S.E.2d at 347–48. As such, reviewing courts should first try to "harmonize" the "apparently conflicting" portions of a judgment. *See Spencer v. Spencer*, 70 N.C. App. 159, 168, 319 S.E.2d 636, 644 (1984) (harmonizing apparently conflicting findings of fact by determining they "clearly reflect[ed]" the trial court's conclusion when read in

context). If the reviewing court cannot harmonize the conflicting portions, those portions must be vacated and remanded for the trial court to cure the inconsistency. *See Lackey*, 257 N.C. App. at 84, 125 S.E.2d at 348 (vacating and remanding judgment for inconsistent findings of fact and directing on remand that the facts be corrected).

¶ 120 Here, we reject Appellants' argument that ordering them to sit for new depositions after the court found additional deposition sessions would not deter them from evading discovery obligations was inconsistent because that Finding of Fact can be harmonized with the rest of the judgment. *Spencer*, 70 N.C. App. at 168, 319 S.E.2d at 644. Finding 113 about the lack of benefit from additional deposition sessions is part of the trial court's section considering lesser sanctions. Thus, when the trial court was saying additional depositions would not be helpful, it was justifying its imposition of default judgment as to issues of liability. As a compliment to only imposing default judgment as to liability, the trial court "reserved for trial" the damages issue as to both Appellants. The order of additional depositions therefore applied to damages issues rather than liability. Further, given the purpose of sanctions is to "prevent or eliminate dilatory tactics on the part of unscrupulous attorneys or litigants," *Essex Group, Inc. v. Express Wire Services, Inc.*, 157 N.C. App. 360, 363, 578 S.E.2d 705, 707 (2003), the trial court's goal in imposing harsh sanctions here was to ensure that the depositions on damages do not include such tactics. Therefore, any additional depositions are consistent as long as they are limited to the issue of damages.

¶ 121 The additional deposition of Mr. Lindberg is appropriately limited to the issue of damages. Paragraph 16 of the August 2019 Order requires Mr. Lindberg to sit for another deposition and answer questions "that are relevant to any of her [Ms. Lindberg's] counterclaims or damages claims." Beyond the damages claims, the counterclaims also related to damages, specifically compensatory damages from Dunhill and imposing a constructive trust over the tennis complex. While the counterclaims also involve Ms. Lindberg's allegation that Mr. Lindberg is an alter ego of Dunhill, which would have been covered by the default judgment, we can harmonize that portion of the order by reading the word "any" in relation to Ms. Lindberg's counterclaims to mean any counterclaims on the issue of damages. That harmonization is similar to *Spencer* where this Court reconciled apparently inconsistent findings by avoiding "unduly literal stress" on a word. 70 N.C. App. at 168, 319 S.E.2d at 644. Therefore, we find no internal inconsistency as to the additional deposition of Mr. Lindberg.

¶ 122 We find, however, internal inconsistency with the order for an additional deposition for Dunhill. The August 2019 Order requires Dunhill

to sit again for its Rule 30(b)(6) "deposition and designate ten days in advance persons for *all* previously-noticed topics who are prepared to testify as to all matters known and reasonably available to[] Dunhill regarding each topic in the notice of deposition." (Emphasis in original.) The previously-noticed topics included issues relevant to liability alone. For example, Topic 1, as summarized in the same August 2019 Order, asked for "[t]he basis for any claims or allegations made by Dunhill against" Ms. Lindberg in the lawsuit. Given that the August 2019 Order explicitly dismissed, with prejudice, "[a]ll claims for relief asserted by Dunhill in this action," not all previously-noticed topics need to be covered at another deposition. We cannot reconcile this inconsistency because the emphasis on "all" in the order makes it clear the trial court's intention to include topics unrelated to damages such as Topic 1. *See Lackey*, 257 N.C. at 84, 125 S.E.2d at 347–48 (directing courts to reconcile inconsistencies if possible). Therefore, we vacate the paragraph ordering Dunhill to sit for another deposition and remand for clarification that Dunhill's new deposition only cover damages.

C. Order and Privileged Information

¶ 123 Turning to Mr. Lindberg's individual arguments, he contends the August 2019 Order erred by ordering him to sit for another deposition and answer all questions from Ms. Lindberg's counsel without objection. Specifically, Mr. Lindberg argues this language would require him to answer questions even on topics that should be protected by privileges such as attorney-client privilege or the Fifth Amendment's privilege against self-incrimination.

¶ 124 The language of the Order requiring Mr. Lindberg to sit for another deposition is as expansive as he claims. Specifically it erroneously requires him "to answer, without objection, all questions posed by Mrs. Lindberg's counsel that are relevant to any of her counterclaims or damages claims." As Mr. Lindberg correctly argues, this order could require him to answer questions that are otherwise subject to at least attorney-client privilege.[10]

¶ 125 A court cannot pre-determine that a person cannot claim attorney-client privilege as doing so would amount to a forced waiver

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10. Mr. Lindberg also argues his Fifth Amendment privilege against self-incrimination might apply, but Ms. Lindberg points out that the criminal charges Mr. Lindberg previously faced resulted in his conviction in 2020. Because the possibility of a Fifth Amendment privilege is not dispositive based on our analysis of attorney-client privilege, we do not analyze the Fifth Amendment privilege issue.

by the trial court rather than the client. *See Crosmun v. Trustees of Fayetteville Technical Community College*, 266 N.C. App. 424, 439–40, 832 S.E.2d 223, 236 (2019) ("Critically, it [the attorney-client privilege] is the client's alone to waive, for '*[i]t is not the privilege of the court or any third party*.' ") (emphasis and second alteration in original) (quoting *In re Miller*, 357 N.C. 316, 338, 584 S.E.2d 722, 788 (2003)). Rather, once the privilege is asserted, and only then, the trial court can step in and determine whether the attorney-client privilege applies. *See In re Miller*, 357 N.C. at 336, 584 S.E.2d at 787 (noting "a trial court is not required to rely solely on an attorney's assertion that a particular communication falls within the scope of the attorney-client privilege"). Thus, the trial court erred to the extent its order bars Mr. Lindberg from asserting his attorney-client privilege.

¶ 126 Ms. Lindberg highlights the trial court previously overruled many of Mr. Lindberg's attorney-client privilege objections from his first deposition in its August 2019 Order. Ms. Lindberg is correct in that the order separately bars Mr. Lindberg from reasserting attorney-client privilege with respect to those documents, and Mr. Lindberg does not challenge that paragraph. The trial court's error was that it barred Mr. Lindberg from asserting *new* attorney-client privilege objections. Therefore, we vacate the paragraph ordering Mr. Lindberg to sit for a new deposition on damages and answer all questions without objection. On remand, the trial court will clarify that, in his deposition on damages, Mr. Lindberg can assert objections, including privileges, that have not been previously overruled.

D. Proper Notice

¶ 127 Mr. Lindberg's final solo argument under the choice of sanctions issue heading is that he "was not on proper notice." Specifically, he contends that he only had notice for sanctions as to his deposition conduct, not as to the document production issues. He also argues that he was not on notice that the sanctions imposed may include being precluded from introducing evidence or arguments or that default judgment might be entered against him.

¶ 128 Taking Mr. Lindberg's second argument first, he presents no authority for his contention that the trial court can only impose the exact sanctions requested by the other party. Both of the cases he cites involve situations where a party was sanctioned for *conduct* for which it was not on notice. *See Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 438–39 (1998) (finding party did not have proper notice because he was put on notice he was subject to sanctions for one filing but was actually

sanctioned for a different filing); *OSI Restaurant Partners, LLC v. Oscoda Plastics, Inc.*, 266 N.C. App. 310, 315, 831 S.E.2d 386, 390 (2019) (finding party did not have proper notice any sanctions would be imposed).

¶ 129 Mr. Lindberg had proper notice of the conduct for which sanctions were sought and that these sanctions were under Rule 37(b)(2); there was no need for any specific notice that he may be sanctioned by preclusion from introducing evidence and entry of default judgment. First, *OSI Restaurant Partners* explains the notice required is "(1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions." 266 N.C. App. at 315, 831 S.E.2d at 390 (quoting *Megremis v. Megremis*, 179 N.C. App. 174, 179, 633 S.E.2d 117, 121 (2006)). Notably, *OSI Restaurant Partners* says nothing about the choice of sanctions. Further, the sanctions imposed were specifically authorized by Rule 37(b)(2), N.C. Gen. Stat. § 1A-1, Rule 37(b)(2), and Ms. Lindberg's supplemental motion for sanctions indicated she was moving for sanctions pursuant to, *inter alia*, Rule 37(b). The supplemental motion also explicitly requested "[t]hat the court enter any further relief it deems just and proper pursuant to Rule 37(b) . . . ." Based on that language, Mr. Lindberg was on notice that any Rule 37(b) sanction could be imposed. For all these reasons, we reject Mr. Lindberg's argument that he did not have proper notice of the type of sanctions to be imposed.

¶ 130 Turning to his other argument, Mr. Lindberg contends he did not receive proper notice that he could be sanctioned for the document production. As explained above, a person subject to sanctions must have notice "(1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions" as a matter of due process. *OSI Restaurant Partners*, 266 N.C. App. at 315, 831 S.E.2d at 390; *Griffin*, 348 N.C. at 280, 500 S.E.2d at 438 (linking this notice to Fourteenth Amendment due process). "Our Court has held that a party sanctioned under Rule 37 ha[s] [constitutionally adequate] notice of sanctions where the moving party's written discovery motion clearly indicate[s] the party [is] seeking sanctions under Rule 37." *OSI Restaurant Partners*, 266 N.C. App. at 315, 831 S.E.2d at 390 (alterations in original) (quoting *Megremis*, 179 N.C. App. at 179, 633 S.E.2d at 121).

¶ 131 Here, Mr. Lindberg received the notice required by due process via Ms. Lindberg's supplemental motion for sanctions against him. The written supplemental motion for sanctions indicated Ms. Lindberg was moving for sanctions under, *inter alia*, Rule 37(b), thereby satisfying *OSI Restaurant Partners*'s first requirement of notice that sanctions may be imposed under Rule 37. *Id.*

The supplemental motion also satisfied the second requirement because it indicated Mr. Lindberg could be subject to sanctions for the document production. *See id.* (requiring notice of "the alleged grounds for the imposition of sanctions"). The supplemental motion for sanctions specifically moved for entry of sanctions against Mr. Lindberg and Dunhill "for their repeated and willful violations of the Court's prior discovery orders and the Rules of Civil Procedure." In the corrected motion for sanctions, which Ms. Lindberg specifically "incorporated by reference herein [in the supplemental motion] as if fully restated," Ms. Lindberg included four paragraphs detailing how the 129,000 page document production by Dunhill *and Mr. Lindberg* days before Dunhill's deposition was part of the reasons she was moving for sanctions.

Further, the supplemental motion requested, among other sanctions, that "*neither Mr. Lindberg* nor Dunhill" be allowed to use any of the documents in the 129,000 page document production. (Emphasis added.) Logically, a sanction barring Mr. Lindberg from using documents in a certain production would be based on misconduct related to that production. Given all this information in the supplemental motion for sanctions against Mr. Lindberg, we determine Mr. Lindberg received proper notice as to the conduct subject to sanctions. As a result, we reject Mr. Lindberg's final argument under the heading choice of sanctions as well.

VII. Forensic Examination

¶ 132 **[5]** Finally, Appellants both incorporate the arguments made in their prior appeal that challenged the "ordered forensic examination" on the basis that it "was an inappropriate invasion of privacy." As Appellants note and as we explained more fully above, the ruling in the prior appeal directed us to consider the issues in that appeal when we decided the sanctions issues in this appeal. *Dunhill I* at *12. Therefore, we address the issue.

¶ 133 Before potentially reaching the merits of the discovery issues raised in the prior appeal, we note the prior appeal carried mootness concerns. As the prior panel's opinion summarized, Ms. Lindberg filed a motion to dismiss the appeal, arguing "the appeal is moot because she has filed a 'Notice of Withdrawal of Forensic Search Request' with the trial court, removing the underlying motion to compel discovery." *Dunhill I* at *11. Ms. Lindberg also filed a document in the prior appeal arguing "that the trial court's imposition of a final sanctions order on 1 August 2019," i.e. the sanctions order on appeal here, mooted the dispute over the forensic examination discovery order. *Dunhill I* at *11. Based on these

arguments and the concerns of the prior panel,[11] we examine mootness and ultimately conclude the forensic examination issue is moot.

¶ 134 "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Ass'n, Inc.*, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996). Put another way, "[w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). In our state courts, mootness is not a jurisdictional issue "but rather represents a form of judicial restraint." *Id.* Thus, unlike jurisdiction, "the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action." *Id.*, 296 N.C. at 148, 250 S.E.2d at 912; *see also Comer v. Ammons*, 135 N.C. App. 531, 536, 522 S.E.2d 77, 80 (1999) ("An appeal which presents a moot question should be dismissed.").

¶ 135 Applying the mootness doctrine here, the August 2019 Order mooted the forensic examination issue because it granted all the relief sought via the forensic examination. *In re Peoples*, 296 N.C. at 147, 250 S.E.2d at 912. To understand how the August 2019 Order granted all the relief requested without actually granting a forensic examination, we review the original reasoning behind the request, as limited by the June 2018 Order, for a forensic examination.

¶ 136 Appellee sought the forensic examination for purposes of discovering documents relevant to liability issues. First, the motion to compel discovery that led to the forensic inspection order indicated the forensic examination would help prove the spoliation claim as laid out in Ms. Lindberg's Amended Counterclaims and Third-Party Complaint:

> Upon information and belief, Mr. Lindberg and Dunhill have intentionally attempted to destroy evidence from computers and electronic devices that is relevant to this matter. The spoliation of evidence

11. Even if this history of mootness concerns did not exist, we could have addressed the issue *ex mero motu*. *See State ex rel. Rhodes v. Gaskill*, 325 N.C. 424, 426, 383 S.E.2d 923, 925 (1989) (dismissing appeal *ex mero motu* for mootness).

> by Mr. Lindberg and Dunhill was set out in the pleadings in this matter in Mrs. Lindberg's Amended Counterclaims and Third-Party Complaint. For example, upon information and belief, Mr. Lindberg and Dunhill destroyed emails and computer files maintained by Mr. Lindberg's companies soon after Mr. Lindberg took out the *Ex Parte* Domestic Violence Protective Order and restricted her access to email servers. Requests for Inspection 23 and 24 to Dunhill and Requests for Inspection 23 and 24 to Greg Lindberg seek to inspect the computers, drives and devices of Mr. Lindberg and Dunhill, but they have refused to allow for this inspection. Mrs. Lindberg respectfully requests that the Court order such a forensic computer inspection.

¶ 137 Looking in turn at Ms. Lindberg's Amended Counterclaims and Third-Party Complaint, the spoliation claim related to the deletion of emails that corroborated Ms. Lindberg's claim that two pieces of real estate were gifted to her as her sole property:

> 164. Mrs. Lindberg is informed and believes that Mr. Lindberg has spoliated critical material evidence, including many emails exchanged between them, corroborating that he gifted both the Key West House and tennis complex to her as her sole property. Specifically, Mrs. Lindberg's email account in 2017 was maintained on a server controlled exclusively by Mr. Lindberg. Mr. and Mrs. Lindberg exchanged numerous emails regarding the acquisition of the Key West House as her birthday gift and the gift of the tennis complex to her.
>
> . . .
>
> 166. Mr. Lindberg deleted Mrs. Lindberg's emails at some time following his involuntary commitment of Mrs. Lindberg in May or June, 2017. This purposeful deletion of Plaintiffs emails constitutes spoliation of material evidence which Mr. Lindberg has deleted to avoid confirmation that the Key West House and the Tennis complex were gifted to Mrs. Lindberg.

As part of her prayer for relief, Ms. Lindberg sought constructive trust over one of those pieces of property, the tennis complex. While Ms.

Lindberg's pleading mentions a Key West house, that property was not at issue in this lawsuit. Rather, as clarified at the June 2018 hearing on the motion to compel, the Key West house was, at least at that time, part of a separate lawsuit in Florida.[12] Because the June 2018 Order limited the forensic examination to, *inter alia*, "[a] determination as to whether emails or text messages dealing with real estate holdings *subject to dispute in this lawsuit* exist or ever existed, and producing copies of the same for the parties," (emphasis added), the trial court implicitly denied the request as to the Key West house, so we need not further examine that portion of the request. Based on the motion to compel and its references to the pleadings, the forensic examination sought to advance Ms. Lindberg's spoliation argument and provide evidence to support her claim the tennis complex was gifted to her and should be placed in a constructive trust.

¶ 138 The purposes for the forensic examination advanced by Ms. Lindberg at the hearing on the motion to compel are broadly similar. At the hearing, Ms. Lindberg's counsel repeatedly emphasized the forensic examination sought to uncover emails that would support her spoliation claim and show the Florida house and the tennis complex were gifts to her personally. Ms. Lindberg also raised two new purposes for the forensic examination at the hearing. First, she said the emails she believed the forensic examination would uncover would also prove the allegation "on the money being her money." This appears to relate to Ms. Lindberg's denial of Dunhill's claims that she took funds from Dunhill, which was the animating claim in this suit. *See Dunhill I* at *3 (Dunill claiming Ms. Lindberg took funds from it and Ms. Lindberg "denying various allegations of Dunhill").

¶ 139 The second new purpose for the forensic examination was that it would uncover emails "specifically related to the yacht claim." This purpose relates to Ms. Lindberg's claim for indemnity as to a deposit on a yacht vacation that Ms. Lindberg claims she made on behalf of Mr. Lindberg.

¶ 140 With the exception of the Florida house, the June 2018 Order's grant of the forensic examination confined its scope to those purposes:

> 5. Dunhill Holdings LLC and Greg Lindberg shall make the server or any electronic device housing,

12. An earlier version of Ms. Lindberg's third-party complaint and counterclaim also sought control of the Florida house, but that was not included in the amended version of that document that we discuss above. *See Dunhill I* at *3 (summarizing the claims in the original and amended third-party complaint and counterclaim pleadings).

> hosting, or storing the outlook email account used by the parties available for a forensic examination, but that inspection and examination is limited to:
>
> a. A determination as to whether emails or text messages between Mr. Lindberg and Mrs. Lindberg exist or ever existed, and producing copies of the same for the parties;
>
> b. A determination as to whether emails or text messages dealing with real estate holdings subject to dispute in this lawsuit exist or ever existed, and producing copies of the same for the parties;
>
> c. Whether any of those email or text messages, if there were any, have been intentionally deleted and, if deleted, the circumstances of any deletion and whether or not they can be recovered.

¶ 141 The first paragraph granting the forensic examination appears to encompass all the listed purposes. The second paragraph relates to the tennis complex as the real estate holding subject to dispute in this lawsuit. The final paragraph relates to spoliation, i.e. "a party's intentional destruction of evidence in its control before it is made available to the adverse party . . . ." *Holloway v. Tyson Foods, Inc.*, 193 N.C. App. 542, 547, 668 S.E.2d 72, 75 (2008) (quoting *Red Hill Hosiery Mill, Inc. v. MagneTek, Inc.*, 138 N.C. App. 70, 78, 530 S.E.2d 321, 328 (2000)).

¶ 142 All these purposes, as defined by the June 2018 Order, related to issues of liability between the parties. The money, tennis complex, and yacht purposes all relate directly to proving claims or defenses made by the parties. Specifically, the emails that would be uncovered by the forensic examination "would prove every single allegation about these promises [Mr. Lindberg] made to [Ms. Lindberg]" on the tennis complex and the money Dunhill claims Ms. Lindberg improperly took. The lost emails could help prove the yacht claim according to Ms. Lindberg's counsel. Notably, all three of those claims featured a dispute on liability, i.e. whether promises were made, etc., rather than the amount of money the claim would be worth. The money issue was a defense against Dunhill's claim Ms. Lindberg took its funds, so Dunhill would know the amount.

¶ 143 As to the tennis complex, Ms. Lindberg seeks a constructive trust rather than monetary damages. And as to the yacht claim, Ms. Lindberg seeks indemnity "for all amounts she is required to pay" if found liable

for the yacht rental. Thus, none of these claims feature a dispute as to damages. Ms. Lindberg either wins on liability and keeps the money she received from Dunhill and receives a constructive trust and indemnification, or she loses and does not.

¶ 144 Finally, the spoliation claim could only possibly relate to liability, not damages, because "the spoliation of evidence principle is an evidentiary matter" that "can give rise to an inference that the evidence destroyed would injure its (the party who destroyed the evidence) case." *Holloway*, 193 N.C. App. at 547, 668 S.E.2d at 75–76 (in the second part of the quote, quoting *Red Hill Hosiery Mill*, 138 N.C. App. at 78, 530 S.E.2d at 328). In other words, spoliation is not a claim that allows for recovery of damages. Thus, the spoliation could only go to liability when the evidence allegedly spoliated would prove Ms. Lindberg's arguments on liability. Because the forensic examination would only provide evidence relevant to questions of liability, it would only have a practical effect on the controversy if liability were still at issue. *Roberts*, 344 N.C. at 398–99, 474 S.E.2d at 787.

¶ 145 The August 2019 sanctions order renders the forensic examination request and order moot because it resolves all liability issues in favor of Ms. Lindberg. Specifically, it dismisses with prejudice "[a]ll claims for relief asserted by Dunhill in this action" and it enters judgment by default against both Dunhill and Mr. Lindberg, and in favor of Ms. Lindberg, "on the issue of liability for each of" Ms. Lindberg's claims in the action.

¶ 146 It also established as true all facts related to Dunhill's claim against Ms. Lindberg for improperly taking funds. Finally, the August 2019 Order specifically bars Dunhill and Mr. Lindberg from opposing at trial the issue of liability in Ms. Lindberg's favor on her claims against them. Since the August 2019 Order has already determined all issues on liability, the relief Ms. Lindberg sought via the forensic examination has been granted, and the provisions regarding forensic examination are moot. *In re Peoples*, 296 N.C. at 147, 250 S.E.2d at 912.

¶ 147 Appellants' only response to Ms. Lindberg's argument in the prior appeal that the sanctions order mooted the forensic examination issue was that "the referenced order has been appealed." As explained above, we have now upheld the relevant parts of the sanctions order, i.e. the parts on liability, against all of Appellants' arguments, so Appellants' prior response has no persuasive force. The merits of the forensic examination issue are not addressed and are dismissed as moot.

VIII. Conclusion

¶ 148 The trial court did not abuse its discretion in (1) sanctioning Appellants for their document production behavior, (2) sanctioning Appellants for their deposition misconduct, and (3) choosing sanctions, except as to two sanctions as described below. Those portions of the sanctions order are affirmed.

¶ 149 We vacate the August 2019 Order's sanctions in paragraphs 13 and 16 and remand to the trial court to ensure any new depositions ordered in those paragraphs are limited to the issue of damages only and do not bar a party from asserting objections, particularly asserting attorney-client or other rights and privileges, not previously ruled upon. Finally, because we affirm the sanctions deciding all issues of liability in favor of Ms. Lindberg, we hold the provisions regarding forensic examinations are moot.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges TYSON and ZACHARY concur.

IN THE MATTER OF THE ADOPTION OF C.H.M., A MINOR CHILD

No. COA21-196

Filed 1 March 2022

1. Appeal and Error—interlocutory order—substantial right—parent's consent to adoption

A father was entitled to immediate appellate review of an interlocutory order denying his motion to dismiss an adoption petition, where the order implicated his substantial right to consent to his minor daughter's adoption.

2. Adoption—constitutional challenge—parental consent to adoption—parental liberty interest—failure to develop relationship with child

In an as-applied constitutional challenge, in which a father argued that applying N.C.G.S. § 48-3-601 to preclude his consent to the adoption of his daughter violated his due process rights, the trial court did not err by denying the father's motion to dismiss the adoption petition at issue where the court—looking at the

father's conduct after he discovered he was the child's father—properly concluded that the father failed to demonstrate parental responsibility or to grasp the opportunity to develop a relationship with the child, and therefore he did not belong to the constitutionally protected class of fathers whose fundamental parental rights would be violated if the adoption petition were allowed. Specifically, the father visited the child only once at the petitioners' home and made no attempts to parent the child for nine months until petitioners filed a termination of parental rights action against him.

Judge GORE concurring in part and dissenting in part.

Appeal by respondent from order entered 13 August 2020 by Judge Debra Sasser in Wake County District Court. Cross-appeal by petitioners from order entered 21 July 2020 by Judge Debra Sasser in Wake County District Court. Heard in the Court of Appeals 14 December 2021.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for petitioners-appellees/cross-appellants.

Jonathan McGirt for respondent-appellant/cross-appellee.

TYSON, Judge.

¶ 1 Venson Westgate ("Respondent") appeals the trial court's order denying his motion to dismiss the adoption petition. We affirm. Carolyn and Michael Morris' ("Petitioners") cross-appeal is dismissed as moot.

I. Background

¶ 2 The factual background of this case is set forth in three previous appellate opinions: *In re C.H.M.*, 245 N.C. App. 566, 782 S.E.2d 582, 2016 WL 611926 (2016) (unpublished) (affirming the dismissal of Petitioners' petition for termination of Respondent's parental rights to his minor daughter, C.H.M.); *In re Adoption of C.H.M.*, 248 N.C. App. 179, 189, 788 S.E.2d 594, 600 (2016), (affirming trial court's order concluding Respondent's consent is required to proceed with the adoption of his minor daughter, C.H.M.), *rev'd*, 371 N.C. 22, 23, 812 S.E.2d 804, 806 (2018) (holding "respondent failed to meet his burden of proving that he provided such support within the relevant statutory period, we conclude that the evidence is legally insufficient to support the trial court's order requiring respondent's consent").

¶ 3 The Supreme Court of North Carolina's 4-3 decision, reversing this Court's unanimous opinion that Respondent had complied with N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) did not address Respondent's due process arguments. The Supreme Court remanded the cause to this Court for further remand to the trial court "for proceedings consistent with [the] opinion." *Adoption of C.H.M.*, 371 N.C. at 34, 812 S.E.2d at 812.

¶ 4 The trial court issued its order upon remand on 15 November 2018. The order states, "[as] a result of the North Carolina Supreme Court's holding that '[R]espondent's evidence was insufficient as a matter of law to support the trial court's conclusion that respondent [had] complied with the statutory support payment requirements' [the court's] finding is no longer supported by the evidence."

¶ 5 The trial court deferred and set for hearing Respondent's motion to intervene, motions to dismiss the adoption petitions pursuant to N.C. Gen. Stat. § 48-2-604 and asserting federal and state constitutional due process provisions. Prior to this hearing being held, both parties entered notices of appeal.

¶ 6 The parties most recently appeared before this Court in January 2020, wherein this Court issued an order dismissing the parties' interlocutory appeals and directing the cause be remanded to the district court for hearing and resolution of the remaining issues and motions before the court.

¶ 7 Following a hearing on 10 June 2020, the trial court issued its order ("August 2020 Order") on 13 August 2020, denying Respondent's motion in the cause and motion to dismiss the adoption. The trial court concluded Respondent had a limited right to intervene in the action for the court to determine whether N.C. Gen. Stat. § 48 was unconstitutional as applied to him. The trial court found and concluded Respondent "does not qualify for the class of protected fathers whose liberty interests are such that he would enjoy a constitutionally paramount protected interest to C.H.M.'s custody."

¶ 8 The facts underlying Respondent's and Petitioners' dispute over C.H.M. are well-documented and not in dispute. The parties presently have two additional cases pending in Wake County district court involving their eight-year-dispute over C.H.M. The painful saga beginning with the birth mother's dishonesty regarding Respondent's paternity of C.H.M. need not be repeated.

II. Jurisdiction

¶ 9 **[1]** "A party to an adoption proceeding may appeal a judgment or order entered by a judge of district court by giving notice of appeal as provided in G.S. 1-279.1." N.C. Gen. Stat. § 48-2-607(b) (2021). Respondent timely appealed. He asserts his appeal of right is made pursuant to N.C. Gen. Stat. §§ 1-277(a), 1-278 and 7A-27(b)(3)(a) & (c) (2021).

¶ 10 Petitioners ask this Court to dismiss Respondent's appeal. Respondent acknowledges his appeal may be interlocutory. The August 2020 Order transfers jurisdiction of the matter to the Wake County Clerk of Court, Division of Special Proceedings with instructions that the adoption proceeding be resolved in accordance with the mandate of the North Carolina Supreme Court, this Court, and the subsequent orders of the trial court.

¶ 11 Respondent asserts a substantial right will be lost if this appeal is not immediately heard. He shows, and Petitioners do not dispute, the August 2020 Order resolves all remaining motions and issues. Our appellate courts have recognized that orders concerning whether a parent's consent to an adoption is required implicate a substantial right and are immediately appealable. *In re Adoption of Baby Boy*, 233 N.C. App. 493, 498, 757 S.E.2d 343, 346 (2014).

¶ 12 Respondent asserts "[if] the adoption proceeds to a final decree of adoption, any parental rights that [he] may have had would be terminated. Moreover, the adoption statute severely limits the avenues for challenging a final decree of adoption through appeal." *In re S.D.W.*, 228 N.C. App. 151, 155, 745 S.E.2d 38, 42 (2013) (citations omitted), *rev'd on other grounds sub nom.*, *In re Adoption of S.D.W.*, 367 N.C. 386, 758 S.E.2d 374 (2014). We agree and address the merits of Respondent's appeal. Petitioners' cross-appeal of an unrelated interlocutory order, subsequently stayed by our Supreme Court, is dismissed by separate order.

III. Issue

¶ 13 **[2]** Whether the trial court erred by denying Respondent's motion to dismiss the adoption petition.

IV. Analysis

¶ 14 Respondent argues the trial court erred by concluding his conduct excluded him from the constitutionally protected class of fathers, whose liberty interests would be violated if the adoption petition were allowed. We reject Petitioners' arguments that Respondent had not asserted or

preserved this argument for appeal. The record and pleadings clearly show: (1) Respondent repeatedly asserted this argument; (2) it was not addressed by our Supreme Court; and, (3) was not ripe for our review upon remand until ruled upon by the trial court upon remand in its August 2020 Order.

¶ 15 Respondent asserts applying Chapter 48 to preclude his consent to the adoption of C.H.M. violates his due process rights. His challenge is an as-applied challenge to N.C. Gen. Stat. § 48-3-601 (2021). An as-applied challenge represents a party's "protest against how a statute was applied in the particular context in which [the party] acted or proposed to act." *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 460, 786 S.E.2d 335, 347 (2016) (citation omitted), *aff'd*, 369 N.C. 722, 799 S.E.2d 611 (2017).

A. Fundamental Parental Rights

¶ 16 The Supreme Court of the United States "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000).

> This parental liberty interest is perhaps the oldest of the fundamental liberty interests the United States Supreme Court has recognized. This interest includes the right of parents to establish a home and to direct the upbringing and education of their children. Indeed, the protection of the family unit is guaranteed not only by the Due Process Clause, but also by the Equal Protection Clause of the Fourteenth Amendment and possibly by the Ninth Amendment.

Owenby v. Young, 357 N.C. 142, 144–45, 579 S.E.2d 264, 266 (2003) (citations and internal quotation marks omitted).

B. Trial Court's Findings of Fact

¶ 17 Relevant to Respondent's present appeal, the trial court found:

> 8. Respondent had no ability to visit C.H.M. nor have access to her except at the discretion of the Petitioners and/or Agency.
>
> 9. Respondent made no request to the adoption agency (Hereinafter the "Agency") or the Petitioners for any additional visits with C.H.M. in 2014 after the March 2014 visit. During this time period he continued

to purchase items for the child but did not send those items to the agency or Petitioners for the remainder of that year.

10. Respondent did not request from either the Agency or the Petitioners any information as to C.H.M.s well-being or development for the remainder of 2014.

11. Respondent has never had an email address for the Petitioners. Respondent was first provided the cell phone number for Petitioner [] at or around the time the parties had mediation in October 2016.

12. Petitioners continued to reside for the remainder of 2014 at the address they resided at when the Respondent and his family visited C.H.M. in March, 2014. (The Petitioners still reside at this address.)

13. Respondent continued to save money for C.H.M. in his "lockbox" during the remainder of 2014.

14. There is a dispute in the evidence and evidence proffer before this Court as to whether Respondent through counsel offered the existing funds in his lockbox of over $3260 to Petitioners' counsel at the conclusion of the hearing in April, 2014. The Court does not find this dispute to be material.

15. After the hearing in April 2014 and until January 30, 2015 Respondent paid nothing for C.H.M.'s support.

. . .

23. Respondent after being served with the petition to terminate his parental rights wrote a letter to A Child's Hope dated January 30, 2015. That letter stated Respondent had saved a total of approximately $5,270 for C.H.M. and enclosed a cashier's check to the agency for $2,635 for C.H.M.'s benefit. Respondent stated he desired to send the remaining funds for C.H.M.'s benefit, and he subsequently did so. That letter requested pictures of C.H.M. and information about her developmental milestones and reiterated that he continued to want custody of C.H.M.

¶ 18 Respondent does not challenge these findings as unsupported by properly admitted evidence. Instead, he contends an unenumerated category of parental rights exists that requires his consent for adoption under N.C. Gen. Stat. § 48-3-601.

C. *Lehr v. Robertson*

¶ 19 Respondent asserts this category has its roots in the Supreme Court of the United States' opinion in *Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614 (1983).

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. *If he grasps that opportunity* and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. *If he fails to do so*, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.

Id. at 262, 77 L. Ed. 2d at 627 (emphasis supplied).

¶ 20 Respondent asserts his actions fall within an unenumerated category of N.C. Gen. Stat. § 48-3-601. He argues he had seized all opportunities available to him and that he has done all that he could possibly do under the circumstances "to grasp[] that opportunity" to "develop a relationship with his offspring." *Id.*

¶ 21 In *Lehr*, the putative father "never had any significant custodial, personal, or financial relationship with [his child], and he did not seek to establish a legal tie until after she was two years old." *Id.* The father asserted he was entitled to an additional special notice, because the trial court and the mother knew that he had filed an affiliation action. *Id.* at 265, 77 L. Ed. 2d at 629.

¶ 22 The question before the Supreme Court was whether New York's statutory adoption scheme protected "the unmarried father's interest in assuming a responsible role in the future of his child." *Id.* at 263, 77 L. Ed. 2d at 627. The Court held the father's opportunity to establish a relationship with his child was adequately protected by the adoption statute "that automatically provide[d] notice to seven categories of putative fathers who are likely to have assumed some responsibility for the care of their natural children." *Id.* at 263, 77 L. Ed. 2d at 628.

¶ 23 This Court has previously interpreted *Lehr*. In the case of *In re Adoption of B.J.R.*, 238 N.C. App. 308, 311, 767 S.E.2d 395, 397 (2014), the father "contend[ed] that his substantive due process rights supplied by the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution were violated by the district court's determination that his consent to adoption was not required[,] and that Chapter 48 [was] therefore unconstitutional as applied to him."

¶ 24 The trial court's findings in *B.J.R.*, showed the father had "made very few efforts *after* the birth of his child to develop a parent-child relationship." *Adoption of B.J.R.*, 238 N.C. App. at 315, 767 S.E.2d at 399. The trial court found that the pre-adoptive parents had provided the father "*the opportunity* to visit the baby, which he took advantage of on only one occasion . . . a few weeks after the birth." *Id.*

¶ 25 The trial court found the father of B.J.R. had made no further attempts to meet with his child or to provide support for her during the next five months. *Id.* The court found the father had purchased diapers, which he never delivered. This Court noted "during the child's first six months of life, besides filing papers with the court, [the father] largely remained 'passive' in developing a relationship with his child." *Id.*

¶ 26 Here, in this "as-applied" challenge, Respondent contends the Petitioners and the private adoption agency violated his constitutional rights in the manner in which Chapter 48 was applied to him. "[O]nly in as-applied challenges are facts surrounding the plaintiff's particular circumstances relevant." *Town of Beech Mountain*, 247 N.C. App. at 460, 786 S.E.2d at 347 (citation omitted).

¶ 27 The relevant conduct to our review is Respondent's conduct towards C.H.M., once he knew she was his child, and any actions the Petitioners or the adoption agency took to prevent him from acting "to develop a relationship with his offspring." *Lehr*, 463 U.S. at 262, 77 L. Ed. 2d at 627.

D. N.C. Gen. Stat. § 48 - Adoption

¶ 28 The Supreme Court of the United States has recognized, "[t]wo state interests are at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings." *Santosky v. Kramer*, 455 U.S. 745, 766, 71 L. Ed. 2d 599, 615 (1982).

¶ 29 Chapter 48 sets forth our General Assembly's stated purpose:

> (a) . . . it is in the public interest to establish a clear judicial process for adoptions, to promote the integrity and finality of adoptions, to encourage prompt, conclusive disposition of adoption proceedings, and to structure services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.
>
> (b) With special regard for the adoption of minors, the General Assembly declares as a matter of legislative policy that:
>
> > (1) The primary purpose of this Chapter is to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents, (ii) facilitating the adoption of minors in need of adoptive placement by persons who can give them love, care, security, and support, (iii) protecting minors from placement with adoptive parents unfit to have responsibility for their care and rearing, and (iv) assuring the finality of the adoption[.]

N.C. Gen. Stat. § 48-1-100 (2021).

¶ 30 Our Supreme Court stated: "We believe the General Assembly crafted these subsections of this statute primarily to protect the interests and rights of men who have demonstrated paternal responsibility and to facilitate the adoption process in situations where a putative father for all intents and purposes has walked away from his responsibilities to mother and child, but later wishes to intervene and hold up the adoption process." *In re Adoption of Byrd*, 354 N.C. 188, 194, 552 S.E.2d 142, 146 (2001). The trial court's extensive findings and conclusions set forth herein focus on the initial and immediate responses of respondent and reveal whether Respondent "demonstrated paternal responsibility" or his lack thereof. *Id.*

¶ 31 Here, while being duped and deceived by the child's mother into initially believing the child was not his, once he learned C.H.M. was his child, Respondent remained "passive" in developing a relationship with his child. Respondent testified he did not know how to contact Petitioners. However, he and his parents had visited C.H.M. in Petitioners' home

when he was in North Carolina for his deposition in this matter. He acknowledged he had mailed no notes, cards, nor gifts to C.H.M. after his one visit with her in 2014. Respondent purchased a crib, which remained in his home in Illinois, and gifts which he did not send to C.H.M., despite knowing Petitioners' and the agency's addresses. Respondent provided no evidence that Petitioners or the agency thwarted him in contacting them or C.H.M. during this period of time.

¶ 32 Here, the trial court's findings focus on Respondent's "demonstrated parental responsibility" or his lack thereof during the period immediately after Respondent learned he was the father of C.H.M and was served with notice of the pendency of the adoption petition in November 2013. *Id.* Respondent father timely filed his objection to the North Carolina adoption petition in December 2013. Respondent made one visit with C.H.M. in March 2014 while it coincided with a court appearance. Other than his savings in the lockbox and purchase of a crib and some items in Illinois, Respondent did not begin any support payments, make or maintain contacts, or make any other attempts to parent C.H.M. until 30 January 2015 and after Petitioners had filed their Termination of Parental Rights action in November 2014.

¶ 33 The trial court's supported and unchallenged findings and conclusions reveal a father who did not "grasp[] that opportunity and accept[] some measure of responsibility for the child's future." *Lehr*, 463 U.S. at 262, 77 L. Ed. 2d at 627.

¶ 34 As the trial court found, Respondent's later conduct, while laudable, does not remove or excuse his non-actions for nine months in 2014, where "for all intents and purposes [he]. . . walked away from his responsibilities," after visiting his child in Petitioners' home. *In re Byrd*, 354 N.C. at 194, 552 S.E.2d at 146. Respondent's conduct after the 2014 visit failed to preserve his entitlement to the constitutional "protection of the family unit" guaranteed by the Due Process Clause. *Owenby*, 357 N.C. at 144-45, 579 S.E.2d at 266.

V. Conclusion

¶ 35 The trial court properly found and concluded Respondent has no statutory or Due Process rights to provide or withhold consent to Petitioners' adoption of C.H.M. Further issues involving these parties are not before us and our opinion remands this matter to the district court and to the clerk of superior court per the trial court's order for further proceedings consistent with North Carolina's adoption laws, N.C. Gen. Stat. § 48-1-100 *et seq*. *It is so ordered.*

AFFIRMED.

Judge CARPENTER concurs.

Judge GORE concurs in part and dissents in part with separate opinion.

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

¶ 36 I join the majority opinion, except for the portion holding that Respondent has no due process right to withhold consent to the adoption. There is an old adage of measuring ten times and cutting once. The majority in this opinion was handcuffed from ever being able to take a proper measurement of the totality of the facts of the case because of the unfathomable deceit and fraud perpetrated by the biological mother. The conduct by the birth mother led to a slippery slope of premature cutting of Respondent's parental rights, by previous rulings and discretionary reviews, prior to the case being heard on its merits and a proper review of the denial of Respondent's due process rights by the trial court.

¶ 37 The core foundation of a parent's rights were expressed when the Supreme Court of the United States "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000) (citations omitted).

> This parental liberty interest is perhaps the oldest of the fundamental liberty interests the United States Supreme Court has recognized. This interest includes the right of parents to establish a home and to direct the upbringing and education of their children. Indeed, the protection of the family unit is guaranteed not only by the Due Process Clause, but also by the Equal Protection Clause of the Fourteenth Amendment and possibly by the Ninth Amendment.

Owenby v. Young, 357 N.C. 142, 144–45, 579 S.E.2d 264, 266 (2003) (citing *Troxel*, 530 U.S. at 65, 147 L. Ed. 2d at 56; *Meyer v. Nebraska*, 262 U.S. 390, 399-400, 67 L. Ed. 1042, 1045-46 (1923); *Stanley v. Illinois*, 405 U.S. 645, 661, 31 L. Ed. 2d 551, 559 (1972)).

¶ 38 The Respondent made efforts prior to the child being born to establish his role as a biological parent. Prior to the birth of the child,

he attended a doctor's appointment with the biological mother. After the birth of the child, Respondent repeatedly requested the biological mother agree to DNA testing to establish his paternity, which she found excuses to not do. The biological mother also refused offers by Respondent to provide financial support towards prenatal medical bills and any support after the child was born. The record is full of efforts and attempts Respondent made to show he wanted to exercise his right "to establish a home and to direct the upbringing . . ." of a child that could be his own. *Id.* at 144, 579 S.E.2d at 266 (citation omitted).

¶ 39 The record also establishes that the Petitioners in this case at some point actively prevented Respondent from interacting with C.H.M. after initially allowing contact. The Petitioners would not let Respondent refer to himself as "daddy" during the visit he did have, eventually blocked Respondent's calls, and stopped responding to requests for or allow any visitation. There was a period from March of 2014 until January 2015 that Respondent did not contact Petitioners. However, during this time Respondent took actions to prepare himself to parent C.H.M. and to show that he wanted to "grasp[] that opportunity [to parent] and accept[] some measure of responsibility for the child's future . . . ." *Lehr v. Robertson*, 463 U.S. 248, 262, 77 L. Ed. 2d 614, 627 (1983). In my view the majority's review of Respondent's conduct after he knew C.H.M. was his biological child does not go far enough. It does not scrutinize the trial court's order to establish that Petitioners were not culpable for conduct that impeded Respondent from contacting C.H.M. from March of 2014 until January 2015. The trial court's order establishes in its findings of fact:

> 7. Respondent had no ability to visit C.H.M. nor have access to her except at the discretion of the Petitioners and/or Agency.
>
> …
>
> 11. Respondent has never had an email address for the Petitioners. Respondent was first provided the cell phone number for Petitioner [] at or around the time parties had mediation in October 2016.
>
> …
>
> 17. Petitioner [] testified the Petitioners did not want support for C.H.M. from Respondent.

These findings along with the uncontroverted findings that Petitioners purposefully withheld or blocked Respondent from contact require the

trial court to inquire into potential due process violations, and it failed to do so.

¶ 40 My last disagreement with the majority's opinion about the denial of Respondent's due process rights stems from the conduct of the biological mother from the time C.H.M. was born until she was placed for adoption. It appears from the record that C.H.M. was eleven-days old when placed for adoption on or about 9 July 2013. There is an argument that the biological mother's purposeful denial and refusal to allow Respondent DNA testing hindered his due process rights to a degree that it mandates his right to object or withhold his consent to adopt. The facts viewed in the light most favorable to Respondent, show that if he was on notice that C.H.M. was his child or allowed to have DNA testing done there was an eleven-day window between birth and adoption that he could have filed a custody action to preserve his parental rights. However, Respondent was deliberately denied this opportunity because of the blatant fraud perpetrated by the biological mother. The question we must address is how long is too long for a parent to be deprived their parental due process rights and for a child to be deprived of the opportunity of the love and affection from said parent.

¶ 41 A biological parent must be afforded an opportunity to assert their constitutional rights. Here, Respondent attempted to assert his constitutionally protected rights but was hindered along the way by the fraudulent actions of the child's biological mother. Depriving Respondent of his right to raise his biological child without proper review, especially considering the fact he attempted to assert his rights and duties as a parent before and immediately after the child was born and before he knew with any degree of certainty that C.H.M. was his biological child, is not in line with the paramount rights and protections afforded to biological parents by the United States Constitution. *See Meyer*, 262 U.S. at 399, 67 L. Ed. at 1045 (finding the rights to conceive and raise one's children have been deemed "essential"); *Skinner v. Oklahoma*, 316 U.S. 528, 541, 97 L. Ed. 1655, 1660 (1942) (finding the right to raise one's child is a "basic civil right[] of man"); *Lehr*, 463 U.S. at 262, 77 L. Ed. 2d at 627 ("The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring.").

¶ 42 While reviewing the totality of the facts of this case the majority is absolutely right that: "[t]he painful saga beginning with the birth mother's dishonesty regarding the Respondent's paternity of C.H.M. need not be repeated." For that very reason I bring out these issues of disagreement with the majority and respectfully concur in part and dissent in part.

IN RE MAGESTRO

[282 N.C. App. 115, 2022-NCCOA-127]

IN THE MATTER OF FRANK NINO MAGESTRO, DECEASED

No. COA21-306

Filed 1 March 2022

Appeal and Error—mootness—no practical effect in existing controversy—two appeals—resolution reached in one appeal

In an estate dispute, where the decedent's siblings filed two appeals—one challenging a declaratory judgment naming the decedent's former sister-in-law an heir under his will and another challenging the trial court's dismissal of the siblings' caveat action seeking to invalidate the will—the Court of Appeals dismissed the siblings' appeal in the caveat action after ruling in their favor in the other appeal. The siblings sought the same practical result in both actions—to take their brother's estate as sole heirs by intestacy—and, therefore, the favorable result in one appeal eliminated any practical effect that a resolution of the other appeal would have had on the existing controversy.

Appeal by caveators from an order entered 16 December 2020 by Judge George Frank Jones in New Hanover County Superior Court. Heard in the Court of Appeals 19 October 2021.

McGuire, Wood & Bissette, P.A., by Mary E. Euler & Joseph P. McGuire, for Caveators-Appellants.

Coastal Legal Counsel, by A. David Ervin, and Graves May, PLLC, by Rick E. Graves, for Propounder-Appellee.

INMAN, Judge.

¶ 1 This appeal arises from many of the same underlying facts as those found in *Parks v. Johnson*, 2022-NCCOA-129, COA21-51 (March 1, 2022), also filed today. In that case, Caveators-Appellants ("the Magestros"), filed a declaratory judgment action seeking to construe the will of their deceased brother, Frank Nino Magestro ("Mr. Magestro"), in their favor and in a manner that would preclude any devise to Propounder-Appellee Peggy L. Johnson ("Ms. Johnson").

¶ 2 After the trial court rejected the Magestros' arguments in the declaratory judgment action and declared Ms. Johnson an heir under the will, the Magestros filed this caveat action to have the will set aside so

that they may take by intestacy to the exclusion of Ms. Johnson. The trial court dismissed the Magestros' caveat action on estoppel grounds, and the Magestros now appeal that dismissal. Because our decision in *Parks* renders resolution of the Magestros' caveat action without practical effect—as the Magestros will take through application of the intestacy statutes independent of the validity of Mr. Magestro's will—we dismiss this appeal as moot.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 3 Much of the operative facts and law applicable to this case may be found in *Parks*. We outline below the facts pertinent to our holding that *Parks* renders this appeal moot.

1. The 1983 Will and Declaratory Judgment Action

¶ 4 Mr. Magestro executed a will in March 1983 (the "1983 Will") that included several devises referencing his then-wife Carol L. Magestro ("Carol"). Specifically, the will devised Mr. Magestro's entire estate to Carol or, should she predecease him, to any children of their marriage. The will also included a residuary clause providing that, in the event Carol predeceased Mr. Magestro and there were no children of their marriage, half of the estate would pass to Carol's mother or her descendants[1] and half would pass to Mr. Magestro's parents or their descendants.[2]

¶ 5 Mr. Magestro divorced Carol in 2016 and died in 2018. The 1983 Will was submitted to probate and Leah Magestro, a caveator-appellant in this case, qualified as executor of his estate. The Magestros then filed a declaratory judgment action in superior court, arguing that they are the sole heirs of Mr. Magestro's estate through application of Sections 31-5.4 and 31-42(b) of our General Statutes.

2. Resolution of the Declaratory Judgment Action

¶ 6 The Magestros argued in the declaratory judgment action that the 1983 Will's direct devise to Carol must be struck by Section 31-5.4, which "revokes all provisions in [a] will in favor of the testator's former spouse" upon their divorce, N.C. Gen. Stat. § 31-5.4 (2021), and that because Carol did not predecease Mr. Magestro, the residuary fails,

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1. Carol's mother predeceased Mr. Magestro, and Carol and Ms. Johnson are her only children; as such, Ms. Johnson is the sole member of the class described in this portion of the residuary.

2. Mr. Magestro's parents predeceased him, so the Magestros constitute this class of potential inheritors.

and Section 31-42(b)—which governs failed devises—requires that Mr. Magestro's estate "pass by intestacy." N.C. Gen. Stat. § 31-42(b) (2021). The trial court ruled in favor of Ms. Johnson and the Magestros appealed one month later; as explained in our decision in *Parks*, we agree with the Magestros' theory and reverse the trial court's ruling in favor of Ms. Johnson. *Parks*, ¶ 25.

3. The Caveat

¶ 7 While their appeal in the declaratory judgment case was pending before this Court, the Magestros filed a caveat on 26 August 2020 seeking to invalidate the 1983 Will. Ms. Johnson moved to dismiss the caveat on 29 October 2020, and the Magestros filed an amended caveat on 8 December 2020. The amended caveat alleged various facts—all of which were known to at least some of the Magestros prior to filing the declaratory judgment action—purporting to show that Mr. Magestro intended to revoke the 1983 Will shortly before his death. The amended caveat did not allege that any other will exists and did not seek to propound any other document as Mr. Magestro's last will and testament.[3] As acknowledged by both parties, a successful caveat of the 1983 Will would render the Magestros his sole heirs by operation of our intestacy statutes. In short, both the declaratory judgment action in *Parks* and the caveat action here seek the same practical end: the disbursement of Mr. Magestro's estate to the Magestros as his intestate heirs.

¶ 8 The trial court heard Ms. Johnson's motion to dismiss on 14 December 2020, with Ms. Johnson arguing that various estoppel doctrines barred the Magestros' caveat in light of the trial court's judgment in *Parks*. On 16 December 2020, the trial court entered an order dismissing the caveat. The Magestros timely filed notice of appeal, and the matter was consolidated for oral argument with *Parks*. Ms. Johnson moved this Court to dismiss the appeal, but her counsel withdrew that motion at oral argument.

II. ANALYSIS

¶ 9 Since at least as early as 1878, our appellate courts have dismissed moot appeals without reaching their merits. *See*, *e.g.*, *State ex rel. Crawley v. Woodfin*, 78 N.C. 4, 6 (1878). "As a general proposition,

3. The Magestros did attach an unsigned, unexecuted draft will that was purportedly written by Mr. Magestro in 2015 through LegalZoom. The Magestros did not seek to propound that document as a valid will and, in any event, that draft will left the entirety of Mr. Magestro's estate to three of the four caveators and nothing to Ms. Johnson.

North Carolina appellate courts do not decide moot cases." *Chavez v. McFadden*, 374 N.C. 458, 467, 843 S.E.2d 139, 146 (2020). The doctrine is one of judicial restraint rather than jurisdiction, *id.* at 467, 843 S.E.2d at 146-47, and is subject to several exceptions. *Id.* at 467, 843 S.E.2d at 147.[4] We will exercise this judicial restraint and dismiss an appeal "when a determination is sought on a matter which when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cnty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). The doctrine is employed:

> [t]o ensure that this Court does not determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions.

Chavez, 374 N.C. at 467, 843 S.E.2d at 147 (quotation marks and citations omitted).

¶ 10 We dismiss this appeal as moot in light of our decision in *Parks*. Per our holding in that case, the application of Sections 31-5.4 and 31-42(b) to the 1983 Will, along with our mandate to give effect to the testator's intent, results in Mr. Magestro's estate passing by intestacy to his siblings. *Parks*, ¶ 25.

¶ 11 If we affirmed the trial court's dismissal of the caveat, or if we reversed the dismissal and the trial court concluded on remand that the 1983 Will is valid, then the Magestros would take the entirety of Mr. Magestro's estate through execution of the declaratory judgment required by *Parks*.[5] The end result would be no different than if we

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4. The parties have not argued that any exception to the doctrine applies here.

5. Appellee acknowledged at oral argument that she would not caveat the 1983 Will if we were to rule against her in *Parks*, as she only takes from Mr. Magestro's estate if she prevails in that appeal *and* the 1983 Will is valid. Though her counsel suggested some unknown party might attempt to caveat the 1983 Will depending on our ruling in *Parks*, we cannot discern who would. The Magestros are the only siblings of Mr. Magestro, who died divorced, with no surviving parents, and without any lineal descendants. There is no indication that Mr. Magestro ever executed any other last will and testament that might be probated in place of the 1983 Will. The Magestros, as Mr. Magestro's siblings, are thus the only persons entitled to take—by intestacy—from Mr. Magestro's estate, whether that be by operation of the declaratory judgment mandated by our decision in *Parks* or by a straightforward invalidation of the 1983 Will. *See* N.C. Gen. Stat. §§ 29-13, 29-15, and 29-16 (2021) (collectively providing that the estate of an unmarried decedent, dying intestate without lineal descendants or surviving parents, passes to his siblings).

reversed the dismissal of the caveat and the trial court ultimately voided the 1983 Will. In the absence of any competing document purported to be Mr. Magestro's last will and testament, the Magestros would again take the entirety of the estate through intestacy. §§ 29-13, 29-15, and 29-16. In other words, this appeal is moot because its resolution "cannot have any *practical* effect on the existing controversy." *Roberts*, 344 N.C. at 398-99, 474 S.E.2d at 787 (emphasis added). We therefore dismiss the Magestros' appeal without reaching the merit of the trial court's order dismissing their caveat on estoppel grounds.

III. CONCLUSION

¶ 12 For the foregoing reasons, we hold that this appeal is moot in light of our decision in *Parks*. The Magestros' appeal is dismissed.

DISMISSED AS MOOT.

Chief Judge STROUD and Judge CARPENTER concur.

VINAYA MADDUKURI, Plaintiff
v.
NIRUPAMA CHINTANIPPU, Defendant

No. COA20-803

Filed 1 March 2022

Stipulations—divorce and custody action—stipulations for settlement—consent withdrawn—resumption of trial

Where a trial for divorce, equitable distribution, child custody, and child support was suspended when the parties came to an oral settlement of most issues, but, although the agreement was read into the record, it was never reduced to writing and more than two years passed without the parties being able to finalize all the terms of the agreement, there was no error in the trial court's decision to resume the trial after one party withdrew consent because the stipulations were no longer binding.

Appeal by defendant from orders entered 17 April 2020 by Judge Gary L. Henderson in Mecklenburg County District Court. Heard in the Court of Appeals 21 September 2021.

James, McElroy & Diehl, P.A., by Preston O. Odom, Jonathan D. Feit, and Caroline D. Weyandt, for plaintiff-appellee.

Passenant & Shearin Law, by Brione B. Pattison, for defendant-appellant.

GORE, Judge.

¶ 1 Defendant, Nirupama Chintanippu, appeals the trial court's Order (Re: Permanent Child Custody) ("Custody Order") and Order and Judgment (Re: Equitable Distribution) ("ED Order"). We hold the trial court did not err and affirm.

I.

¶ 2 Ms. Chintanippu and plaintiff, Vinaya Maddukuri, were married on 12 May 2003. The marriage produced one child, born in May 2010. Ms. Chintanippu and Mr. Maddukuri physically separated on 19 May 2013. On 10 February 2016, Mr. Maddukuri filed a Complaint seeking child custody, a temporary parenting arrangement, child support, equitable distribution, and absolute divorce. On 11 April 2016, Ms. Chintanippu filed an Answer and Counterclaim seeking custody of the minor child, child support, equitable distribution, and attorney's fees. The Answer admitted to Mr. Maddukuri's allegations relating to the claim for absolute divorce. A Judgment of Divorce was entered on 13 May 2016.

¶ 3 Mr. Maddukuri submitted an Equitable Distribution Affidavit on 10 October 2016. Ms. Chintanippu submitted her Equitable Distribution Affidavit on 19 October 2016. The trial court's Final Equitable Distribution Pretrial Order was entered on 7 July 2017.

¶ 4 This matter came on for trial on 7 July 2017. The trial proceeded for three days, hearing testimony and evidence presented by Mr. Maddukuri. On the third day of trial the parties came to a settlement agreement on the issues of physical child custody, legal custody, child support, equitable distribution, and attorney's fees. The settlement agreement covered all matters, except for a few details where the parties did not agree. The settlement terms were read into the record and the trial court asked both parties if they understood the terms and had agreed to the terms, but a written agreement was not signed or entered.[1] The trial court gave the parties a week to continue to negotiate and resolve the remaining issues out of court.

1. The record reflects only Mr. Maddukuri gave his assent to the terms of the agreement.

¶ 5 A hearing was held on 19 December 2017 where the trial court heard arguments on the five remaining issues, but at the hearing two additional issues arose, which the trial court requested the parties submit written arguments on. Over the following two years the parties were unable to finalize all the terms of their agreement, did not reduce the terms of the agreement to writing, and did not submit a final written order to the trial court for entry.

¶ 6 On 20 March 2019, Mr. Maddukuri withdrew his consent to the partial agreement reached in July 2017. Following a scheduling conference on 28 June 2019, the trial court ordered that the parties shall resume the trial that had partially taken place in July 2017. The matter came on for trial on 4 and 5 February 2020. On 17 April 2020, the trial court entered a Custody Order and ED Order. Ms. Chintanippu filed written notice of appeal on 14 May 2020.

II.

¶ 7 Ms. Chintanippu argues the trial court erred by concluding the terms of the 2017 agreement were not stipulations, resuming trial on all issues, allowing Mr. Maddukuri to take a position at trial that was inconsistent with the 2017 agreement, and by entering orders that are inconsistent with the terms of the 2017 agreement. We conclude the trial court did not err by allowing Mr. Maddukuri to withdraw his consent to the 2017 agreement and continuing trial.

¶ 8 Ms. Chintanippu bases her arguments on the fact that stipulations are agreements between the parties which establish a disputed fact and that a party is bound by its stipulation. *See Smith v. Beasley*, 298 N.C. 798, 259 S.E.2d 907 (1979); *see also Moore v. Richard W. Farms*, 113 N.C. App. 137, 141, 437 S.E.2d 529, 531 (1993). However, Ms. Chintanippu fails to recognize the distinction between stipulations of fact and stipulations for settlement. The majority of cases Ms. Chintanippu relies on for support involve stipulations of fact. *See*, *e.g.*, *Estate of Carlsen v. Carlsen*, 165 N.C. App. 674, 678, 599 S.E.2d 581, 584 (2004); *Plomaritis v. Plomaritis*, 222 N.C. App. 94, 101, 730 S.E.2d 784, 789 (2012); *Young v. Young*, 133 N.C. App. 332, 335, 515 S.E.2d 478, 480 (1999); *Sharp v. Sharp*, 116 N.C. App. 513, 521, 449 S.E.2d 39, 43, *rev. denied*, 338 N.C. 669, 453 S.E.2d 181 (1994); *Lawling v. Lawling*, 81 N.C. App. 159, 166, 344 S.E.2d 100, 106 (1986).

¶ 9 "[S]tipulations are of two kinds, some being mere admissions of fact relieving a party from the inconvenience of making proof, while others have all the characteristics of concessions of some rights as consideration for those secured, the courts have sometimes based the granting

or denial of relief upon the nature of the stipulation." 73 Am. Jur. 2d Stipulations § 14 (2021). "Thus, stipulations for settlement are generally regarded as removed from the sphere of [stipulations of fact] . . . ." *Id.*; *see also Winrow v. Discovery Ins. Co.*, No. COA06-1681, 189 N.C. App. 212, 657 S.E.2d 447 (filed March 4, 2008) (unpublished) (recognizing there is a distinction between stipulations of fact and stipulations for settlement). The stipulations in the case *sub judice* were stipulations for settlement.

¶ 10 Ms. Chintanippu points to *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E.2d 600 (1985), to argue that the stipulations are binding upon the parties. This Court did consider stipulations for settlement in *McIntosh*. The *McIntosh* Court discussed the procedure for entering oral stipulations for settlement as such,

> We believe the same scrutiny which is applied to separation agreements must also be applied to stipulations entered into by a husband and a wife regarding the distribution of their marital property. Any agreement entered into by parties regarding the distribution of their marital property should be reduced to writing, duly executed and acknowledged. If, as in the case *sub judice*, oral stipulations are not reduced to writing it must affirmatively appear in the record that the trial court made contemporaneous inquiries of the parties at the time the stipulations were entered into. It should appear that the court read the terms of the stipulations to the parties; that the parties understood the legal effects of their agreement and the terms of the agreement, and agreed to abide by those terms of their own free will.

74 N.C. App. at 556, 328 S.E.2d at 602. The Court in *McIntosh* vacated the trial court's order because the trial court did not inquire into the parties' understanding of the legal effect of their agreement or the terms of the agreement and failed to have the parties acknowledge that the terms stipulated to accurately reflected their agreement. 74 N.C. App. at 557, 328 S.E.2d at 602.

¶ 11 Here, the terms of the stipulations were properly read into the record and it appears that the trial court properly inquired whether the parties understood the legal effects and terms of their agreement, and that they agreed to the terms. However, the record only reflects that Mr. Maddukuri gave his affirmative assent to the agreement and is silent as

to Ms. Chintanippu's response. Therefore, we cannot say that the procedure provided for in *McIntosh* was followed here.

¶ 12 This court again examined stipulations for settlement in *Chance v. Henderson*, 134 N.C. App. 657, 518 S.E.2d 780 (1999). In *Chance*, the parties read the settlement terms aloud in open court at a scheduled hearing. 134 N.C. App. at 659, 518 S.E.2d at 781. The stipulated agreement addressed custody and visitation arrangements, alimony, child support, property division, and attorney's fees and complied with the requirements stated in *McIntosh*. *Id*. The defendant allegedly withdrew his consent to the agreement within hours of the hearing and instructed his attorney not to sign the order agreed upon in open court. 134 N.C. App. at 659, 518 S.E.2d at 782. Approximately one month later, the trial judge entered an order in line with the stipulated agreement, despite the defendant's council informing the trial judge that defendant had withdrawn his consent. *Id*. This Court stated the rule for entering a consent order as, "[f]or a valid consent order, the parties' consent to the terms must still subsist at the time the court is called upon to sign the consent judgment. If a party repudiates the agreement by withdrawing consent before entry of the judgment, the trial court is without power to sign the judgment." 134 N.C. App. at 663, 518 S.E.2d at 784. However, the Court in *Chance* ultimately concluded that the defendant's subsequent actions ratified and validated the order, and that defendant was thereby estopped from challenging the order. 134 N.C. App. at 663, 666, 518 S.E.2d at 784, 785-86.

¶ 13 While *Chance* was not ultimately decided on the rule for withdrawal of consent to stipulations for settlement, the analysis in *Chance* indicates that a party to a stipulation for settlement can withdraw their consent to the agreement before the court enters an order on the matter, so long as the stipulations for settlement are not reduced to writing. If stipulations for settlement are reduced to writing and signed by the parties, contract principles would apply to the stipulations, including to a party's ability to withdraw consent. Under *Chance*, it would be improper for a trial court to enter an order based on stipulations for settlement once a party has withdrawn their consent to the agreement. Thus, once a party withdraws consent to the stipulations for settlement, in order to resolve the issues before the court, the trial court must continue proceedings from the point which they were stopped due to the parties' agreement. In the case *sub judice*, the trial court properly resumed trial from the point the July 2017 trial was stopped for the parties to enter their stipulations for settlement.

III.

¶ 14 For the foregoing reasons we hold the trial court did not err by resuming trial and no longer treating the stipulations for settlement as binding. The trial court's orders are affirmed.

AFFIRMED.

Judges TYSON and JACKSON concur.

ANDREA PARKS, JUSTIN MAGESTRO, DION MAGESTRO, AND LEAH MAGESTRO, PLAINTIFFS
v.
PEGGY L. JOHNSON AND LEAH MAGESTRO, IN HER CAPACITY AS ADMINISTRATOR CTA OF THE ESTATE OF FRANK NINO MAGESTRO, DEFENDANTS

No. COA21-51

Filed 1 March 2022

Wills—interpretation—condition precedent—unfulfilled—residuary devise fails

In a dispute between a decedent's siblings and the sister of his former wife concerning who should inherit his estate under his will, where decedent died with no children and after he was divorced from his wife, the trial court erred by excising all references to decedent's former wife rather than excising solely the provisions that favored her. Further, because decedent's former wife survived him, the provision beginning with the condition precedent "In the event my wife, Carol. L. Magestro, should predecease me" failed; therefore, because no other residuary clause existed, the estate passed by intestacy to decedent's siblings.

Appeal by Plaintiffs from judgment entered 14 July 2020 by Judge J. Stanley Carmical in New Hanover County Superior Court. Heard in the Court of Appeals 19 October 2021.

McGuire, Wood & Bissette, P.A., by Mary E. Euler & Joseph P. McGuire, for Plaintiffs-Appellants.

Coastal Legal Counsel, by A. David Ervin, and Graves May, PLLC, by Rick E. Graves, for Defendant-Appellee Peggy L. Johnson.

INMAN, Judge.

¶ 1 This appeal arises out of a dispute between a decedent's siblings and the sister of his former spouse about who should inherit his estate under his will. Resolving this question requires us to consider the interplay between the language of the will and relevant statutory and common law. Applying esoteric principles of interpretation to these facts leads us to a straightforward conclusion: the testator's express intent must prevail.

¶ 2 Plaintiffs-Appellants, the decedent's siblings, argue the trial court erred in entering judgment on the pleadings in favor of the decedent's former spouse's sister by: (1) concluding our General Statutes require removing all references to the former spouse in the will; (2) failing to conclude the lapsed gift in one provision of the will resulted in the decedent's estate passing by intestacy; and (3) considering matters outside the pleadings. After careful review, we reverse the judgment of the trial court.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 3 Frank Nino Magestro ("Mr. Magestro") died in New Hanover County on 2 May 2018. Mr. Magestro was married to Carol Magestro ("Carol")—the sister of Defendant-Appellee Peggy L. Johnson ("Ms. Johnson") and daughter of Elizabeth W. Chamblee ("Ms. Chamblee")—from 1982 until they divorced in 2016. They had no children.

¶ 4 In March 1983, after celebrating his first wedding anniversary, Mr. Magestro executed his last will and testament (the "1983 Will"). The 1983 Will provides in relevant part:

> ITEM TWO: I devise and bequeath unto my wife, Carol L. Magestro, all of my property of every sort, kind, and description, both real and personal, absolutely and in fee simple.
>
> ITEM THREE: In the event my wife, Carol L. Magestro, be not living at the time of my death, I will, devise, and bequeath all of my property of every sort, kind, and description, both real and personal, unto the children of my marriage with Carol L. Magestro, whether or not born of adopted after the execution of this will, absolutely and in fee simple, to be equally divided between them, share and share alike. In the event either of my said children shall predecease me, then and in that event such child's share shall go to his or her children.

> ITEM FOUR: In the event my wife, Carol L. Magestro, should predecease me and in the event there are no children born or adopted of my marriage with Carol L. Magestro, then and in that event, I direct that my estate be divided into two equal shares to be distributed as follows:
>
> One (1) share to my mother-in-law, Elizabeth W. Chamblee, or her descendants per stirpes;
>
> One (1) share to my mother and father, Irene and Andrew Magestro, or the survivor of them; in the event they both predecease me, then to their descendants per stirpes.

¶ 5 Mr. Magestro's parents, Irene and Andrew Magestro, predeceased Mr. Magestro. Ms. Chamblee, Mr. Magestro's former mother-in-law, also predeceased Mr. Magestro, leaving her two daughters, Carol and Ms. Johnson.

¶ 6 When he died in 2018, Mr. Magestro was survived by Carol and by his siblings Andrea Parks, Justin Magestro, Dion Magestro, and Leah Magestro (collectively, "the Magestros"). The Magestros are Mr. Magestro's intestate heirs at law—entitled to inherit from him in the absence of any will. *See* N.C. Gen. Stat. §§ 29-13, 29-15, and 29-16 (2021).

¶ 7 Shortly after his death, the 1983 Will was admitted to probate in New Hanover County. Leah Magestro was appointed administrator of the estate. In November 2019, after learning that Ms. Johnson claimed an interest in the estate, the Magestros filed a declaratory judgment action to interpret the 1983 Will. Ms. Johnson counterclaimed one month later. All parties moved for judgment on the pleadings.

¶ 8 The Magestros argued to the trial court that the 1983 Will's direct devise to Carol in ITEM TWO must be revoked pursuant to N.C. Gen. Stat. § 31-5.4 (2021), which removes all provisions in a will in favor of a former spouse upon divorce. Then, because Carol had not predeceased Mr. Magestro and because they had no children, ITEMS THREE and FOUR of the 1983 Will were inoperative pursuant to N.C. Gen. Stat. § 31-42(b) (2021), which provides an estate shall pass to intestate heirs where there is no effective residuary clause. Application of those statutes would result in the residuary passing by intestacy to the Magestros at the exclusion of Ms. Johnson.

¶ 9 Ms. Johnson offered a different interpretation of Section 31-5.4, asserting that the trial court should avoid any intestate distribution under

the 1983 Will by removing all provisions which benefit Carol—the direct devise to Carol and the residuary's condition precedent that she predecease Mr. Magestro. With these provisions revoked, the residuary operates and both Ms. Johnson and the Magestros would take one-half of Mr. Magestro's estate.

¶ 10 The trial court heard the parties' cross motions for judgment on the pleadings and entered an order on 14 July 2020 in favor of Ms. Johnson. The trial court's order concluded in relevant part:

> [Section 31-5.4] removes any reference of Carol L. Magestro under the Will, including revoking the bequest to Carol L. Magestro set out in ITEM TWO of the Will, revoking the appointment of Carol L. Magestro as executrix as set out in ITEM FIVE of the Will, and removing any condition precedent that appears in ITEM THREE and FOUR of the Will that Carol L. Magestro predecease Frank Nino Magestro in order that ITEM THREE and/or ITEM FOUR become operable.

By removing the condition precedent, the trial court determined one-half of the residuary of the estate would pass to Ms. Johnson, as the issue of the predeceased Ms. Chamblee, and one-half would pass to the Magestros, as issues of Mr. Magestro's predeceased parents, Irene and Andrew Magestro. The Magestros timely appealed.

II. ANALYSIS

A. The Trial Court Erred in Excising All References to Mr. Magestro's Former Spouse in the 1983 Will

¶ 11 No party disputes that the distribution scheme under ITEM TWO in the 1983 Will is revoked pursuant to Section 31-5.4 because it was "in favor" of Mr. Magestro's former spouse, Carol. However, the Magestros assert that by removing *all* provisions in the 1983 Will referencing Carol, the trial court revoked provisions beyond the statute's scope and undermined Mr. Magestro's intent. We agree.

¶ 12 We review a trial court's order of a motion for judgment on the pleadings *de novo*. *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764 (2008). Judgment on the pleadings is only appropriate "when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Groves v. Cmty. Hous. Corp. of Haywood Cnty.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (quotation marks and citations omitted). Under *de novo* review, we consider the matter anew

and substitute our judgment for that of the trial court. *In re Estate of Pope*, 192 N.C. App. 321, 331, 666 S.E.2d 140, 148 (2008).

¶ 13 In will interpretation, "the intention of the testator is the polar star which is to guide," *Clark v. Connor*, 253 N.C. 515, 520, 117 S.E.2d 465, 468 (1960), so we must give effect to the intention of the testator, *Misenheimer v. Misenheimer*, 312 N.C. 692, 696, 325 S.E.2d 195, 197 (1985).

¶ 14 This matter is governed not only by common law, but also by statute directly addressing the inheritance rights of former spouses. Section 31-5.4 provides in pertinent part:

> Dissolution of marriage by absolute divorce or annulment after making a will does not revoke the will of any testator but, unless otherwise specifically provided in the will, it revokes all provisions in the will *in favor of* the testator's former spouse or purported former spouse . . . .

§ 31-5.4 (emphasis added). Section 31-5.4 plainly provides that divorce revokes only those provisions in a will which are "in favor" of a former spouse. We cannot interpret the statute to nullify all provisions in a will which simply refer to a former spouse. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) ("Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning."); *Gibboney v. Wachovia Bank, N.A.*, 174 N.C. App. 834, 837, 622 S.E.2d 162, 165 (2005) ("[Section 31-5.4] . . . clearly mandates that unless the testator expressly indicates in his will that even if he divorces his spouse she would remain a beneficiary, the former spouse is denied any testate disposition.").

¶ 15 Consistent with the plain language of this statute and our objective to give effect to the testator's intent, *Misenheimer*, 312 N.C. at 696, 325 S.E.2d at 197, we hold the trial court erred by excising *all* provisions in the 1983 Will which reference Carol and not solely the provisions that favor her.

¶ 16 Contrary to Ms. Johnson's assertion, the provision in ITEM FOUR of the 1983 Will, "[i]n the event my wife, Carol L. Magestro, be not living at the time of my death," is a condition precedent that cannot be interpreted to favor Carol, because the residuary is operative only if Carol has died. Necessarily, she would not be alive to benefit from the estate passing to her relatives.

¶ 17 Citing contractual legal principles, Ms. Johnson also argues the trial court appropriately excised the condition precedent from the 1983 Will because condition precedents are "disfavored in the law." But we construe a provision as a condition precedent "where the clear and plain language of the agreement dictates such construction." *See Handy Sanitary Dist. v. Badin Shores Resort Owners Ass'n, Inc.*, 225 N.C. App. 296, 303, 737 S.E.2d 795, 801 (2013) (citation omitted).

B. The Unfulfilled Condition Precedent Means the Residuary Devise Fails

¶ 18 Because Carol survived Mr. Magestro, the condition precedent went unfulfilled and the residuary devise under ITEM FOUR fails.

¶ 19 Our General Statutes provide:

> *Unless the will indicates a contrary intent* . . . if a devise otherwise fails, the property shall pass to the residuary devisee or devisees in proportion to their share of the residue. . . . *If there are no residuary devisees, then the property shall pass by intestacy.*

§ 31-42(b) (emphasis added).

¶ 20 There is a general presumption that "one who makes a will is of disposing mind and memory and does not intend to die intestate as to any part of his property." *Wing v. Wachovia Bank & Trust Co., N.A.*, 301 N.C. 456, 463, 272 S.E. 2d 90, 95 (1980). We will "construe a residuary clause so as to prevent an intestacy as regards any part of the testator's estate, *unless there is an apparent intention to the contrary*." *Faison v. Middleton*, 171 N.C. 170, 172, 88 S.E. 141, 142 (1916) (emphasis added). In particular, our Supreme Court has held intestate distribution is appropriate where a residuary clause is expressly subject to an unfulfilled condition. *See, e.g., McKinney v. Mosteller*, 321 N.C. 730, 734, 365 S.E.2d 612, 614-15 (1988); *Betts v. Parrish*, 312 N.C. 47, 57, 320 S.E.2d 662, 668 (1984). Further, "[i]n the absence of a manifest intention to the contrary, a will is to be construed in favor of beneficiaries appearing to be the natural or special objects of the testator's bounty." *Coffield v. Peele*, 246 N.C. 661, 666, 100 S.E.2d 45, 48-49 (1957) (citing *Mangum v. Durham Loan & Trust Co.*, 195 N.C. 469, 142 S.E. 711 (1928)).

¶ 21 Ms. Johnson argues Subsection 31-42(b) is inapplicable because the trial court correctly concluded Carol's death was not a condition precedent. If Carol's death was not a condition precedent, Ms. Johnson contends, the residuary estate does not lapse and the devisees under ITEM FOUR, namely Ms. Johnson and the Magestros, inherit the residuary.

¶ 22 Ms. Johnson cites our decision in *McKinney v. Mosteller*, 85 N.C. App. 429, 355 S.E.2d 164 (1987), *rev'd*, 321 N.C. 730, 365 S.E.2d 612 (1988), for the general proposition that there is a presumption against intestate distribution when a decedent has written a residuary clause into his or her will. But the Supreme Court rejected this Court's analysis on that very issue where a condition precedent caused a lapsed devise, holding the "condition precedent in [the will] demonstrates a contrary intention and *militates against* such a presumption when the condition precedent has not been met." *McKinney*, 321 N.C. at 733, 365 S.E.2d at 614 (emphasis added). Our Supreme Court further concluded:

> [T]he intent of the testator is manifest and unequivocal, that is, the residue is to pass to the named beneficiaries under the residuary clause of the will only if testator's wife survives him. She did not. Therefore, the residue passes to the heirs at law in accordance with the laws of intestacy as enacted by the legislature.

Id. at 734, 365 S.E.2d at 614-15.

¶ 23 The 1983 Will provides a residuary should Carol predecease Mr. Magestro (and should he also have no children):

> One (1) share to my mother-in-law, Elizabeth W. Chamblee, or her descendants per stirpes;
>
> One (1) share to my mother and father, Irene and Andrew Magestro, or the survivor of them; in the event they both predecease me, then to their descendants per stirpes.

Ms. Johnson and Mr. Magestro's siblings are the living devisees under the residuary clause. When the trial court removed the condition precedent in ITEM FOUR, the residuary devise became effective, leaving Ms. Johnson with one-half of the residuary estate and Mr. Magestro's siblings to divide the remaining half of the residuary. However, as explained above, removing the condition precedent of Carol predeceasing Mr. Magestro violates our statutes and undermines Mr. Magestro's intent.

¶ 24 Here, Mr. Magestro "manifest[ly] and unequivocal[ly]" expressed an intention contrary to distribution under the residuary clause by including a definite condition precedent in the 1983 Will––that Carol predecease him. *See McKinney*, 321 N.C. at 734, 365 S.E.2d at 614-15. As written, Mr. Magestro only intended the residuary devise to operate

if Carol did, in fact, predecease him. She did not, and the condition went unfulfilled.

¶ 25 Because the gift in equal shares to Mr. Magestro's "mother-in-law, Elizabeth W. Chamblee, or her descendants per stirpes" and "my mother and father, Irene and Andrew Magestro . . . or . . . their descendants per stirpes" fails, and no other residuary clause exists, Mr. Magestro's estate passes by intestacy to his siblings. *See* § 31-42(b) (providing that when a devise fails and "there are no residuary devisees, then the property shall pass by intestacy"). *Cf. Betts*, 312 N.C. at 57, 320 S.E.2d at 668; *Coffield*, 246 N.C. at 666, 100 S.E.2d at 48-49.

¶ 26 Ms. Johnson contends our reversal of the trial court "would invalidate thousands of North Carolina wills wherein a former spouse is still living" and disinherit countless children of divorced couples. This argument is refuted by our state intestacy statutes. A divorced couple's children are neither divested as intestate heirs nor do they share the estate with another class of relatives; they inherit the "entire net estate or share" alongside any other children of the decedent. *See* §§ 29-13, 29-15, and 29-16.

¶ 27 The Magestros further argue the trial court erred by considering factual allegations beyond the pleadings in rendering its decision. In light of our holding that the trial court erred in entering judgment on the pleadings in favor of Ms. Johnson, we need not address this issue.

III. CONCLUSION

¶ 28 Based on the reasons set forth, we reverse the trial court's judgment.

REVERSED.

Chief Judge STROUD and Judge CARPENTER concur.

SNOW ENTERPRISE, LLC, a North Carolina Limited Liability Company, MICKEY DALE SNOW, and RUSSELL M. SNOW, Plaintiffs
v.
BANKERS INSURANCE COMPANY, a Florida Corporation, Defendant

No. COA21-41

Filed 1 March 2022

1. Sureties—bail bond—pre-breach surrender—based on good faith mistake—liability for failure to return premium

In a case of first impression, where the surety on plaintiff's $15 million bail bond—for which plaintiff, a convicted criminal, paid a $1 million premium—filed a pre-breach surrender based on a good faith mistake about whether plaintiff breached the conditions of the bond, and where the surety corrected the mistake by issuing a rewritten $15 million bond without charging plaintiff an additional premium, the surety was not liable for failing to return the premium from the original bond to plaintiff within seventy-two hours of the surrender, as required by N.C.G.S. § 58-71-20. Further, because plaintiff did not seek recovery of the premium within the prescribed seventy-two-hour period and, instead, accepted the benefit of the rewritten bond without notifying the surety that he did not wish to receive it, the doctrines of estoppel, election of remedies, and unjust enrichment precluded plaintiff from recovering the premium almost a year later.

2. Evidence—expert testimony—requirements—opinion as to legal conclusions or standards—bail bond dispute

In a civil action between a convicted criminal (plaintiff) and the surety on his bail bond (defendant), in which the main issue was whether defendant was liable to plaintiff for failing to return the bond premium pursuant to N.C.G.S. § 58-71-20 after filing a pre-breach surrender, the trial court did not abuse its discretion by disqualifying a retired judge as an expert and by striking the judge's testimony where the only opinions he offered on plaintiff's behalf were that particular legal conclusions or standards had or had not been met (including the opinion that defendant violated section 58-71-20). Additionally, the judge's opinions did not satisfy the requirements of Evidence Rule 702 where they were based solely on the judge's personal knowledge, his twenty-one years of experience as a superior court judge, and application of statutory law to the facts.

SNOW ENTER., LLC v. BANKERS INS. CO.

[282 N.C. App. 132, 2022-NCCOA-130]

Appeal by Plaintiffs from orders entered on 17 August 2020 and 16 September 2020 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 20 October 2021.

Fox Rothschild LLP, by Robert H. Edmunds, Jr., Kip D. Nelson, and Elizabeth Brooks Scherer, and Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., and Jennifer L. Carpenter, for the Plaintiff-Appellants.

Jordan Price Wall Gray Jones & Carlton, PLLC, by Lori P. Jones, for the Defendant-Appellee.

JACKSON, Judge.

¶ 1 Snow Enterprises, LLC, Mickey Dale Snow, and Russell M. Snow (collectively, "Plaintiffs")[1] appeal the trial court's orders disqualifying Plaintiffs' expert and striking the expert's affidavit, denying Plaintiffs' motion to strike an affidavit by a former employee of Bankers Insurance Company ("Defendant"), granting summary judgment in favor of Defendant, and denying Plaintiffs' motion for reconsideration. We affirm the orders of the trial court.

I. Background

¶ 2 In March 2015, Mickey Snow and his wife, a native of Thailand, made arrangements to travel to Bangkok, Thailand. They originally planned to depart on 26 October 2015 and return on 11 November 2015. Mr. Snow lives in Eden, North Carolina, and owns a second home in Ormond Beach, Florida. He planned to depart from Daytona, Florida, near his home in Ormond Beach, and make a connection in Atlanta, Georgia, before flying to Bangkok.

¶ 3 Mr. Snow subsequently learned that he had become the subject of a criminal investigation involving the sexual exploitation and abuse of an underaged girl. On Thursday, 10 September 2015, Thomas Woodall, another individual implicated in the investigation, was arrested and charged with various sex crimes.

¶ 4 The next day, Friday, 11 September 2015, Mr. Snow changed his travel plans. At an approximate cost of $2,600 per ticket, he caused his reservations to be changed to a direct flight from Atlanta to Bangkok

1. Plaintiff Russell M. Snow is Mickey Snow's son, and Snow Enterprises, LLC, is a family company.

departing Monday, 14 September 2015 and returning Wednesday, 30 September 2015. Then he drove to Atlanta with his wife and they flew to Thailand on Monday, 14 September 2015.

¶ 5 On 5 October 2015, Mr. Snow was indicted by a Rockingham County grand jury with the Class D felony of patronizing a prostitute with a severe or profound mental disability. *See* N.C. Gen. Stat. § 14-205.2(d) (2021). He was subsequently indicted with six counts of statutory rape/sexual offense of a 13-, 14-, or 15-year-old by a defendant more than six years older than the victim, 10 counts of patronizing a prostitute, four counts of second-degree forcible sexual offense, and six counts of promoting the prostitution of a minor.

¶ 6 At the time, Mr. Snow was still abroad. After he was indicted, he left Bangkok for Costa Rica by way of Holland and Panama. At some point, he was detained by authorities in Panama and forced to return to Holland, where he was then forced to return to Bangkok. His return ticket was changed from 30 September 2015 to 1 November 2015, but it was never used.

¶ 7 On or about 24 November 2015, Mr. Snow was arrested in Thailand and turned over by Thai officials to United States law enforcement. He was then returned to the United States and incarcerated in the Rockingham County Jail. At his first appearance before a Rockingham County magistrate, his bond was set at $25 million.

¶ 8 On 16 December 2015, Defendant posted bond on Mr. Snow's behalf in exchange for a $1 million bond premium and Mr. Snow was released from jail. As a condition of his release, Mr. Snow was required to submit to electronic house arrest, including GPS monitoring. As collateral for the bond, Plaintiffs provided Defendant with $20 million in cash and pledged real estate worth at least $5 million.

¶ 9 The day after his release from jail, Mr. Snow executed a Bail Bond Application and Agreement. The terms and conditions of the Bail Bond Application and Agreement state, amongst other things, that "[t]he [bond] premium is fully earned upon your release from custody[,]" and that

> the Surety shall have the right to immediately apprehend, arrest, and surrender you, and you shall have no right to any refund of premium whatsoever . . . [if] you commit any act that constitutes reasonable evidence of your intention to cause a forfeiture of the Bond . . . [or] you are arrested and

> incarcerated for any other offense (other than a minor traffic offense)[.]

¶ 10 For the next year and a half, Mr. Snow was free on bail, subject to the conditions of his electronic house arrest, including GPS monitoring.

¶ 11 On 28 August 2017, Mr. Snow moved the trial court to reduce the amount of his bond. The court allowed the motion, reducing the bond to $15 million in an 8 September 2017 order. The court ordered Mr. Snow to continue to submit to electronic house arrest and electronic monitoring, but allowed him to travel outside the county to meet with his attorney, and outside the state for medical treatment, provided he first notify the District Attorney's office and obtain approval and wear an electronic monitor during any travel for medical treatment. Finally, the court ordered that if Mr. Snow violated the 8 September 2017 order setting the conditions of his pre-trial release, he "be immediately arrested and held in custody without bond until such time as the Court can set any new conditions of pre-trial release under N.C.G.S. § 15A-534(f)." Defendant thereafter released Plaintiffs' real property collateral and $5 million of the cash collateral.

¶ 12 On 15 September 2017, Mr. Snow moved for the trial court to allow him to travel to Jacksonville, Florida, for medical appointments on 20 and 21 September 2017 at the Mayo Clinic. He requested that the court allow him to drive and break up the drive into two days, allowing him an additional day to recuperate after each leg of the trip. He also requested that he be allowed to make the trip without electronic monitoring. Initially, the State objected, arguing that it had not received the notice required by the 8 September 2017 order, that the three days before and after the medical appointments were excessive, and that relieving Mr. Snow of his obligation to wear an electronic monitor was improper. The State subsequently withdrew its objection, provided Mr. Snow submitted to electronic monitoring the entire time, as required by the 8 September 2017 order. The court granted Mr. Snow's request in part, allowing him to travel to Florida for the appointments, but refusing to relieve him of electronic monitoring.

¶ 13 During the trip to Florida, the Rockingham County Sheriff's Office lost track of Mr. Snow. The battery in his electronic monitor died and remained dead for two hours after his medical appointment in Jacksonville on 21 September 2017. Mr. Snow's last known location before the battery died was an Outback Steakhouse, where he arrived at 7:16 p.m. The next location tracked by the monitor was Mr. Snow's home in Ormond Beach, where he returned and connected the monitor's battery to its charger at 9:09 p.m.

¶ 14 On 25 September 2017, a magistrate issued an order for arrest for Mr. Snow for alleged violations of the conditions of his pre-trial release. Mr. Snow was arrested by a deputy from the Rockingham County Sheriff's Office, and at his first appearance in Rockingham County District Court for the arrest the following day, the district court ordered that Mr. Snow be held without bond until a hearing in superior court before Judge Nathaniel Poovey, the judge who had granted Mr. Snow's request to leave the state for medical treatment.[2]

¶ 15 On 29 September 2017, Defendant caused a Surrender of Defendant by Surety form ("Surrender Form") to be filed in Rockingham County Superior Court through its local bail agent. The form stated that it was for a "pre-breach surrender" and that the surrender was being made "before a breach of the bond" and "before there has been a breach of the bond obligation." Defendant thereby requested "exoneration from the bond obligation[.]"

¶ 16 On 2 October 2017, the State moved for the trial court to revoke the conditions of Mr. Snow's pre-trial release. The State's motion came on for hearing in Rockingham County Superior Court before the Honorable Nathaniel Poovey on 4 October 2017. Judge Poovey denied the State's motion, finding that Mr. Snow did not violate the conditions of his pre-trial release during the Florida trip. The court therefore ordered that Mr. Snow be released from jail with the same bond and under the same conditions as in the 8 September 2017 order.

¶ 17 The next day, on 5 October 2017, Defendant posted a re-written $15 million bond and Mr. Snow was released. Mr. Snow was not charged an additional bond premium for the re-written bond. While he was free on bond for the next nine months, Mr. Snow never requested a return of his bond premium or a return of his collateral.

¶ 18 On 19 July 2018, Mr. Snow pleaded guilty to a single count of the Class F felony of aiding and abetting the prostitution of a minor, and the State dismissed all the other charges against him. Mr. Snow's defense counsel informed Defendant that the criminal matters had been resolved, and Defendant released the remaining $15 million in collateral.

¶ 19 A little over a month later, in a 28 August 2018 letter, Mr. Snow for the first time took the position that Defendant was required to return the $15 million in collateral within 72 hours of the filing the Surrender Form on 29 September 2017 and that he was entitled to a refund of

2. Mr. Snow's first appearance occurred in district court because the only superior court judge available at the time recused himself.

the $1 million bond premium because the Surrender Form stated that Defendant's surrender on the original bond was a pre-breach surrender and Judge Poovey ruled on 4 October 2017 that Mr. Snow had not violated the terms of his pre-trial release. In other words, just over a month after his criminal charges were resolved—almost a year after the Surrender Form was filed—and after being free on bail for nearly three years while the criminal charges against him were pending (with the exception of 11 days he spent in jail after his 2017 Florida trip), Mr. Snow argued that Defendant was required to return him $16 million approximately a year earlier. Receiving no response, Mr. Snow sent a second letter on 7 January 2019, threatening legal action.

¶ 20 Defendant disputed both of Mr. Snow's positions in a 15 January 2019 reply, explaining that it posted a new bond without charging Mr. Snow any additional premium after learning he was eligible for bail again after the 4 October 2017 hearing, that it did so after consulting with his attorneys, and that the $1 million premium on the original bond was earned in full upon the posting of that bond, consistent with the provision of the 17 December 2015 Bail Bond Application and Agreement regarding "[t]he [bond] premium [being] fully earned upon [his] release from custody."

¶ 21 On 6 May 2019, Plaintiffs initiated this action in Brunswick County Superior Court. In their verified complaint, Plaintiffs asserted six causes of action, requesting a declaratory judgment, return of the $1 million bond premium, disgorgement of any investment income earned by Defendant with the $16 million allegedly wrongfully retained after the 29 September 2017 filing of the Surrender Form, attorney's fees, pre-judgment interest, treble damages under the Unfair and Deceptive Practices Act, and punitive damages. On 8 July 2019, Defendant moved to dismiss the complaint, and alternatively, answered, asserting affirmative defenses, including waiver, estoppel, and unjust enrichment.

¶ 22 On 27 July 2020, Plaintiffs moved for summary judgment. On 31 July 2020, Defendant moved for summary judgment. On 31 July 2020, Defendant also moved to disqualify an expert identified by Plaintiffs in their expert disclosures and strike an affidavit filed by the expert on 27 July 2020. On 10 August 2020, Plaintiffs filed a motion to strike an affidavit by a former employee of Defendant filed in support of Defendant's motion for summary judgment on 31 July 2020.

¶ 23 These motions came on for hearing before the Honorable Jason C. Disbrow in Brunswick County Superior Court on 10 August 2020. In an order entered 17 August 2020, the trial court granted Defendant's

motion to disqualify and strike the affidavit of Plaintiffs' expert, denied Plaintiffs' motion to strike,[3] and entered summary judgment in favor of Defendant.

¶ 24 On 27 August 2020, Plaintiffs moved for the court to reconsider its 17 August 2020 order pursuant to Rules 58, 59, and 60 of the North Carolina Rules of Civil Procedure and various common law doctrines, which the trial court denied in an order entered on 16 September 2020.[4] That same day, Plaintiffs entered timely written notice of appeal from both the trial court's 17 August 2020 order awarding summary judgment to Defendant and the 16 September 2020 order denying the motion for reconsideration.

II. Analysis

¶ 25 This appeal presents a question of first impression. Because it arises in a novel context, we begin with an introduction of the relevant statutory framework. Then we turn to resolution of this question, as well as the other issue raised by the appeal.

A. Introduction

¶ 26 **[1]** A criminal defendant "charged with a noncapital offense must have conditions of pretrial release determined" by a judge. N.C. Gen. Stat. § 15A-533(b) (2021). One condition available to the judge is the execution of an appearance bond secured by a cash deposit. *Id.* § 15A-534(a)(4). The security for such appearance, called "bail," is to ensure the defendant's appearance in court. *See id.* § 58-71-1(2) (defining a "[b]ail bond" as "[a]n undertaking by the principal to appear in court as required upon penalty of forfeiting bail to the State in a stated amount"). If the defendant fails to appear for a court hearing, the bond amount is forfeited. *Id.* § 15A-544.3(a).

¶ 27 A defendant compensates a bail bondsman or bond surety for the risk that the defendant will not appear, or otherwise violate the conditions of the defendant's bond, through payment of a bond premium. *See id.* § 58-71-1(6a) (defining "premium" as "[a]n amount of money paid

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3. Plaintiffs offer no argument in their brief regarding the trial court's denial of their motion to strike. Any error in the denial of this motion is therefore deemed abandoned. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

4. Plaintiffs also offer no argument in their brief regarding the trial court's denial of their motion for reconsideration. Accordingly, any error in the denial of this motion is deemed abandoned. *See* N.C. R. App. P. 28(a).

in exchange for a bail bondsman's services in writing a bail bond"). In general, a bond premium is not returnable once "an agreement has been entered into between a defendant and a surety," even if the amount of the bond is later reduced. *Id.* § 58-71-16. However,

> [a]t any time before there has been a breach of the undertaking in any type of bail or fine and cash bond the surety may surrender the defendant to the sheriff of the county in which the defendant is bonded to appear or to the sheriff where the defendant was bonded; in such case the full premium shall be returned within 72 hours after the surrender.

Id. § 58-71-20. Interpreting this provision, our Supreme Court has observed that under this statute, if a bondsman "rescind[s] the bail contract and surrender[s] [the] defendant . . . *without cause or reason*[,]" he becomes liable in contract for the amount of the premium that is not returned to the defendant. *Shore v. Farmer*, 351 N.C. 166, 171, 522 S.E.2d 73, 76 (1999) (emphasis added).

¶ 28 North Carolina General Statute § 58-71-20 goes on to provide, however, that a "defendant may be surrendered without the return of [the] premium for the bond if the defendant . . . [v]iolates any order of the court." N.C. Gen. Stat. § 58-71-20(5) (2021). Whether a bond premium must be returned within 72 hours of a surrender thus depends, as a general proposition, on whether the surrender occurs because of a breach of a condition of the bond. *See id.* Section 58-71-20 thus makes the necessity of the return of a bond premium within the statutorily mandated 72 hours dependent on a determination—whether a suspected breach constitutes a breach—that may not occur, and in this case did not occur, within 72 hours of the surrender.

¶ 29 If the surrender is not because of a breach of a condition of the bond, it is considered a pre-breach surrender. *See id.* § 15A-540(a) ("Before there has been a breach of the conditions of a bail bond, the surety may surrender the defendant[.]"). If the surrender *is* because of a breach of a condition of the bond, on the other hand, it is considered a post-breach surrender. *See id.* § 15A-540(b) ("After there has been a breach of the conditions of a bail bond, . . . [a] surety may arrest the defendant . . . [or] may surrender a defendant who is already in the custody of any sheriff[.]").

¶ 30 When a defendant is surrendered because of a suspected breach, "the sheriff shall without unnecessary delay take the defendant before a judicial official, along with a copy of the undertaking received from the

surety and a copy of the receipt provided to the surety." *Id.* § 15A-540(c). "The judicial official shall then determine whether the defendant is again entitled to release and, if so, upon what conditions." *Id.*

¶ 31 This case presents the question of whether a bail bond surety can avoid liability for failure to return a bond premium to a defendant within the 72 hours prescribed by § 58-71-20 where the defendant is surrendered by the surety because of an alleged breach of the conditions of the defendant's pre-trial release (which, by virtue of the bail contract with the surety, would be a breach of a condition of the bond) but the trial court subsequently determines that the suspected breach, did not, in fact, constitute a breach after all. That is, if a surety rescinds its bail contract with a defendant because of a good faith mistake about whether there has been a breach and, after learning of the mistake, re-writes the bond and gives the defendant the benefit of his bargain by waiving any additional premium, returning the surety and defendant to the status quo before the alleged breach, can the surety escape liability under § 58-71-20 for failing to return the bond premium within 72 hours of the surrender? We hold that it can. If the surety returns both itself and the defendant to the same position each occupied before the suspected breach, and the defendant is released from custody and does not raise any objection or request a return of the bond premium before he is released, we hold that the defendant is estopped from later seeking recovery of the bond premium.

B. Standard of Review

¶ 32 Summary judgment is only proper if

> there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. In order to prevail on a summary judgment motion, the moving party must show either (1) an essential element of plaintiff's claim is nonexistent; (2) plaintiff cannot produce evidence to support an essential element of his claim, or (3) plaintiff cannot surmount an affirmative defense which would bar the claim. The trial court must construe all evidence in the light most favorable to the non-moving party, allowing the non-moving party to be given all favorable inferences as to the facts.

Gibson v. Mutual Life Ins. Co. of New York, 121 N.C. App. 284, 286, 465 S.E.2d 56, 58 (1996) (cleaned up).

¶ 33 On appeal,

> [w]e review a trial court order granting or denying a summary judgment motion on a *de novo* basis, with our examination of the trial court's order focused on determining whether there is a genuine issue of material fact and whether either party is entitled to judgment as a matter of law. As part of that process, we view the evidence in the light most favorable to the nonmoving party.

Beeson v. Palombo, 220 N.C. App. 274, 277, 727 S.E.2d 343, 346-47 (2012) (citation omitted).

¶ 34 Furthermore, "[i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989). "If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered." *Id.*

C. Defendant's Liability for Failure to Return the Bond Premium

¶ 35 Plaintiffs are estopped from seeking recovery of the bond premium for the original bond because Mr. Snow received the benefit of the re-written bond and Plaintiffs failed to notify Defendant that Mr. Snow did not wish to receive this benefit within a reasonable amount of time. This holding is based on three related equitable doctrines: (1) estoppel; (2) election; and (3) unjust enrichment.

1. Estoppel

¶ 36 "Broadly speaking, estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 13, 591 S.E.2d 870, 879 (2004) (internal marks and citation omitted). It is "a means of preventing a party from asserting a legal claim or defense which is contrary to or inconsistent with his prior actions or conduct." *Godley v. Pitt Cnty.*, 306 N.C. 357, 360, 293 S.E.2d 167, 169 (1982). "Where a party engages in positive acts that amount to ratification resulting in prejudice to an innocent party, the circumstances may give rise to estoppel." *Chance v. Henderson*, 134 N.C. App. 657, 664, 518 S.E.2d 780, 784 (1999) (citation omitted). Likewise, "unreasonable delay after notice[] resulting in prejudice to innocent parties . . . [can] work an estoppel." *Howard v. Boyce*, 254 N.C. 255, 266, 118 S.E.2d 897, 905 (1961). "[W]hen only one inference can reasonably be

drawn from the undisputed facts, estoppel becomes a question of law, properly decided by this Court." *Tarlton v. Stidham*, 122 N.C. App. 77, 82, 469 S.E.2d 38, 42 (1996) (citation omitted).

¶ 37 "While estoppel in its broadest sense predates the American colonial experience, . . . North Carolina courts have [] long recognized the doctrine of equitable estoppel, otherwise known as estoppel *in pais*." *Whitacre P'ship*, 358 N.C. at 13-16, 591 S.E.2d at 879-81. In general, equitable estoppel applies

> when anyone, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

State Highway Comm'n v. Thornton, 271 N.C. 227, 240, 156 S.E.2d 248, 258 (1967) (cleaned up). Our Supreme Court has described equitable estoppel as "an application of the golden rule to the everyday affairs of men." *McNeely v. Walters*, 211 N.C. 112, 113, 189 S.E. 114, 115 (1937).

¶ 38 "North Carolina has also adopted the doctrine of quasi-estoppel." *Z.A. Sneeden's Sons, Inc. v. ZP No. 116*, 190 N.C. App. 90, 96, 660 S.E.2d 204, 208 (2008). "Under quasi-estoppel doctrine, one is not permitted to injure another by taking a position inconsistent with prior conduct, regardless of whether the person had actually relied upon that conduct." *Mayer v. Mayer*, 66 N.C. App. 522, 532, 311 S.E.2d 659, 666 (1984). Likewise, "[u]nder a quasi-estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument." *Whitacre P'ship*, 358 N.C. at 18, 591 S.E.2d at 881-82. "[T]he essential purpose of quasi-estoppel . . . is to prevent a party from benefitting by taking two clearly inconsistent positions." *B & F Slosman v. Sonopress, Inc.*, 148 N.C. App. 81, 88, 557 S.E.2d 176, 181 (2001).

¶ 39 "The key distinction between quasi-estoppel and equitable estoppel is that the former may operate without detrimental reliance on the part of the party invoking the estoppel[,]" *Whitacre P'ship*, 358 N.C. at 18, 591 S.E.2d at 882, whereas "[u]nder 'true' estoppel, one party induces another to rely to his damage upon certain representations[,]" *Chance*, 134 N.C. App. at 665, 518 S.E.2d at 785. Quasi-estoppel is thus "directly grounded [] upon a party's acquiescence or acceptance of payment or benefits, by

virtue of which that party is thereafter prevented from maintaining a position inconsistent with those acts." *Godley*, 306 N.C. at 361, 293 S.E.2d at 170. "[T]he acceptance of benefits precludes a subsequent inconsistent position, even where acceptance is involuntary, arises by necessity, or where . . . a party voluntarily accepts a benefit in order to avoid the risk of harm." *Shell Island Homeowners Ass'n, Inc. v. Tomlinson*, 134 N.C. App. 217, 226, 517 S.E.2d 406, 413 (1999). While quasi-estoppel "is similar to equitable estoppel in that it may not be invoked by a stranger to the transaction where the prior position was asserted[,]" *Whitacre P'ship*, 358 N.C. at 19, 591 S.E.2d at 882, unlike equitable estoppel more generally, it is "inherently flexible and cannot be reduced to any rigid formulation[,]" *id.* at 18, 591 S.E.2d at 882.

2. Election

¶ 40 "North Carolina courts have long recognized and applied the election of remedies doctrine." *Id.* at 19, 591 S.E.2d at 882.

> The doctrine is founded on the principle that where by law or by contract there is a choice of two remedies which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other. The doctrine precludes the assertion of inconsistent positions by confining a party to the position which he first adopts. Thus, a party asserting rights under a will, deed, or contract is estopped, by claiming under it, to attack any of its provisions. One who accepts the terms of an instrument must accept the same as a whole; one cannot accept part and reject the rest.

Id. at 19-20, 591 S.E.2d at 882-83 (cleaned up). "[T]he doctrine of election is used to prevent double redress for a single wrong." *Id.* at 20, 591 S.E.2d at 883 (internal marks and citation omitted).

3. Estoppel Arises Here Because of the Benefit Conferred on Mr. Snow

¶ 41 Seeking recovery of the bond premium for the original bond almost a year after receiving the benefit of the re-written bond amounts to taking fundamentally inconsistent positions in connection with the bond. Plaintiffs essentially seek to retain the benefit of Defendant's services without paying anything for this benefit. The relief requested by Plaintiffs thus conflicts not only "with the essential purpose of quasi-estoppel, which is to prevent a party from benefitting by taking

two clearly inconsistent positions[,]" *B & F Slosman*, 148 N.C. App. at 88, 557 S.E.2d at 181, but also the doctrine of election, which "prevent[s] double redress for a single wrong[,]" *Whitacre P'ship*, 358 N.C. at 20, 591 S.E.2d at 883.

¶ 42 Four days after Mr. Snow was arrested for allegedly violating the conditions of his pre-trial release, when Defendant caused a Surrender Form to be filed in Rockingham County Superior Court on 29 September 2017, Plaintiffs had a decision to make. The Surrender Form stated that it was for a pre-breach surrender. If that was true, then under N.C. Gen. Stat. § 58-71-20, Plaintiffs were entitled to return of the $1 million bond premium within 72 hours. Plaintiffs could have demanded that Defendant return the bond premium. If Plaintiffs were dissatisfied with Defendant for surrendering Mr. Snow on 29 September 2017, they could have sought out a new surety to post bond for Mr. Snow, anticipating the return of the bond premium within 72 hours and that the trial court would soon set new conditions of pre-trial release for Mr. Snow. And again, 72 hours after the Surrender Form was filed, having not received a return of the bond premium, if Plaintiffs or their counsel in fact believed that they were entitled to a return of the bond premium, the time was ripe to inform Defendant of that view. Neither Mr. Snow, nor anyone acting on his behalf, communicated in any way to Defendant that Mr. Snow believed he was owed $1 million by Defendant in late September 2017.

¶ 43 If any doubt lingered in the mind of Mr. Snow or his counsel about whether Plaintiffs were entitled to a return of the bond premium 72 hours after Defendant caused the Surrender Form to be filed in Rockingham County Superior Court, that doubt should have been removed when Judge Poovey denied the State's motion to revoke the conditions of Mr. Snow's pre-trial release on 4 October 2017. Judge Poovey's ruling that Mr. Snow had not violated the terms of his pre-trial release during the 2017 Florida trip should have vindicated any belief Plaintiffs had that they were entitled to a return of the bond premium by at least the day beforehand—3 October 2017—after the 72 hours had elapsed. After all, the Surrender Form stated that it was for a pre-breach surrender, and the court had ruled that Mr. Snow had not, in fact, violated the conditions of his pre-trial release (and consequently, had not violated a condition of his bond), rejecting the State's argument to the contrary. Yet, even after Judge Poovey ruled that Mr. Snow had not violated the terms of his pre-trial release during the 2017 Florida trip, neither Mr. Snow, nor anyone acting on his behalf, informed Defendant that Plaintiffs believed they were entitled to a return of the bond premium—a return that by that point, was at least a day overdue.

¶ 44 Instead, the next day, on 5 October 2017, Mr. Snow was released from custody after Defendant re-wrote Mr. Snow's bond without charging an additional premium. Plaintiffs dispute whether Mr. Snow, or anyone acting on his behalf, expressly authorized Defendant to re-write the bond on 5 October 2017. However, it is undisputed that Mr. Snow received the benefit of the re-written bond; he was released from custody the same day the bond was re-written. Moreover, "voluntariness is not an element under the doctrine of quasi estoppel." *Carolina Medicorp, Inc. v. Board of Trustees*, 118 N.C. App. 485, 493, 456 S.E.2d 116, 121 (1995).

¶ 45 The benefit Mr. Snow received from the re-written bond was substantial. *See, e.g.*, *Vill. of Pinehurst v. Reg'l Invs. of Moore, Inc.*, 330 N.C. 725, 730, 412 S.E.2d 645, 647 (1992) (noting that the benefit received must be substantial to support estoppel under a quasi-estoppel theory). In all, Mr. Snow was free on bail for nearly three years while the criminal charges against him were pending. He received the benefit of his bargain with Defendant. He chose to accept the benefit of the re-written bond without notifying Defendant within a reasonable amount of time that he believed he was entitled to a return of the bond premium for the original bond. He did not inform Defendant that he believed he was entitled to a return of the bond premium until 28 August 2018, a month after his criminal charges were resolved—almost a year after Defendant re-wrote his bond without charging him an additional premium.

¶ 46 As our Court has observed, "[a]s much as in any area of the law, quasi estoppel cases turn on the particular facts of each case." *Mayer*, 66 N.C. App. at 535, 311 S.E.2d at 668. Mr. Snow elected to accept the benefit of the re-written bond, paid no additional premium for the re-written bond, and failed to notify Defendant within a reasonable amount of time that he did not wish to receive this benefit. We hold that Mr. Snow's receipt of the benefit of his bargain with Defendant by being returned to the same position he occupied before the suspected breach of the conditions of his pre-trial release, coupled with Plaintiffs' silence about their entitlement to a return of the bond premium or $15 million in collateral for almost a year, estops Plaintiffs from seeking return of the bond premium or any other relief requested in their verified complaint. By virtue of Plaintiffs' "acquiescence or acceptance of . . . benefits," Plaintiffs are "prevented from maintaining a position inconsistent with those acts." *Godley*, 306 N.C. at 361, 293 S.E.2d at 170. Accordingly, Plaintiffs' "acceptance of benefits precludes [their] subsequent inconsistent position[s]," even though arguably, Mr. Snow received the benefit of the re-written bond "involuntar[ily], . . . by necessity, or where . . . [he] voluntarily

accept[ed] a benefit in order to avoid the risk of harm." *Shell Island Homeowners Ass'n*, 134 N.C. App. at 226, 517 S.E.2d at 413. Plaintiffs are therefore estopped from obtaining a return of the bond premium.

4. Unjust Enrichment

¶ 47 We note that a contrary holding would result in Plaintiffs' unjust enrichment. Indeed, recovery of any of the relief requested in Plaintiffs' verified complaint would result in a windfall to Mr. Snow.

¶ 48 "The doctrine of unjust enrichment was devised by equity to exact the return of, or payment for, benefits received under circumstances where it would be unfair for the recipient to retain them without the contributor being repaid or compensated." *Collins v. Davis*, 68 N.C. App. 588, 591, 315 S.E.2d 759, 761, *aff'd*, 312 N.C. 324, 321 S.E.2d 892 (1984).

> In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable. . . . A claim of this type is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law. A quasi contract or a contract implied in law is not a contract. The claim is not based on a promise but is imposed by law to prevent an unjust enrichment.

Booe v. Shadrick, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988) (citations omitted).

¶ 49 For example, in the doctrine's paradigmatic fact pattern—that of the mistaken improver—our Supreme Court has observed,

> where one, under a mistake as to the location of his own premises, in good faith, and without inexcusable negligence, makes improvements upon the land of another, and the latter, knowing of the making of the improvements, but being himself ignorant of the mistake in location, fails to make objection, the improver may obtain suitable relief in equity.

Rhyne v. Sheppard, 224 N.C. 734, 737, 32 S.E.2d 316, 318 (1944). In the case of the mistaken improver, the true owner "cannot retain a benefit

which knowingly he has permitted another to confer upon him by mistake[,]" and an owner who "stands by and sees another erect improvements on the estate in good faith in the belief that he has a right to do so, and does not interpose to prevent the work" will be estopped from "claim[ing] such improvements after they are erected." *Id.*

¶ 50 Plaintiffs stood by and watched Defendant in good faith return Mr. Snow to the position he occupied before the suspected breach of the terms of his pre-trial release without interposing to prevent Defendant from doing so. *See id.* After Defendant mistakenly rescinded the bond contract, Mr. Snow had "a choice of two remedies which proceed[ed] upon opposite and irreconcilable claims of right"—accept the restitution tendered to him by Defendant after learning of the mistake, or insist on a return of the bond premium when he did not receive it within 72 hours of the filing of the Surrender Form. *Whitacre P'ship*, 358 N.C. at 19, 591 S.E.2d at 883. The remedy chosen by Mr. Snow—acceptance of the benefit of the re-written bond, and return to the position he occupied before the suspected breach—"exclude[s] and bar[s] the prosecution of the other[,]" i.e., return of the bond premium. *Id.* By "preclud[ing] the assertion of inconsistent positions [and] confining a party to the position which he first adopts[,]" the doctrines of estoppel and election work to prevent Plaintiffs' unjust enrichment here. *Id.*

D. Motion to Disqualify Plaintiffs' Expert and to Strike Expert Testimony

¶ 51 **[2]** Rule 702(a) of the North Carolina Rules of Evidence allows the use of expert testimony if the expert's knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2021). An expert witness may only offer such testimony if

> (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.

Id.

¶ 52 "Generally, the trial court's decision to allow or disqualify an expert will not be reversed on appeal absent a showing of abuse of discretion." *Da Silva v. WakeMed*, 375 N.C. 1, 4, 846 S.E.2d 634, 638 (2020) (internal

marks and citations omitted). "The standard of review remains the same whether the trial court has admitted or excluded the testimony—even when the exclusion of expert testimony results in summary judgment and thereby becomes outcome determinative." *Id.* at 4-5, 846 S.E.2d at 638 (internal marks and citations omitted). "However, when the pertinent inquiry on appeal is based on a question of law—such as whether the trial court properly interpreted and applied the language of a statute—we conduct de novo review." *Id.* at 5, 846 S.E.2d at 638.

¶ 53 Plaintiffs argue that disqualifying retired Judge James D. Llewellyn as an expert and striking his 27 July 2020 affidavit was erroneous. Judge Llewellyn was identified in Plaintiff's expert disclosures pursuant to Rule 26(b)(4) of the North Carolina Rules of Civil Procedure as an expert with

> substantial experience pertaining to pretrial release of criminal defendants, including, *inter alia*, pretrial release conditions, violations of pretrial release, bail bonds, bail bondsmen, surety companies, bond forfeitures, surrenders of criminal defendants by the surety, premiums paid by defendants in connection with their bonds, motions by the State to have defendants' bonds revoked for violating their pretrial release conditions or other relief the State may seek, and matters addressed in N.C. Gen. Stat. 58-71-20.

(Emphasis in original.) Plaintiffs' Rule 26(b)(4) disclosure regarding Judge Llewellyn identified four opinions Judge Llewellyn intended to offer:

> First, by virtue of Defendant's surrender of Mr. Snow, Mr. Snow's original bond was thereby terminated as a matter of law.
>
> Second, by virtue of Judge Poovey's ruling on or about 4 October 2017 that denied the State's motion to revoke Mr. Snow's bond, the Defendant should have immediately returned all of Plaintiffs' 15 million dollars. Defendant's retainage of Plaintiffs' 15 million dollars until approximately ten (10) months later on or about 1 August 2018 was improper.
>
> Third, by virtue of Judge Poovey's ruling on or about 4 October 2017 that denied the State's motion to revoke Mr. Snow's bond, Judge Poovey issued

> a new bond for Mr. Snow's pretrial release on the same terms as Mr. Snow's terminated original bond and Defendant's actions in connection with this second bond pertaining to Mr. Snow . . . were improper and unauthorized.
>
> Fourth, by virtue of Judge Poovey's ruling on or about 4 October 2017 that denied the State's motion to revoke Mr. Snow's bond, the Defendant should have fully returned and fully refunded Plaintiff's bond premium of 1 million dollars, at the very least, within 72 hours after entry of Judge Poovey's ruling (thus, on or about 8 October 2017). Defendant's refusal ever since approximately 8 October 2017 to the present to return Plaintiffs' 1-million-dollar bond premium it received from Plaintiffs was and remains in violation of N.C. Gen. Stat. 58-71-20.

¶ 54 While Plaintiffs concede that an expert "may not testify that [] a particular legal conclusion or standard has or has not been met[,]" *State v. Smith*, 315 N.C. 76, 100, 337 S.E.2d 833, 849 (1985), they argue that the opinions in Plaintiffs' expert disclosures, the opinions offered by Judge Llewellyn during his deposition, and the opinions offered in the 27 July 2020 affidavit do not run afoul of this prohibition. We disagree.

¶ 55 Plaintiffs' Rule 26(b)(4) disclosure, Judge Llewellyn's deposition testimony, and the 27 July 2020 affidavit demonstrate that the *only* opinions Judge Llewellyn was prepared to offer were that "a particular legal conclusion or standard ha[d] or ha[d] not been met." *Smith*, 315 N.C. at 100, 337 S.E.2d at 849. These materials also demonstrate that these opinions were being offered solely on the basis of Judge Llewellyn's personal knowledge and experience as a 21-year North Carolina Superior Court Judge, which does not meet the requirements of Rule 702. Specifically, Judge Llewellyn's deposition testimony demonstrates that his opinions were not "based upon sufficient facts or data[,]" were not "the product of reliable principles and methods[,]" and did not demonstrate that the relevant "principles and methods [had been applied] reliably to the facts of the case[,]" as Rule 702 requires. N.C. Gen. Stat. § 8C-1, Rule 702(a) (2021). For example, Judge Llewellyn testified at his deposition that this was the first case in which he had been engaged as an expert witness on any subject; that he had never given any lectures or seminars to judges or attorneys on the subject of bail bonds; that he had never published any written work on bail bonds; that he had never peer reviewed any article or writing on bail bonds; that by the date of

his deposition, he had not prepared any expert report; that the opinions identified in the Rule 26(b)(4) disclosure were the only opinions he intended to offer; and that these opinions were based only on application of North Carolina statutes to the facts of this case. We therefore hold that the trial court did not err, much less abuse its discretion, in disqualifying Judge Llewellyn as an expert and striking his testimony.

III. Conclusion

¶ 56 We hold that Plaintiffs are estopped from recovering the bond premium because Defendant rescinded its bail contract with Mr. Snow because of a good faith mistake about whether Mr. Snow had breached a condition of his bond and, after learning of the mistake, re-wrote the bond and gave Mr. Snow the benefit of his bargain by waiving any additional premium. Mr. Snow elected to accept the benefit of the re-written bond and failed to notify Defendant within a reasonable amount of time that he did not wish to receive this benefit. We conclude that Mr. Snow's election to accept the benefit of the re-written bond precludes him from adopting the inconsistent position he has taken in this action, and that our holding prevents Plaintiffs' unjust enrichment.

AFFIRMED.

Judges HAMPSON and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
ROGER DALE ESSICK, JR.

No. COA21-134

Filed 1 March 2022

Sentencing—enhancement for reportable convictions—applicability—lower-level felonies enhanced due to habitual felon status

In a prosecution where defendant was convicted of two Class H felonies (two counts of sexual exploitation of a minor), which were consolidated for judgment and for which he was sentenced as a Class D offender on account of his habitual felon status, the trial court erred by increasing defendant's maximum sentence pursuant to the sentencing enhancement provision in N.C.G.S. § 15A-1340.17(f),

which applies to Class B1 through Class E felonies that are reportable convictions requiring enrollment in the sex-offender registry but which does not apply to lower-level felonies that, while reportable, happen to be sentenced at a Class B1 through Class E level due to a habitual felon status enhancement.

Appeal by defendant by writ of certiorari from judgment entered 18 July 2019 by Judge Daniel A. Kuehnert in Surry County Superior Court. Heard in the Court of Appeals 17 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Heather H. Freeman, for the State.

N.C. Prisoner Legal Services, Inc., by Lauren E. Miller, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Roger Dale Essick, Jr., appeals from a judgment entered upon his *Alford* plea[1] to two counts of third-degree sexual exploitation of a minor and one count of attaining habitual-felon status. On appeal, Defendant argues that the trial court erred by enhancing his sentence pursuant to N.C. Gen. Stat. § 15A-1340.17(f) (2019), and consequently sentencing Defendant to an unauthorized maximum term of imprisonment. After careful review, we remand for resentencing.

Background

¶ 2 On 10 September 2018, a Surry County grand jury returned indictments charging Defendant with two counts of third-degree sexual exploitation of a minor, a Class H felony offense, and attaining the status of a habitual felon. The matter came on for hearing before the Honorable Daniel A. Kuehnert in Surry County Superior Court on 18 July 2019.

¶ 3 Defendant entered an *Alford* plea to the sexual-exploitation charges and stipulated to having attained habitual-felon status. The plea arrangement provided that the "charges [would be] consolidated into one Class H felony" judgment, and that Defendant, as a habitual felon and a prior record level III offender, would receive an enhanced, Class D-level sentence of 67 to 93 months' imprisonment, pursuant to N.C. Gen. Stat. § 14-7.6.

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1. An *Alford* plea is a guilty plea in which the defendant does not admit to any criminal act, but admits that there is sufficient evidence to convince the judge or jury of the defendant's guilt. *See North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970).

¶ 4 However, before accepting Defendant's plea and entering judgment, the trial court reconsidered the sentence agreed upon by the parties. The trial court determined that Defendant's maximum sentence should be increased from 93 months to 141 months pursuant to the sentencing enhancement provided in N.C. Gen. Stat. § 15A-1340.17(f), which mandates that the maximum sentence for certain "reportable convictions" that require enrollment in the sex-offender registry be set as the total sum of (1) the minimum sentence, plus (2) 20% of the minimum sentence, rounded to the next highest month, and (3) an additional 60 months.

¶ 5 After conference, the parties revised the plea transcript to reflect this additional sentencing enhancement. The trial court then entered judgment sentencing Defendant to serve 67 to 141 months in the custody of the North Carolina Division of Adult Correction, and admitting Defendant to the Advanced Supervised Release program for a term of 51 months.

¶ 6 Defendant did not appeal; however, on 25 August 2020, he petitioned this Court to issue a writ of certiorari to review the trial court's judgment. We allowed Defendant's petition for writ of certiorari on 25 September 2020.

Discussion

¶ 7 On appeal, Defendant's sole argument is that the trial court erred by increasing his maximum sentence from 93 months to 141 months pursuant to N.C. Gen. Stat. § 15A-1340.17(f)'s sentencing-enhancement provision, which he maintains "does not apply to Class F through I felony reportable convictions enhanced with habitual[-]felon status."

I. Appellate Jurisdiction

¶ 8 In general, a defendant who enters a guilty plea to a felony in superior court may appeal as a matter of right "the issue of whether the sentence imposed . . . [c]ontains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level." N.C. Gen. Stat. § 15A-1444(a2)(3). Here, Defendant did not appeal, but we allowed his petition for writ of certiorari to review the judgment entered against him, which Defendant alleges imposed an excessive and unauthorized term of imprisonment. This issue is thus appropriately before this Court.

II. Standard of Review

¶ 9 "Generally, when a defendant assigns error to the sentence imposed by the trial court our standard of review is whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Allen*, 249 N.C. App. 376, 379, 790 S.E.2d 588, 591 (2016) (citation and internal quotation marks omitted). Nonetheless, when this Court is confronted with a statutory error regarding a sentencing issue, such error is reviewed de novo as a question of law. *Id.*

III. Analysis

¶ 10 Defendant entered an *Alford* plea to two Class H felonies, which were consolidated for sentencing, and he stipulated to having attained habitual-felon status, after which the trial court conducted the requisite plea colloquy. Because of Defendant's status as a habitual felon, the trial court sentenced him as a Class D offender for the consolidated Class H felonies. Then, the court further enhanced Defendant's maximum sentence pursuant to N.C. Gen. Stat. § 15A-1340.17(f), concluding that—as a Class D offender sentenced for a reportable conviction that is subject to the mandatory sex-offender registry—Defendant was also subject to the statutory sentencing enhancement applicable to certain felony sex offenders. *See* N.C. Gen. Stat. § 15A-1340.17(f) ("[T]he maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus 60 additional months" for those who are "sentenced for a Class B1 through E felony that is a reportable conviction subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes[.]").

¶ 11 It is undisputed that Defendant's sentence for the consolidated Class H felonies was properly enhanced due to his habitual-felon status. *See id.* § 14-7.6 (requiring that a habitual felon "be sentenced at a felony class level that is four classes higher than the principal felony for which the [defendant] was convicted"). However, Defendant argues that the trial court erred by further enhancing his maximum sentence pursuant to § 15A-1340.17(f), in that he was not sentenced for an offense prescribed by the statute (that is, a Class B1 through Class E felony that is also a reportable conviction requiring his enrollment in the sex-offender registry); rather, Defendant was convicted of two Class H felonies, which were consolidated into one Class H felony judgment for which he was sentenced as a Class D offender, due to his status as a habitual felon. After analyzing analogous precedent and the plain language of § 15A-1340.17(f), we agree.

¶ 12 A defendant who attains habitual-felon status is subject to increased punishment for his subsequent crimes. *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977). Our habitual-felon statute provides that "[a]ny person who has been convicted of or [pleaded] guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be [a] habitual felon and may be charged as a status offender pursuant to this Article." N.C. Gen. Stat. § 14-7.1(a). When a habitual felon commits a felony, "the felon must, upon conviction or plea of guilty . . . be sentenced at a felony class level that is four classes higher than the principal felony for which the person was convicted[.]" *Id.* § 14-7.6. "The only reason for establishing that an accused is [a] habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status." *Allen*, 292 N.C. at 435, 233 S.E.2d at 588.

¶ 13 A similar statutory sentencing enhancement applies to certain sex offenses that fall within the classification of statutorily defined "reportable convictions":

> [F]or offenders *sentenced for a Class B1 through E felony that is a reportable conviction subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes*, the maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus 60 additional months.

N.C. Gen. Stat. § 15A-1340.17(f) (emphasis added).

¶ 14 On appeal, Defendant concedes that the two counts of third-degree sexual exploitation of a minor, a Class H felony offense, to which he pleaded guilty are "reportable convictions" subject to the sex-offender registry requirement as defined by N.C. Gen. Stat. § 14-208.6(4). Moreover, he does not challenge his convictions, plea, or habitual-felon status. Instead, Defendant argues that the additional sentence enhancement in N.C. Gen. Stat. § 15A-1340.17(f) does not apply here because his Class H felony reportable convictions are outside of the scope of the statute, which only pertains to Class B1 through E felony reportable convictions.

¶ 15 The parties cite no case that directly addresses whether § 15A-1340.17(f) may be applied in addition to the habitual-felon

sentencing enhancement. However, the State contends that *State v. Jones*, 358 N.C. 473, 598 S.E.2d 125 (2004), should guide our analysis.

¶ 16 In *Jones*, our Supreme Court analyzed N.C. Gen. Stat. § 90-95(d)(2) (2003), which provides, *inter alia*, that possession of a "controlled substance classified in Schedule II, III, or IV shall be . . . a Class 1 misdemeanor[,]" but that "[i]f the controlled substance is . . . cocaine . . . , the violation shall be punishable as a Class I felony." 358 N.C. at 476–77, 598 S.E.2d at 127 (emphases omitted); N.C. Gen. Stat. § 90-95(d)(2). After reviewing the plain language of § 90-95(d)(2), the Court concluded that the specific reference to cocaine controlled over the general misdemeanor provision, *Jones*, 358 N.C. at 478–79, 598 S.E.2d at 128–29, and therefore, "the phrase 'punishable as a Class I felony' d[id] not simply denote a sentencing classification, but rather, dictate[d] that a conviction for possession of the substances listed therein, including cocaine, [wa]s elevated to a felony classification for all purposes." *Id.* at 478, 598 S.E.2d at 128.

¶ 17 In the instant case, however, we are not presented with a conflict between two statutory provisions—one general and one specific—which the traditional rules of statutory interpretation would guide us to resolve by favoring the specific provision as an exception to the general. Thus, the State's reliance on *Jones* is misplaced.

¶ 18 Rather, we deem more instructive this Court's opinion in *State v. Vaughn*, 130 N.C. App. 456, 503 S.E.2d 110 (1998), *aff'd per curiam*, 350 N.C. 88, 511 S.E.2d 638 (1999). In *Vaughn*, the trial court determined that for the purposes of calculating the defendant's prior record level at sentencing, the defendant's previous Class H conviction should be treated as a Class C conviction, as that was the enhanced sentence that the defendant received due to his status as a habitual felon. 130 N.C. App. at 458–59, 503 S.E.2d at 111–12. The defendant argued on appeal that when calculating his prior record level, the trial court should have considered the previous conviction to be a Class H felony rather than a Class C felony. *Id.* This Court agreed, concluding that the defendant's "contemporaneous conviction of being [a] habitual felon did not reclassify the [Class H felony] as a Class C felony. Rather, the habitual felon conviction required that the defendant be *sentenced as* a Class C felon." *Id.* at 460, 503 S.E.2d at 113 (citation and internal quotation marks omitted).

¶ 19 The facts of the instant case are similar to those of *Vaughn*. As in *Vaughn*—in which the trial court erroneously determined that the defendant's enhanced prior Class C *sentence* was a Class C *conviction* for purposes of calculating his prior record level—the trial court here erroneously determined that Defendant's enhanced Class D *sentence*

was a Class D *conviction* for purposes of administering the sentencing enhancement pursuant to N.C. Gen. Stat. § 15A-1340.17(f). And just as in *Vaughn*, the habitual-felon sentencing enhancement did not convert the lower-level felony for which Defendant was convicted into the higher-level felony for which he was punished. *See id.*; *accord State v. Gardner*, 225 N.C. App. 161, 169, 736 S.E.2d 826, 832 (2013) ("[T]he fact that a defendant has been *sentenced as a* Class C felon, for example, does not mean that the actual, underlying offense is transformed into a Class C felony." (citation and internal quotation marks omitted)).

¶ 20 Therefore, because Defendant's "contemporaneous conviction of being [a] habitual felon did not reclassify" his Class H felony convictions to a Class D felony conviction, the trial court erred in applying the § 15A-1340.17(f) sentencing enhancement. *Vaughn*, 130 N.C. App. at 460, 503 S.E.2d at 113. In other words, the fact that Defendant was sentenced as a Class D felon for his Class H felony convictions "does not mean that the actual, underlying offense[s were] transformed into a Class [D] felony" simply because of his status as a habitual felon. *Gardner*, 225 N.C. App. at 169, 736 S.E.2d at 832. As a result of this error, Defendant received a sentence "for a duration not authorized by G.S. 15A-1340.17 . . . for [his] class of offense and prior record or conviction level." N.C. Gen. Stat. § 15A-1444(a2)(3).

¶ 21 Further, the plain language of § 15A-1340.17(f) suggests that the sentencing enhancement only applies to those convicted of certain Class B1 through E felonies, rather than those convicted of lower-level felonies but punished at the higher level of Class B1 through E due to the application of some other sentencing enhancement. "When interpreting statutes, our principal goal is to effectuate the purpose of the legislature." *Jones*, 358 N.C. at 477, 598 S.E.2d at 128 (citation and internal quotation marks omitted). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Id.* (citation omitted). However, "where a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Id.* (citation omitted).

¶ 22 By its plain language, subsection (f) applies to those defendants *convicted of and sentenced for* a Class B1 through E felony that is a reportable conviction subject to the sex-offender registry requirement, rather than those convicted of a lower-level felony who happen to be *sentenced at* a Class B1 through E level due to a habitual-felon status enhancement. *See* N.C. Gen. Stat. § 15A-1340.17(f) (applying the maximum sentence enhancement to "offenders *sentenced for* a Class B1 through E felony that is a reportable conviction subject to the registration

requirement of Article 27A of Chapter 14 of the General Statutes" (emphasis added)). Indeed, the phrase "that is a reportable conviction subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes" limits the class of offenders subject to this sentencing enhancement to those individuals being sentenced for (1) Class B1 through E felony offenses that (2) constitute "reportable convictions" subject to Chapter 14, Article 27A's registration requirement. *Id.* Therefore, § 15A-1340.17(f) plainly indicates that the sentencing enhancement applies solely to defendants sentenced for reportable Class B1 through E felony convictions, as opposed to defendants punished as Class B1 through E felons because of habitual-felon status sentencing enhancements.

¶ 23 In the instant case, Defendant's felony convictions clearly constitute "reportable convictions" subject to the sex-offender registry requirement. *See id.* §§ 14-208.6(4)a; 15A-1340.17(f). However, the offenses for which he was convicted and sentenced—two counts of third-degree sexual exploitation of a minor—are undeniably Class H felonies. *See id.* § 14-190.17A(d). As Class H felonies, Defendant's convictions fall outside the scope of the plain language of § 15A-1340.17(f), which applies to "offenders sentenced for a *Class B1 through E felony* that is a *reportable conviction* subject to the [sex-offender] registration requirement[.]" *Id.* § 15A-1340.17(f) (emphases added).

¶ 24 Thus, upon review of *Vaughn* and the plain language of § 15A-1340.17(f), we conclude that the trial court erred by applying the § 15A-1340.17(f) sentencing enhancement in Defendant's case. A defendant's "contemporaneous conviction of being [a] habitual felon d[oes] not reclassify" the underlying felony conviction as a higher-level felony, *Vaughn*, 130 N.C. App. at 460, 503 S.E.2d at 113, and the statute clearly indicates that subsection (f) applies only to those "sentenced for a Class B1 through E felony that is a reportable conviction subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes," N.C. Gen. Stat. § 15A-1340.17(f). Here, because Defendant was not sentenced for a reportable conviction of a Class D felony—but instead was sentenced as a Class D felon for his convictions of the Class H felonies due to his status as a habitual felon—we conclude that it was error for the trial court to also enhance his sentence pursuant to § 15A-1340.17(f).

Conclusion

¶ 25 For the foregoing reasons, we conclude that the trial court erred in subjecting Defendant to the maximum sentence enhancement

provided in N.C. Gen. Stat. § 15A-1340.17(f). Accordingly, we remand for resentencing.

REMANDED FOR RESENTENCING.

Judges INMAN and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
KEVIN GRAHAM, DEFENDANT

No. COA21-440

Filed 1 March 2022

Probation and Parole—probation revocation—new criminal offense—insufficient evidence

The trial court abused its discretion in revoking defendant's probation on the basis that he committed a new criminal offense where the State's evidence showed only that he had been arrested on a charge of possession of a firearm by a felon, which was still pending at the time of the revocation hearing.

Appeal by defendant from judgment entered 6 April 2021 by Judge Paul L. Jones in Wayne County Superior Court. Heard in the Court of Appeals 16 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Szany, for State-appellant.

Jason Christopher Yoder for defendant-appellee.

GORE, Judge.

¶ 1 Defendant Kevin Graham appeals from a judgment revoking his probation. On appeal, defendant argues that the trial court erred by revoking his probation on the basis of pending charges and unpaid court costs. For the following reasons, we reverse the trial court's judgment.

¶ 2 On 10 November 2005, defendant pled guilty to second-degree murder and possession of a firearm by a convicted felon. Defendant was sentenced to active terms of 176-221 months imprisonment for the

second-degree murder charge and 16-20 months imprisonment for the possession of a firearm by a convicted felon charge. Defendant's active sentence for possession of a firearm by a convicted felon was suspended for 36 months of supervised probation, to commence after he was released from prison following his active sentence for second-degree murder. Defendant was released from prison on 12 August 2019.

¶ 3 On 23 February 2021, the State filed a Violation Report alleging defendant violated his probation by failing to pay the full monetary judgment entered against him and because he was arrested and charged with possession of a firearm by a felon on 11 February 2021. Following a hearing, the trial court found defendant committed a crime and revoked defendant's probation on 6 April 2021. Defendant entered written notice of appeal on 15 April 2021 and gave oral notice of appeal in open court on 16 April 2021. Defendant filed a Petition for Writ of Certiorari to correct errors within his oral and written notice of appeal. In our discretion we grant defendant's petition.

¶ 4 Defendant argues the trial court erred when it revoked his probation based on pending charges and unpaid court costs. The State concedes that defendant's failure to pay full court costs may not serve as grounds for revocation of probation. Thus, we only discuss the trial court's revocation of defendant's probation based on pending criminal charges.

¶ 5 Under the Justice Reinvestment Act a trial court may only revoke probation if (1) the probationer commits a criminal offense in any jurisdiction, (2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a), or (3) violates any condition of probation after serving two prior periods of confinement in response to violations ("CRV") under N.C. Gen. Stat. § 15A-1344(d1). N.C. Gen. Stat. § 15A-1344(a) (2020). Here, the parties agree that defendant did not abscond supervision nor did he serve two prior periods of CRV; thus, defendant could only have his probation revoked for committing a criminal offense.

¶ 6 A proceeding to revoke probation is not a criminal prosecution and is often regarded as informal or summary. *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 479 (1967). Thus, "the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt." *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967). Instead, "[a]ll that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation . . . ." *Hewett*, 270 N.C. at 353, 154 S.E.2d at 480. "Accordingly, the decision of the trial court is reviewed for abuse of discretion." *State*

v. Murchison, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014) (citation omitted). Abuse of discretion occurs when a ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009), *cert. denied*, 559 U.S. 1052, 176 L. Ed. 2d 568 (2010).

¶ 7 In order to revoke a defendant's probation for committing a criminal offense there must be some form of evidence that a crime was committed. *See Murchison*, 367 N.C. at 465, 758 S.E.2d at 359 (holding the trial court did not err in relying on hearsay evidence that a crime had been committed to revoke the defendant's probation). In the case *sub judice*, the only evidence presented at the probation revocation hearing was the probation officer's Violation Report and testimony from the probation officer. This evidence only established that defendant was arrested for possession of a firearm by a felon. There was no evidence beyond the fact that defendant was arrested that tended to establish he committed a crime. Thus, we hold that the trial court abused its discretion in concluding a crime was committed and revoking defendant's probation.

REVERSED.

Judges DILLON and MURPHY concur.

STATE OF NORTH CAROLINA
v.
CHARLES ROBERT GUIN, JR., DEFENDANT

No. COA21-150

Filed 1 March 2022

1. Homicide—jury instruction—lesser-included offense—attempted first-degree murder—premeditation and deliberation

In a prosecution arising from a domestic violence incident, the trial court did not commit plain error by failing to instruct the jury on attempted voluntary manslaughter as a lesser-included offense of attempted first-degree murder where, although defendant testified that he beat his wife only after she provoked him by stabbing him, the State's evidence established that defendant acted with premeditation and deliberation where there was an extensive history of abuse in the relationship; defendant was angry with his wife on the night of the incident and accused her of infidelity; defendant brutally

beat his wife for several hours, leaving her severely wounded; he did not call the police or seek medical assistance for his wife after the incident, traveling instead to another state to seek medical attention for himself; and he later testified that he "knew what [he] was doing."

2. Constitutional Law—effective assistance of counsel—implied concession of guilt—only one charge mentioned at closing argument

In a prosecution arising from a domestic violence incident, defense counsel's statements during opening and closing arguments were not implied concessions of defendant's guilt to multiple assault charges, and therefore the trial court was not required to conduct a *Harbison* inquiry to ensure that defendant consented to these statements. Specifically, when saying that what happened between defendant and his wife was a "brutal, calculated assault," defense counsel was referring to the wife's act of stabbing defendant with a knife during the incident, and counsel's statement that defendant "beat" his wife was a recitation of an uncontroverted fact at trial (supported by defendant's own testimony in which he repeatedly admitted to beating his wife). Finally, although defense counsel only argued against the severest charge (first-degree murder) during closing arguments and the jury found defendant guilty of five of the six unmentioned assault charges, counsel's failure to mention those six charges did not constitute *Harbison* error.

3. Kidnapping—confinement—separate from assault—sufficiency of evidence

In a prosecution arising from a domestic violence incident, the trial court properly denied defendant's motion to dismiss a charge of first-degree kidnapping because the State presented sufficient evidence of confinement separate from that which was inherent in defendant's assault of his wife. Specifically, the evidence showed that on the night of the incident, defendant beat his wife until she stabbed him with a knife, at which point—despite having an opportunity to leave and to not continue assaulting her—he closed the blinds of her bedroom window and pulled her back by the hair as she tried to leave the apartment, after which he continued to beat her.

Appeal by Defendant from judgments entered 25 February 2020 by Judge Keith O. Gregory in Johnston County Superior Court. Heard in the Court of Appeals 1 December 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brian D. Rabinovitz, for the State.

Joseph P. Lattimore for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Charles Robert Guin, Jr., appeals from the trial court's judgments entering jury verdicts finding Defendant guilty of criminal charges arising from a domestic dispute between Defendant and his wife. Defendant contends the trial court (1) committed plain error by failing to instruct the jury on attempted voluntary manslaughter as a lesser-included offense of first-degree murder; (2) failed to ensure that Defendant knowingly consented to defense counsel's alleged concessions of guilt to multiple assault charges; and (3) erred by denying Defendant's motion to dismiss the charge of first-degree kidnapping because there was insufficient evidence distinct from evidence supporting assault. We discern no error.

I. Factual and Procedural Background

¶ 2 This case arises from a domestic violence incident between Defendant and his wife, Ms. Gaster, during the night of 29 September 2018. On 14 January 2019, a grand jury indicted Defendant for seven crimes arising from that domestic violence incident: (1) attempted first-degree murder, (2) first-degree kidnapping, (3) assault with a deadly weapon with intent to kill or inflict serious bodily injury ("AWDWIKISI"), (4) assault inflicting serious bodily injury, (5) assault by strangulation, (6) violation of a domestic violence protective order, and (7) habitual misdemeanor assault. Evidence at trial tended to show as follows:

¶ 3 Defendant and Ms. Gaster met and began to date in 2014 while both attended a substance abuse treatment class. Defendant and Ms. Gaster moved in together. During this time, Defendant and Ms. Gaster purchased and consumed drugs together. Defendant became paranoid about the couple's drug use, frequently accusing Ms. Gaster of hiding or overusing their drugs, slapping Ms. Gaster, and subjecting Ms. Gaster to verbal abuse.

¶ 4 On 12 October 2016, Defendant and Ms. Gaster married. Defendant's verbal and physical abuse of Ms. Gaster continued into their marriage. The abuse often resulted in police involvement, Ms. Gaster needing medical attention, or both. On one occasion, Ms. Gaster recalled that Defendant accused her of cheating, physically assaulted her, and tied

her to a tree. Ms. Gaster acquired a domestic violence protective order ("DVPO") against Defendant in August 2018.

¶ 5 On 29 September 2018, despite the DVPO, Ms. Gaster agreed to pick Defendant up from work to have a "friendly visit." The couple returned to Ms. Gaster's apartment around 10:30 p.m., where they consumed drugs and alcohol. After about an hour had passed, Defendant accused Ms. Gaster of cheating and began to physically assault her. Defendant forced Ms. Gaster to sit on her bed, then discovered that she had hidden knives under her pillow.

¶ 6 Defendant searched Ms. Gaster's apartment and found more knives hidden in each room. Defendant "hit [Ms. Gaster], slapped [her] across the face, and asked [her] what was [she] doing so wrong in [her] life that [she] needed to protect [her]self like that[?]" Ms. Gaster testified that Defendant "started curling [her] hair up in his hand so he could hold [her] face to his," demanded that she admit to cheating, and dragged her "back and forth from the kitchen to the bedroom" by her hair. Ms. Gaster explained that Defendant said he "was going to chop [her] up where nobody would find [her] body," "he turned the water on really loud, really on high," and he "turned the air condition[ing]—or heat on to where the fan was constantly running so no one would hear [her] scream." Ms. Gaster "thought [she] was going to die that night."

¶ 7 Defendant eventually "drug [Ms. Gaster] back in the bedroom" and beat her in the head until she "started seeing bright lights." Ms. Gaster remembered that Defendant "had thrown the knives up on the dresser, and [she] reached behind [her] and [she] grabbed one." Ms. Gaster "pushed the knife into [Defendant], and he let go of [her]." Defendant "pulled the knife out, and [Ms. Gaster] pushed it back in him." Ms. Gaster attempted to escape the bedroom, but Defendant "grabbed [her] by [her] hair and pulled [her] back in and started beating [her] some more." Defendant continued to beat Ms. Gaster, choke her, and kick her in her stomach and ribs for the rest of the night.

¶ 8 Ms. Gaster testified that, when Defendant eventually left her alone, she "could hear the birds chirping, so she knew it was morning." Ms. Gaster crawled out of her back door and sought help from a neighbor, who called for an ambulance. Ms. Gaster was treated in the trauma unit and hospitalized for about six days. The hospital trauma center treated Ms. Gaster for "extensive swelling and bruising to face and neck[,]" fractures to rib bones and bones around her eyes, strangulation, contusions, and kidney failure induced by toxins released from "skeletal muscle destruction."

¶ 9 According to Defendant's testimony at trial, he and Ms. Gaster bought drugs and alcohol, then went to Ms. Gaster's apartment on 29 September 2018. Defendant explained that he placed the knives on top of the dresser because Ms. Gaster coaxed him into the bedroom and asked him to "lift up the mattress and give [sic] them five butcher knives up under the bed." Defendant and Ms. Gaster then consumed drugs on the mattress. Defendant placed his portion of the drugs beside him on the mattress, looked away for a second, then could not find the drugs when he looked back down at the mattress. Ms. Gaster insisted that they search for the drugs, but Defendant knew she had taken them because "she was trying to get [him] to put [his] hands on her." Defendant testified that he "had just spent a year in jail and three months in prison[,]" he "had been out three weeks, and there was no way in the world [he] was going to put [his] hands on this lady, because [he] knew [he] would go to jail."

¶ 10 Defendant then attempted to leave, but Ms. Gaster kept "antagonizing" him, "reached across the dresser, picked up the butcher knife[,]" and stabbed him in "both lungs." Defendant explained he "was bleeding like a stuck hog" and "thought [he] was going to die." Defendant testified,

> And after she stabbed me, I'll be honest with you, I lost my cool. I come back to a couple of hours later and I beat the hell out of her. I'm not -- I'm guilty of that. I'm guilty of beating that woman, but I did not try to kill her. She knows I didn't try to kill her.
>
> After I quit beating her, I come to, and I knew right then. I said, oh, Lord. I looked at her and said, "Look what you caused me to do because you stabbed me and I beat the hell out of you."

¶ 11 Defendant then left the apartment and sought medical attention in Tennessee because he thought he would be left injured in jail without medical care if he stayed in North Carolina. Defendant said that Ms. Gaster was lucid when he left and she just waited twelve hours to seek medical attention herself.

¶ 12 Following the jury trial, the jury convicted Defendant of all charges, other than habitual misdemeanor assault. The trial court arrested judgment on Defendant's assault inflicting serious injury and assault by strangulation charges. The trial court sentenced Defendant to four consecutive sentences totaling 578 to 730 months. Defendant timely appeals.

II. Analysis

¶ 13 Defendant challenges each of his convictions on appeal, arguing (1) the trial court should have instructed the jury on a lesser-included offense of attempted first-degree murder; (2) the trial court did not ensure Defendant had knowingly consented before allowing defense counsel to concede Defendant's guilt to multiple charges; and (3) the State failed to present evidence of confinement supporting kidnapping that was distinct from evidence supporting the charges of assault. We address each argument in turn.

A. Jury Instruction on Lesser-Included Offense

¶ 14 **[1]** Defendant contends "the trial court committed plain error in failing to instruct the jury on the lesser-included offense of attempted voluntary manslaughter" because the evidence showed Defendant lacked the requisite intent for attempted first-degree murder.

¶ 15 Defendant did not request a jury instruction on attempted voluntary manslaughter at trial, or otherwise object to the jury instructions given by the trial court. "A trial court must give instructions on all lesser-included offenses that are supported by the evidence, even in the absence of a special request for such an instruction; and the failure to so instruct constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense." *State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819, *judgment entered*, 352 N.C. 595, 544 S.E.2d 565 (2000).

¶ 16 Nonetheless, because "[D]efendant did not object to the trial court's instructions or request an instruction on lesser-included offenses, we must review this assignment under the 'plain error' standard[.]" *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (citation omitted). To amount to plain error, "the error in the trial court's jury instructions must be 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *Id.* (citation omitted).

¶ 17 "[A] defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts." *State v. Palmer*, 293 N.C. 633, 643–44, 239 S.E.2d 406, 413 (1977). "The test is whether there 'is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.' " *State v. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989) (citation omitted). "However, the trial court is not required to submit lesser degrees of a crime to the jury

'when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime.' " *State v. McKinnon*, 306 N.C. 288, 300–01, 293 S.E.2d 118, 126 (1982) (citation omitted). "When the State's evidence establishes 'each and every element of first-degree murder and there is no evidence to negate these elements, it is proper for the trial court to exclude [a lesser-included offense] from the jury's consideration.' " *State v. Thibodeaux*, 352 N.C. 570, 582, 532 S.E.2d 797, 806 (2000) (citation omitted).

¶ 18 To show an "attempt" crime, the State must show "(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996) (citation omitted). "The [substantive] elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation." *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citation omitted). Because it is difficult to prove a defendant's specific mental intent by direct evidence, our Courts have found the following types of circumstantial evidence show premeditation and deliberation:

> (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Olson, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992) (citation omitted).

¶ 19 North Carolina also recognizes attempted voluntary manslaughter. *State v. Rainey*, 154 N.C. App. 282, 289, 574 S.E.2d 25, 30, *writ denied*, *review denied*, 356 N.C. 621, 575 S.E.2d 520 (2002). "[V]oluntary manslaughter is an intentional killing without premeditation, deliberation or malice but done in the heat of passion suddenly aroused by adequate provocation or in the exercise of imperfect self-defense where excessive force under the circumstances was used or where the defendant is the aggressor." *State v. Wallace*, 309 N.C. 141, 149, 305 S.E.2d 548, 553 (1983)

(citation omitted). The "specific intent [of first-degree murder] is either excused, justified, or negated by heat of passion arising under sudden and adequate provocation." *Rainey*, 154 N.C. App. at 287, 574 S.E.2d at 28. Attempted voluntary manslaughter is a lesser-included offense of attempted first-degree murder. *See id.* at 289, 574 S.E.2d at 29.

¶ 20 Defendant does not contend the State failed to show that he took overt acts which could have caused Ms. Gaster's death but fell short of that completed offense. Defendant argues only that the State failed to conclusively prove he had the requisite intent of premeditation and deliberation to commit first-degree murder because evidence at trial showed that he assaulted Ms. Gaster spontaneously in response to adequate provocation. We disagree.

¶ 21 The State presented the following evidence at trial supporting premeditation and deliberation: Defendant was upset with Ms. Gaster when she picked him up that evening and continued to accuse her of infidelity throughout the night. *See State v. Pridgen*, 313 N.C. 80, 94, 326 S.E.2d 618, 627 (1985) (including prior ill-will between the victim and the defendant over the victim's planned actions as evidence of premeditation and deliberation).

¶ 22 After the assault, Defendant did not call the police or seek medical attention for Ms. Gaster. Rather, Defendant left North Carolina and fled to Tennessee to seek medical attention for himself. *State v. Sierra*, 335 N.C. 753, 759, 440 S.E.2d 791, 795 (1994) (finding as evidence for premeditation and deliberation that the defendant left his victim to die and instead cared for his own needs).

¶ 23 There was a history of mental, physical, and emotional abuse between Defendant and Ms. Gaster. Ms. Gaster testified that Defendant routinely threatened her with violence during their relationship. In one instance, Defendant previously threatened Ms. Gaster while he was in prison that he would "go postal on you and all your friends" when he thought she cheated on him. *See State v. Potter*, 295 N.C. 126, 131, 244 S.E.2d 397, 401 (1978) (holding the defendant's earlier threats against the victim were evidence permitting inference of premeditation and deliberation). The State presented evidence that Ms. Gaster had previously suffered broken bones as a result of this abuse and was once tied to a tree. *See State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991) (noting prior instances of physical abuse and arguments between the victim and the defendant as evidence of premeditation and deliberation). The record shows that Defendant's history of abuse was sufficient for Ms. Gaster to seek and obtain a DVPO against Defendant in August

2018. Further, Ms. Gaster testified that, during the September 29 assault, Defendant threatened that he "was going to chop [her] up where nobody would find [her] body."

¶ 24 The State's evidence tended to show Defendant's assault on Ms. Gaster on September 29 was lengthy and excessively brutal. Defendant began assaulting Ms. Gaster no later than 3:00 a.m. that night. During the assault, Defendant beat Ms. Gaster with his fists, pulled her up by her hair, and kicked her while she lied on the floor. Defendant continued to assault Ms. Gaster until the sun rose the next morning and Ms. Gaster could hear the birds chirping. *See State v. Vause*, 328 N.C. 231, 239, 400 S.E.2d 57, 62 (1991) (finding sufficient evidence of premeditation and deliberation where the defendant excessively beat female murder victim, shoved her around her home, and paused during assault); *State v. Barts*, 321 N.C. 170, 177, 362 S.E.2d 235, 239 (1987) (holding evidence "that multiple injuries had been inflicted upon the victim in a particularly brutal and vicious beating" was "sufficient evidence from which premeditation and deliberation could be inferred").

¶ 25 When Ms. Gaster sought medical treatment, her face was bleeding and her eyes were swollen shut. Ms. Gaster's injuries were so severe that she had to be treated at a trauma center for broken bones, strangulation, and force-induced kidney failure. *See State v. Robbins*, 319 N.C. 465, 511–12, 356 S.E.2d 279, 306 (1987) ("[T]he nature and number of the victim's wounds is a circumstance from which premeditation and deliberation can be inferred." (citation omitted)). This evidence was sufficient to show premeditation and deliberation.

¶ 26 Defendant contends that his testimony that he began to assault Ms. Gaster only after she stabbed him in the chest shows that he acted with adequate provocation, directly contradicted the evidence recounted above, and therefore created a question of fact regarding his intent which warranted a jury instruction on attempted voluntary manslaughter. *See*, *e.g.*, *State v. McConnaughey*, 66 N.C. App. 92, 96, 311 S.E.2d 26, 29 (1984) (finding evidence supported a verdict of voluntary manslaughter where the victim attacked the defendant first and the defendant shot the victim in the ensuing altercation). However, Defendant's evidence did not excuse, justify, or negate the other overwhelming evidence at trial supporting premeditation and deliberation. "One may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and, to a large extent, controlled by passion at the time." *Bonney*, 329 N.C. at 77, 405 S.E.2d at 154 (citation omitted).

¶ 27 Ms. Gaster admitted during trial that she stabbed Defendant in the chest with a knife. Nonetheless, Defendant's testimony confirmed that

the subsequent assault lasted multiple hours. Defendant testified that he "knew what [he] was doing" and agreed in response to numerous questions from the State that he "could have left at any time." Defendant's testimony did not warrant an instruction on attempted voluntary manslaughter, and it is unlikely that the trial court's alleged failure to instruct the jury on attempted voluntary manslaughter had a probable impact on the jury's decision. The trial court did not commit error, much less plain error, by failing to instruct the jury *ex mero motu* on the lesser-included offense of voluntary manslaughter.

B. Concession of Guilt by Defense Counsel

¶ 28 **[2]** Defendant argues that this Court should remand to the trial court because Defendant's counsel provided ineffective assistance when she "conceded that [Defendant] committed all charged offenses . . . except Attempted First Degree Murder" and "the trial judge [did not] conduct the required inquiry with [Defendant] to ensure voluntary and knowing consent to these admissions of guilt." This Court reviews whether a defendant received effective assistance of counsel, including alleged improper concessions of a defendant's guilt by defense counsel, *de novo*. *State v. Foreman*, 270 N.C. App. 784, 788, 842 S.E.2d 184, 187–88 (2020).

¶ 29 In *State v. Harbison*, our Supreme Court established the rule that "ineffective assistance of counsel, *per se* in violation of the Sixth Amendment [of the U.S. Constitution], has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507–08 (1985). In *Harbison*, the defendant's counsel specifically asked the jury to find the defendant guilty of one charge instead of another, stating: "I think you should find [Defendant] guilty of manslaughter and not first degree [murder]." *Id.* at 178, 337 S.E.2d at 506. The trial court did not inquire whether, and no evidence in the record showed, the defendant knowingly and voluntarily agreed to defense counsel's request. *Id.* The Court explained that "[w]hen counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away." *Id.* at 180, 337 S.E.2d at 507. "[W]hen counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." *Id.*

¶ 30 Our Supreme Court later extended *Harbison* to instances where defense counsel does not expressly request that the jury convict the defendant of a charge, but impliedly concedes the defendant's guilt to a charged offense. In *State v. McAllister*, the defendant was tried for

assault on a female, assault by strangulation, second-degree sexual offense, and second-degree rape. *State v. McAllister*, 375 N.C. 455, 458—59, 847 S.E.2d 711, 714 (2020). In its case-in-chief, the State played for the jury a videotaped police interview with the defendant, in which the defendant admitted that he and the victim got into a rough "tussle," but he denied sexually assaulting her. *Id.* at 458, 847 S.E.2d at 713–14. The defendant also stated in the interview: "[I]f I smacked [her] ass up, then I smacked [her]; I can take the rap for that." *Id.*

¶ 31 During his closing argument, the defendant's counsel referenced the defendant's statements presented in the interview. Defense counsel reminded the jury that the defendant admitted "things got physical. You heard him admit that he did wrong. God knows he did." *Id.* at 473, 847 S.E.2d at 722. Defense counsel told the jury that the defendant "was being honest" during the interview. *Id.* at 460, 847 S.E.2d at 715. Throughout his closing argument, the defendant's "counsel never expressly mentioned [or asked the jury to find the defendant not guilty of] the charge of assault on a female but repeatedly addressed the other three charges against [the] defendant." *Id.* at 473, 847 S.E.2d at 722.

¶ 32 The Court in *McAllister* held that *Harbison* error occurs where counsel's statements "cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense":

> [A] *Harbison* violation . . . encompass[es] situations in which defense counsel impliedly concedes his client's guilt without prior authorization.
>
> . . .
>
> [W]e expressly hold that such an implied admission of guilt can, in fact, constitute *Harbison* error.
>
> . . .
>
> Although an overt admission of the defendant's guilt by counsel is the clearest type of *Harbison* error, it is not the exclusive manner in which a *per se* violation of the defendant's right to effective assistance of counsel can occur. In cases where—as here—defense counsel's statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense, *Harbison* error exists unless the defendant has previously consented to such a trial strategy. In such cases, the defendant is prejudiced in the same manner and to the same degree as if the admission of guilt had been overtly

> made. Thus, our decision in this case is faithful to the rationale underlying *Harbison*.
>
> . . .
>
> [U]nder *Harbison* and its progeny defense counsel was required to obtain the informed consent of [the] defendant before embarking on such a strategy that implicitly acknowledged to the jury his guilt of a separately charged offense.

Id. at 473, 475, 847 S.E.2d at 722, 723–24. The *McAllister* Court concluded that defense counsel's statements constituted error under *Harbison* as "an implied concession of guilt." *Id.* at 476, 847 S.E.2d at 724. The Court found no evidence that the defendant consented to his defense counsel's implied concession, and remanded to the trial court "for an evidentiary hearing . . . for the sole purpose of determining whether [the] defendant knowingly consented in advance to his attorney's admission of guilt to the assault on a female charge." *Id.* at 477, 847 S.E.2d at 725.

¶ 33 Defendant argues that statements made by his defense counsel during opening and closing statements constituted an "implied admission of [his] guilt" identical to *McAllister* because counsel (1) told the jury that Defendant "beat" Ms. Gaster and (2) argued only against the charge of first-degree murder and did not mention Defendant's other charges in closing argument.

¶ 34 First, we disagree with Defendant's assertion that defense counsel's references to Defendant beating Ms. Gaster conceded his guilt to crimes of assault. During opening statements, defense counsel told the jury:

> [Defendant] alleged that [Ms. Gaster] had been unfaithful to him. And you'll hear that he -- he wanted her to tell the truth, that he was going to give her 30 seconds to tell the truth. And her response to "I'll give you 30 seconds" was she stabbed him twice in the abdomen.
>
> Now, this day that turned out to start off so normal, husband and wife spending quality time together, ended up with [Ms. Gaster] in a hospital in North Carolina and [Defendant] in a hospital in Tennessee. Now, how did this come to be? Well, there was only two people in that apartment. [T]he evidence will show what happened between those walls and this couple was a *brutal*, *calculated assault* leaving

> blood-covered walls, bloodstained sheets, and broken furniture, we believe the evidence will show you that it's a result of this couple's very -- and I emphasize "very" – complicated relationship gone awry.

(Emphasis added).

¶ 35 Defendant points specifically to defense counsel's statement that a "brutal, calculated assault" occurred between Ms. Gaster and Defendant as a concession of Defendant's guilt to his assault charges. We cannot agree. Defense counsel had referred only to Ms. Gaster's stabbing of Defendant before she made this statement. Defendant's theory in this case was that Ms. Gaster planned to stab him from the moment she picked him up that evening. According to Defendant's theory, Ms. Gaster completed a "brutal, calculated assault" when she stabbed him with the knife and all of the blood on those "blood-covered walls, blood-stained sheets" came from Defendant's wounds. Defense counsel's opening statement was not a concession of Defendant's guilt.

¶ 36 Defense counsel also made the following statements during closing arguments:

> [T]here's one thing that I need you to focus on about those days. There's not a question as to whether [Ms. Gaster] got beat.
>
> . . .
>
> Ladies and gentleman, that's what it comes down to – premeditation and deliberation. Did [Defendant], in a cool state, form the intent to murder and kill [Ms. Gaster]?
>
> . . .
>
> [Defendant] came up here and he told you in his words, "I beat the hell out of her."
>
> . . .
>
> I'm not asking you to award [Defendant] with Person of the Year. That, he is not. But what we are here to determine is whether or not he is guilty of attempting to murder [Ms. Gaster].
>
> . . .
>
> [Defendant] did not form the intent or premeditation and deliberation to kill [Ms. Gaster]. And because of that and that alone, we ask you to find him not guilty of doing so.

¶ 37 The Court in *McAllister* found the defendant's counsel's statements problematic for three core reasons: "First, defense counsel attested to the accuracy of the admissions made by [the] defendant in his videotaped statement by informing the jurors that [the] defendant was 'being honest.' " *Id.* at 474, 847 S.E.2d at 722. "Second, [the] defendant's attorney not only reminded the jury that [the] defendant had admitted he 'did wrong' during the altercation in which [the victim] got 'hurt,' but defense counsel then proceeded to also state his own personal opinion that 'God knows he did [wrong]'—thereby implying that there was no justification for [the] defendant's use of force against [the victim]." *Id.* at 474, 847 S.E.2d at 723. Third, "at the very end of his closing argument, defense counsel asked the jury to find [the] defendant not guilty of every offense for which he had been charged except for the assault on a female offense." *Id.*

¶ 38 Here, Defense counsel's references to Defendant having beaten Ms. Gaster are distinguishable from the statements made in both *McAllister* and *Harbison*. These references do not depict a circumstance "when counsel to the surprise of his client admits his client's guilt." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507. In *McAllister*, the defendant's statements were introduced through a police interview presented by the State. In this case, Defendant chose to testify on his own behalf, under oath. Before taking the stand, Defendant confirmed that he was aware that he did not have to testify and that he would have to answer questions from both his counsel and the State truthfully. Defendant then repeatedly admitted that he beat Ms. Gaster:

> [Defendant]: I beat the hell out of her. . . . I'm guilty of beating that woman.
>
> . . .
>
> [Defendant]: I beat her for a period of time. . . . You're damn right I beat her.
>
> . . .
>
> [Defendant]: I could have left at any time; you're right. But I don't know who in this room right here has the emotional and the ability to be stabbed by somebody you love and to know they're doing it on purpose to try to kill you that you can control your emotions when you hit them.
>
> . . .
>
> [Defendant]: I did not deny that I beat her that night.

Defense counsel did not bolster the State's evidence or attest to the accuracy of Defendant's admissions. Defense counsel repeated Defendant's own testimony, then urged the jury to evaluate the truth in Defendant's words. Defense counsel repeatedly insisted that adequate provocation justified Defendant's use of force against Ms. Gaster and that provocation negated evidence of premeditation and deliberation.

¶ 39 Further, defense counsel's statement can logically be interpreted as a recitation of facts presented at trial. Our Supreme Court has stated that "[a]dmitting a fact is not equivalent to an admission of guilt." *State v. Wiley*, 355 N.C. 592, 620, 565 S.E.2d 22, 42 (2002) (citing *State v. Strickland*, 346 N.C. 443, 454, 488 S.E.2d 194, 200 (1997)). In *State v. Strickland*, the defendant alleged that his defense counsel committed error under *Harbison* when counsel conceded that the defendant was holding a shotgun at the time the victim was shot by that shotgun. *State v. Strickland*, 346 N.C. 443, 454, 488 S.E.2d 194, 200 (1997). The *Strickland* Court disagreed, holding that defense counsel's statement of an uncontroverted, material fact was not equal to an admission of guilt to a criminal charge:

> We are persuaded that the statements made by defense counsel did not amount to an admission of defendant's guilt. The uncontroverted evidence in this case was that [the] defendant had been holding the gun when [the victim] was shot. Defense counsel's statements were not the equivalent of asking the jury to find [the] defendant guilty of any charge, and therefore, *Harbison* does not control.

Id. (citation omitted)

¶ 40 In this case, the uncontroverted evidence presented at trial by the State and by Defendant's own testimony was that Defendant did use physical force against Ms. Gaster on the night of 28 September 2018. Defendant repeatedly testified, "I beat the hell out of her." Defendant also consistently maintained that he did not inflict serious injury on Ms. Gaster, and insisted: "I never pulled her hair out and I never strangled her. . . . Did I strangle her? No, I did not. Did I pull some of her hair out? No, I did not." Defendant was charged with a number of "assault" charges, but each charge required the State to provide additional evidence beyond the fact that a use of physical force occurred. *See* N.C. Gen. Stat. § 14-32(A) (2017) (defining AWDWISIKI); N.C. Gen. Stat. § 14-32.4 (2017) (defining assault inflicting serious bodily injury); N.C. Gen. Stat. § 14-32.4(B) (defining assault by strangulation).

¶ 41 Defense counsel made no statements which could be construed as concessions to the remaining elements necessary for the State to prove each charge of assault. Defense counsel's statements admitted, at most, a material fact relevant to crimes of assault. *State v. Arnett*, 2021-NCCOA-42, ¶ 42, 276 N.C. App. 106, 856 S.E.2d 123, 129 ("[D]efense counsel can admit an element of a charge without triggering a *Harbison* violation.").

¶ 42 This case is similar to the facts in *McAllister* in that defense counsel's omissions, rather than affirmative statements, are the basis for alleged error. In *McAllister*, defense counsel mentioned three out of the defendant's four charges in closing argument; the jury found the defendant guilty of the single unmentioned charge. *McAllister*, at 460–61, 847 S.E.2d at 715. Here, defense counsel mentioned one of Defendant's seven charges during closing argument; the jury found Defendant guilty of five of the six unmentioned charges. The Court in *McAllister* cautioned that "a finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence" and stressed that their holding was appropriate based upon "the unique circumstances contained in the record" of the "unusual case" before the Court. *Id.* at 476, 847 S.E.2d at 724. Absent wholly similar "unique circumstances[,]" wherein defense counsel's affirmative statements either expressly or impliedly concede the defendant's guilt, we do not find a defense counsel's failure to mention the defendant's less severe charges to alone constitute *Harbison* error. The trial court did not err by allowing defense counsel to make the challenged statements without first conducting an inquiry into Defendant's consent.

C. Distinct Evidence of Confinement

¶ 43 **[3]** Defendant contends the trial court erred by denying his motion to dismiss the charge of first-degree kidnapping because "the State failed to introduce sufficient evidence of confinement separate from that which was inherent in the commission of the assaults on Ms. Gaster." We disagree.

¶ 44 We review the denial of a motion to dismiss *de novo*, to determine whether, in the light most favorable to the State, "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." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citation omitted). "When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *State v. Scott*, 356 N.C. 591, 596–97, 573 S.E.2d 866, 869 (2002) (citation omitted).

¶ 45 Under North Carolina law, the essential elements of first-degree kidnapping are: (1) the unlawful confinement, restraint, or movement from one place to another of any person age sixteen or older without their consent; (2) for the purpose of, inter alia, "[f]acilitating the commission of any felony" or "doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person"; where (3) "the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted[.]" *State v. Jerrett*, 309 N.C. 239, 260, 307 S.E.2d 339, 350 (1983) (citation omitted); N.C. Gen. Stat. § 14-39 (2017).

¶ 46 To avoid double jeopardy, "a kidnapping charge cannot be sustained if based upon restraint[, confinement, or movement] which is an inherent feature of another felony." *State v. Williams*, 308 N.C. 339, 346, 302 S.E.2d 441, 447 (1983). "The key question . . . is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping 'exposed [the victim] to greater danger than that inherent in the [underlying felony] itself, . . . [or] is . . . subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.' " *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (citation omitted).

¶ 47 The State presented evidence that Defendant confined Ms. Gaster to her apartment through actions apart from confinement inherent in the many instances of assault. Ms. Gaster testified that "if [she] were able to get away" during the night of 28 September, she would "have gotten out of there and left[.]" But Defendant kept her there.

¶ 48 At some point, Defendant "ran over to the blinds[,] and he was trying to hang them back up so nobody could see what was going on inside." Ms. Gaster ran for the door of her bedroom, "was almost out[,] and he grabbed [her] by [her] hair and he pulled [her] back in and started beating [her] some more." The evidence allowed a reasonable inference that Defendant chose to close the blinds and to wholly confine Ms. Gaster to her apartment to prevent her from seeking aid. *See State v. Newman*, 308 N.C. 231, 239, 302 S.E.2d 174, 180—81 (1983) (holding movement of rape victim from her car into the woods before sexual assault occurred was not inherent in the assault, but instead "was a separate course of conduct designed to remove her from the view of a passerby who might have hindered the commission of the crime"); *cf. State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981) (holding victim's "removal to the back of the store was an inherent and integral part of the attempted armed robbery" because the defendant commanded the victim to open the safe in the back room).

¶ 49 Essentially, at this time, Defendant had ceased assaulting Ms. Gaster, could have let her leave the apartment, and had an opportunity to not begin assaulting her once more. *State v. Fulcher*, 294 N.C. 503, 524, 243 S.E.2d 338, 352 (1978) (holding evidence that victims were bound and prevented from leaving before suffering sexual assault was evidence of confinement distinct from the assault, because "the crime of kidnapping was complete, irrespective of whether the then contemplated [felony] ever occurred"). Ms. Gaster was specifically prevented from leaving her apartment and denied the opportunity to reach safety, subjecting her to further abuse. The trial court did not err in denying Defendant's motion to dismiss the charge of first-degree kidnapping.

III. Conclusion

¶ 50 We hold the trial court did not commit plain error by not instructing the jury *ex mero motu* on the lesser-included offense of attempted voluntary manslaughter because the evidence did not support such an instruction. The trial court also did not err by not conducting an inquiry into Defendant's consent to defense counsel's statements in opening and closing arguments. The content of defense counsel's arguments did not constitute *Harbison* error as implied concessions of guilt. Finally, the trial court did not commit error by denying Defendant's motion to dismiss the charge of first-degree kidnapping because there was sufficient evidence of confinement to support the charge distinct from evidence of assault.

NO ERROR.

Judges TYSON and ARROWOOD concur.

STATE v. HALES

[282 N.C. App. 178, 2022-NCCOA-134]

STATE OF NORTH CAROLINA
v.
JOSEPH ADAMS HALES, III, DEFENDANT

No. COA21-121

Filed 1 March 2022

1. Criminal Law—selective prosecution—interracial marriage—no evidence of discrimination

In a prosecution for violation of N.C.G.S. § 14-4 for defendant's failure to bring his property into compliance with a city ordinance, the trial court properly denied defendant's motion to dismiss for selective prosecution where defendant alleged that he was selected for prosecution because of his interracial marriage but failed to offer any evidence to show that the State targeted or discriminated against him in prosecuting him.

2. Search and Seizure—reasonable expectation of privacy—lawful, public vantage points—public roadway and neighbor's property

In a prosecution for violation of N.C.G.S. § 14-4 for defendant's failure to bring his property into compliance with a city ordinance, the trial court properly denied defendant's motion to suppress where the evidence against defendant was obtained by a city code inspector's observations from a public roadway and from a neighboring property where he had the owner's permission to be.

3. Criminal Law—motions made before trial—hearing and ruling on motions—trial court's discretion

In a prosecution for violation of N.C.G.S. § 14-4 for defendant's failure to bring his property into compliance with a city ordinance, while defendant argued on appeal that the trial court erred in hearing arguments on his motion to suppress all evidence and his motion to dismiss for selective prosecution at trial (rather than holding separate hearings), his argument was meritless where, contrary to his assertion, the trial court heard arguments on the motions immediately before the trial. The trial court denied defendant's motion to dismiss before trial and held in abeyance its ruling on the motion to suppress until after all the evidence had been presented. None of the trial court's actions were erroneous.

4. Criminal Law—summons—correct statutory reference—incorrect city ordinance reference

In a prosecution for violation of N.C.G.S. § 14-4 for defendant's failure to bring his property into compliance with a city ordinance, the criminal summons was not defective even though it identified the incorrect city ordinance that defendant allegedly violated (city code subsection 16(a)(1), which required property owners to keep their premises free from breeding grounds for insects and pests, rather than subsection 16(a)(6), regarding dangerous metal and appliances). The summons correctly identified N.C.G.S. § 14-4 as the statutory basis for the charge, and it correctly stated that the charge was based on defendant's failure to "remove all metal items from the yard."

5. Sentencing—violation of city ordinance—fine—maximum—pretrial release

In a prosecution for violation of N.C.G.S. § 14-4 for defendant's failure to bring his property into compliance with a city ordinance, the trial court erred in its application of sentencing requirements for a Class 3 misdemeanor with one prior conviction, where it sentenced defendant to a 15-day term of incarceration and 18 months of probation. Pursuant to statute, only a fine was permissible, and because the city ordinance did not specify a maximum fine, the fine could not exceed $50. However, the trial court did not err by imposing conditions of pretrial release.

6. Constitutional Law—effective assistance of counsel—pro se defendant

Where defendant chose to proceed pro se in a prosecution for his failure to bring his property into compliance with a city ordinance, he could not claim on appeal that he received ineffective assistance of counsel for his own deficient performance as counsel.

7. Constitutional Law—right against self-incrimination—waiver—pro se defendant—trial court's instruction

Where a pro se defendant chose to testify in a prosecution for his failure to bring his property into compliance with a city ordinance, the trial court did not err in its statement of law informing him of his right against self-incrimination and the consequences of waiving that right.

Appeal by Defendant from judgment entered 30 July 2020 by Judge James F. Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 1 December 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Colin Justice, for the State-Appellee.

Joseph Adams Hales, III, pro se Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Joseph Adams Hales appeals from judgment entered upon his conviction of violating N.C. Gen. Stat. § 14-4 for failure to bring his property into compliance with a local ordinance. We discern no error in Defendant's conviction. However, because the trial court imposed a statutorily impermissible sentence upon Defendant, we vacate Defendant's sentence and remand for resentencing.

I. Background

¶ 2 Throughout 2017 and 2018, the City of Fayetteville, North Carolina, received multiple complaints concerning Defendant's property, including excessive noise, unauthorized use of a generator, and a domestic disturbance. In the fall of 2018, the City received an anonymous written complaint that Defendant's property was one of the "worst looking houses" the complainant had "ever seen" and "should be condemned." Fayetteville City Code Inspector Jeffrey Morin responded to the complaint. Morin discovered that Defendant's property was littered with various metal items, debris, and construction materials, which posed a danger to others. Morin took photos of Defendant's property from a public roadway and from a neighboring property with permission of the owner. The City of Fayetteville issued a citation and mailed several notices to Defendant for violating City of Fayetteville Code of Ordinances, Chapter 22 ("Ordinance") for "failure to keep premises free from public health and safety nuisances." Fayetteville, N.C., Code of Ordinances, § 22-16(a) (2019).

¶ 3 After failing to correct the issues identified in the citation, Defendant was charged with violating N.C. Gen. Stat. § 14-4 (2019), which states, "[I]f any person shall violate an ordinance of a county, city, town, or metropolitan sewerage district created under Article 5 of Chapter 162A, he shall be guilty of a Class 3 misdemeanor . . . ." Defendant was issued a criminal summons on 13 September 2019 stating that Defendant's property was in violation of City of Fayetteville Code of Ordinances Section 22-16(a) for "fail[ure] to remove all metal items from the yard" after due notice. Defendant's case came on for trial on 1 October 2019 in Cumberland County Environmental Court. Defendant was convicted of violating N.C. Gen. Stat. § 14-4.

¶ 4 Defendant appealed to superior court. At a hearing on 7 July 2020, Defendant waived his right to counsel and elected to proceed *pro se*. Defendant also waived his right to a jury trial. Defendant filed pre-trial motions to dismiss for selective prosecution and to suppress all evidence. The motions were heard on 30 July 2020, just prior to trial. After hearing argument on the motions, the trial court denied Defendant's motion to dismiss for selective prosecution. The trial court postponed its ruling on the motion to suppress until all evidence had been heard at trial. The case then came on for trial. The State presented evidence, including the testimony of Inspector Morin. Defendant testified on his own behalf. At the close of the evidence, the trial court denied Defendant's motion to suppress.

¶ 5 The trial court found Defendant guilty of violating a local ordinance under N.C. Gen. Stat. § 14-4. The trial court found Defendant had one prior conviction, giving him a prior record level II, and sentenced Defendant to 15 days' confinement. The trial court suspended the sentence, placed him on supervised probation for 18 months, and ordered him to comply with the regular conditions of probation and several special conditions of probation. The trial court also imposed a $100.00 fine plus $372.50 in costs. The trial court stayed probation and payment of the fine and costs pending appeal and imposed the following conditions of pretrial release: post a $500.00 bond; not violate any criminal law; not violate any city code, ordinance, rule, or regulation; and allow the city inspectors to inspect Defendant's property upon 48 hours' written notice either delivered to Defendant or posted on his door.

¶ 6 The trial court entered judgment on 30 July 2020. Defendant timely appealed.

II. Discussion

A. Motion to Dismiss

¶ 7 **[1]** Defendant argues that the trial court erred by denying his motion to dismiss for selective prosecution.[1]

¶ 8 A trial court's ruling on a motion to dismiss criminal charges is reviewed de novo. *State v. Cole*, 199 N.C. App. 151, 156, 681 S.E.2d 423, 427 (2009).

¶ 9 "To prevail on a selective prosecution challenge, a defendant must first make a *prima facie* showing that he has been singled out for prosecution while others similarly situated and committing the same acts

1. This is Defendant's issue III.

have not." *State v. Rogers*, 68 N.C. App. 358, 367, 315 S.E.2d 492, 500 (1984) (quotation marks and citation omitted). "[A]fter doing so, he must demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." *State v. Pope*, 213 N.C. App. 413, 416, 713 S.E.2d 537, 540 (2011) (quotation marks and citation omitted). The defendant carries the burden to allege "that he has been selectively prosecuted . . . [and] must establish discrimination by a clear preponderance of proof." *Id.* at 415-16, 713 S.E.2d at 540 (quotation marks and citation omitted). When selective prosecution is shown, the proper remedy is dismissal. *See State v. Howard*, 78 N.C. App. 262, 266, 337 S.E.2d 598, 601 (1985).

¶ 10 In his motion to dismiss, Defendant alleged that he had "been singled out as a violator of the code . . . by a person with a dubious background acting in Representation of the City of Fayetteville, North Carolina as a 'code enforcer.' " Defendant further alleged that a neighbor "solicited" the code enforcer, Mr. LaMont DeBerry, to target Defendant, who is white, because of Defendant's interracial marriage to his wife, who is black. At the hearing, however, Defendant offered no evidence to support his allegations. Although Defendant introduced evidence at trial, including reports of the complaints to the City about his property, the evidence was not introduced until after the trial court had denied his motion to dismiss at the pretrial hearing.

¶ 11 As Defendant offered no evidence, much less the clear preponderance of evidence required, to show the State targeted or discriminated against Defendant in prosecuting him, the trial court did not err by denying Defendant's motion to dismiss for selective prosecution.

B. Motion to Suppress

¶ 12 **[2]** Defendant next argues that the trial court erred by denying Defendant's motion to suppress all evidence on the ground that the evidence was obtained in violation of his Fourth Amendment right to be free from warrantless search and seizure, and in violation of his privacy and property rights.[2]

¶ 13 Generally, the standard of review in evaluating a trial court's denial of a motion to suppress is "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (quoting *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824,

2. These are Defendant's issues IV and VIII.

827 (2012)). However, when "evaluating a trial court's denial of a motion to suppress when the facts are not disputed and the trial court did not make specific findings of fact either orally or in writing, we infer the findings from the trial court's decision and conduct a de novo assessment of whether those findings support the ultimate legal conclusion reached by the trial court." *State v. Nicholson*, 371 N.C. 284, 288, 813 S.E.2d 840, 843 (2018). Likewise, the standard of review for questions concerning constitutional rights is de novo. *State v. Fernandez*, 256 N.C. App. 539, 543, 808 S.E.2d 362, 366 (2017).

¶ 14 There is no reasonable expectation of privacy in private property which can be seen in plain view from lawful, public vantage points. *State v. Grice*, 367 N.C. 753, 756, 767 S.E.2d 312, 315-16 (2015). "The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

¶ 15 Here, Inspector Morin testified that he viewed and took photos of Defendant's property from a public roadway and from a neighboring property where he had secured permission from the neighbor to be on their property. Uncontroverted evidence at trial showed that Inspector Morin's observations and his taking of photographs occurred in public areas and places in which he had a right to be.

¶ 16 Accordingly, the trial court's inferred factual findings arising from the uncontroverted evidence support the trial court's conclusion of law that Defendant's Fourth Amendment rights were not violated by Inspector Morin's investigation. *See Grice*, 367 N.C. at 756, 767 S.E.2d at 315-16. The trial court did not err by denying Defendant's motion to suppress.

C. Trial Court's Hearings on Defendant's Motions

¶ 17 **[3]** Defendant argues the trial court erred by not holding separate hearings on Defendant's motion to dismiss for selective prosecution and motion to suppress all evidence, but instead heard arguments on both motions at trial.[3]

¶ 18 "When a motion is made before trial, the court in its discretion may hear the motion before trial, on the date set for arraignment, on the date set for trial before a jury is impaneled, or during trial." N.C. Gen. Stat. § 15A-952(f) (2019); *see also State v. Skeels*, 346 N.C. 147, 153, 484 S.E.2d 390, 393 (1997) ("Whether to hear and rule on a motion before or during

3. This is Defendant's issue I.

trial is within the discretion of the trial court.") (citing N.C. Gen. Stat. § 15A-952(f)).

¶ 19 Contrary to Defendant's assertion that the trial court heard arguments on both motions at trial, the record reflects that the trial court heard arguments from the parties on both motions immediately preceding the trial. The trial court denied Defendant's motion to dismiss prior to trial and held in abeyance its ruling on the motion to suppress until the trial court had heard all the evidence. Defendant has not shown any legal error or abuse of discretion in the trial court's actions, and we discern none. Defendant's argument lacks merit.

D. Criminal Summons

¶ 20 **[4]** Defendant next argues that the summons delivered to him was defective because it referenced the incorrect statutory subsection.[4]

¶ 21 The criminal summons, signed by a magistrate, charged Defendant with violating N.C. Gen. Stat. § 14-4 and provided the following factual allegations:

> I, the undersigned, find that there is probable cause to believe that on or about the date of the offense shown and in the county named above you unlawfully and willfully did AFTER DUE NOTICE FAIL[] TO REMOVE ALL METAL ITEMS FROM THE YARD LOCATED AT [DEFENDANT'S ADDRESS], FAYETTEVILLE, NC, IN VIOLATION OF CHAPTER 22, SECTION 16(A)(1) OF THE CITY OF FAYETTEVILLE CODE OF ORDINANCES.

¶ 22 Chapter 22, Section 16(a)(1) of the City of Fayetteville Code of Ordinances requires property owners to keep their premises free from breeding grounds for insects and pests,[5] and Section 16(a)(6) requires property owners to keep their premises free from dangerous metal items and appliances.[6] While the factual allegation that Defendant "fail[ed] to

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4. This is Defendant's issue VI.

5. Section 22-16(a)(1) provides: "Every person owning or occupying any premises in the city shall keep such premises free from . . . [a]ny condition which constitutes a breeding ground or harbor for rats, mosquitos, harmful insects, or other pests." Fayetteville, N.C., Code of Ordinances, § 22-16(a)(1).

6. Section 22-16(a)(6) provides: "Every person owning or occupying any premises in the city shall keep such premises free from . . . [a]ny furniture, appliances or other metal products of any kind or nature openly kept which have jagged edges of metal or glass

remove all metal items" from his yard seems a violation of Section 16(a)(6) as opposed to Section 16(a)(1), "[n]o criminal summons is invalid because of any technicality of pleading if the statement is sufficient to identify the crime or infraction." N.C. Gen. Stat. § 15A-303(b) (2019). The summons listed N.C. Gen. Stat. § 14-4 as the statutory basis for the charge against Defendant, thus correctly identifying the crime with which Defendant was charged. *See State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984) ("An indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense."). Furthermore, the summons indicated that the charge was based on Defendant's failure "to remove all metal items from the yard," thus indicating to Defendant the proper city ordinance subsection of which he was in violation. The summons was not defective in that Defendant had sufficient notice of the charge against him.

E. Sentencing

¶ 23 **[5]** Defendant argues, and the State concedes, that the trial court erred in applying the sentencing requirements for a Class 3 misdemeanor with one prior conviction.[7]

¶ 24 Defendant was convicted of violating N.C. Gen. Stat. § 14-4 for violating City of Fayetteville Ordinance, Section 22-16(a), and the trial court found Defendant had one prior conviction. Pursuant to N.C. Gen. Stat. § 15A-1340.23, "[u]nless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine." N.C. Gen. Stat. § 15A-1340.23(d) (2019). An individual convicted of violating a city ordinance pursuant to N.C. Gen. Stat. § 14-4[8] is "guilty of a Class 3 misdemeanor and shall be fined not more than five hundred dollars ($500.00). No fine shall exceed fifty dollars ($50.00) unless the ordinance expressly states that the maximum fine is greater than fifty dollars ($50.00)." N.C. Gen. Stat. § 14-4(a).

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where such furniture, appliances or other metal products poses a source of danger for children through entrapment in areas of confinement that cannot be opened from the inside." *Id.* § 22-16(a)(6).

7. This is Defendant's issue XI.

8. Section 14-4(b) provides an exception to the penalties prescribed by Section 14-4(a) for violations of traffic and parking ordinances, which are considered infractions, and carry a maximum fine of $50.00. N.C. Gen. Stat. § 14-4(b).

¶ 25 Section 22-16 of the City of Fayetteville Code of Ordinances is silent as to the maximum fine for a violation of (a)(1) through (a)(6) of this section. *See* Fayetteville, N.C., Code of Ordinances, § 22-16. While subsection (d) expressly states that an individual who violates "(c)(1) through (c)(8) of this section . . . shall be subject to a civil penalty of $500.00 and shall be responsible for the city's cost of removal of such items,"[9] one must look outside the Code to the city council's approved fee and penalty schedule to determine the maximum fine for a violation of subsection (a) of Section 22-16.

¶ 26 Because "the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine," N.C. Gen. Stat. § 15A-1340.23(d), the trial court erred by sentencing Defendant to a 15-day term of incarceration and 18 months' probation. Furthermore, because Section 22-16 does not expressly state that the maximum fine for a violation of Section 22-16(a) is greater than $50.00, the maximum fine for Defendant's violation of N.C. Gen. Stat. § 14-4 is $50.00. The trial court thus erred by imposing a $100.00 fine. Accordingly, we vacate Defendant's sentence and remand to the trial court for resentencing.

¶ 27 Defendant also argues that the trial court erred by imposing upon him conditions of pretrial release pending appeal.[10]

¶ 28 "A defendant whose guilt has been established in the superior court . . . [who] has filed an appeal from the judgment entered may be ordered released upon conditions in accordance with the provisions of this Article." N.C. Gen. Stat. § 15A-536(a) (2019). "If release is ordered, the judge must impose the conditions set out in [N.C. Gen. Stat. §] 15A-534(a) which will reasonably assure the presence of the defendant when required and provide adequate protection to persons and the community." N.C. Gen. Stat. § 15A-536(b). N.C. Gen. Stat. § 15A-534(a) authorizes a judicial official to "[r]elease the defendant upon his execution of an unsecured appearance bond in an amount specified by the judicial official" and to "place restrictions on the travel, associations, conduct, or place of abode of the defendant as conditions of pretrial release." N.C. Gen. Stat. § 15A-534(a) (2019). N.C. Gen. Stat. § 15A-536 applies to a defendant who is not in custody and whose probation has

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9. Subsection (c) prohibits illegally dumping, leaving, or disposing of certain items upon property within the city limits.

10. This is Defendant's issue XII.

been stayed pending appeal. *State v. Howell*, 166 N.C. App. 751, 753-54, 603 S.E.2d 901, 903-04 (2004).

¶ 29 Accordingly, the trial court did not err by imposing the following conditions of pretrial release upon Defendant, pending the disposition of his appeal: post a $500.00 secured bond; not violate any criminal law; not violate any city code, ordinance, rule, or regulation; and allow the city inspectors to inspect Defendant's property upon 48 hours' written notice either delivered to Defendant or posted on his door.

F. Ineffective Assistance of Counsel

¶ 30 **[6]** Throughout his brief, Defendant argues ineffective assistance of counsel for his own deficient and inadequate performance as counsel.[11] But "[i]f a defendant chooses to proceed pro se, he cannot on appeal claim ineffective assistance of counsel." *State v. Thomas*, 331 N.C. 671, 677, 417 S.E.2d 473, 477 (1992). As Defendant waived his right to counsel at trial and chose to proceed pro se, Defendant's ineffective assistance of counsel arguments are without merit.

G. Right Against Self-Incrimination

¶ 31 **[7]** Defendant argues that the trial court gave him contradictory rules regarding his right against self-incrimination.[12] Defendant contends that the trial court told him both that he cannot be made to testify against himself and that by choosing to take the stand, he loses his right against self-incrimination.

¶ 32 The trial court stated:

> You have the absolute right to testify. Nobody can stop you from testifying. You have the absolute right to not testify and nobody can make you testify. You cannot be compelled to be a witness against yourself. If you choose to testify, you will be placed under oath and must answer all the questions truthfully, including the questions asked by the Court and the questions asked by the state. You will have given up your right [against] self-incrimination by taking the witness stand.

¶ 33 This is a correct statement of the law. *See Harrison v. United States*, 392 U.S. 219, 222 (1968) ("A defendant who chooses to testify waives

11. These are Defendant's issues I, II, X, and XIII.

12. This is Defendant's issue IV.

his privilege against compulsory self-incrimination with respect to the testimony he gives[.]"); *Kansas v. Cheever*, 571 U.S. 87, 88 (2013) ("[W]hen a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination."). The trial court, therefore, did not err when it gave this instruction.

H. Abandoned Arguments

¶ 34 Defendant has failed to make arguments or cite authorities sufficient for this Court to understand and address the remaining issues presented in his brief.[13] These issues are deemed abandoned and we do not address them. *See* N.C. R. App. P. 28(b)(6) (An appellant's brief must contain "[a]n argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

III. Conclusion

¶ 35 We discern no error in Defendant's conviction for violating N.C. Gen. Stat. § 14-4. However, because the maximum punishment for this conviction is a $50.00 fine, the trial court erred by sentencing Defendant to suspended confinement and probation, and imposing a $100.00 fine. We vacate Defendant's sentence and remand for resentencing consistent with this opinion.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges DILLON and ZACHARY concur.

13. These are Defendant's issues II, V, VII, IX, X, and XIII.

STATE v. JULIUS

[282 N.C. App. 189, 2022-NCCOA-135]

STATE OF NORTH CAROLINA
v.
JOANNA KAYE JULIUS

No. COA20-548

Filed 1 March 2022

1. Search and Seizure—motion to suppress—warrantless search of vehicle following accident—driver fled on foot

Officers had reasonable suspicion to search a vehicle that was involved in a single-car accident to look for the driver's identification because the purported driver fled on foot due to having outstanding warrants for his arrest and defendant (whose parents owned the car and who was a passenger when it wrecked) said she could only give the driver's first name. Therefore, defendant's motion to suppress the methamphetamine that was found in the vehicle was properly denied.

2. Drugs—jury instructions—possession of methamphetamine—knowledge element

In a drug prosecution in which methamphetamine was found in defendant's backpack and in a second bag that was located in the same vehicle—but which defendant claimed belonged to the driver who fled the scene—the trial court adequately instructed the jury with regard to the knowledge element of the charges, requiring the State to prove that defendant "knowingly" possessed methamphetamine.

Judge INMAN dissenting in part and concurring in result only in part.

Appeal by defendant from judgments entered 17 April 2019 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 5 October 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General William Walton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah Hall Love, for defendant-appellant.

TYSON, Judge.

¶ 1 Joanna Kaye Julius ("Defendant") appeals her convictions of trafficking in methamphetamine by possession and possession of methamphetamine with the intent to sell or deliver. We find no error.

I. Background

¶ 2 McDowell County Sheriff's Deputy Jesse Hicks ("Deputy Hicks") and State Highway Patrol Trooper Justin Sanders ("Trooper Sanders") responded to a single-car accident on Tom's Creek Road on 20 May 2018. At the time of the crash, Defendant was the passenger and her acquaintance, Kyle, was driving the vehicle with Defendant's permission. The silver Suzuki SUV was owned by Defendant's parents, and had come to rest in a drainage ditch on the side of the road, with the driver's side partially submerged in water.

¶ 3 At least three witnesses at the site of the accident told the officers the driver had fled the scene and walked into nearby woods because of having outstanding warrants. Defendant stood alone, away from those gathered on the side of the road, with a pink backpack on the ground next to her. She provided Trooper Sanders with her identification from the wallet inside her pink backpack. Defendant also told Trooper Sanders the driver, a man she knew as Kyle, had fled the scene. Defendant claimed not to know Kyle's full or last name.

¶ 4 Trooper Sanders searched the SUV to "look[ ] for Kyle's driver's license or ID." He entered the car through the passenger side and found a black and green Nike bag on the passenger side floorboard. Inside the Nike bag, Trooper Sanders discovered a black box. Inside the box were two cell phones, a scale, and two large bags of a clear crystal-like substance, which was later determined to be 40.83 grams of methamphetamine.

¶ 5 Officers placed Defendant into custody after locating the substances inside of the vehicle. The officers searched her pink backpack. Inside of Defendant's backpack, the officers found a glass smoking pipe, five cell phones, a handgun, a notebook, $1,785 in cash, and a clear container holding several bags of a white crystal-like substance, one of which contained one tenth of an ounce of methamphetamine.

¶ 6 Defense counsel filed a pretrial motion to suppress the evidence found in the black and green Nike bag and the pink backpack, alleging the search of the vehicle violated Defendant's Fourth Amendment protection from unreasonable searches and seizures.

¶ 7 During a hearing on 5 March 2019, Trooper Sanders testified he had searched the vehicle to locate the driver's identification in order to

investigate the motor vehicle collision and a potential hit-and-run. The alleged driver, Kyle, had left the scene of a car accident after causing property damage. The trial court concluded the warrantless search was constitutional because Trooper Sanders had probable cause to search the SUV and denied Defendant's motion.

¶ 8 Defendant was indicted for two counts of possession of methamphetamine, possession of drug paraphernalia, two counts of trafficking methamphetamine, possession with intent to sell and deliver a Schedule II controlled substance, and failure to appear.

¶ 9 Defendant's trial began on 15 April 2019. Defendant pled guilty to possession of methamphetamine. Pursuant to her plea, the State agreed to consolidate the conviction of possession of methamphetamine with Defendant's conviction of possession with intent to sell and deliver methamphetamine in 18 CRS 50818 and dismiss the charges of possession of drug paraphernalia and failure to appear.

¶ 10 Defendant was convicted of trafficking in methamphetamine by possession by a jury's verdict and sentenced to the mandatory minimum of 70 to maximum 93 months imprisonment. The court consolidated Defendant's convictions of possession with intent to sell and deliver and possession of methamphetamine for judgment, and imposed a sentence of 6-17 months in prison that was suspended for 30 months of supervised probation, to commence upon Defendant's release from prison. Defendant appealed.

II. Jurisdiction

¶ 11 Appellate jurisdiction is proper pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

¶ 12 Defendant contends the trial court: (1) erred in denying her motion to suppress evidence found in a warrantless search of her parents' vehicle without sufficient probable cause; and, (2) plainly erred by failing to provide an additional instruction about her actual knowledge of the drugs found inside the vehicle.

IV. Standard of Review

> In examining the case before us, our review is limited. It is the trial judge's responsibility to make findings of fact that are supported by the evidence, and then to derive conclusions of law based on those findings of fact. Where the evidence presented supports the trial

> judge's findings of fact, these findings are binding on appeal. . . . The trial court's conclusions of law, however, are fully reviewable on appeal.

State v. Hughes, 353 N.C. 200, 207–08, 539 S.E.2d 625, 630–31 (2000).

V. Defendant's Motion to Suppress

¶ 13 **[1]** It is well established that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions." *State v. Fizovic*, 240 N.C. App. 448, 452, 770 S.E.2d 717, 720 (2015) (citations omitted).

> [W]here a search of a suspect's person occurs before instead of after formal arrest, such search can be equally justified as "incident to the arrest" provided probable cause to arrest existed prior to the search and it is clear that the evidence seized was in no way necessary to establish the probable cause. If an officer has probable cause to arrest a suspect and as incident to that arrest would be entitled to make a reasonable search of his person, we see no value in a rule which invalidates the search merely because it precedes actual arrest. The justification for the search incident to arrest is the need for immediate action to protect the arresting officer from the use of weapons and to prevent destruction of evidence of the crime.

State v. Wooten, 34 N.C. App. 85, 89–90, 237 S.E.2d 301, 305 (1977) (citation and quotation marks omitted).

¶ 14 The same reasoning in *Wooten* applies to the search of Defendant's parents' vehicle involved in the accident and subsequently of her person and backpack. Our Supreme Court held, "when investigators have a reasonable and articulable basis to believe that evidence of the offense of arrest might be found in a suspect's vehicle after the occupants have been removed and secured, the investigators are permitted to conduct a search of that vehicle." *State v. Mbacke*, 365 N.C. 403, 409-10, 721 S.E.2d 218, 222 (2012).

¶ 15 Defendant challenges the following conclusion of law: "Trooper J.L. Sanders did not know . . . the true identity of the suspect, the cause of the collision, the extent of any damage caused by the collision, or the reason the alleged perpetrator had fled, if any. The answer to those inquiries lay within the vehicle driven by Kyle Lytle."

¶ 16 Here, the evidence and findings show officers received a dispatch call and responded to the scene of a vehicle accident. Defendant told officers the vehicle belonged to her parents, she was a passenger in the car at the time of the accident, and she had allowed Kyle to drive the SUV. Defendant stated she did not know "Kyle's full name."

¶ 17 Officers on the scene were told the purported driver of the vehicle had fled from the scene because he had pending active arrest warrants. Defendant claimed she was not driving the vehicle at the time of the accident. Defendant could not tell officers if the purported driver had taken his driver's license or other identification with him. Trooper Saunders' search of the vehicle was limited to plain view areas and containers in which the alleged driver's identification could have reasonably been located.

¶ 18 Officers had reasonable suspicion to search the vehicle to verify the claims of another occupant and custodian of the vehicle to determine that alleged driver's identity. Kyle's true identity was unknown at the time of the search. Kyle's identification may not have been inside the vehicle, but there was no other way for the officers to try to find information to identify the driver if the passengers and other witnesses did not know or would not provide his full name. The identification of the purported driver may have reasonably been determined from looking inside the wrecked vehicle.

¶ 19 It is not disputed, and evidence supports the trial court's finding that the officers did not know the "true identity" of the purported driver, the cause of the collision, the extent of the damage caused by the collision, or the reason the driver had fled. Presuming the last sentence of the conclusion: "The answer to those inquiries lay within the vehicle" is overstated, the officers were trying to identify the driver, who had fled from the scene of the accident, which itself is a crime, and who reportedly had outstanding warrants for other crimes. Defendant providing the name "Kyle" did not identify the driver. As it turned out, "Kyle" was the middle name of the driver.

¶ 20 In either event, the officers were justified in searching the wrecked vehicle to get it out of the ditch for an inventory or for officer safety. Officers searched the vehicle in an effort to find the purported driver's name or some means of identification. Once they discovered the black and green Nike bag containing drug-like substances and multiple cell phones was discovered, the officer testified "the nature of the investigation changed." The trial court properly denied Defendant's motion to suppress. *Mbacke*, 365 N.C. at 409-10, 721 S.E.2d at 222.

VI. Jury Instructions

¶ 21 **[2]** Defendant failed to object to the jury instructions at trial and is limited only to appellate review for plain error. "[T]o rise to the level of plain error, the error in the instructions must be so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Barton*, 335 N.C. 696, 702, 441 S.E.2d 295, 298 (1994) (citation and internal quotation marks omitted).

¶ 22 "A jury instruction must be evaluated as a whole. If the entire instruction is an accurate statement of the law, one isolated piece that might be considered improper or wrong on its own will not be found sufficient to support reversal." *State v. Roache*, 358 N.C. 243, 311, 595 S.E.2d 381, 424 (2004).

¶ 23 Defendant argues the court failed to instruct on the knowledge element of the illegal drug charges. The jury was instructed that the State must prove Defendant "knowingly" possessed methamphetamine. The trial court adequately advised the jury of the knowledge requirement by stating, "[a] person possesses methamphetamine if the person is aware of its presence . . . and intent to control the disposition or use of that substance."

¶ 24 In totality, the jury was sufficiently instructed the State had to prove beyond a reasonable doubt that Defendant knowingly possessed methamphetamine, and Defendant could not be convicted if she lacked knowledge of the methamphetamine found inside of her parent's vehicle. *Roache*, 358 N.C. at 311, 595 S.E.2d at 424. The trial court properly instructed the jury that the State had to prove beyond a reasonable doubt that Defendant knowingly possessed methamphetamine. Defendant's argument is overruled.

VII. Conclusion

¶ 25 The trial court properly denied Defendant's motion to suppress. Officers had reasonable suspicion to search the vehicle involved in an accident to find the identification of the purported driver and, from the contents of black and green Nike bag, developed probable cause to search Defendant's person and backpack. The trial court's instructions to the jury adequately explained the knowledge element and requirement of the possession of methamphetamines charge. Defendant received a fair trial free from prejudicial errors. We affirm the findings and conclusions as noted to deny Defendant's motion to suppress and find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Chief Judge STROUD concurs.

Judge INMAN dissents in part and concurs in the result only in part with separate opinion.

INMAN, Judge, dissenting in part; concurring in result only in part.

¶ 26 Because the evidence and argument presented to the trial court did not establish probable cause for the warrantless search of Defendant's parent's vehicle, I respectfully dissent from the majority's decision affirming the trial court's denial of Defendant's motion to suppress. I concur in the majority's mandate denying Defendant relief related to the trial court's failure to give the requested jury instruction, but for a different reason, as explained below.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 27 The majority opinion omits the following facts relevant to Trooper Sanders' search of the vehicle:

¶ 28 In addition to telling officers that the driver of the vehicle had fled the scene on foot, witnesses described the driver as a white male with short hair and a facial tattoo. Deputy Hicks was familiar with a man named Kyle, later determined to be William Kyle Lytle ("Mr. Lytle"), matching the description of the driver.

¶ 29 After learning that the driver had fled but before learning the driver's last name, Trooper Sanders searched the vehicle without Defendant's consent, specifically "looking for Kyle's driver's license or ID." Neither the black and green Nike bag nor the black box discovered during the search of the vehicle contained any identification.

II. ANALYSIS

A. Motion to Suppress Evidence Obtained by Warrantless Search of Vehicle

¶ 30 We review a motion to suppress to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Malone*, 373 N.C. 134, 145, 833 S.E.2d 779, 786 (2019) (citation omitted). The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. *Id.* at 145, 833 S.E.2d at 786.

Findings of fact not challenged on appeal are binding. *State v. Lupek*, 214 N.C. App. 146, 150, 712 S.E.2d 915, 918 (2011). We review the trial court's conclusions of law *de novo*. *Malone*, 373 N.C. at 145, 833 S.E.2d at 786 (citation omitted).

¶ 31 The Fourth Amendment protects all persons from "unreasonable searches and seizures," U.S. Const. amend. IV, subject to only a few clearly designated exceptions, *Mincey v. Arizona*, 437 U.S. 385, 390, 57 L. Ed. 2d 290, 298 (1978). To overcome a defendant's motion to suppress evidence, the State bears the burden of demonstrating "how the [warrantless search] was exempted from the general constitutional demand for a warrant." *State v. Nowell*, 144 N.C. App. 636, 642, 550 S.E.2d 807, 812 (2001) (brackets in original) (citation omitted).

¶ 32 Here, the trial court concluded the search of the vehicle was constitutional based on the following reasoning:

> During his investigation of this collision, Trooper J.L. Sanders was provided with the first name and physical characteristics of the alleged perpetrator of a hit and run. He became aware that someone with the first name 'Kyle' had been operating a silver Suzuki SUV involved in a collision and that this man had fled the scene on foot. He learned that the man was concerned about having unserved warrants. In speaking with each of the eyewitnesses, Trooper J.L. Sanders and Deputy Jesse Hicks were able to determine it was possible that the crime of hit and run had been committed and that the person responsible was fleeing into the woods. Trooper J.L. Sanders did not know, however, the true identity of the driver, the cause of the collision, the extent of any damage caused by the collision, or the reason the alleged perpetrator fled, if any. The answer to those inquiries lay within the vehicle. It was reasonable for [Trooper] J.L. Sanders to conclude that the vehicle may contain evidence of the true identity of the driver, the cause of the collision, and/or the reason for the driver fleeing the scene, and he therefore had probable cause to search the vehicle for that evidence . . . . As a result, Trooper J.L. Sanders had legal authority to search the vehicle and every place within the vehicle where any form of identification for Kyle Lytle could be found. Trooper J.L. Sanders' subsequent search of the black and

green Nike bag and the black box inside it were therefore constitutional searches.

¶ 33 While there may have been probable cause to justify the issuance of a warrant by a magistrate, no exception to the warrant requirement authorized the warrantless search of the vehicle on the scene of the single-car accident in this case. Even if it was reasonable to believe that Kyle's identification would be in the car to corroborate witnesses' testimony that he was the driver and that he had subsequently committed the crime of hit and run by leaving the scene of the accident, the warrant requirement protection may not be usurped absent some exception. *See State v. Fizovic*, 240 N.C. App. 448, 452, 770 S.E.2d 717, 720 (2015) ("Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.").

1. Search Incident to Arrest Exception

¶ 34 The majority relies on the State's argument that the search of the vehicle was incident to Mr. Lytle's arrest and therefore authorized without a warrant, but Mr. Lytle was not arrested anywhere near the vehicle, and he was not arrested at the time of the search.

¶ 35 Police may "search a vehicle *incident to a recent occupant's arrest* only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Fizovic*, 240 N.C. App. at 452, 770 S.E.2d at 720 (citing *Arizona v. Gant*, 556 U.S. 332, 351, 173 L. Ed. 2d 485, 501 (2009)) (emphasis added).

¶ 36 The search of the vehicle fails an essential threshold requirement of the search incident to arrest exception—the arrest of a recent occupant of the vehicle. Trooper Sanders testified that at the time of the warrantless search of the vehicle, the person officers intended to arrest in connection with the accident, the driver, Kyle, was not on the scene and his whereabouts were unknown. The officers' authority to arrest Mr. Lytle once they found him "does not necessarily include the authority to search a motor vehicle in the absence of probable cause." *State v. Braxton*, 90 N.C. App. 204, 208, 368 S.E.2d 56, 59 (1988).

¶ 37 For a search incident to arrest based on an outstanding warrant, "it is highly unlikely that [evidence relevant to the crime of arrest] would exist to permit a search of a vehicle, unless incriminating facts concerning the offense charged in the warrant exist at the arrest scene." Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* 250-52

(UNC Sch. of Gov't, 5th ed. 2016) (citing *United States v. Hinson*, 585 F.3d 1328, 1334-35 (10th Cir. 2009) (applying *Gant*)). Because Mr. Lytle was not present on the scene at the time of the search, there was no arrest to justify, even retroactively, the warrantless search of the vehicle. *Cf. State v. Fisher*, 141 N.C. App. 448, 456, 539 S.E.2d 677, 683 (2000) ("Because [the] defendant was never arrested, the search of his vehicle was not justified as a search incident to a lawful arrest. Furthermore, in accordance with *Knowles*, the officers were not justified in searching [the] defendant's car based upon the issuance of the citation. This is true even though the officers may have had probable cause to arrest [the] defendant.").

¶ 38 The majority relies on *State v. Wooten*, 34 N.C. App. 85, 237 S.E.2d 301 (1977), to justify the warrantless search at issue in this case. In *Wooten*, this Court reasoned:

> [W]here a search of a suspect's person occurs before instead of after formal arrest, such search can be equally justified as 'incident to the arrest' provided probable cause to arrest existed prior to the search and it is clear that the evidence seized was in no way necessary to establish the probable cause.

Id. at 89, 237 S.E.2d at 305. Contrary to the majority's summary of the evidence, officers did not testify that they suspected Defendant had been driving the vehicle at the time of the collision. Witnesses told police unequivocally Kyle had been driving the vehicle. Further, there was no probable cause to search or arrest Defendant; even if she were the driver, she remained with the vehicle after the accident. *See* N.C. Gen. Stat. § 20-166 (2021) ("Duty to stop in event of a crash."). The search of the vehicle could not be justified as incident to *Defendant*'s arrest because, as the majority concedes, the illegal drugs and paraphernalia seized from the search of the vehicle singularly established the probable cause to arrest and search Defendant and her belongings. *See Wooten*, 34 N.C. App. at 89, 237 S.E.2d at 305. Police did not form the intent to arrest Defendant until after finding contraband in the vehicle through the warrantless search.

2. Other Exceptions to Warrant Requirement

¶ 39 Nor was the search of the vehicle authorized under the automobile exception to the warrant requirement, as the State contends.

¶ 40 "A search of a motor vehicle which is on a public roadway or in a public vehicular area is not in violation of the fourth amendment if it

is based on probable cause, even though a warrant has not been obtained." *State v. Isleib*, 319 N.C. 634, 638, 356 S.E.2d 573, 576 (1987) (citing *United States v. Ross*, 456 U.S. 798, 809, 72 L. Ed. 2d 572, 584 (1982)). "Probable cause requires that the existing facts and circumstances be sufficient to support a fair probability or reasonable belief that contraband will be found in the automobile." *State v. Corpening*, 109 N.C. App. 586, 589, 427 S.E.2d 892, 894 (1993) (citing *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971); *State v. Ford*, 70 N.C. App. 244, 318 S.E.2d 914 (1984)). The automobile exception exists because "the inherent mobility of motor vehicles" creates the risk that evidence of criminal activity will be removed from the scene before officers have time to obtain a search warrant. *Isleib*, 319 N.C. at 637, 356 S.E.2d at 576; *see also Collins v. Virginia*, 138 S. Ct. 1663, 1669, 201 L. Ed. 2d 9, 18 (2018) ("The 'ready mobility' of vehicles served as the core justification for the automobile exception for many years." (citations omitted)). In this case, as the majority acknowledges, the vehicle was in a ditch and inoperable, negating the automobile exception's purpose.

¶ 41 The other theories offered by the majority to justify the warrantless search of the vehicle—officer safety, an inventory search, or search for other people—are nowhere to be found in the evidence, the officers' testimony at the motion to suppress hearing, in the trial court's findings on the motion to suppress, or in the State's arguments presented on appeal. It is not within the province of this Court to create the probable cause which might have existed to justify the warrantless search of the vehicle; that burden falls squarely on the State to present evidence to the trial court. *See Nowell*, 144 N.C. App. at 642, 550 S.E.2d at 812. I would hold that the warrantless search of the vehicle was unconstitutional.

3. Fruit of the Poisonous Tree

¶ 42 Because the warrantless search of the vehicle was unconstitutional, the evidence discovered in the black and green Nike bag should be suppressed under the exclusionary rule. *See State v. Jackson*, 199 N.C. App. 236, 244, 681 S.E.2d 492, 498 (2009); *see also Wong Sun v. United States*, 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 455 (1963) (holding evidence that is the "fruit" of an illegal search is inadmissible).

¶ 43 As the trial court concluded, "[t]he discovery of what appeared to be methamphetamine and drug paraphernalia inside of the black and green Nike bag found in the passenger floorboard provided [the officers] with probable cause to arrest [Defendant] and search her pink backpack." Because the probable cause to arrest Defendant and search her pink backpack arose only from the illegal search of the vehicle, the evidence

seized from Defendant's backpack also should have been excluded as "fruit of the poisonous tree." *See Jackson*, 199 N.C. App. at 243-44, 681 S.E.2d at 497-98.

¶ 44 I would reverse the trial court's order denying Defendant's motion to suppress, vacate Defendant's convictions, and remand for a new trial.

B. Additional Jury Instruction

¶ 45 I concur in the majority's denial of relief to Defendant based on the trial court's failure to instruct the jury on additional pattern jury language after Defendant denied knowledge of the drugs in the black and green Nike bag. But unlike the majority, which holds that the trial court did not err, I would conclude that Defendant has failed to demonstrate plain error.

¶ 46 "Failure to follow the pattern instructions does not automatically result in error." *State v. Bunch*, 363 N.C. 841, 846,689 S.E.2d 866, 870 (2010). We will uphold instructions when, "viewed in their entirety, [the instructions] present the law fairly and accurately to the jury." *State v. Roache*, 358 N.C. 243, 304, 595 S.E.2d 381, 420 (2004).

¶ 47 Footnote 6 of the pattern jury instruction for drug trafficking provides: "If the defendant contends that the defendant did not know the true identity of what the defendant possessed, add this language to the first sentence: '*and the defendant knew that what the defendant possessed was* (*name substance*).' " N.C.P.I. Crim. 260.17 n.6 (2019) (emphasis added).

¶ 48 The supplemental instruction is derived from *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984), *superseded by statute on other grounds as stated in State v. Oates*, 366 N.C. 264, 732 S.E.2d 571 (2012), in which our Supreme Court held

> the trial court erred in instructing the jury that defendant could be found guilty of possessing marijuana if he had reason to know that what he possessed was marijuana . . . . [T]he court should have instructed the jury that the defendant is guilty only in the event he knew the marijuana was in the trunk of his automobile and that if he was ignorant of that fact, and the jury should so find, they should return a verdict of not guilty.

Id. at 294, 311 S.E.2d at 559. Here, on the charge of drug trafficking by possession, the trial court instructed jurors, in relevant part, that they

must determine whether the State proved beyond a reasonable doubt that "the defendant knowingly possessed methamphetamine. A person possesses methamphetamine if the person is aware of its presence and has, either by one's self or together with others, both the power and intent to control the disposition or use of that substance." The Supreme Court's holding in *Boone* and the additional jury instruction would have resulted in the jury being told in this case that "defendant knowingly possessed *the methamphetamine in the black bag and the defendant knew that what she possessed in the black bag was methamphetamine*." (emphasis added).

¶ 49 Throughout the trial, Defendant denied knowledge of the contents of the black and green bag, which she testified Mr. Lytle had left in her car at the time of the accident before he fled the scene. She testified she never opened, touched, or saw what was in the bag. During closing argument, Defendant's counsel argued that even if Defendant knowingly possessed the methamphetamine contained in her pink backpack, she did not knowingly possess a trafficking amount of methamphetamine because she had no knowledge of what was in the black and green Nike bag. The State asserted in its closing arguments that Defendant was aware of the methamphetamine contained in the black and green bag and therefore was guilty of trafficking by possession.

¶ 50 Here, unlike in *Boone*, the trial court correctly instructed jurors on the standard of actual knowledge required for them to find Defendant guilty of possessing a controlled substance. But in light of the evidence presented to support the trafficking charge, Defendant's knowledge of the contents of the black and green bag was a "determinative issue of fact" at trial, and she was still entitled to the additional jury instruction on that issue of fact. *State v. Lopez*, 176 N.C. App. 538, 546, 626 S.E.2d 736, 742 (2006) (awarding the defendant a new trial because "[o]ur courts have previously awarded new trials for the failure to properly instruct the jury that a defendant was guilty only if he knew a package contained an illicit substance, when the defendant had presented evidence that he lacked knowledge of the true contents of the package.") (citing *Boone*, 310 N.C. at 295, 311 S.E.2d at 559)); *see also State v. Coleman*, 227 N.C. App. 354, 362, 742 S.E.2d 346, 352 (2013) ("[S]ubstantive evidence that defendant did not know that the substance he possessed was heroin was sufficient to . . . trigger the necessity to give the required additional instruction on guilty knowledge contained within [the pattern jury instructions].") For these reasons, I would hold the trial court erred in failing to further instruct the jury about Defendant's knowledge as prescribed by our pattern jury instructions. But given the ability of Defendant's trial

counsel to present to jurors the argument that Defendant did not know the black and green Nike bag contained methamphetamine, and considering all other evidence of record, as well as the jury's sole province to assess the credibility of all witnesses, I do not conclude that the error had a probable impact on the jury's verdict. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

III. CONCLUSION

¶ 51 Based on the reasons outlined above, I respectfully dissent from the majority's decision in part and concur in result only in part.

STATE OF NORTH CAROLINA
v.
TYCOY PETTIFORD, DEFENDANT

No. COA21-348

Filed 1 March 2022

Probation and Parole—revocation—allegation of crime committed—competent evidence

The trial court did not abuse its discretion in revoking defendant's probation where the State presented competent evidence—including that a male (not identified) and female (later identified and known to associate with defendant) were seen inside a vacant apartment, that one of several latent prints taken from the entry point belonged to defendant, and that defendant lived next door to the vacant apartment—to reasonably satisfy the trial court that defendant willfully violated his probation by committing misdemeanor breaking and entering, even if the evidence may not have been enough to prove the crime beyond a reasonable doubt.

Appeal by Defendant from judgment entered 31 August 2020 by Judge John M. Dunlow in Person County Superior Court. Heard in the Court of Appeals 22 September 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden William Hayes, for the State.

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

WOOD, Judge.

¶ 1 Tycoy Pettiford ("Defendant") appeals from a judgment on August 31, 2020, revoking his probation. After a careful review of the record and applicable law, we affirm the judgment of the court.

I. Facts and Procedural Background

¶ 2 On June 2, 2020, Defendant entered an *Alford* plea to one count of assault with a deadly weapon with the intent to kill. The trial court sentenced Defendant to 25 to 42 months in prison and suspended the sentence for 30 months of supervised probation. On June 11, 2020, Defendant's probation officer, Officer Jim Lynch, filed a Violation Report. Officer Lynch attested under oath that "Defendant has willfully violated [his probation by] . . . committ[ing] the crime of . . . [misdemeanor] breaking . . . [or] entering."

¶ 3 The trial court held a probation violation hearing on August 31, 2020. Defendant denied he had committed the criminal offense of misdemeanor breaking or entering. The State and Defendant stipulated to the following: On June 8, 2020, an officer responded to a breaking or entering call at an apartment complex. The officer arrived to the complex and spoke to the complex's manager, David Turner. Turner stated one of his employees went to perform work on a vacant apartment within the complex. Upon entering the apartment, the worker discovered a female and a male in the back room. The male offender was a black male with dark hair and wearing a dark shirt and jeans. After seeing the male and female, the worker quickly exited the apartment. The female offender then walked out the front door, got into a silver Chevy Cobalt, and left the scene. Furthermore, the female offender was later identified as Daniah Richardson ("Richardson").

¶ 4 Jason Howell, a detective with the Roxboro Police Department, testified for the State. Detective Howell reported he "recovered several latent prints off the point of entry, point of exit window in the rear of the residence." One of the fingerprints was determined to be that of Defendant. Detective Howell spoke with the property manager of the apartment and, based upon that conversation, formed the belief Defendant did not have permission to be in the apartment. Defendant lived next door to the apartment with his mother and was known to associate with Richardson.

¶ 5 Based upon the evidence presented, the trial court found Defendant violated his probation by committing a new offense of misdemeanor breaking or entering and activated Defendant's suspended sentence on

August 31, 2020. The day after the probation hearing, the State voluntarily dismissed the misdemeanor breaking or entering charge.

¶ 6 On September 9, 2020, Defendant filed a motion for appropriate relief asking the trial court to set aside the revocation of his probation. The trial court entered an order on September 28, 2020, denying Defendant's motion for appropriate relief. Defendant next filed an appeal to this Court wherein this Court granted Defendant's petition for writ of certiorari for the purpose of reviewing the August 31, 2020 judgment revoking Defendant's probation and the September 28, 2020 order denying Defendant's motion for appropriate relief. In our order granting certiorari, we remanded the case to the trial court to determine whether Defendant was entitled to appointment of counsel, indigent status, release on bond pending appeal, and a copy of the transcript at the State's expense.

¶ 7 On remand on April 12, 2021, the trial court found Defendant was indigent and entitled to an appointment of counsel and denied Defendant's motion to set bond while the matter was on appeal. Defendant comes before this Court pursuant to an order granting certiorari and now appeals the August 31, 2020 activation of his suspended sentence, arguing that insufficient evidence existed to show he violated his probation, or, in the alternative, the trial court abused its discretion by revoking his probation.

II. Discussion

¶ 8 Defendant raises several issues on appeal; each will be addressed in turn.

A. Sufficient Evidence to Show Defendant Violated His Probation

¶ 9 Defendant first argues on appeal the State's evidence was insufficient to show he committed a new offense in violation of his probation. Prior to revoking a defendant's probation, the trial court must conduct a hearing to determine whether to revoke or to extend the probation. N.C. Gen. Stat. § 15A-1345(e) (2021). The court must make findings of fact to support its decision and make a summary record of the probationary proceeding. *Id*. Our Supreme Court has firmly established, "[p]robation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime." *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967) (citation omitted). Thus, a defendant in a probation proceeding has "more limited due process rights." *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014) (brackets omitted) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 789, 93 S. Ct. 1756, 1763, 36 L. Ed. 2d

656, 666 (1973)). A probation proceeding is more informal than a criminal prosecution and, accordingly, "the court is not bound by strict rules of evidence, and the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt." *Duncan*, 270 N.C. at 245, 154 S.E.2d at 57 (citation omitted).

¶ 10 Defendant attempts to persuade this Court to examine the sufficiency of the evidence presented at the probationary hearing. The function of this Court when reviewing the sufficiency of the evidence in a probation hearing is not to conduct a *de novo* review of the evidence and thereby replace the trial court's findings with our own. Rather, it is the role of this court to determine if evidence existed so as to reasonably satisfy the trial court judge that a violation of probation occurred. *See Duncan*, 270 N.C. at 245, 154 S.E.2d at 57 (1967).

¶ 11 The findings of a trial court judge which are based on competent evidence are required only to be "such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation." *Murchison*, 367 N.C. at 464, 758 S.E.2d at 358 (quoting *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967)); *see also State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960). "Judicial discretion implies conscientious judgment . . . [i]t takes account of the law and the particular circumstances of the case, and [is] '. . . directed by the reason and conscience of the judge to a just result.' " *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (quoting *Langnes v. Green*, 282 U.S. 531, 541, 51 S. Ct. 243, 247, 75 L. Ed. 520, 526 (1931)).

¶ 12 In this case, we only need to examine whether the evidence was such as to reasonably satisfy the trial court judge that Defendant violated his probation by committing the new offense of misdemeanor breaking or entering. A misdemeanor breaking or entering under N.C. Gen. Stat. § 14-54(b) is the wrongful breaking or entering into a building. N.C. Gen. Stat. § 14-54(b) (2021); *State v. Young*, 195 N.C. App. 107, 112, 671 S.E.2d 372, 375 (2009). "A breaking or ent[ering] is wrongful when it is without the consent of the owner or tenant or other claim of right." *Young*, 195 N.C. App. at 112, 671 S.E.2d at 375.

¶ 13 Here, the trial court judge was presented with the following evidence. The State and Defendant stipulated that when the apartment's property manager arrived at the apartment, a male and Richardson were in the back room. At the hearing, a police officer testified Defendant was known to associate with Richardson "on a routine basis." The officer recovered several prints from the point of entry, a window in the rear of the residence. One of the prints was identified as belonging to

Defendant. The police officer spoke with the apartment's property manager, and based on this discussion, formed the opinion that Defendant did not have permission to be inside the apartment. Moreover, Defendant lived next door to the apartment.

¶ 14 Examining the evidence presented at the probation hearing, we hold competent evidence was presented to satisfy the trial court judge that Defendant broke or entered into the apartment without permission from the property manager. In other words, competent evidence exists that Defendant willfully violated his probation by committing a new offense of misdemeanor breaking or entering.

¶ 15 We recognize that based on the evidence, the State likely could not have proven Defendant committed the offense of misdemeanor breaking or entering in a criminal prosecution wherein the burden of proof is beyond a reasonable doubt. However, this was a probation hearing wherein the burden of proof is probable cause and wherein the rules of evidence do not apply. Thus, we are compelled to hold competent evidence existed so as to satisfy the trial court judge that Defendant had committed a new criminal offense in violation of the conditions of his probation.

B. No Abuse of Discretion in Revoking Defendant's Probation

¶ 16 Next, Defendant contends the trial court abused its discretion by revoking his probation. When reviewing the decision of a trial court to revoke probation, we review for abuse of discretion. *Murchison*, 367 N.C. at 464, 758 S.E.2d at 358. *See Guffey*, 253 N.C. at 45, 116 S.E.2d at 150.

¶ 17 An abuse of discretion occurs when "a ruling 'is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (quoting *State v. Peterson*, 361 N.C. 587, 602, 652 S.E.2d 216, 227 (2007)). Under N.C. Gen. Stat. § 15A-1344(a), a trial court may "reduce[], terminate[], continue[], extend[], modify[], or revoke[]" a defendant's probation when a defendant commits a criminal offense in any jurisdiction. N.C. Gen. Stat. § 15A-1344(a) (2021). However, a trial court is "not obligated to activate a defendant's sentence" should a defendant be found to have violated probation. *State v. Arnold*, 169 N.C. App. 438, 441, 610 S.E.2d 396, 398 (2005).

¶ 18 Per our analysis herein, competent evidence existed to support the trial court's finding Defendant violated his probation by committing the new offense of misdemeanor breaking or entering. Thus, pursuant to N.C. Gen. Stat. § 15A-1344(a), the trial court had the authority to

revoke Defendant's probation. We note that an alternative, more fitting means of punishment may have been more appropriate for Defendant due to his age and the circumstances surrounding the violation; nonetheless, we hold the trial court's decision to revoke Defendant's probation and to activate Defendant's sentence was not so devoid of reason or so arbitrary as to be considered an abuse of discretion.

III. Conclusion

¶ 19 Based on the analysis above, we are compelled to hold that the State presented sufficient evidence that Defendant violated the terms of his probation and that the trial court did not abuse its discretion by revoking Defendant's probation.

AFFIRMED.

Judges DILLON and COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 MARCH 2022)

HARRIS v. HARRIS 2022-NCCOA-137 No. 20-700	Durham (19CVD247)	REVERSED IN PART, VACATED AND REMANDED IN PART.
HARRISON v. MORRIS 2022-NCCOA-138 No. 21-66	Buncombe (20CVS471)	Affirmed
HICKS v. HICKS 2022-NCCOA-139 No. 21-246	Person (15CVD393)	Affirmed
IN RE K.W-M. 2022-NCCOA-140 No. 21-251	New Hanover (20JA48)	Affirmed
IN RE T.B. 2022-NCCOA-141 No. 21-349	Durham (20SPC2106)	Vacated and Remanded
LINDBERG v. LINDBERG 2022-NCCOA-142 No. 21-283	Chatham (18CVS345)	Appeal dismissed.
LOWREY v. CHOICE HOTELS INT'L, INC. 2022-NCCOA-143 No. 21-199	Durham (19CVS3400)	Dismissed
SMOKY MOUNTAIN COUNTRY CLUB PROP. OWNERS ASS'N, INC. v. DUNGAN 2022-NCCOA-144 No. 21-128	Swain (20CVS89)	Reversed and Remanded
STATE v. BROOKS 2022-NCCOA-145 No. 21-185	Cleveland (19CRS581)	PETITION FOR WRIT OF CERTIORARI ALLOWED; NO ERROR.
STATE v. COCHRAN 2022-NCCOA-146 No. 21-87	Haywood (20CRS642)	Affirmed
STATE v. JOHNSON 2022-NCCOA-147 No. 21-241	Mecklenburg (11CRS247933)	Affirmed

STATE v. KELLY 2022-NCCOA-148 No. 21-287	Cumberland (19CRS62090)	Vacated and Remanded
STATE v. McCRAE 2022-NCCOA-149 No. 20-847	Wake (17CRS216619) (17CRS3865)	No Error
STATE v. MELVIN 2022-NCCOA-150 No. 18-843-2	Wake (15CRS218490) (15CRS218494-98) (15CRS218500-05)	No Error
STATE v. MOORE 2022-NCCOA-151 No. 20-733	Gaston (18CRS64229) (19CRS3163)	No Error
STATE v. MURDOCK 2022-NCCOA-152 No. 20-547	Rowan (15CRS50267) (15CRS50268)	Affirmed
STATE v. MURPHY 2022-NCCOA-153 No. 21-244	Davidson (19CRS52705)	Affirmed
STATE v. OVERCASH 2022-NCCOA-154 No. 21-217	Johnston (19CRS1768) (19CRS52529)	No Prejudicial Error
VIZCAINO v. AM. EMERALD TRANSP. SERVS., INC. 2022-NCCOA-155 No. 21-299	N.C. Industrial Commission (15-721067)	Affirmed.

CARL L. BREWTON, PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, DEFENDANT

No. COA21-215

Filed 15 March 2022

Damages and Remedies—negligent destruction of property—inmate's law books—loss of value—failure to consider

In a tort action filed with the Industrial Commission by a prison inmate (plaintiff), where the Commission awarded plaintiff $100 for the loss of use and enjoyment of his law books after finding that a correctional officer had negligently destroyed them, the Commission's award was vacated and remanded because the Commission failed to exercise its discretion—and therefore abused its discretion—by failing to consider whether plaintiff was also entitled to damages for the value of the books themselves.

Appeal by Plaintiff from Decision and Order entered 23 October 2020 by Vice-Chair Myra Griffin for the North Carolina Industrial Commission. Heard in the Court of Appeals 16 November 2021.

Carl Brewton, Pro Se.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth B. Jenkins, for the Defendant-Appellee.

DILLON, Judge.

¶ 1 Plaintiff is a prison inmate who is seeking damages for his books that he alleged were negligently destroyed by a prison officer.

I. Background

¶ 2 Plaintiff is an inmate at the Tabor Correctional Institute. While under the State's custody, a correctional officer seized and destroyed Plaintiff's law books, which he was using for legal research for his own defense in a criminal case. The officer believed Plaintiff was in violation of Section F.00503(b) of the facility rules that govern the amount of legal materials an inmate may possess.

¶ 3 Plaintiff filed a *pro se* tort claim with the Industrial Commission. After a full evidentiary hearing, the deputy commissioner entered an

order denying Plaintiff's claims, finding that Defendant had not acted negligently. Plaintiff appealed that decision to the Full Commission.

¶ 4 The Full Commission reversed the prior decision, finding that Defendant had acted negligently. The Commission awarded Plaintiff $100 for the loss of use and enjoyment of his legal books; however, it did not grant Plaintiff any damages for the value of the books. Plaintiff timely appealed to our Court.

II. Analysis

¶ 5 Defendant's negligence is undisputed on appeal. The only issue before us is whether the Full Commission correctly calculated Plaintiff's damages.

A. Standard of Review

¶ 6 Our standard of review from an order of the Industrial Commission is limited to whether competent evidence supported the findings of fact and whether such findings justify the conclusion and decision of the Commission. *Henry v. A. C. Lawrence Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 762 (1950). "While the commission is not required to make findings as to each fact presented by the evidence, it is required to make specific findings with respect to crucial facts upon which the question of *plaintiff's right to compensation depends*." *Gaines v. L. D. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977) (emphasis added).

B. Damages

¶ 7 Plaintiff argues that the Commission failed to make any award for the loss of the value of his books, merely awarding "$100.00 in damages *for the loss of use and enjoyment* of his ten legal books" (emphasis added). Plaintiff presented some evidence regarding the value of the books; however, the Commission never addressed the value as a measure of damages in its award.

¶ 8 Our General Statutes direct that "the Commission shall determine the amount of damages that the claimant is entitled to be paid, including medical and other expenses, and by appropriate order direct the payment of damages[.]" N.C. Gen. Stat. § 143-291(a) (2018). And our Supreme Court has held that "[t]he amount of damages to be awarded is a matter which the statute leaves to the discretion of the Commission." *Brown v. Charlotte-Mecklenburg Bd. of Educ.*, 269 N.C. 667, 671, 153 S.E.2d 335, 339 (1967).

¶ 9 It is undisputed that Defendant negligently destroyed Plaintiff's books. Where a plaintiff's property is destroyed through the negligence of

a defendant, the plaintiff is entitled to damages equal to the value of that property. *See Carolina Power & Light Co. v. Paul*, 261 N.C. 710, 710-11 136 S.E.2d 103, 104 (1964) ("North Carolina is committed to the general rule that the measure of damages for injury to personal property is the difference between the market value of the damaged property immediately before and immediately after the injury."); *see also Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 126, 723 S.E.2d 352, 357 (2012) ("The current law in North Carolina is clear that the market value measure of damages applies in cases involving the negligent destruction of personal property[.]").

¶ 10 In this appeal, there is no challenge by either party regarding the Commission's award of $100 for Plaintiff's *loss of use* of his books. What is before us is whether the Commission erred by failing to consider whether Plaintiff was entitled to be compensated for the value of the books themselves, after finding that Plaintiff's books were indeed destroyed through the negligence of Defendant. A tribunal's failure to exercise discretion is essentially an abuse of discretion. *See Myers v. Myers*, 269 N.C. App. 237, 256, 837 S.E.2d 443, 456 (2020). As there is nothing in the order suggesting that the Commission made any determination regarding Plaintiff's claim for damages based on the value of the books, we conclude that it is appropriate to remand to allow the Commission to make this determination.

III. Conclusion

¶ 11 "If the findings of fact of the Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the cause must be remanded to the Commission for proper findings of fact." *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109-10 (1981).

¶ 12 Here, we conclude that the Full Commission erred by not including any findings of fact nor conclusions of law pertaining to the actual value of the destroyed books. Though the Full Commission has discretion to determine the *amount* of the award, it is appropriate for us to remand where it appears that the Commission never exercised this discretion. We, therefore, remand this matter and direct that the Commission reconsider its award to Plaintiff and base any claim on the appropriate measure of damages, including the value of the books destroyed through Defendant's negligence.

VACATED AND REMANDED.

Judges MURPHY and GORE concur.

EDWARDS v. JESSUP

[282 N.C. App. 213, 2022-NCCOA-157]

IDA EDWARDS, PETITIONER
v.
TORRE JESSUP, COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES, STATE OF NORTH CAROLINA, RESPONDENT

No. COA21-7

Filed 15 March 2022

1. Motor Vehicles—driving while impaired—license revocation—refusal to submit to chemical analysis—reasonable grounds to suspect DWI

In a driving while impaired case, the superior court improperly reversed the DMV's order revoking appellee's driver's license for refusing to submit to a chemical analysis where the evidence supported a finding that the investigating officer had reasonable grounds to believe appellee had been driving while impaired. Specifically, the officer received a report about a driver who had fallen asleep in the drive-through lane of a fast-food restaurant; the officer was directed to the restaurant parking lot, where he saw appellee sitting in the driver's side of her car; appellee admitted to falling asleep at the drive-through lane and mentioned that a friend had been "riding with her"; and, after failing a sobriety test and exhibiting signs of impairment, appellee admitted to taking unprescribed hydrocodone.

2. Constitutional Law—due process—driver's license revocation hearing—DMV employee as hearing officer

In a driving while impaired case, the superior court improperly reversed the DMV's order revoking appellee's driver's license (for refusing to submit to a chemical analysis) because, contrary to the superior court's conclusion, appellee's due process rights were not violated at her license revocation hearing conducted pursuant to N.C.G.S. § 20-16.2, where the hearing officer was a DMV employee whose role was to consider the evidence, issue subpoenas when necessary, and question appellee and any witnesses. Because nothing in the record indicated that the hearing officer showed bias in favor of the DMV or did anything other than attempt to elicit the truth, appellee was not deprived of a meaningful opportunity to be heard before an impartial decision maker.

Appeal by Respondent from order entered 22 September 2020 by Judge Jeffery K. Carpenter in Union County Superior Court. Heard in the Court of Appeals 5 October 2021.

Paul A. Tharp for the Petitioner-Appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher W. Brooks, for the Respondent-Appellant.

DILLON, Judge.

¶ 1 Appellee was charged with driving while impaired ("DWI"). This appeal does not concern this charge but rather concerns the revocation of her driver's license by the North Carolina Division of Motor Vehicles (the "DMV") based on her failure to consent to a chemical analysis after being charged with DWI. The superior court held that the DMV erred in revoking Appellee's license on appeal. We reverse the superior court.

I. Background

¶ 2 On 7 February 2019, a law enforcement officer (the "Officer") responded to a call about a driver who had fallen asleep in the drive-through lane of a fast-food restaurant. Upon arrival, police at the scene directed the Officer to a vehicle parked in the restaurant's parking lot. Appellee was seated in the driver side of the vehicle. The vehicle was not running. The Officer asked Appellee to step out of the vehicle. The Officer noticed that Appellee seemed very lethargic, had a "deer in the headlights" look, and slurred her speech. When requested to present her driver's license, Appellee mistakenly gave the Officer her bank card and post office identification. Appellee then failed a field sobriety test and eventually admitted to taking unprescribed Hydrocodone.

¶ 3 The Officer charged Appellee with DWI, an implied consent offense. Appellee was transported to a detention center, where she refused to consent to a blood sample for a chemical analysis.

¶ 4 Appellee received notice that her driving privileges were being revoked for refusing chemical analysis pursuant to N.C. Gen. Stat. § 20-16.2 (2019). She requested an administrative hearing. At the conclusion of the hearing, the DMV hearing officer sustained the revocation. Appellee then filed a petition seeking review in the superior court. After a hearing on the matter, the superior court reversed the DMV's decision. The DMV timely appealed to our Court.

II. Analysis

¶ 5 If an officer has "reasonable grounds to believe" that a driver has committed an implied-consent offense, such as DWI, the driver is required to submit to a chemical analysis. N.C. Gen. Stat. § 20-16.2(a). Any

such driver who refuses to submit to a chemical analysis may have her license revoked, simply for refusing, even if she is not later convicted of the underlying crime.

¶ 6 Here, the superior court reversed the DMV decision on two different grounds. We address each in turn.

A. Reasonable Grounds That Appellee Was Operating Her Vehicle

¶ 7 **[1]** The superior court concluded that there was a lack of evidence to support a finding that Appellee was operating her motor vehicle. However, the evidence does not need to establish that Appellee was driving the vehicle. The only requirement is that the Officer had "reasonable grounds to believe that" Appellee had driven the vehicle while under the influence. N.C. Gen. Stat. § 20-16.2(a). We held as such in unpublished opinions, which we find persuasive. *Neilon v. Comm'r of Motor Vehicles*, 2011 N.C. App. LEXIS 1233, *13, 718 S.E.2d 737 (2011) (unpublished); *Thurman v. Comm'r, NC DMV*, 2008 N.C. App. LEXIS 1009 *5-6 (2008) (unpublished). Our Court has equated "reasonable grounds" with "probable cause." *Moore v. Hodges*, 116 N.C. App. 727, 730 449 S.E.2d 218, 220 (1994).

¶ 8 Here, we conclude that the evidence supports a finding that the Officer had a reasonable belief/probable cause that Appellee had been driving her vehicle while impaired. First, the Officer had reasonable grounds that Appellee was impaired based on the evidence, including that recounted above. And there was evidence that she had been driving. Specifically, there was a report of a driver who had fallen asleep in the drive-through lane at a fast-food restaurant. The Officer arrived to investigate and was directed to Appellee's car, which was in the restaurant parking lot. Appellee was seated on the driver's side. The vehicle belonged to her. She stated that a friend had been "riding with her." And she admitted to falling asleep while in her car in the drive-through lane. It may be that the evidence was not sufficient *to convict* Appellee of DWI, but we conclude the evidence was sufficient to give the Officer probable cause that Appellee had driven her car while impaired.

B. Due Process

¶ 9 **[2]** The superior court concluded that Appellee was "denied the fundamental protections of the Due Process Clause . . . in that she was deprived of the opportunity to be heard at a meaningful time and in a meaningful manner." However, Appellee never alleged a due process violation in her petition to the superior court. Assuming *arguendo* that

Appellee's due process argument is properly before us, we conclude that her due process rights were not violated, as explained below.

¶ 10 The superior court found that Appellee's due process rights were violated because the hearing officer is a DMV employee *and* because she essentially acted, not only as fact-finder, but also as the prosecutor. Neither party cited, nor has our research uncovered a North Carolina case on point. We note, though, that the Fourth Circuit affirmed the decision of the Western District of North Carolina concluding that the hearing procedure prescribed in N.C. Gen. Stat. 20-16.2 does not violate the driver's due process rights. *Montgomery v. N.C. Dep't of Motor Vehicles*, 455 F. Supp. 338, 341 (W.D.N.C. 1978), *aff'd*, 599 F.2d 1048 (4th Cir. 1979).

¶ 11 We conclude that the fact that a hearing officer in a DMV hearing is a DMV employee does not violate a driver's due process rights *per se*. For instance, the United States Supreme Court has held that a prisoner facing disciplinary procedures is not deprived of due process merely because the panel who hears the matter is comprised of prison officials. *See Wolff v. McConnell*, 418 U.S. 539, 570 (1974). Justice Marshall dissented in *Wolff*, but did agree on the above point, stating:

> Finally, the [majority] addresses the question of the need for an impartial tribunal to hear these prison disciplinary cases. We have recognized that an impartial decisionmaker is a fundamental requirement of due process in a variety of relevant situations . . . and I would hold this requirement fully applicable here. But in my view there is no constitutional impediment to a disciplinary board composed of responsible prison officials like those on the Adjustment Committee here. While it might well be desirable to have persons from outside the prison system sitting on disciplinary panels, so as to eliminate any possibility that subtle institutional pressures may affect the outcome of disciplinary cases and to avoid any appearance of unfairness, in my view due process is satisfied as long as no member of the disciplinary board has been involved in the investigation or prosecution of the particular case, or has had any other form of personal involvement in the case.

Id. at 592 (Marshall dissenting).

¶ 12 In this case, there is nothing to indicate that the DMV hearing officer had any special knowledge or connection to Defendant's case that

would indicate a lack of impartiality. We hold that there is nothing "in the record presented here for [us to] conclud[e] that the [DMV Hearing Officer acting in accordance with Section 20-16.2] presents such a hazard of arbitrary decision making that it should be held violative of due process of law." *See id.* at 571.

¶ 13 The superior court also took issue with the fact that there was no attorney at the hearing putting on the DMV's case. Rather, the hearing officer considers the evidence in the DMV file, issues subpoenas when necessary, and questions the driver and other witnesses. In sum, the superior court essentially held that the hearing is not "meaningful" because the hearing officer is biased in favor of the DMV. Based on our jurisprudence, though, we hold that this procedure does not violate a driver's due process rights where there is nothing to indicate that the hearing officer was doing anything more than attempting to elicit the truth.

¶ 14 We have made similar holdings in commitment proceedings where the State is not represented by counsel. *See*, *e.g.*, *In re C.G.*, 278 N.C. App. 416, 2021-NCCOA-344, 863 S.E.2d 237 (2021); *In re Perkins*, 60 N.C. App. 592, 299 S.E.2d 675 (1983). Our Supreme Court has described this principle, stating that "the trial judge may interrogate a witness for the purpose of developing a relevant fact . . . in order to ensure justice and aid [the fact-finder] in their search for a verdict that speaks the truth." *State v. Pearce*, 296 N.C. 281, 285, 250 S.E.2d 640, 644 (1979). That Court has further held that it is not a *per se* constitutional violation for the trial court to exercise its right to call or question witnesses. *State v. Quick*, 329 N.C. 1, 21-25, 405 S.E.2d 179, 192-93 (1991). And our Court has held that it is not *per se* prejudicial for a judge to question a witness, even where the answer provides the sole proof of an element which needs to be proved. *See State v. Lowe*. 60 N.C. App. 549, 552, 299 S.E.2d 466, 468 (1983).

¶ 15 In sum, we conclude that the procedure prescribed by Section 20-16.2 does not violate a driver's right to due process. The fact that the hearing officer is a DMV employee and plays a role in drawing out the truth does not render that officer biased any more than a judge, who has the same employer as the prosecutor (the State of North Carolina), could be deemed biased for merely questioning witnesses. This is not to say that the manner in which a hearing officer conducts her hearing could never rise to a due process violation where the hearing officer displays clear bias. However, there is no indication that any such bias was present in the way Appellee's hearing officer conducted the hearing.

III. Conclusion

¶ 16 We conclude that the superior court erred by reversing the DMV's order revoking Appellee's driving privileges. The record supports the findings in the DMV order, and the findings support the conclusions of law. In addition, Appellee was not deprived of due process at the hearing before the DMV officer.

REVERSED.

Judges MURPHY and JACKSON concur.

ERIC STEVEN FEARRINGTON, CRAIG D. MALMROSE, Plaintiffs
v.
CITY OF GREENVILLE, PITT COUNTY BOARD OF EDUCATION, Defendants

No. COA20-877

Filed 15 March 2022

1. Jurisdiction—facial constitutional challenge—local act—administrative remedies exhausted—standing

An appeal by two plaintiffs challenging the constitutionality of a local red light camera enforcement program was properly before the Court of Appeals. Plaintiffs had exhausted all administrative remedies once the trial court entered a consent order disposing of their petition for writ of certiorari, leaving no other administrative remedy available. Further, where there was no adequate statutory or common law remedy which would provide redress for plaintiffs' injury (being issued a citation and fined $100.00), plaintiffs' constitutional claims were not barred. Finally, plaintiffs had standing to make their challenge where they alleged they were residents and taxpayers of the county in which they were found liable for running a stop light.

2. Engineers and Surveyors—red light camera enforcement program—alleged failure to comply with Chapter 89C—no private right of action

In plaintiffs' case challenging the constitutionality of a local red light camera enforcement program, the trial court properly dismissed plaintiffs' claim that defendants—a city and a local school board—violated Chapter 89C of the General Statutes by employing

unlicensed engineers to design the program. Chapter 89C did not provide a private cause of action for its enforcement.

3. Constitutional Law—procedural due process—administrative hearing—denial of right to record hearing

In a case challenging the constitutionality of a local red light camera enforcement program brought by two people who were issued citations for running a red light, the administrative appeal hearings did not violate plaintiffs' procedural due process rights—which plaintiffs argued were not protected because the hearing officers disregarded evidence and did not allow the hearings to be recorded—where the legal issue involved a strict liability offense for which only two defenses could be asserted, neither plaintiff presented evidence establishing an affirmative defense, and plaintiffs' constitutional claims were subject to review in superior court.

4. Constitutional Law—substantive due process—local red light camera enforcement program—rational basis

A city's red light camera enforcement program did not violate the substantive due process rights of plaintiffs—two people who were each issued a citation for running a red light—or arbitrarily deprive them of their right to travel where the program was reasonably related to a legitimate governmental interest in regulating traffic for public safety. Although plaintiffs argued that the short duration of the yellow light created a "dilemma zone" for drivers in which they had to decide to stop quickly or proceed through the intersection, that issue constituted a policy determination for lawmakers.

5. Constitutional Law—North Carolina—Fines and Forfeitures Clause—"clear proceeds"—interlocal agreement—fines from red light cameras

The funding framework in an interlocal agreement between a city and a local school board regarding the cost-sharing of the city's red light camera enforcement program violated the Fines and Forfeitures Clause of the North Carolina Constitution (Art. IX, section 7) and N.C.G.S. § 115C-437 where the school board did not receive the "clear proceeds" of the fines collected from the program—defined as the sum total of penalties from which the actual costs of collection, but not any enforcement costs, are to be deducted, with the costs not to exceed 10% of the amount collected—since, even though the school board initially received all of the penalties collected, it then had to pay nearly 30% back to the city to pay the costs of the program.

Appeal by Plaintiffs from orders entered 22 April 2020, 22 July 2020, and 28 July 2020 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 8 September 2021.

Stam Law Firm, PLLC, by R. Daniel Gibson and Paul Stam, for Plaintiffs-Appellants.

Hartzog Law Group LLP, by Dan Hartzog Jr., for Defendant-Appellee City of Greenville.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Robert J. King III, Jill R. Wilson, and Elizabeth L. Troutman, for Defendant-Appellee Pitt County Board of Education.

GRIFFIN, Judge.

¶ 1 Plaintiffs Eric Steven Fearrington and Craig D. Malmrose appeal from orders denying Plaintiffs' motion for summary judgment and granting City of Greenville's and Pitt County Board of Education's motions to dismiss. Plaintiffs argue that various aspects of Greenville's Red Light Camera Enforcement Program ("RLCEP") are illegal and unconstitutional. After review, we hold that the funding framework of the RLCEP violates the Fines and Forfeitures Clause contained in Article IX, Section 7 of our State Constitution. We therefore reverse the trial court's dismissal of Plaintiffs' claim under Article IX, Section 7 and remand for entry of summary judgment in Plaintiffs' favor. We otherwise affirm the trial court's orders.

¶ 2 Plaintiffs also argue that the trial court erroneously considered the affidavit of an unqualified expert. We hold that Plaintiffs failed to preserve this argument for appellate review.

I. Factual and Procedural Background

¶ 3 Pursuant to sections 20-158 and 20-176 of our General Statutes, failure to stop at a traffic light when the light is red is an infraction subject to a "penalty of not more than one hundred dollars[.]" N.C. Gen. Stat. §§ 20-158(b)(2)(a), 20-176(a), (b) (2019). Notwithstanding these provisions, the General Assembly has further provided that certain "[m]unicipalities may adopt ordinances for the civil enforcement of [N.C. Gen. Stat. §] 20-158 by means of a traffic control photographic system[.]" N.C. Gen. Stat. § 160A-300.1(c) (2019). These "traffic control photographic system[s]" are more commonly known as "red light cameras." *Id.*

¶ 4 On 30 June 2016, the General Assembly enacted a local act authorizing Greenville to implement an RLCEP, providing in pertinent part:

> SECTION 3. . . . (2) A violation detected by a [red light camera] shall be deemed a noncriminal violation for which a civil penalty of one hundred dollars ($100.00) shall be assessed, and for which no points authorized by G.S. 20-16(c) shall be assigned to the owner or driver of the vehicle nor insurance points as authorized by G.S. 58-36-65.
>
> SECTION 4. The City of Greenville and the Pitt County Board of Education may enter into an interlocal agreement necessary and proper to effectuate the purpose and intent of G.S. 160A-300.1 and this act. Any agreement entered into pursuant to this section may include provisions on cost-sharing and reimbursement that the Pitt County Board of Education and the City of Greenville freely and voluntarily agree to for the purpose of effectuating the provisions of G.S. 160A-300.1 and this act.

An Act to Make Changes to the Law Governing Red Light Cameras in the City of Greenville, 2016 N.C. Sess. Laws 64, §§ 3, 4 [hereinafter "S.L. 2016-64"].

¶ 5 After S.L. 2016-64 was enacted, Greenville implemented an RLCEP and amended its Code of Ordinances accordingly:

> Sec. 10-2-283. Offense.
>
> (a) It shall be unlawful for a vehicle to cross the stop line at a [red light camera] location when the traffic signal for that vehicle's direction of travel is emitting a steady red light[.]
>
> . . .
>
> Sec. 10-2-285. Appeals. . . .
>
> Appeals shall be heard through an administrative process established by the city. Once an appeal is requested, an appeal hearing will be scheduled. The hearing officer's decision is subject to review in the Superior Court of Pitt County by proceedings in the nature of certiorari.

Greenville, N.C., Code of Ordinances §§ 10-2-283(a), 285 (2016).

¶ 6 In March 2017, Greenville entered into a contract with American Traffic Solutions ("ATS"), a firm headquartered in Arizona, for the installation, maintenance, and management of the City's RLCEP. Pursuant to the contract, Greenville agreed to pay ATS $31.85 in fees for every $100.00 paid citation, in addition to other miscellaneous fees associated with ATS services. The record reflects that detailed design plans for the RLCEP were produced with ATS's logo and address appearing on each page. Robert F. Rennebaum, a licensed North Carolina engineer, signed and affixed his seal to the design plans.

¶ 7 In November 2018, the North Carolina Board of Examiners for Engineers and Surveyors sent a letter to ATS, stating that "there [wa]s sufficient evidence to support the charges that [ATS] [wa]s practicing or offering to practice engineering and surveying in North Carolina . . . without being licensed" by the Board. The Board also sent a letter to Mr. Rennebaum, which stated, "[F]or red light camera installation plans for . . . Greenville . . . bearing your certification, you may be in violation for affixing your seal to work not done under your direct supervisory control . . . and aiding and abetting [ATS] to evade or attempt to evade the provisions of [N.C. Gen. Stat. § 89C-16]. Allegedly, the work you certified was prepared by [ATS]." In May 2019, the Board entered a Decision and Order finding that Mr. Rennebaum did commit the foregoing violations and ordered that he pay a $5,000.00 civil penalty and pass an "Engineering Ethics" course.

¶ 8 Greenville and Pitt County Board of Education (the "School Board") entered into an interlocal funding agreement whereby the civil penalties from the RLCEP would be collected by Greenville and forwarded to the School Board. It was agreed that Greenville would then invoice the School Board monthly for all expenses associated with maintaining the RLCEP, and the invoices were to be paid within thirty days of receipt. According to Greenville's responses to interrogatories, the RLCEP generated $2,495,380.46 in total revenue from 2017 through June 2019. The School Board paid Greenville $706,986.65 in program expenses during the same period, which included $581,986.65 in fees invoiced by ATS. The School Board received $1,788,393.81 in net revenue during the period, which is 71.66% of the total amount of fines and fees collected by Greenville.

¶ 9 On 15 May 2018, Plaintiff Fearrington was issued a citation for failing to stop at a red light camera location when the light was red. Fearrington submitted a written request for an appeal and stated in his request that (1) the RLCEP violated "Article I, Sections 1, 19, 35 and 36 of the North Carolina Constitution"; and (2) the interlocal agreement between

Greenville and the School Board violated "Article IX, Section 7 of the North Carolina [Constitution]" because less than "ninety percent of the clear proceeds of" the civil penalties collected by Greenville went to the School Board. An appeal hearing was held on 16 October 2018, after which a Notice of Determination was issued finding Fearrington "liable" because he presented "no defense[.]"

¶ 10 Following the appeal hearing, Fearrington was informed in writing that he had "fully exhausted [his] administrative remedies with the City of Greenville concerning [his] citation" and that, if he wished to pursue the matter further, he should file a petition for writ of certiorari with Pitt County Superior Court. Fearrington then filed a petition for writ of certiorari. In response, Defendants stated to him in writing that "[t]he proper mechanism through which to present your two constitutional challenges to the [RLCEP] is through a declaratory judgment action[.]" Pursuant to an agreement between the parties, the trial court entered a "Consent Order for the purpose of effectuating their agreements" and concluded the following as a matter of law:

> 1. [Fearrington] has fully exhausted his administrative remedies with the City of Greenville concerning his citation.
>
> 2. A declaratory judgment action, rather than a Petition for Review under N.C. Gen. Stat. § 160A-393, is the most efficient means for [Fearrington] to present his as-applied challenges to the [RLCEP].

¶ 11 Plaintiff Malmrose also appealed his citation. Malmrose stated in a sworn deposition that he attempted to record his appeal hearing on his phone, but a Greenville police officer stopped him from doing so. The officer confiscated Malmrose's phone and informed him that Greenville's city attorney instructed him to not allow respondents to record the hearings. Following the hearing, a Notice of Determination was issued finding Malmrose "liable" because of a "fast yellow[.]"

¶ 12 On 22 April 2019, Plaintiffs jointly filed a Complaint in Pitt County Superior Court, seeking declaratory judgments that the RLCEP violated (1) Article I, Sections 1, 19, 35 and 36 of the North Carolina Constitution, as applied; (2) N.C. Gen. Stat. § 160A-300.1; (3) Article IX, Section 7 of the North Carolina Constitution, as applied, due to the funding scheme adopted by the interlocal agreement between Greenville and the School Board; (4) Chapter 89C of the North Carolina General Statutes governing the lawful practice of engineering in North Carolina; and (5) procedural due process.

¶ 13 On 22 April 2020, the trial court granted Defendants' motions to dismiss, and denied Plaintiffs' motion for summary judgment, as to claims (2), (3), and (4). On 22 July 2020, the court granted the School Board's motion to dismiss as to claims (1) and (5), resolving all remaining claims against the School Board. With only claims (1) and (5) pending against Greenville remaining, the trial court granted summary judgment in Greenville's favor as to those claims. Plaintiffs' timely filed notice of appeal from the trial court's orders.

II. Jurisdiction

¶ 14 **[1]** Defendants argue that (1) Plaintiffs' claims must be dismissed for failure to exhaust administrative remedies and (2) an adequate state remedy exists to redress Plaintiffs' injury, barring Plaintiffs' constitutional claims. Defendants also argue that Plaintiffs lack standing to bring their claim under Article IX, Section 7. We address each argument in turn.

A. Administrative Remedies

¶ 15 Defendants argue that Plaintiffs' claims should be dismissed because Plaintiffs failed to exhaust administrative remedies. Because Plaintiffs did not have their administrative appeals heard via petitions for certiorari in Pitt County Superior Court, Defendants reason that Plaintiffs were barred from filing the instant action. We disagree.

¶ 16 "As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). "If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed." *Phillips v. Orange Cty. Health Dep't*, 237 N.C. App. 249, 257, 765 S.E.2d 811, 817 (2014) (citation omitted).

¶ 17 With respect to red light camera citations, N.C. Gen. Stat. § 160A-300.1(c)(4) provides that "[t]he municipality shall institute a nonjudicial administrative hearing to review objections to citations or penalties issued or assessed under this section." The local ordinance governing Greenville's RLCEP provides,

> Appeals shall be heard through an administrative process established by the city. Once an appeal is requested, an appeal hearing will be scheduled. The hearing officer's decision is subject to review in the Superior Court of Pitt County by proceedings in the nature of certiorari.

Greenville, N.C., Code of Ordinances §§ 10-2-285. Review of the hearing officer's decision in superior court is the final step in the appeal process established by Greenville.

¶ 18 In this case, Fearrington filed a petition for writ of certiorari in Pitt County Superior Court seeking review of the constitutional claims he presented during the administrative hearing. Defendants then stated to him in writing that "[t]he proper mechanism through which to present your two constitutional challenges to the [RLCEP] is through a declaratory judgment action[.]" Pursuant to an agreement by the parties, the trial court entered a Consent Order disposing of Fearrington's petition for writ of certiorari and concluded as a matter of law that Fearrington had "fully exhausted his administrative remedies with the City of Greenville concerning his citation."

¶ 19 We conclude that Fearrington exhausted his administrative remedies once the trial court entered the Consent Order disposing of his petition for writ of certiorari. The Consent Order constitutes a final order entered in the last stage of the administrative appeal process. Once the order was entered, Fearrington had no other administrative remedy available to him and was free to file the instant action in the trial court.

¶ 20 Defendants argue that, regardless of the trial court's conclusion that administrative remedies were exhausted, Plaintiffs' appeal should be dismissed because (1) the trial court's conclusion was incorrect and (2) the Consent Order was entered to give effect to the parties' agreements, which is insufficient to establish subject matter jurisdiction.

¶ 21 It is true that "parties to an action may not stipulate to give a court subject matter jurisdiction[] where no such jurisdiction exists. Thus, the parties could not simply stipulate that they had exhausted all administrative remedies in order for the trial court to have jurisdiction over the matter." *Bio-Medical Apps. of N.C., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 179 N.C. App. 483, 492, 634 S.E.2d 572, 579 (2006). In this case, however, a final order was entered which disposed of the final appeal in the administrative process. The Consent Order thus amounted to more than a mere stipulation by the parties. Once the parties' agreement was reduced to a written order, "[i]t acquire[d] the status of a judgment, *with all its incidents*, through the approval of the judge and its recordation in the records of the court." *McRary v. McRary*, 228 N.C. 714, 719, 47 S.E.2d 27, 31 (1948) (emphasis added). "The fact that a judgment is rendered by consent gives it neither less nor greater force and effect than it would have had it been rendered after protracted litigation, except to the extent that the consent excuses error and operates to end all controversy between the parties." *Id.* at 720, 47 S.E.2d at 31.

¶ 22 Moreover, our inquiry with respect to the exhaustion requirement is not whether the legal conclusions contained in the final order are correct or incorrect. Once a tribunal with proper jurisdiction enters a final order disposing of the last stage in the administrative process, as here, all administrative remedies are exhausted. *See Hentz v. Asheville City Bd. of Educ.*, 189 N.C. App. 520, 523, 658 S.E.2d 520, 522 (2008) ("Because the [Board of Education] had not yet issued a final decision at the time [the] plaintiff filed her action in superior court, [the] plaintiff had not exhausted all administrative remedies."). Whether the trial court correctly concluded that Fearrington had exhausted his administrative remedies is therefore irrelevant.

B. Adequate State Remedy

¶ 23 Defendants also argue that Plaintiffs' constitutional claims are barred because an adequate state remedy exists to redress Plaintiffs' injury. *See Corum v. Univ. of N.C. Bd. of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) ("Having no other remedy, our common law guarantees [the] plaintiff a direct action under the State Constitution for alleged violations of his constitutional . . . rights." (citation omitted)). We have already concluded that Fearrington exhausted all remedies available to him. There is also no adequate statutory or common law remedy which would redress Plaintiffs' asserted injuries under the State Constitution. *See Alt v. Parker*, 112 N.C. App. 307, 318, 435 S.E.2d 773, 779 (1993) (dismissing the plaintiff's appeal due to the existence of adequate state remedies because the plaintiff failed to exhaust administrative remedies and had a "common law tort action for false imprisonment available to him"). We therefore conclude that an adequate state remedy does not exist to bar Plaintiffs' constitutional claims.

C. Article IX, Section 7 Standing

¶ 24 Finally, Defendants argue that Plaintiffs lack standing to challenge the funding scheme adopted by the interlocal agreement between Greenville and the School Board. Because "Plaintiffs do not have a sufficient stake in any alleged controversy arising under the Interlocal Agreement" and "have not suffered some 'injury in fact' from any breach thereof," Defendants contend that Plaintiffs' claim under Article IX, Section 7 must be dismissed. We disagree.

¶ 25 First, our Supreme Court has made plain that the "injury-in-fact requirement has no place in the text or history of our [S]tate Constitution" and is "inconsistent with the caselaw of this Court." *Comm. to Elect Dan Forest v. Emps. Political Action Comm.*, 376 N.C. 558, 2021-NCSC-6, ¶¶ 73–74. "Rather, as a rule of prudential self-restraint . . . we have

required a plaintiff to allege 'direct injury' to invoke the judicial power to pass on the constitutionality of a legislative or executive act." *Id.* ¶ 73. On the other hand, "[w]hen a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, . . . the legal injury itself gives rise to standing." *Id.* ¶ 82. This is because the "remedy clause [of our State Constitution] should be understood as guaranteeing standing to sue in our courts where a legal right at common law, by statute, or arising under the North Carolina Constitution has been infringed." *Id.* ¶ 81 (emphasis in original) (citing N.C. Const. Art. I, § 18, cl. 2). Because Plaintiffs are not challenging the constitutionality of a statute or an "executive act," they need not demonstrate an injury-in-fact in order to establish standing. *Id.* ¶¶ 73, 81.

¶ 26 Even so, we cannot say that Plaintiffs have failed to demonstrate any injury resulting from the funding agreement between Greenville and the School Board. Plaintiffs were both issued citations at red light camera locations and each were found liable for a $100.00 fine. If Plaintiffs are correct in arguing that the proceeds of the fines are unconstitutionally appropriated pursuant to Article IX, Section 7, they have demonstrated an injury to their rights under the State Constitution. Our appellate courts have previously addressed the merits of at least one case strikingly similar to the case at bar. *See Cauble v. City of Asheville*, 301 N.C. 340, 271 S.E.2d 258 (1980).

¶ 27 In *Cauble*, the plaintiff "alleged that he and the citizens, residents and taxpayers of the City of Asheville had paid fines for overtime parking which . . . , pursuant to Article IX, [S]ection 7 of the North Carolina Constitution, belonged to the county to be 'used exclusively for maintaining free public schools.' " *Id.* at 341, 271 S.E.2d at 259. At no point did this Court or our Supreme Court doubt whether it had subject-matter jurisdiction to hear the plaintiff's appeal. *Id.* at 342, 271 S.E.2d at 259. Similar to *Cauble*, Plaintiffs allege that they each paid fines for red light camera violations which, under Article IX, Section 7, belong to the School Board. We discern no notable difference between *Cauble* and the instant case with respect to jurisdiction.

¶ 28 Moreover, there is "no serious question that a taxpayer ha[s] an equitable right to sue to prevent an illegal disposition of the moneys of [a] county." *Goldston v. State*, 361 N.C. 26, 31, 637 S.E.2d 876, 880 (2006) (citations and internal quotation marks omitted). "[I]f such rights were denied to exist against municipal corporations, then taxpayers and property owners who bear the burdens of government would not only be without remedy, but liable to be plundered whenever irresponsible

men might get into the control of the government of towns and cities." *Id.* (citation omitted). Plaintiffs alleged in their Complaint that they are residents and taxpayers of Pitt County.

¶ 29 We conclude that Plaintiffs' appeal is properly before this Court and proceed to address the merits of their arguments.

III. Analysis

¶ 30 Plaintiffs argue that the trial court erred in denying their motion for summary judgment because Greenville's RLCEP violates (1) Chapter 89C of the North Carolina General Statutes; (2) procedural due process; (3) substantive due process; and (4) the Fines and Forfeitures Clause contained in Article IX, Section 7 of the North Carolina Constitution. We hold that Plaintiffs are entitled to summary judgment as to their claim under the Fines and Forfeitures Clause. We otherwise affirm the trial court's orders.

¶ 31 Plaintiffs also argue that the trial court erred in considering the affidavit of an unqualified expert. Although Plaintiffs motioned to strike the affidavit from the court's consideration, our review of the record indicates that Plaintiffs never obtained a ruling on that motion. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection or motion . . . [and] obtain a ruling upon the party's request, objection, or motion."); *Finley Forest Condo. Ass'n v. Perry*, 163 N.C. App. 735, 738, 594 S.E.2d 227, 230 (2004) ("This Court is unable to review the issue concerning the trial court's admission and consideration of the affidavits since there is nothing before this Court indicating the trial court's ruling on the question."). We are thus unable to review this issue.

A. Chapter 89C

¶ 32 **[2]** Plaintiffs contend that Chapter 89C of the General Statutes "imposes a duty on municipalities to enforce its provisions" and that "Defendants violated this duty by using red light camera plans drawn by unlicensed engineers" with ATS. Because Chapter 89C does not contemplate or provide a private cause of action for violations of its provisions, we hold that Plaintiffs' claim was appropriately dismissed by the trial court.

¶ 33 "[A] statute may authorize a private right of action either explicitly or impliedly, though typically, 'a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute[.]' " *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 338, 828 S.E.2d 467, 474 (2019) (citations omitted). "Where a cause of action is created by statute and the statute also provides who is

to bring the action, the person or persons so designated, and, ordinarily, only such persons, may sue." *State ex rel. Lanier v. Vines*, 274 N.C. 486, 492, 164 S.E.2d 161, 164 (1968) (citation omitted).

¶ 34 N.C. Gen. Stat. § 89C-23 provides in pertinent part:

> Any person who shall practice, or offer to practice, engineering or land surveying in this State without first being licensed in accordance with the provisions of this Chapter . . . , in addition to injunctive procedures set out hereinbefore, shall be guilty of a Class 2 misdemeanor. . . . It shall be the duty . . . of the State and all political subdivisions of the State to enforce the provisions of this Chapter and to prosecute any persons violating them.

N.C. Gen. Stat. § 89C-23 (2019). Section 89C-23 thus provides two enforcement mechanisms for violations of its provisions: (1) "injunctive procedures" and (2) criminal prosecution. *Id.* With respect to the former, N.C. Gen. Stat. § 89C-10(c) provides, "The Board [of Examiners for Engineers and Surveyors] may in the name of the State apply for relief, by injunction, . . . to enforce the provisions of this Chapter, or to restrain any violation of the provisions of this Chapter." N.C. Gen. Stat. § 89C-10(c) (2019).

¶ 35 Here, Chapter 89C does not provide Plaintiffs with a private cause of action. It instead vests authority in the Board to seek an injunction in the name of the State for violation of the Chapter's provisions. *Id.* Although section 89C-23 requires "all political subdivisions of the State to enforce the provisions of th[e] Chapter and to prosecute any persons violating them[,]" it does not provide Plaintiffs with a private right of action against Defendants. *Id.* § 89C-23.

¶ 36 The fact that Plaintiffs seek a declaratory judgment as opposed to an injunction does not change our analysis. For example, in *Sykes*, the plaintiffs sought a declaratory judgment that the defendants "fail[ed] to comply with various provisions of the [S]tate's Insurance Law found in Chapter 58 of the North Carolina General Statutes." *Sykes*, 372 N.C. at 337, 828 S.E.2d at 474. The plaintiffs argued that the "Declaratory Judgment Act g[a]ve[] them a path to declaratory relief, notwithstanding Chapter 58's language vesting enforcement authority in the Commissioner of Insurance." *Id.* at 339, 828 S.E.2d at 475. The Court rejected this argument, holding that "the language of [Chapter 58], as well as the previous cases interpreting other portions of Chapter 58, vest enforcement of the requirements of the statutory sections identified by plaintiffs in

the Commissioner of Insurance, meaning that plaintiffs do not have a private right of action for declaratory relief under these provisions." *Id.*

¶ 37 As in *Sykes*, Plaintiffs seek a declaration that Defendants violated certain statutory provisions, but those provisions do not provide Plaintiffs with a private right of action. Instead, the authority to enforce Chapter 89C lies with the Board of Examiners for Engineers and Surveyors and "political subdivisions of the State." N.C. Gen. Stat. §§ 89C-10, 23. Plaintiffs point to no portions of Chapter 89C that, either expressly or impliedly, confer a right of action on private claimants. We affirm the trial court's dismissal of Plaintiffs' claim under Chapter 89C.

B. Procedural Due Process

¶ 38 **[3]** Plaintiffs next argue that the RLCEP's administrative appeal hearings violate procedural due process because the hearing officers "disregard[] evidence and deny[] the right to record hearings." We disagree.

¶ 39 "The fundamental premise of procedural due process protection is notice and the opportunity to be heard . . . 'at a meaningful time and in a meaningful manner.' " *Peace v. Emp. Sec. Comm'n of N.C.*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). "At a minimum, due process requires adequate notice of the charges and a fair opportunity to meet them, and the particulars of notice and hearing must be tailored to the capacities and circumstances of those who are to be heard." *State v. Stines*, 200 N.C. App. 193, 198, 683 S.E.2d 411, 414 (2009) (citation omitted). Under the 14th Amendment of the federal constitution, the degree of process due in a particular proceeding turns on three factors: (1) "the private interests at stake," (2) "the government's interest," and (3) "the risk that the procedures used will lead to erroneous decisions." *Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 27 (1981) (citing *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)).

¶ 40 Greenville is required by statute to "institute a nonjudicial administrative hearing to review objections to [red light camera] citations[.]" N.C. Gen. Stat. § 160A-300.1(c)(4). To that end, the local ordinance governing Greenville's RLCEP provides that appeals from citations "shall be heard through an administrative process established by the city." Greenville, N.C., Code of Ordinances §§ 10-2-285. If the appellant receives an unfavorable decision following his administrative appeal, the RLCEP provides that the "hearing officer's decision is subject to review in the Superior Court of Pitt County by proceedings in the nature of certiorari." *Id.*

¶ 41 Once a petition for certiorari is filed and granted, the superior court reviews the administrative decision pursuant to the following standard of review:

> (1) . . . [T]he court shall ensure that the rights of petitioners have not been prejudiced because the decision-making body's findings, inferences, conclusions, or decisions were:
>
> a. In violation of constitutional provisions, including those protecting procedural due process rights.
>
> b. In excess of the statutory authority conferred upon the local government, including preemption, or the authority conferred upon the decision-making board by ordinance.
>
> c. Inconsistent with applicable procedures specified by statute or ordinance.
>
> d. Affected by other error of law.
>
> e. Unsupported by competent, material, and substantial evidence in view of the entire record.
>
> f. Arbitrary or capricious.
>
> (2) When the issue before the court is one set forth in sub-subdivisions a. through d. of subdivision (1) of this subsection, including whether the decision-making board erred in interpreting an ordinance, the court shall review that issue de novo. . . . Whether the record contains competent, material, and substantial evidence is a conclusion of law, reviewable de novo.

N.C. Gen. Stat. § 160D-1402(j)(1-2) (2020).[1]

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1. Prior to 19 June 2020, appeals from municipal administrative decisions subject to superior court review were governed by N.C. Gen. Stat. § 160A-393 (2019). The General Assembly subsequently amended the provisions therein and recodified them under a new Chapter: 160D. The standard of review governing the instant appeal remains unchanged. Moreover, N.C. Gen. Stat. § 160D-111, titled "Effect on prior laws," provides, "The enactment of [160D] does not require the readoption of any local government ordinance enacted pursuant to laws that were in effect before June 19, 2020 and are restated or revised herein. The provisions of this Chapter do not affect any act heretofore done, any liability incurred, any right accrued or vested, or any suit or prosecution begun or cause of action accrued as of June 19, 2020." N.C. Gen. Stat. § 160D-111(a) (2020). Plaintiffs received their citations and commenced the instant suit prior to these amendments.

¶ 42 We conclude that the hearing process established by Greenville is constitutionally adequate. First, there is little "risk that the procedures used will lead to erroneous decisions." *Lassiter*, 452 U.S. at 27 (1981). Given that running a red light is a strict liability offense, N.C. Gen. Stat. §§ 20-158(2)(a), 20-176(a), (b) (2019), it follows that determining whether a cited individual is liable for a violation involves a rather limited inquiry. For example, Greenville's ordinances provide only two affirmative defenses to a red light camera violation:

> (c) . . . [T]he owner of the vehicle shall not be responsible for the violation if . . . he furnishes the officials or agents of the city either of the following:
>
> (1) An affidavit by him stating the name and address of the person or entity who had the care, custody, and control of the vehicle at the time of the violation; or
>
> (2) An affidavit by him stating that, at the time of the violation, the vehicle involved was stolen. The affidavit must be supported with evidence that supports the affidavit, including insurance or police report information.
>
> (d) . . . [T]he owner of the vehicle shall not be responsible for the violation if notice of the violation is given to the owner of the vehicle more than ninety (90) days after the date of the violation.

Greenville, N.C., Code of Ordinances § 10-2-283(c-d).

¶ 43 Neither Plaintiff presented evidence establishing an affirmative defense. Although Malmrose was prevented from recording his hearing, the affirmative defenses under the ordinance require submission of affidavits or proof that notice of the violation was received more than ninety days after the violation. In light of this limited inquiry, it is unlikely that recordings or transcripts of the proceedings would mitigate the risk of erroneous decisions.

¶ 44 We also reject Plaintiffs' argument that the hearing officers "disregard[ed] evidence" during Fearrington's hearing. During his hearing, Fearrington argued and submitted evidence that the RLCEP, as applied, violated substantive due process as well as Article IX, Section 7 of the State Constitution. A Notice of Determination was subsequently issued finding Fearrington "liable" because he had "no defense[.]" Fearrington indeed did not present evidence establishing an affirmative

defense. Moreover, municipal hearing officers do not have jurisdiction to decide constitutional issues. *See Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998) (stating that "it is the province of the judiciary to make constitutional determinations").

¶ 45 Although "constitutional claims will not be acted upon by administrative tribunals, such claims can be reserved for the" judiciary by statute, as here. *Johnston v. Gaston Cty.*, 71 N.C. App. 707, 713, 323 S.E.2d 381, 384 (1984). "This division of review, saving constitutional issues for the courts, does not unduly hinder or restrict [an appellant] in asserting his rights." *Id.* On appeal to superior court, the trial judge has jurisdiction to determine whether the hearing officers' decisions are "[i]n violation of constitutional provisions, including those protecting procedural due process rights." N.C. Gen. Stat. § 160D-1402(j)(1)(a). The superior court decides constitutional questions *de novo* and, if necessary, has the authority to "allow the record to be supplemented with affidavits, testimony of witnesses, or documentary or other evidence[.]" *Id.* § 160D-1402(j)(1), (i). We conclude that these procedures adequately protected Plaintiffs' procedural due process rights.

C. Substantive Due Process

¶ 46 **[4]** Plaintiffs also argue that Greenville's RLCEP, as applied, violates substantive due process under the State Constitution because it "infringes Plaintiffs' fundamental right to travel and has no rational relation to a legitimate governmental purpose." This argument is without merit.

¶ 47 In general, substantive due process bars government action that unreasonably or arbitrarily deprives individuals of a liberty or property interest. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181, 594 S.E.2d 1, 15 (2004). "When reviewing an alleged violation of substantive due process rights, a court's first duty is to carefully describe the liberty interest the complainant seeks to have protected." *Standley v. Woodfin*, 362 N.C. 328, 331, 661 S.E.2d 728, 730 (2008). If the liberty interest is "fundamental," our standard of review is strict scrutiny. *Rhyne*, 358 N.C. at 180, 594 S.E.2d at 15. Otherwise, we apply the rational basis test, which only requires that the government action "in question [be] rationally related to a legitimate government purpose." *Standley*, 362 N.C. at 332, 661 S.E.2d at 731.

¶ 48 Plaintiffs argue that the RLCEP infringes on "the fundamental right to travel[.]" "[T]he right to travel on public streets is a fundamental segment of liberty" such that "the absolute prohibition of such travel requires substantially more justification *than the regulation of it by traffic lights or rules of the road*." *State v. Dobbins*, 277 N.C. 484, 499, 178

S.E.2d 449, 457-58 (1971) (emphasis added). "The familiar traffic light is . . . an ever present reminder that this segment of liberty is not absolute. It may be regulated, as to the time and manner of its exercise, when reasonably deemed necessary to the public safety, *by laws reasonably adapted to the attainment of that objective*." *Id.* at 456, 178 S.E.2d at 497 (emphasis added).

¶ 49 Our precedent clearly demonstrates that laws relating to "traffic lights and rules of the road" are different in kind than other laws regulating travel. *Id.* at 499, 178 S.E.2d at 457-58. So long as such laws are "reasonably adapted to the attainment of" the government's interest in "public safety," they will not be disturbed upon review by the courts. *Id.* at 456, 178 S.E.2d at 497. We therefore review Plaintiffs' substantive due process claim under the rational basis test.

¶ 50 "When determining whether a rational basis exists for application of a law, we must determine whether the law in question is rationally related to a legitimate government purpose." *Standley*, 362 N.C. at 332, 661 S.E.2d at 731 (citations omitted). In making this determination, "it is immaterial whether this Court or an individual could devise a more precise or perfect fit between the espoused goal and the means chosen to effectuate that goal. The two need only be reasonably related[.]" *N.C. Bd. of Mortuary Sci. v. Crown Mem'l Park, LLC*, 162 N.C. App. 316, 321, 590 S.E.2d 467, 471 (2004) (citing *Clark's Charlotte, Inc. v. Hunter*, 261 N.C. 222, 229, 134 S.E.2d 364, 369 (1964)); *see also FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.").

¶ 51 In this case, Plaintiffs submitted an affidavit from Brian Ceccarelli, a North Carolina licensed engineer, stating that "Greenville's yellow light durations" create a "dilemma zone" for many drivers such that even a "driver who takes responsible steps to follow the law[] neither has the distance to stop comfortably nor has the time to traverse the distance to the intersection before the light turns red." In his opinion, Greenville's "yellow light duration is too short, thus forcing the driver [in the dilemma zone] to run the red light." He further concluded that, if Greenville's yellow light durations were lengthened to account for the dilemma zone, "80%-90% fewer red light running violations w[ould] be recorded by the camera system. . . . In particular, neither [Plaintiff] would have been cited for a red-light violation."

¶ 52 We hold that Greenville's RLCEP did not violate Plaintiffs' substantive due process rights. In seeking authority from the General Assembly

to implement an RLCEP, Greenville resolved that "a serious public safety hazard is created by drivers of motor vehicles who violate the law by entering an intersection after the traffic signal light turns red[.]" Perhaps citations issued to those caught in the "dilemma zone" do not further Greenville's interest in public safety, or perhaps they do. As long as the matter is rationally debatable, "it is immaterial whether this Court or an individual could devise a more precise or perfect fit between the espoused goal and the means chosen to effectuate that goal. The two need only be reasonably related[.]" *Crown Mem'l Park*, 162 N.C. App. at 321, 590 S.E.2d at 471 (citing *Hunter*, 261 N.C. at 229, 134 S.E.2d at 369).

¶ 53 We note that red light cameras, along with other forms of technology, have the potential to drastically alter the enforcement of our traffic laws. A red light camera now enables the government to monitor each and every traffic signal with exacting precision, twenty-four hours a day, without blinking an eye. Mr. Ceccarelli noted in his affidavit that Plaintiffs entered the intersection within "0.4" seconds of the light turning red, stating that "[s]uch a quick time is discernable only by computer-triggered camera, not by human perception." In his opinion, Plaintiffs "had no reason to know they were running a red light."

¶ 54 Developments in technology will continue to present challenging problems with which policymakers must contend. This Court, however, does not sit to make policy determinations. A citizen's best defense to what he sees as incompetent or corrupt policy judgments is to appeal to his fellow citizens and hold his government to account at the ballot box.

D. Fines and Forfeitures Clause

¶ 55 **[5]** Plaintiffs argue that the RLCEP, as applied, violates the Fines and Forfeitures Clause contained in Article IX, Section 7 of the State Constitution due to the funding scheme adopted by the interlocal agreement between Greenville and the School Board. Plaintiffs contend that, because the School Board receives less than the "clear proceeds" of the civil penalties collected by Greenville, the RLCEP violates the Fines and Forfeitures Clause. We agree, reverse the trial court's order as to this claim, and remand for entry of summary judgment in Plaintiffs' favor.

¶ 56 Article IX, Section 7 provides that "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State . . . shall be faithfully appropriated and used exclusively for maintaining free public schools." N.C. Const. Art. IX, § 7. "[T]he term 'clear proceeds' as used in Article IX, Section 7 is synonymous with net proceeds[,] . . . and . . . the costs of collection should be deducted from the gross proceeds of monies received

for traffic violations in order to determine the net or 'clear proceeds.' " *Shavitz v. City of High Point*, 177 N.C. App. 465, 481, 630 S.E.2d 4, 15 (2006) (quoting *Cauble v. City of Asheville*, 314 N.C. 598, 604, 336 S.E.2d 59, 63 (1985)) (alterations in original). "By 'clear proceeds' is meant the total sum *less only the sheriff's fees for collection*, when the fine and costs are collected in full." *Cauble*, 314 N.C. at 602–03, 336 S.E.2d at 62 (quoting *State v. Maultsby*, 139 N.C. 583, 585, 51 S.E. 956, 956 (1905)) (alteration in original).

> [C]osts of collection do not include the costs associated with enforcing the ordinance but are limited to the administrative costs of collecting the funds. If . . . the costs of enforcing the penal laws of the State were a part of collection of fines imposed by the laws, there could never be any *clear proceeds* of such fines to be used for the support of the public schools. . . . Conversely it would be an impractical and harsh rule to deny municipalities the reasonable costs of collections.

Id. at 606, 336 S.E.2d at 64 (alteration in original).

¶ 57 "Article IX, Section 7 'is not self-executing'; therefore, the General Assembly may 'specify[] how the provision's goals are to be implemented.' " *Shavitz*, 177 N.C. App. at 482, 630 S.E.2d at 16 (quoting *N.C. Sch. Bds. Ass'n v. Moore*, 359 N.C. 474, 512, 614 S.E.2d 504, 527 (2005)). To that end, and not inconsistent with caselaw limiting deductible costs to "costs of collection," *Moore*, 359 N.C. at 527, 614 S.E.2d at 512; *Cauble*, 314 N.C. at 606, 336 S.E.2d at 64, the General Assembly has defined "clear proceeds" as "the full amount of all penalties, forfeitures or fines collected under authority conferred by the State, *diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected*." N.C. Gen. Stat. § 115C-437 (2019) (emphasis added).

¶ 58 We hold that the interlocal agreement between Greenville and the School Board does not meet the minimum requirements of Article IX, Section 7 or N.C. Gen. Stat. § 115C-437. According to Greenville's responses to interrogatories, the RLCEP generated $2,495,380.46 in total revenue from 2017 through June 2019. The School Board paid Greenville $706,986.65 in program expenses during the same period, which included $581,986.65 in fees invoiced by ATS. Ultimately, the School Board received $1,788,393.81 in net revenue during the period, which is only 71.66% of the total amount of fines and fees collected by Greenville. N.C. Gen. Stat. § 115C-437 provides that, at a minimum, school boards must receive 90% of the total fines and fees collected.

¶ 59 Moreover, fines and fees may be "diminished only by the actual costs of collection," N.C. Gen. Stat. § 115C-437, and "the costs of collection do not include the costs associated with enforcing the ordinance but are limited to the administrative costs of collecting the funds." *Cauble*, 314 N.C. at 606, 336 S.E.2d at 64. Pursuant to the interlocal agreement, Greenville invoices the School Board for the salary and benefits of a law enforcement officer as well as for all fees invoiced to Greenville by ATS. This Court has previously held that the salary and benefits of law enforcement officers are enforcement costs and are thus not deductible from the clear proceeds. *Shavitz*, 177 N.C. App. at 482, 630 S.E.2d at 16 (stating that "the costs of employing police and judges are not deducted to determine the clear proceeds of a penalty"). Also, the contract between ATS and Greenville provides that Greenville pay ATS $31.85 in fees for every $100.00 paid citation, in addition to other miscellaneous fees associated with ATS services. The contract states that "[t]his fee will cover the services set out in Article 2" of the contract, wherein "collections" is only one of ten services included in the $31.85 fee. The fee also includes "enforcement" costs, which may not be deducted from clear proceeds. *Cauble*, 314 N.C. at 606, 336 S.E.2d at 64. Even assuming that the entirety of the $31.85 fee was for collection costs, Greenville is only permitted to deduct $10 from every $100 paid citation to offset the costs of collection. N.C. Gen. Stat. § 115C-437.

¶ 60 Defendants argue that the interlocal agreement does not violate Article IX, Section 7 because Greenville initially pays the School Board 100% of the fines collected under the RLCEP. Because Greenville collects all of its RLCEP expenses from the School Board *after* forwarding the fines to the School Board, Defendants argue that the funding agreement is constitutionally adequate.

¶ 61 This argument asks us to not only frustrate the clear intent of the people in ratifying Article IX, Section 7, it also contravenes the plain language of the Fines and Forfeitures Clause, which provides that "the clear proceeds . . . *shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free and public schools*." N.C. Const. Art. IX, § 7 (emphasis added).

¶ 62 We disagree that the School Board receives the "clear proceeds" of the fines collected simply because Greenville initially forwards the fines to the School Board and collects its expenses at a later date. The School Board does not receive the "clear" proceeds of fines in any real sense when Greenville forwards the fines to the School Board and subsequently takes 30% of the money back for costs which are not deductible to

begin with. Moreover, the clear purpose of the people in mandating that the clear proceeds of such fines be "*faithfully* appropriated" to the public schools cannot be circumvented by the elaborate diversion of funds or cleverly drafted contracts. *Id.* (emphasis added).

¶ 63 Even if we were to accept Defendants' argument that the School Board does receive the clear proceeds at least initially, the clear proceeds must then "be used exclusively for maintaining free and public schools" and thus may not be used to reimburse Greenville for its RLCEP expenses to ATS. *Id.* Moreover, by stating that the clear proceeds are to "remain in the several counties," it is clear that the framers did not intend for $31.85 of every $100.00 paid fine to go to private companies such as ATS, a for-profit corporation located in Arizona. *Id.*

¶ 64 The language of Article IX, Section 7 "is unequivocal as to its drafters' intent to benefit the public schools as opposed to city treasuries" or private companies. *Shavitz*, 177 N.C. App. at 484, 630 S.E.2d at 17. We hold that Plaintiffs are entitled to summary judgment as to their claim under the Fines and Forfeitures Clause.

IV. Conclusion

¶ 65 For the foregoing reasons, we reverse the trial court's dismissal of Plaintiffs' claim under the Fines and Forfeitures Clause and remand for entry of summary judgment in Plaintiffs' favor. We otherwise affirm the trial court's orders. We dismiss Plaintiffs' assignment of error as to the expert affidavit as not preserved for appellate review.

DISMISSED IN PART; AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges DIETZ and GORE concur.

GALLOWAY v. SNELL

[282 N.C. App. 239, 2022-NCCOA-159]

MICHAEL R. GALLOWAY, AS TRUSTEE OF THE MELISSA GALLOWAY SNELL LIVING TRUST DATED MAY 1, 2018, AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MELISSA GALLOWAY SNELL, PLAINTIFF
v.
JEFFREY SNELL, DEFENDANT

No. COA21-135

Filed 15 March 2022

Contracts—separation settlement agreement—terms—ability to change beneficiary of insurance policy—ambiguous

In a declaratory judgment action to determine the beneficiary of $1 million in proceeds from insurance policies on the life of defendant's ex-wife, who died of cancer after the couple separated, the trial court erred by granting summary judgment in favor of the ex-wife's brother acting as trustee of a living trust that she had established for the benefit of her four children with defendant. There was a genuine issue of material fact as to whether defendant's separation settlement agreement with his ex-wife did or did not permit the ex-wife to change the beneficiary of her life insurance policies from defendant to the trust where the terms of the agreement could reasonably be interpreted either way and, therefore, were ambiguous.

Judge HAMPSON dissenting.

Appeal by Defendant from order entered 19 August 2020 by Judge A. Graham Shirley, II, in Wake County Superior Court. Heard in the Court of Appeals 3 November 2021.

The Connor Law Firm, PLLC, by Gregory S. Connor, for Plaintiff-Appellee.

Smith, Debnam, Narron, Drake, Saintsing, & Myers, LLP, by Bettie Kelley Sousa, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Jeffrey Snell ("Jeff") appeals the trial court's order granting summary judgment to Plaintiff Michael Galloway, as Trustee of the Melissa Galloway Snell Living Trust and Personal Representative of the Estate of Melissa Galloway Snell ("Michael"), in a declaratory judgment action to determine the beneficiary of $1,000,000 in proceeds

from certain insurance policies on the life of Melissa Galloway Snell ("Melissa"), who was Jeff's ex-wife and Michael's sister. At issue is whether the terms of an agreement between Jeff and Melissa permitted Melissa to change the beneficiary of her life insurance policies from Jeff to a living trust Melissa set up for the benefit of the four children she shared with Jeff. Because the pertinent language of the agreement is ambiguous, the trial court erred by granting summary judgment to Michael. We reverse the trial court's order and remand for further proceedings.

I. Facts

¶ 2 Jeff and Melissa were married on 25 March 2000 and separated on or about 11 August 2017. They had four children together. Melissa filed a comprehensive lawsuit against Jeff arising from their separation. The parties entered into a Memorandum of Mediated Settlement Agreement ("Agreement") on 8 February 2018 addressing child support, spousal support, and equitable distribution.[1] The Agreement was signed by both Jeff and Melissa, their attorneys, and the mediator, and was notarized. The Agreement provides that "more formal" documents reflecting the parties' agreement will follow and that the parties shall promptly execute the formal documents when their attorneys are "reasonably satisfied that the formal documents substantially comply with the terms of this Memorandum."

¶ 3 The Agreement further states that "[t]he parties agree to be mutually bound by the terms and conditions set forth herein and on the attached document." The attached document consists of "five additional pages containing terms and conditions of the settlement reached by the parties hereto." The terms and conditions provide, in part:

> Equitable Distribution
>
> . . . .
>
> - **Non ED [Equitable Distribution] Assets/ Children's Assets:**
>
> o The children's treasury bonds and checking accounts would be kept intact and not used for anything absent the parties mutual agreement. Melissa and Jeff shall be joint owners of the accounts, such that no funds can be removed absent

1. Child custody was addressed in a separate document.

both parties' signatures. Both parties shall have online access to all statements.

o The children's American Funds accounts shall be used for the children's education only, absent mutual agreement by the parties.

o The [c]hildren's life insurance policies shall be kept intact. Jeff will be responsible for 90% of the premiums and Melissa shall be responsible for 10% of the premiums until the child is gainfully employed. The beneficiary shall be the children's trust (see details about trust below).

Custody- see the consent order for custody

Support- Child and Spousal

- Jeff to pay $4,400/mo. in child support with automatic step down of $750.00 when child support for a child terminates by statute. The amount of child support may be modified if a child begins residing primarily with Jeff, or a court orders a different amount of child support.
- Alimony to be paid as follows: commencing March 1, 2018 and continuing on the first day of each month thereafter for the next six years (February 1, 2024), unless sooner terminated as set forth below Jeff shall pay alimony in the amount of $6,000 month (taxable to Melissa, tax-deductible to Jeff); Alimony shall sooner terminate upon the death of either party, Melissa's remarriage or cohabitation, or reconciliation of the parties, whichever first occurs. The alimony obligation to be contained in SAPS and non-modifiable unless Jeff suffers an involuntary decrease in gross annual income of 20 percent or more below an annual income of $292,000. If Melissa suffers an involuntary increase in her needs, she may also seek

modification of the alimony via arbitration. In no event shall the duration of alimony exceed 6 years. The parties shall submit the issue of modified alimony to arbitration, with the arbitrator's cost to be equally divided.

- Jeff will pay 100% of premium costs for kids' medical, dental, and vision insurance until the child graduates from college or reaches age 21, whichever comes first.
- Unreimbursed children's medical expenses shall be split 90% Jeff and 10% Melissa, unless modified by court order. Party incurring the expense shall submit receipt, etc. to the other party and the other party shall reimburse within 20 days of receiving expense. Unreimbursed or uncovered health care costs shall include any amount not covered by health, dental, or vision insurance for co-pays, doctor's visits, medical and hospitalization, and reasonable and necessary dental, orthodontic, optical, ophthalmologic, psychological, psychiatric, therapeutic, or pharmaceutical or any other health care related expenses incurred for the benefit of or on behalf of the child. The parties shall explore whether they can obtain [an] HSA account to use for the children's medical expenses.
- Jeff to pay for [Eli] and [Landon]'s cell phones and Melissa to pay for [Jill] and [Jamie]'s cell phones until that child graduates from college or turns 21, whichever comes first.[2]
- As long as Jeff has support obligations or is obligated to pay for children's college as outlined below, he shall maintain a life insurance policy naming Melissa is (sic) as the beneficiary with a death benefit of $2 Million.
- Until Melissa no longer has an obligation to pay for college expenses, she shall maintain

2. We use pseudonyms for the children to protect their identities.

> a life insurance policy naming Jeff the beneficiary with a death benefit of at least $1 Million. Jeff at his election may maintain (as owner) at his sole expense [words crossed out] life insurance policy on Melissa's life totaling $1,000,000 in death benefit.
>
> - Additional term: the parties currently have a health insurance policy with a deductible of $10K. Prior to Melissa's flu and hospitalization, Melissa had paid almost $1K. Jeff shall pay as non-taxable support the sum of up to $9,000.00 in the form of payments directly to medical providers as the bills come due for the 2018 policy term.
> - Children's trust–each party shall, within 90 days, set up a trust for the benefit of the minor children so that the children can receive any insurance proceeds in lieu of the other party being named the beneficiary. Jeff's brother shall be named as trustee of the children's trust established by Jeff, and Melissa's brother shall be named as trustee of the children's trust established by Melissa.
> - Jeff shall keep Melissa on his health insurance until the date of divorce. Melissa shall be responsible for her own out of pocket expenses prospectively.

The Agreement also addresses the parties' payments for the children's private school and college, attorneys' fees, and business valuation costs.

¶ 4 At the time of signing the Agreement, Jeff had five policies on his own life, each naming Melissa as the beneficiary—two $1,000,000 policies, and three other policies in the amounts of $305,000; $882,393; and $1,695,000. Melissa had three policies on her own life, each naming Jeff as the beneficiary—two $500,000 policies and one $415,392 policy. Each of the four children also had a life insurance policy, each naming Jeff and Melissa as beneficiaries.

¶ 5 In late March or early April 2018, Melissa learned that cancer, for which she had previously been treated, had returned. On 1 May 2018, Melissa established the Melissa Galloway Snell Living Trust ("Trust"),

naming the children as the beneficiaries and her brother Michael as the trustee and contingent beneficiary. On 16 May 2018, Melissa changed the beneficiary of at least her two $500,000 life insurance policies from Jeff to the Trust.[3]

¶ 6 Melissa sent Jeff a "Separation and Property Settlement Agreement" on 23 May 2018, which she proposed as the anticipated formalization of the Agreement, that included the following terms:

> 16. Children's Trust:
>
> a. On or before May 9, 2018, each party shall set up a trust for the benefit of the minor children. Wife shall name her brother, Michael Galloway, as the trustee for her trust, and Husband shall name his brother, Justin Snell as the beneficiary for his trust.
>
> b. So long as Wife has an obligation to pay for the children's college expenses as outlined hereinbelow, she shall maintain a life insurance policy on her life naming the children's trust as the beneficiary with a death benefit of at least one million dollars. So long as Husband has a child support obligation and/or college expense obligation as outlined hereinbelow, he shall maintain a life insurance policy on his life with a death benefit of at least two million dollars naming the children's trust as the beneficiary.

¶ 7 Neither Jeff nor Melissa signed the Separation and Property Settlement Agreement. On 4 June 2018, Melissa notified Jeff's attorney that she had established the Trust and changed the beneficiary of her two $500,000 life insurance policies from Jeff to the Trust. In or around February 2019, Jeff notified Northwestern Mutual, the issuer of the policies, that he was contesting the beneficiary of Melissa's two $500,000 life insurance policies. On 15 February 2019, Melissa signed an affidavit detailing her intentions for the insurance proceeds and her understanding of the original Agreement. Melissa died of cancer on 21 February 2019.

¶ 8 Michael filed a Verified Complaint on 26 February 2019 and a Verified First Amended Complaint on 23 March 2019, seeking declaratory judgment that the Agreement "unambiguously provides that Melissa may

3. The proceeds in dispute are from the two $500,000 insurance policies on Melissa's life. The proceeds of Melissa's third life insurance policy, totaling $415,392, is not in dispute.

lawfully name [the Trust] as the beneficiary of the proceeds of the Life Insurance Policy" and that "Defendant has no lawful claim to the proceeds of the Life Insurance Policy because [the Trust] was created and named the beneficiary of the Life Insurance Policy."[4] Jeff filed an answer and counterclaim seeking declaratory judgment that he is the sole beneficiary of the two $500,000 insurance policies on Melissa's life and asserting a breach of contract claim against Michael, arguing that Melissa failed to keep in effect life insurance policies with a $1,000,000 death benefit payable to Jeff as beneficiary. Michael answered and moved to dismiss Jeff's counterclaims. The parties filed cross-motions for summary judgment on all claims and submitted supplemental materials, including affidavits, in support of their motions.

¶ 9 The parties' motions came on for hearing on 28 July 2020. The trial court entered an order on 19 August 2020 ("Order") wherein it concluded, in relevant part:

> 6. The terms of the Settlement Agreement are not ambiguous.
>
> 7. There is no genuine issue of material fact precluding the granting of summary judgment on [Michael]'s declaratory judgment cause of action.
>
> 8. [Michael] is entitled to summary judgment on his declaratory judgment cause of action, with the following declared:
>
> > I. The Settlement Agreement, subject to II below, required [Melissa] to maintain life insurance naming Jeff the beneficiary with a death benefit of at least $1 Million until she no longer had an obligation to pay for college expenses;
> >
> > II. The Settlement Agreement permitted Melissa Galloway Snell to change the beneficiary on insurance she owned to the children's trust in lieu of having [Jeff] named as beneficiary, including changing the beneficiary on the two life insurance policies in which [Jeff] was named as the beneficiary, with death benefits totaling $1,000,000.00, to the Melissa Galloway Snell Living Trust as beneficiary;

4. Michael's complaint also alleged an unrelated claim for breach of contract regarding an equitable distribution dispute. The resolution of that issue is not on appeal.

> III. That the Melissa Galloway [Snell] Living Trust dated May 1, 2018 is the proper sole beneficiary of all of the life insurance policies owned by Melissa Galloway Snell at her death.

¶ 10 The trial court granted Michael's motion for summary judgment and denied Jeff's cross-motion for summary judgment.

¶ 11 Jeff timely appealed.

II. Discussion

¶ 12 Jeff argues that the trial court erred by granting summary judgment to Michael, and by failing to grant summary judgment to Jeff, as there was no genuine issue of material fact and Jeff was the beneficiary of Melissa's disputed insurance policies as a matter of law. In the alternative, Jeff argues that the trial court erred by granting summary judgment to Michael because there is a genuine issue of material fact as to the life insurance beneficiary under the Agreement, and therefore, that the matter should be remanded to the trial court for further proceedings.

¶ 13 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. Gen. Stat. § 1A-1, Rule 56(c) (2020). "[A]ll inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quotation marks omitted). The standard of review for summary judgment is de novo. *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). The interpretation of a contract is a conclusion of law that is likewise reviewed de novo. *In Re Est. of Cracker*, 273 N.C. App. 534, 538, 850 S.E.2d 506, 509 (2020).

¶ 14 Settlement agreements are interpreted as contracts and are governed by the rules of contract interpretation and enforcement. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000) (citation omitted). "Whenever a court is called upon to interpret a contract[,] its primary purpose is to ascertain the intention of the parties at the moment of its execution." *Gilmore v. Garner*, 157 N.C. App. 664, 666, 580 S.E.2d 15, 18 (2003) (quotation marks and citation omitted). "It must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean." *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (citations omitted). Under well-settled principles of legal construction, when "the language of a

contract is clear and unambiguous, construction of the contract is a matter of law for the court." *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987).

¶ 15 If, however, the language of a contract "is ambiguous and the intention of the parties is unclear, interpretation of the contract is for the [finder of fact]," and summary judgment is not appropriate. *Glover v. First Union Nat'l. Bank of N.C.*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993). A contract is ambiguous "when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations." *Register v. White*, 358 N.C. 691, 695, 599 S.E.2d 549, 553 (2004). In determining whether a contract is ambiguous, "words are to be given their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible . . . ." *Piedmont Bank and Trust Co. v. Stevenson*, 79 N.C. App. 236, 241, 339 S.E.2d 49, 52 (1986).

¶ 16 The Agreement at issue in this case includes, inter alia, the following:

> Equitable Distribution
>
> . . . .
>
> • Non-ED Assets/Children's Assets:
>
> . . . .
>
> o The Children's life insurance policies shall be kept intact. Jeff will be responsible for 90% of the premiums and Melissa shall be responsible for 10% of the premiums until the child is gainfully employed. The beneficiary shall be the children's trust (see details about trust below).
>
> Custody– see the consent order for custody
>
> Support– Child and Spousal
>
> . . . .
>
> • As long as Jeff has support obligations or is obligated to pay for children's college as outlined below, he shall maintain a life insurance policy naming Melissa is (sic) as the beneficiary with a death benefit of $2 Million.
>
> • Until Melissa no longer has an obligation to pay for college expenses, she shall maintain a

> life insurance policy naming Jeff the beneficiary with a death benefit of at least $1 Million. Jeff at his election may maintain (as owner) at his sole expense life insurance policy on Melissa's life totaling $1,000,000 in death benefit.
>
> • Additional term: the parties currently have a health insurance policy with a deductible of $10K. Prior to Melissa's flu and hospitalization, Melissa had paid almost $1K. Jeff shall pay as non-taxable support the sum of up to $9,000.00 in the form of payments directly to medical providers as the bills come due for the 2018 policy term.
>
> • Children's trust–each party shall, within 90 days, set up a trust for the benefit of the minor children so that the children can receive any insurance proceeds in lieu of the other party being named the beneficiary. Jeff's brother shall be named as trustee of the children's trust established by Jeff, and Melissa's brother shall be named as trustee of the children's trust established by Melissa.

¶ 17 The "Equitable Distribution" section addressing "Non-ED Assets/ Children's Assets" provides, "The [c]hildren's life insurance policies shall be kept intact" and, "The beneficiary shall be the children's trust (see details about trust below)."[5] This subsection of the Agreement, which pertains to assets not to be distributed to the parties in equitable distribution and assets belonging to the Children, is the sole provision in the Agreement that specifically instructs that certain life insurance policies shall name the children's trust as the beneficiary.

¶ 18 Subsequently, the "Support–Child and Spousal" section requires Jeff to "maintain a life insurance policy naming Melissa is (sic) as the beneficiary with a death benefit of $2 Million" and Melissa to "maintain a life insurance policy naming Jeff the beneficiary with a death benefit of at least $1 Million." After an intervening term addressing payment of certain medical bills, the parameters of the children's trust are set forth, stating that "each party shall, within 90 days, set up a trust for the benefit

5. We note that the "Children's trust" section requires two trusts to be set up, one by each party. The Agreement does not indicate which of these two trusts would be the beneficiary of the children's life insurance policies.

of the minor children so that the children can receive any insurance proceeds in lieu of the other party being named the beneficiary."

¶ 19 Jeff argues that the Agreement unambiguously required Melissa to "maintain a life insurance policy naming Jeff the beneficiary with a death benefit of at least $1 Million" until "Melissa no longer had an obligation to pay for college expenses," and the children's trust was to be the beneficiary of proceeds from other policies—including each of the children's life insurance policies, the $415,392 policy on Melissa's life, and the three policies on Jeff's life in the amounts of $305,000; $1,695,000; and $882,393. Jeff further argues that the two $500,000 policies on Melissa's life and the two $1,000,000 policies on Jeff's life "represented carve-outs with funds going directly to the surviving spouse" and were "never intended for the Trust."

¶ 20 In the alternative, Jeff argues that the Agreement is ambiguous as to whether Melissa was required to "maintain a life insurance policy naming Jeff the beneficiary with a death benefit of at least $1 Million" until "Melissa no longer had an obligation to pay for college expenses" or whether, once a party set up a trust for the benefit of the children, the party could change the beneficiary of any insurance policy such that "the children can receive any insurance proceeds in lieu of the other party being named the beneficiary."

¶ 21 Michael, by contrast, argues that the Agreement unambiguously provides that once a party sets up a trust for the benefit of the children, the party could change the beneficiary of any insurance policy such that "the children can receive any insurance proceeds in lieu of the other party being named the beneficiary."[6]

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6. In his complaint and appellate brief, Michael represents that the relevant portions of the Agreement are as follows:

> *Until Melissa no longer has an obligation to pay for college expenses, she shall maintain a life insurance policy naming Jeff the beneficiary with a death benefit of at least $1 Million…Children's Trust–each party shall, within 90 days, set up a trust for the benefit of the minor children so that the children can receive any insurance proceeds in lieu of the other party being named the beneficiary, Jeff's brother shall be named as trustee of the children's trust established by Jeff, and Melissa's brother shall be named as trustee of the children's trust established by Melissa.*

By omitting the provision regarding the children's life insurance policies, which directly references the creation of the children's trust, and by replacing the intervening term in the above-quoted language with ellipses, Michael's representation of the relevant portions is somewhat misleading.

¶ 22 It is reasonable to interpret the terms of the Agreement as requiring Melissa to maintain a $1,000,000 life insurance policy with Jeff as the beneficiary; requiring Melissa to set up a trust for the benefit of the children within 90 days of signing the Agreement; and, after setting up the trust, naming the children's trust the beneficiary of the children's life insurance policies and other insurance policies not specified in the Agreement, "so that the children can receive any insurance proceeds in lieu of the other party being named beneficiary."

¶ 23 It is also reasonable to interpret the terms of the Agreement as requiring Melissa to maintain a $1,000,000 life insurance policy with Jeff as the beneficiary; requiring Melissa to set up a trust for the benefit of the children within 90 days of signing the Agreement; and, after setting up the children's trust, allowing Melissa to name the Trust as the beneficiary of her two $500,000 life insurance policies "in lieu of" Jeff.

¶ 24 In sum, we conclude that the language of the Agreement is ambiguous, and summary judgment is not appropriate for either party. To resolve the ambiguity, the case must be remanded to the trial court for further proceedings. *See*, *e.g.*, *Schenkel & Shultz*, *Inc. v. Hermon F. Fox & Assocs.*, 362 N.C. 269, 275, 658 S.E.2d 918, 923 (2008); *C. O. Gore v. George J. Ball*, *Inc.*, 279 N.C. 192, 201, 182 S.E.2d 389, 394 (1971) ("While the construction of clear and unambiguous language in a contract is for the court, it is for the [fact finder] to determine whether a particular agreement was or was not part of the contract actually made by the parties.").

¶ 25 In light of this conclusion, we do not reach Jeff's remaining arguments.

III. Conclusion

¶ 26 We reverse the trial court's order granting summary judgment to Michael on the issue of the proper life insurance beneficiary of Melissa's insurance policies and remand to the trial court for further proceedings.

REVERSED AND REMANDED.

Judge CARPENTER concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

¶ 27 The Opinion of the Court captures—with characteristic precision and clarity—both the salient facts and the applicable law. I simply diverge from the majority in my analysis and conclusion. In my view, the provisions of the Agreement at issue in this case relating to child support are unambiguous and Summary Judgment was appropriately granted to Plaintiff.[1] I would affirm the trial court's 19 August 2020 Order granting summary judgment in favor of Plaintiff on the declaratory judgment claim. Therefore, I respectfully dissent.

¶ 28 It is apparent on the face of the Agreement that Jeff and Melissa intended the support provisions—in relevant part—to address and resolve the respective responsibilities of the parties to ensure for their children's college education beyond each of the four children reaching the age of majority. *See Altman v. Munns*, 82 N.C. App. 102, 104, 345 S.E.2d 419, 422 (1986) ("Under North Carolina law, a separation agreement may provide for the support of the children of the marriage after they reach majority. The most common of these provisions is one providing for the payment of college expenses of the children.") (citations omitted). The Agreement accomplishes this goal by providing: (1) each party contribute a portion of their income to 529 accounts for the children; and (2) in the event a child's 529 account does not cover the costs of college, apportioning the remaining costs between Jeff (90%) and Melissa (10%) with each party's obligation limited to the cost of in-state tuition, books, fees, etc. at UNC-Chapel Hill, for up to 8 semesters per child.[2]

¶ 29 Additionally, in the provisions specifically at issue in this case, in the event of the other party's death, Jeff and Melissa agreed to secure Jeff's support obligation and their respective responsibilities for the four children's college education through life insurance policies until those obligations were complete:

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1. That is not to say there is not some level of ambiguity in other terms of the Agreement related to spousal and child support or property distribution—just that those terms are not before us. This is also not to say that the memorandum memorializing the mediated settlement agreement is itself a model of clarity and organization. It is not. However, that likely reflects the long, difficult and complicated negotiations that go into resolving these cases—involving all aspects of the parties' lives—and the efforts to capture each party's disparate concerns and demands in order to resolve the case short of the uncertainty of trial. Nevertheless, where we can discern the clear intent of the parties from the plain and unambiguous text of the agreement—even if written less than eloquently—we should.

2. See my prior footnote re: potential ambiguity in other terms of the Agreement.

> • As long as Jeff has support obligations or is obligated to pay for children's college as outlined below, he shall maintain a life insurance policy naming Melissa is (sic) as the beneficiary with a death benefit of $2 Million.
>
> • Until Melissa no longer has an obligation to pay for college expenses, she shall maintain a life insurance policy naming Jeff the beneficiary with a death benefit of at least $1 Million. Jeff at his election may maintain (as owner) at his sole expense life insurance policy on Melissa's life totaling $1,000,000 in death benefit.

These two provisions anticipate: (1) life insurance coverage purchased by Jeff with Melissa as beneficiary in the event of Jeff's death in the amount of $2 million; (2) life insurance coverage purchased by Melissa with Jeff as the beneficiary in the event of Melissa's death in the amount of $1 million; and (3) a potential third policy purchased or maintained by Jeff with Jeff as the beneficiary in the event of Melissa's death in the further amount of $1 million. Next—after an unrelated provision for medical expenses and health insurance deductible payments—the Agreement provides:

> • Children's trust–each party shall, within 90 days, set up a trust for the benefit of the minor children so that the children can receive any insurance proceeds in lieu of the other party being named the beneficiary. Jeff's brother shall be named as trustee of the children's trust established by Jeff, and Melissa's brother shall be named as trustee of the children's trust established by Melissa.

This provision anticipates that each party will set up a trust and that the purpose of this trust is to provide an additional level of security to the parties to the Agreement by providing a mechanism whereby one spouse could (but was not required) ensure the proceeds from the insurance policy they purchased to secure their support and college expense obligation would ultimately be used for the benefit of the children and not result in a "windfall" for the opposing party. The provision does this by allowing each party to establish a trust for the benefit of the children that may be named as the beneficiary "in lieu of the other party." In other words, applied to this case, Melissa was to set up a trust for the benefit of the minor children and was permitted—but not required—to name

the trust as the beneficiary of the life insurance policy (or policies) she purchased to secure her college expense obligations "in lieu of" Jeff.[3]

¶ 30 Thus, the support the provisions at issue in this case unambiguously provide for the parties' obligations for college expenses of their minor children secured by life insurance policies purchased with the other party as the beneficiary with the option of a trust set up for the benefit of the children to be named the beneficiary in lieu of the other party. Therefore, by the unambiguous language of the Agreement, Melissa was permitted to name the trust she set up for the benefit of the children as the beneficiary of the insurance policies she maintained to secure her college expense obligations. Consequently, the trust is the proper beneficiary of the insurance proceeds. Accordingly, Summary Judgment was properly granted to Plaintiff and should be affirmed.

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3. The argument advanced by Defendant—that a separate provision related to the parties' property distribution claims and addressing life insurance policies taken out by Jeff insuring the lives of the children creates ambiguity in the support provisions—is not persuasive to me. I agree that particular provision is itself somewhat ambiguous. It states: "The [c]hildren's life insurance policies shall be kept intact. Jeff will be responsible for 90% of the premiums and Melissa shall be responsible for 10% of the premiums until the child is gainfully employed. The beneficiary shall be the children's trust (see details about trust below)." As the majority notes, where the subsequent provision detailing the children's trusts to be set up anticipates two separate trusts, it is not entirely clear which trust or trusts is intended to be the beneficiary of the children's life insurance policies referenced in the property settlement. This ambiguity is not, however, before us and has no bearing on the separate support provisions. Indeed, there is not any argument before us that the property settlement and support provisions were reciprocal or non-severable. *See, e.g.*, *Morrison v. Morrison*, 102 N.C. App. 514, 520, 402 S.E.2d 855, 859 (1991) ("There exists a presumption that the provisions of a marital agreement are separable and the burden of proof is on the party claiming that the agreement is integrated."). As such, the provisions truly at issue in this case are those support provisions. In that regard, I also disagree with the majority's footnote 6 characterizing Plaintiff's pleadings and argument focusing on those relevant provisions as "somewhat misleading." To the contrary, Plaintiff merely attempts to focus the argument on the relevant provisions.

IN RE GODWIN REVOCABLE TR.

[282 N.C. App. 254, 2022-NCCOA-160]

IN RE THE HERMAN EARL GODWIN REVOCABLE TRUST CREATED UNDER AGREEMENT DATED AUGUST 9, 2017

THERESA ANN GODWIN, PLAINTIFF

v.

CECIL S. HARVELL, IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF HERMAN E. GODWIN, IN HIS CAPACITY AS TRUSTEE OF THE HERMAN E. GODWIN REVOCABLE TRUST CREATED UNDER AGREEMENT DATED AUGUST 9, 2017, IN HIS CAPACITY AS TRUSTEE OF THE TRUST F/B/O AIDEN GAFFNEY CREATED UNDER ARTICLE IV OF THE HERMAN E. GODWIN REVOCABLE TRUST AGREEMENT DATED AUGUST 9, 2017, IN HIS CAPACITY AS TRUSTEE OF THE TRUST F/B/O ZHOE GAFFNEY CREATED UNDER ARTICLE IV OF THE HERMAN E. GODWIN REVOCABLE TRUST AGREEMENT DATED AUGUST 9, 2017; APRIL M. JONES; PAULA K. WOODY; HEATHER GAYLOR; AND ZHOE GAFFNEY, DEFENDANTS

IN THE MATTER OF THE ESTATE OF HERMAN EARL GODWIN, DECEASED

No. COA21-351

Filed 15 March 2022

1. Wills—caveat proceeding—testamentary capacity—dementia and confusion regarding property

In an estate dispute involving allegations of undue influence by caregivers, plaintiff (the deceased settlor's daughter) presented a genuine issue of material fact—making summary judgment inappropriate—concerning the settlor's mental capacity to execute the disputed testamentary instruments where plaintiff's evidence tended to show that the settlor was suffering from dementia during the relevant time period and lacked understanding regarding who was managing his finances, what real property he owned, and who were the beneficiaries of his will and trusts.

2. Wills—caveat proceeding—undue influence—non-family caregivers—control over life and finances

In an estate dispute, the trial court erred by granting a directed verdict in favor of defendants on the issue of undue influence where plaintiff presented more than a scintilla of evidence that, at the time the disputed testamentary instruments disinheriting her were executed, her elderly father was physically and mentally weak, his caregivers (who were not family) took control of his life and finances, his caregivers would not allow his family to see him without supervision, many of his family members attempted to warn him that his caregivers were taking advantage of him, and medical personnel and bank employees observed his unusual behavior and alerted both family and law enforcement with concerns about activities and expenses by the caregivers.

IN RE GODWIN REVOCABLE TR.

[282 N.C. App. 254, 2022-NCCOA-160]

3. Wills—caveat proceeding—testamentary capacity—declaration by decedent—admissibility

In an estate dispute involving the issue of testamentary capacity and allegations of undue influence by caregivers, the trial court erred by excluding the testimony of the deceased settlor's nephew that, five months after the disputed testamentary instruments were executed, the elderly settlor stated that he wanted his real property to go to plaintiff (who was disinherited in the testamentary instruments).

Appeal by plaintiff from orders entered 14 December 2020 by Judge Paul Quinn, 11 January 2021 by Judge Joshua W. Willey, and 29 January 2021 by Judge Paul Quinn in Carteret County Superior Court. Heard in the Court of Appeals 23 February 2022.

Womble Bond Dickinson (US) LLP, by Jesse A. Schaefer and Elizabeth K. Arias, for plaintiff-appellant, Theresa Ann Godwin.

Harvell and Collins, P.A., by Wesley A. Collins and Samuel K. Morris-Bloom and Harris, Creech, Ward & Blackerby, P.A., by C. David Creech, for defendant-appellee Cecil S. Harvell in his capacity as Executor of the Estate of Herman E. Godwin, in his capacity as Trustee of the Herman E. Godwin Revocable Trust created under Agreement dated August 9, 2017, in his capacity as Trustee of the trust f/b/o Aiden Gaffney created under ARTICLE IV of the Herman E. Godwin Revocable Trust Agreement dated August 9, 2017, in his capacity as Trustee of the trust f/b/o Zhoe Gaffney created under Article IV of the Herman E. Godwin Revocable Trust Agreement dated August 9, 2017.

TYSON, Judge.

¶ 1 Theresa Ann Godwin ("Plaintiff") appeals from orders entered granting summary judgment, a directed verdict, and finding Plaintiff's claims lacked substantial merit to Cecil S. Harvell ("Harvell"), in his capacity as Executor of the Herman E. Godwin, in his capacity as Trustee of the Herman E. Godwin Revocable Trust, in his capacity as Trustee of the trust for the benefit of Aiden Gaffney created under Article IV of the Herman E. Godwin Revocable Trust Agreement, and in his capacity as Trustee of the trust for the benefit of Zhoe Gaffney created under Article IV of the Herman E. Godwin Revocable Trust Agreement; April M. Jones; Paula K. Woody; Heather Gaylor; and, Zhoe Gaffney (collectively "Defendants"). We reverse and remand.

I. Background

¶ 2 Herman E. Godwin ("Settlor") and wife, Ellen Godwin ("Ellen") owned 76 acres of real property containing 22 rental units in and around Newport. Ellen managed the couple's finances, including collecting rent from tenants and writing checks for the household expenses and for the rental properties. Settlor and Ellen are parents of two daughters: Plaintiff and Barbara Bittner. Bittner has a daughter, Heather Gaylor ("Gaylor"). Gaylor has two children: Zhoe Gaffney and Aiden Gaffney.

¶ 3 In November 2009, Settlor and Ellen retained Harvell to complete their estate plans. Settlor and Ellen each signed a revocable trust agreement, an irrevocable trust agreement, and deeds transferring their real property to the irrevocable and revocable trusts. Settlor executed a will to govern the distribution of his other property.

¶ 4 Settlor and Ellen appointed Plaintiff and Bittner as co-executors and co-trustees upon their deaths. Settlor funded the trusts with real property. The documents directed the assets to pass to the surviving spouse of the couple, and if no spouse survived, then in equal shares between Plaintiff and Bittner, or their living issue *per stirpes*.

¶ 5 In 2014, Settlor underwent coronary artery bypass surgery and was hospitalized for five days. Plaintiff stayed with Settlor during his hospitalization and arranged for in-home care following his discharge from the hospital. Settlor and Ellen were dissatisfied with the caregivers sent from the home health company and the family began looking for replacements.

¶ 6 Paula Woody ("Paula") was a tenant of Settlor and Ellen. Paula, who was employed as a hairdresser, volunteered to become a caregiver for Settlor and Ellen, and was hired in late September 2014. Shortly afterwards, Paula's son, Justin Woody ("Justin"), Paula's niece, Danah Hartley ("Hartley"), and Paula's daughter, April Jones ("Jones"), were also hired as caregivers.

¶ 7 Soon after Settlor had returned home from the hospital, Ellen became ill and passed away on 18 October 2014. Following Ellen's death, Plaintiff became Settlor's attorney-in-fact ("AIF") under his 2009 estate plan. Paula, Jones, Justin, and Hartley also began collecting the rent from other tenants and managing Settlor's rental properties.

¶ 8 In December 2014, Settlor requested Plaintiff to collect timesheets from the caretakers, review them for errors, and submit claims for reimbursement from John Hancock Life Insurance Company, U.S.A., Settlor's long-term care insurance carrier.

¶ 9 Plaintiff visited Settlor in July 2015 and noticed the caretakers were only working approximately four to six hours a day. Plaintiff further noticed when she posed a question, Settlor looked to a caretaker for assistance in responding to her question. On 5 September 2015, Plaintiff told Paula that she and the other caretakers could not submit claims for hours that they had not worked, by texting to her: "I will not submit falsified claims" to John Hancock.

¶ 10 Plaintiff reported the caretakers immediately stopped being friendly with her. Plaintiff further recounted Settlor believed she was "fishing around" with the insurance policy so John Hancock would deny the claim. Settlor came to believe Plaintiff wanted to place him into a nursing home and take control of his assets. Plaintiff told Settlor she and her sister, Bittner, did not want to place Settlor into a nursing home, but "no matter how many times [Plaintiff and Bittner] said it wasn't true, [they] kept being accused of it."

¶ 11 Plaintiff, as Settlor's AIF, feared the caretakers were taking financial advantage of Settlor. Plaintiff reviewed Settlor's credit report and bank account statements. Plaintiff discovered: (1) checks were not being signed in Settlor's handwriting; (2) checks were written out of numerical sequence; (3) checks were being written to individuals with whom Settlor did not do business; (4) checks were written for items that did not fit within Settlor's spending habits; (5) a cash withdrawal of $20,000 was made from his account; and, (6) a new credit card account in Settlor's name had been opened with a different signature from his.

¶ 12 Plaintiff was concerned about transactions involving "Sarah Burns" where on 13 August 2015 a check for $500 was written for a funeral donation and then Settlor received a car financing payment from "Sarah Burns" in November 2015. Plaintiff hired Durward Matheny, a forensic document examiner, to examine the credit card application and Settlor's checks. Matheny concluded neither were signed by Settlor, but the signatures were attempts to simulate his handwriting.

¶ 13 Bittner filed an Adult Protective Services report with the Carteret County Department of Social Services on 19 October 2015. Bittner stated Settlor was "alienated" and "brainwashed" into fear that his daughters "only want to put him in a nursing home and take all of his money." Bittner's claim was not accepted for evaluation.

¶ 14 Two days later, on 21 October 2015, Plaintiff contacted the Carteret County Sheriff's Department reporting the inconsistencies in Settlor's bank accounts and alleging two caregivers had been overpaid. Deputy David Perry was assigned to investigate the claims.

¶ 15 During Deputy Perry's interview with Settlor, he had reported Plaintiff was "mad at him because he threatened to remove her from his will after she failed to accurately manage his finances and because she is angry that he only gave $7,500 to [Plaintiff's] daughter instead of the $15,000 he had promised to give her years ago when she was old enough."

¶ 16 Settlor said "he [was] perfectly capable to direct his own affairs and regrets having given [Plaintiff] power of attorney claiming at the time he did not understand what []he was doing when he signed the power of attorney partly because his wife had died recently and because he trusted his daughter." Deputy Perry reported Settlor stated, "[N]o one forged his signature on any checks[.]" Settlor further told Deputy Perry he had an appointment with his attorney, Harvell, to remove Plaintiff as his AIF and to change his will. Deputy Perry noted Settlor "was very articulate and direct in his answers."

¶ 17 Settlor decided to revise his estate plan and held a meeting with Harvell on 22 October 2015. Settlor told Harvell his daughters, Plaintiff and Bittner, were "plotting and planning" to put him on "a path toward" living in a nursing home. Harvell reported Settlor had told him that he always signed all of his checks. Harvell advised Settlor to replace Plaintiff with a different family member. Settlor instructed Harvell to remove all his real property out from the trusts. Harvell sent a letter to Plaintiff and Bittner informing them of Settlor's intention to take all his real property out of the trusts and enclosed quit claim deeds for them to sign conveying the property back to Settlor. Settlor decided to replace Plaintiff as his AIF.

¶ 18 Shortly thereafter his caregiver, Paula, called Settlor's nephew, Bill Godwin ("Godwin"), who lives in Florida. Paula asked him to serve as Settlor's AIF. Godwin was concerned because he had never met Paula, did not know why a caretaker was calling, and both of Settlor's daughters lived closer to Settlor than him. Godwin called Settlor directly and determined he "didn't sound right." Godwin noticed Settlor's tone of voice was different and he was not able to converse normally. Godwin called Plaintiff.

¶ 19 Plaintiff, Bittner, and Roy Ivey ("Ivey"), Bittner's husband, went to Settlor's bank to obtain copies of his credit card statements on 23 October 2015. While at the bank, Plaintiff, Bittner, and Ivey accessed Settlor's safety deposit box and removed $10,000 in cash. Bank employees notified Settlor that Plaintiff was attempting to access his account statements.

¶ 20 Settlor came to the bank branch and Plaintiff told him she was there to access his bank records but did not tell him $10,000 had been removed

from the safety deposit box. Settlor gave the bank permission to release the statements to Plaintiff and Bittner. Plaintiff and Bittner sought to turn over the alleged forged checks to the Carteret County Sheriff's Department, but were informed the investigation had been closed.

¶ 21 Also on 23 October 2015, Plaintiff, Bittner, Settlor, and Harvell met in Harvell's office. Harvell told Plaintiff and Bittner that Settlor "sign[ed] his name different ways." Plaintiff and Bittner refused to quit claim their interest in the real property being held in the irrevocable trust. Harvell informed Plaintiff her AIF powers would be revoked. Settlor later named attorney M. Douglas Goines ("Goines") as his AIF.

¶ 22 Plaintiff and Bittner hired Wyles Johnson ("Johnson"), an attorney, to explore terminating the employment of Settlor's caregivers. Johnson informed Plaintiff and Bittner the only way to remove the caregivers was for Settlor to be declared incompetent. Plaintiff and Bittner declined to pursue such an action.

¶ 23 Johnson contacted Goines, Settlor's AIF and relayed Plaintiff's and Bittner's concerns regarding the caregivers and Settlor's financial competency. Goines then met with Settlor and Harvell. Harvell told Goines there was a "long family history of tension between the daughters, especially [Plaintiff], and [Settlor] . . . he lets [Plaintiff] take advantage of him . . . [and] he greatly resents the efforts of [Plaintiff] to try and take over his life."

¶ 24 Goines concluded it was "completely clear to [him] that [Settlor] is competent and quite capable of managing his affairs . . . [and] that he very much wants to manage his own affairs and is not going to voluntarily surrender that privilege to anyone."

¶ 25 Settlor's bank reported to the Carteret County Sheriff's Department that Settlor was being financially exploited on 10 November 2015. Settlor: (1) had come into the bank branch with Paula's daughter, Jones; (2) had transferred $2,000 to Jones' deceased grandmother; and, (3) "appeared to be confused about the transaction."

¶ 26 Following a second investigation request by Bittner, Deputy Perry conducted a second personal interview with Settlor. Deputy Perry noted Settlor "appears to be in full control of his mental facilities and fully understands his actions and those of his employees . . . [and] does not appear to be in any distress mentally or physically[.]"

¶ 27 Settlor told Deputy Perry the money had to be withdrawn from his account because an account Jones and her grandmother shared had purportedly been seized by the state for outstanding debts. Settlor admitted

being confused by the transaction, did not know Jones' grandmother, but had authorized it anyway because Jones had assured him "everything is on the up and up."

¶ 28 Settlor stated, "No one signs any checks for me" and "All financial transactions" are authorized by me. Deputy Perry concluded he did not "believe [Settlor] is being taken advantage of by his caretakers or anyone else." Deputy Perry again closed the investigation. None of Settlor's family members were informed of the bank's allegations at the time, nor of the Carteret County Sheriff's Department's subsequent investigation.

¶ 29 On 2 December 2015, Plaintiff, Bittner, Ivey, and Godwin, traveled to Settlor's home to tell Settlor about the irregularities concerning the checks. The family members noticed family photographs were removed and missing from the home, Settlor's checkbook was not present in the drawer where it was usually kept, and files containing Settlor's important documents were missing. When the topic of checks was brought up, Settlor became uncharacteristically angry, refused to look at the cancelled checks, and went into his room.

¶ 30 Godwin left to confront Paula at her residence. Paula called law enforcement and Godwin returned to Settlor's residence. Settlor attempted to get into his vehicle, but Godwin would not allow him to drive away because he felt Settlor was not able to drive by himself at night.

¶ 31 At this time, Paula, Jones, and Justin along with law enforcement officers arrived at Settlor's house. An argument broke out between Plaintiff, Godwin, Paula, and Jones. After Settlor's family left, Paula told Settlor "You have to get a restraining order against [Plaintiff and Bittner] because I'm not going to put up with their s—t, [and] I don't have to."

¶ 32 Settlor, through counsel, obtained an *ex parte* domestic violence protective order ("DVPO") on 14 December 2015 against Plaintiff. After being served with the 14 December DVPO, Plaintiff contacted Johnson, who referred her to attorney Joel Hancock ("Hancock"). Plaintiff is employed by the United States Department of the Treasury and holds a top-secret level security clearance. Plaintiff was concerned she could lose her security clearance due the allegations of domestic violence in the DVPO complaint. Plaintiff hired Hancock who contacted Wesley Collins, Harvell's law partner. Settlor voluntarily dismissed the 14 December DVPO.

¶ 33 After the 14 December DVPO was filed, several tenants of Settlor's properties called Plaintiff and Bittner asserting Paula had "some kind of hold" on Settlor and Settlor was "agree[ing] with everything" she said. Plaintiff did not bring these third-party allegations to Settlor for fear of a second DVPO.

¶ 34 The following day on 15 December 2015, Settlor visited a neurologist. Settlor sought a "letter of mental competency to give to his attorney." Settlor complained of "memory problems." The neurology clinic noted Settlor did not know the day of the week and his attention and concentration were impaired. The neurology clinic ordered imaging and clinical tests. The neurologist concluded all tests showed cognitive impairment and declined to determine or confirm Settlor's legal competency, because it required "a higher level of neurocognitive, behavioral, and comprehension than we can presently perform in this office. Based on these tests alone, we are not in a position to give an opinion regarding competency."

¶ 35 On 17 November 2015, Harvell drafted a document naming Paula's daughter, Jones, as Settlor's healthcare agent. In January 2016, Settlor decided to again revise his estate plan. Settlor replaced Plaintiff and Bittner as executor and named Harvell as executor. Settlor's new will also included specific bequests of $7,000 each to Paula, Jones, and Zhoe. The residuary of Settlor's estate was to be divided between Plaintiff and Bittner *per stirpes* if both survived Settlor. If Bittner predeceased Settlor, Plaintiff would inherit the entire residuary estate.

¶ 36 Plaintiff and Settlor communicated sporadically by phone with no face-to-face visits from January 2016 until Marth 2017. In March 2017, Settlor again revised his estate plan. Settlor retained Harvell to draft the will and trusts and named Harvell as his executor. The will included $7,000 bequests each to Paula and Jones. The will poured the estate residuary into a new revocable testamentary trust. The beneficiaries of the revocable testamentary trust were granddaughter Gaffney, and her children Zhoe and Aiden. No provisions in the will were made for Plaintiff or her children. Settlor's earlier irrevocable and revocable trusts holding the real property remained unchanged.

¶ 37 In April 2017, Plaintiff received a call from a nurse concerning Settlor's annual medical examination. The report concluded Settlor's mental health was deteriorating and he was relying more upon his caretakers. On 26 July 2017, Bittner died. Around the time of Bittner's funeral, Ivey showed Settlor a letter from Plaintiff, which contained the medical evaluation and a note suggesting the daughters to re-evaluate their position to not seek to have Settlor declared incompetent to fire the caretakers.

¶ 38 Settlor became "fed up" with Plaintiff and contacted Harvell to remove Plaintiff from his estate plan and pass his estate to Bittner's lineal heirs. In the 9 August 2017 estate plan, Settlor revoked the prior

revocable trust, the testamentary trust created by the pour over will, and conveyed his real property back to himself. Settlor deeded the real property into a new trust which distributed the real property to Gaffney, Zhoe, and Aiden.

¶ 39 Settlor executed a new will with the same distribution provisions from the March 2017 will. Harvell testified he had no concerns about Settlor's mental capacity or him being subject to undue influence nor did anyone else in his office who had witnessed the execution of the documents.

¶ 40 On 22 August 2017, Plaintiff came to Settlor's home in Newport. Settlor had paid for and travelled to Florida with his caregivers and their families. Plaintiff stopped by Settlor's house and noticed the television was on, but no one was home. Plaintiff called Paula, who told her about Settlor and her family's trip to Florida. Settlor called Harvell and asked him to call Plaintiff to "ask her to leave and come to the house when [he is] there."

¶ 41 Settlor also asked Harvell to call law enforcement to "make sure everything is ok." Harvell called Plaintiff and relayed this message and called law enforcement to check on the property. Harvell also sent Plaintiff a letter memorializing Settlor's wishes from the telephone conversations.

¶ 42 On 6 September 2017 law enforcement officers were called to Settlor's home by Justin for reports of a trespass by Debbie Turnage ("Turnage"), a friend of Plaintiff. Turnage asserted she was invited into Settlor's home and Settlor never asked her to leave. She was neither cited nor arrested. Later that day, Wesley Collins, Harvell's law partner, met with the caretakers to discuss the preparation of another DVPO complaint against Plaintiff.

¶ 43 On 8 September 2017 Settlor through counsel filed another DVPO. A protective order was entered against Plaintiff. The parties attended a hearing on 14 September 2017. The parties entered a contact agreement, through counsel, which established Plaintiff could maintain contact with Settlor, but she would not have any involvement in his financial affairs. The 8 September 2017 DVPO was voluntarily dismissed.

¶ 44 In November 2017 Settlor could not recognize any family members at a family reunion. Settlor was diagnosed with terminal cancer in January 2018. Plaintiff moved into Settlor's residence for his final weeks. On 27 February 2018, Settlor died.

¶ 45 In August 2018, Plaintiff filed a caveat and trust contest. Plaintiff's complaint alleged the testamentary instruments and deeds executed by

Settlor in the two years prior to his death were invalid due to incapacity and undue influence.

¶ 46 The trial court heard arguments on Defendants' motion for summary judgment on 28 October 2020. The trial court granted Defendants' motion for summary judgment on the issue of Settlor's capacity by correspondence to the parties on 8 November 2020. The trial court drafted an order granting Defendants' motion for summary judgment dated 12 November 2020 and it was filed on 11 January 2021.

¶ 47 At the close of Plaintiff's case-in-chief, the trial court granted Defendants' motion for a directed verdict on undue influence on 14 December 2020. Plaintiff appealed both the order granting summary judgment and the order granting a directed verdict on 12 January 2021.

¶ 48 Defendants moved for attorney's fees pursuant to N.C. Gen. Stat. §§ 6-21(2) and 6-21.5 (2021) on 14 January 2021. Following a hearing, the trial court entered an order on 29 January 2021 finding Plaintiff's claims lacked substantial merit and preserved the issue of attorney's fees for a hearing after the appeal has been ruled upon. Plaintiff also appealed this order.

II. Jurisdiction

¶ 49 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

¶ 50 Plaintiff argues the trial court erred by: (1) granting Defendants' motion for summary judgment; (2) granting Defendants' motion for a directed verdict; (3) excluding the testimony of Godwin; and, (4) concluding Plaintiff's claims lacked substantial merit.

IV. Summary Judgment

¶ 51 **[1]** The trial court granted Defendants' motion for summary judgment on the issue of Settlor's capacity to execute the will and trusts.

A. Standard of Review

¶ 52 "A caveat is an *in rem* proceeding" that operates as "an attack upon the validity of the instrument purporting to be a will." *In re Will of Cox*, 254 N.C. 90, 91, 118 S.E.2d 17, 18 (1961) (citation omitted).

¶ 53 Summary judgment may be entered in a caveat proceeding where there are no genuine issues as to material facts. *See In re Will of McCauley*, 356 N.C. 91, 100-01, 565 S.E.2d 88, 95 (2002). This Court

reviews the trial court's ultimate determination of the summary judgment motion *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

¶ 54 Summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). Because of the factual nature of the issues presented during a caveat proceeding, "[s]ummary judgment should be entered cautiously." *Seagraves v. Seagraves*, 206 N.C. App. 333, 338, 698 S.E.2d 155, 161 (2010).

B. Analysis

¶ 55 "[A] presumption exists that every individual has the requisite capacity to make a will, and those challenging the will bear the burden of proving, by the greater weight of the evidence, that such capacity was wanting." *In re Will of Sechrest*, 140 N.C. App. 464, 473, 537 S.E.2d 511, 517 (2000). Our Supreme Court has confirmed: "A testator has testamentary capacity if he comprehends the natural objects of his bounty; understands the kind, nature and extent of his property; knows the manner in which he desires his act to take effect; and realizes the effect his act will have upon his estate." *In re Will of Buck*, 130 N.C. App. 408, 412, 503 S.E.2d 126, 130 (1998) (citation omitted), *aff'd*, 350 N.C. 621, 516 S.E.2d 858 (1999).

¶ 56 This Court has stated: "To establish lack of testamentary capacity, a caveator need only show that any one of the essential elements of testamentary capacity is lacking." *In re Estate of Phillips*, 251 N.C. App. 99, 110, 795 S.E.2d 273, 282 (2016). A caveator cannot "establish lack of testamentary capacity where there [is] no specific evidence relating to testator's understanding of his property, to whom he wished to give it, and the effect of his act in making a will at the time the will was made." *In re Estate of Whitaker*, 144 N.C. App. 295, 298, 547 S.E.2d 853, 856 (2001) (citation and internal quotation marks omitted) (emphasis original). It is not sufficient for a caveator to present "only general testimony concerning testator's deteriorating physical health and mental confusion in the months preceding the execution of the will." *In re Will of Buck*, 130 N.C. App. at 413, 503 S.E.2d at 130.

¶ 57 A testator is entitled to disinherit a child. *See Ladd v. Estate of Kellenberger*, 314 N.C. 477, 483, 334 S.E.2d 751, 756 (1985) ("The law in North Carolina does not prohibit parents from disinheriting children.

The right to give or take property is not a natural or inalienable right, but one of positive law, created and controlled by the legislature.") (citing *Pullen v. Commissioners of Wake County*, 66 N.C. 361, 363-64 (1872)).

¶ 58 Here, viewed in the light most favorable to Plaintiff, as the non-movant, Plaintiff's affidavits, answers during depositions, and evidence presented during the summary judgment hearing tend to show Settlor was suffering from dementia at the time the will and trusts were executed. The affidavits and answers during deposition tend to indicate Settlor's confusion and lack of knowledge regarding who was managing his finances, what real property he owned, and who were the beneficiaries of his will and trusts. Viewed in the light most favorable to, and with all reasonable inferences that could be drawn therefrom to Plaintiff, genuine issues of material fact exist concerning Settlor's testamentary capacity. The trial court erred in granting summary judgment. The 11 January 2021 summary judgment order is reversed.

V. Directed Verdict

¶ 59 **[2]** Plaintiff argues the trial court erred in granting a directed verdict in favor of Defendants on the issue of undue influence.

A. Standard of Review

¶ 60 "The standard of review of 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) (citation omitted).

¶ 61 Our Supreme Court has held:

> 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). "If there is more than a scintilla of evidence supporting each element of the nonmoving party's claim, the motion for directed verdict or JNOV should be denied." *Horner v. Byrnett*, 132 N.C. App.

323, 325, 511 S.E.2d 342, 344 (1999) (citation omitted). "A scintilla of evidence is defined as very slight evidence." *Hayes v. Waltz*, 246 N.C. App. 438, 442-43, 784 S.E.2d 607, 613 (2016) (citation omitted).

B. Analysis

¶ 62 In the context of a will caveat, undue influence is "a fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result." *In re Estate of Loftin*, 285 N.C. 717, 722, 208 S.E.2d 670, 674-75 (1974).

¶ 63 "There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert influence; (3) a disposition to exert influence; and (4) a result indicating undue influence." *In re Sechrest*, 140 N.C. App. at 469, 537 S.E.2d at 515 (citation omitted).

¶ 64 Our Supreme Court noted a number of factors, in *In re Andrews*, which are relevant to the issue of undue influence:

1. Old age and physical and mental weakness.
2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.
3. That others have little or no opportunity to see him.
4. That the will is different from and revokes a prior will.
5. That it is made in favor of one with whom there are no ties of blood.
6. That it disinherits the natural objects of his bounty.
7. That the beneficiary has procured its execution.

In re Andrews, 299 N.C. 52, 55, 261 S.E.2d 198, 200 (1980) (citation and quotation marks omitted).

¶ 65 A caveator is "not required to demonstrate the existence of every factor to prove undue influence, because undue influence is generally proved by a number of facts, each one of which standing along may be of little weight, but taken collectively may satisfy a rational mind of its

existence." *In re Estate of Phillips*, 251 N.C. App. at 111, 795 S.E.2d at 282 (citation and internal quotation marks omitted). This Court has further held: "Whether these or other factors exist and whether executor unduly influenced decedent in the execution of the Will are material questions of fact." *In re Will of Smith*, 158 N.C. App. 722, 727, 582 S.E.2d 356, 360 (2003).

¶ 66 At oral argument, Defendants asserted the allegations that the caregivers, who received none of the real property at issue and received only bequests of $7,000 each, from an almost two-million-dollar estate, were the alleged undue influencers is unsupported by precedent. This assertion is contrary to our Supreme Court's holding in *In re Andrews*, which cautions "It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning." *In re Andrews*, 299 N.C. at 54, 261 S.E.2d at 200. In evaluating allegations of undue influence, our Supreme Court held "it is impossible for the law to lay down tests to determine its existence with mathematical certainty." *Id*. at 54-55, 261 S.E.2d at 200.

¶ 67 Viewed in the light most favorable to the nonmoving party, the evidence produced at trial demonstrates and emphasizes the caregivers overarching involvement in Settlor's life. In November 2009, Settlor and Ellen appointed their daughters Plaintiff and Bittner as co-executors and co-trustees upon their deaths. Settlor funded these trusts with real property. The documents directed the assets to pass to the surviving spouse of the couple, and if no spouse survived, then in equal shares between Plaintiff and Bittner, or their living issue *per stirpes*.

¶ 68 The evidence in the record and over twelve days of testimony asserts factual issues concerning Settlor's physical and mental weakness around the time of the execution of the 9 August 2017 estate plan; the caregivers' status as propounders; and, the refusal of the caregivers to allow Plaintiff and Settlor's other family members to visit and see Settlor without supervision. No evidence tends to show Plaintiff ever communicated any threats or intent to harm Settlor. Plaintiff acted in conjunction with her sister, first cousin, and other family members to alert Settlor to non-family members and employees potentially taking advantage of Settlor and his assets.

¶ 69 Medical personnel and employees of financial institutions observed Settlor's unusual behaviors and actions and, on their own initiative, alerted family members and law enforcement to questionable activities and expenses by non-family caregivers and employees who were related

to each other, who had accompanied Settlor, managed his daily schedule, and overtly influenced his activities. These questionable actions and activities by caregivers were shared with Settlor's fiduciaries, who assisted and facilitated these activities, in derogations of the warnings and concerns of medical personnel, bank employees, Settlor's children, a son-in-law, and Settlor's nephew.

¶ 70 After surviving summary judgment and during twelve days of testimony Plaintiff presented more than a "scintilla of evidence" to preclude the trial court entering a directed verdict for Defendants. *Hayes*, 246 N.C. App. at 443, 784 S.E.2d at 613. The trial court erred in granting Defendants' motion for a directed verdict. The trial court's 14 December 2020 order entering a directed verdict is reversed.

VI. Exclusion of Godwin's Testimony

¶ 71 **[3]** Plaintiff asserts the trial court erred in excluding Godwin's testimony, specifically his statement Settlor stated he wanted his "[real] property to go to [Plaintiff]."

¶ 72 Almost a century ago, our Supreme Court held:

> It has been generally held that declarations, oral or written, by the deceased may be shown in evidence upon the trial of an issue involving his mental capacity, whether such declarations were made before, at or after the date on which it is contended that the deceased was of unsound mind.

In re Will of Brown, 194 N.C. 583, 595, 140 S.E.2d 192, 199 (1927) (citation omitted).

¶ 73 "Declarations made by the testator, in order to be admissible, must be made at a time not too remote from the making of the will." *In re Will of Hall*, 252 N.C. 70, 81, 113 S.E.2d 1, 9 (1960). Settlor's nephew, Godwin, who was never a beneficiary under any iteration of Settlor's wills or trusts, heard Settlor's purported statement five months after the testamentary documents at issue were executed. The trial court erred in excluding Godwin's testimony. The trial court's order excluding Godwin's testimony is reversed.

VII. Substantial Merit

¶ 74 The trial court held Plaintiff's claims lacked substantial merit. In light of this Court's holdings to reverse and remand for further proceedings, the trial court's holding of no substantial merit is vacated.

VIII. Conclusion

¶ 75 The trial court erred by: granting Defendants' motion for summary judgment on the issue of capacity; granting Defendants' motion for a directed verdict on the issue of undue influence; granting Defendants' motion to exclude Godwin's testimony; and, in holding Plaintiff's claims lacked substantial merit.

¶ 76 We reverse the trial court's orders granting summary judgment, granting a directed verdict, and excluding Godwin's testimony, and remand. We vacate the trial court's order holding Plaintiff's claims lacked substantial merit. *It is so ordered.*

REVERSED IN PART; VACATED IN PART; AND REMANDED.

Judges CARPENTER and JACKSON concur.

ESTATE OF GREGORY GRAHAM, PLAINTIFF
v.
ASHTON LAMBERT, INDIVIDUAL AND OFFICIAL CAPACITY, FAYETTEVILLE POLICE DEPARTMENT AND CITY OF FAYETTEVILLE, DEFENDANTS

No. COA21-15

Filed 15 March 2022

1. Immunity—governmental—waiver—sufficiency of allegation in complaint—notice pleading

In a negligence and wrongful death action filed after a police officer's vehicle accidentally struck and killed a pedestrian, the pedestrian's estate (plaintiff) sufficiently alleged in its complaint that the city which employed the officer (defendant) had waived governmental immunity. Although plaintiff's complaint neither contained the word "waiver" nor explicitly mentioned that defendant had purchased liability insurance, the complaint did state multiple times that the action was brought and that defendant was liable pursuant to N.C.G.S. § 160A-485, which provides that a municipality waives governmental immunity if it purchases liability insurance.

2. Immunity—public official—police officer—driving to scene of emergency—negligence and wrongful death

In a negligence and wrongful death action filed after a police officer's vehicle accidentally struck and killed a pedestrian, the

officer was entitled to public official immunity from the claims brought against him in his individual capacity where, at the time of the accident, he was acting within the scope of his law enforcement duties (he was driving to the scene of a domestic violence incident involving a firearm) and his conduct was neither malicious nor corrupt. Further, the pedestrian's estate (plaintiff) conceded that the officer was entitled to public official immunity.

3. Negligence—gross negligence—police officer—speeding—en route to scene of domestic violence incident

In a negligence and wrongful death action filed after a police officer's car accidentally struck and killed a pedestrian while the officer was driving to the scene of a domestic violence incident involving a firearm, the trial court improperly denied summary judgment to the officer and the city employing him where the evidence showed that the officer's acts of discretion during the accident may have been negligent but were not grossly negligent. Specifically, the officer was driving thirteen miles per hour above the speed limit without activating his emergency siren or blue lights; he was traveling on a multi-lane straightaway road at night, through clear weather, and through sparse traffic; he looked down at his laptop twice while driving; and his vehicle slightly deviated from its traffic lane twice, but there was no evidence that the officer lost control of the vehicle. Importantly, N.C.G.S. § 20-145 exempts police officers from complying with speed laws when they are pursuing a law violator or are "emergency response driving" to the scene of an incident.

Judge JACKSON concurring in part and dissenting in part.

Appeal by defendants from order entered 16 July 2020 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 21 September 2021.

Kevin Vidunas for plaintiff-appellee.

Steven A. Bader for defendants-appellants.

GORE, Judge.

¶ 1 We review an order from the trial court that denied the motion for summary judgment filed by defendants Officer Ashton Lambert and the City of Fayetteville (collectively defendants). Therefore, the following

recitation of facts presents the evidence in the light most favorable to plaintiff. *See Peter v. Vullo*, 234 N.C. App. 150, 153, 758 S.E.2d 431, 434 (2014).

¶ 2 On 24 July 2018, Officer Lambert was on-duty as a police officer with the City of Fayetteville Police Department. At approximately 11:53 p.m., Officer Lambert was dispatched to a domestic violence incident involving a firearm. In responding to the call, Officer Lambert traveled westbound in the middle straight lane along Raeford Road in a marked police cruiser. Officer Lambert traveled at a speed of 58 miles per hour, the speed limit on Raeford Road is 45 miles per hour. Officer Lambert did not activate his emergency siren or blue lights.

¶ 3 At approximately the same time on 24 July 2018, Gregory Graham walked across Raeford Road, between the intersections of Raeford Road and Sandalwood Drive and Eucalyptus Road in Fayetteville, North Carolina. Mr. Graham crossed three eastbound lanes, stopped on the median, looked to ensure traffic was clear, and then proceeded to cross the westbound lanes of Raeford Road. Mr. Graham crossed at a portion of road that did not have a pedestrian crosswalk, but was well lit.

¶ 4 While Mr. Graham was crossing Raeford Road he was struck and killed by Officer Lambert's police cruiser. At the point of impact Officer Lambert had slowed his vehicle to 53 miles per hour. Footage from Officer Lambert's body camera shows that while he was traveling down Raeford Road, Officer Lambert looked at and touched his laptop computer. Additionally, twice, in the moments before impact, Officer Lambert's vehicle slightly deviated from the lane it was traveling in. At the time of the accident, traffic was light, but there were a few other cars on the road. Raeford Road is straight and flat with no curves and the weather was clear with no rain the night of the accident. Additionally, at the time of the accident Mr. Graham's blood alcohol content was 0.31.

¶ 5 On 13 June 2019, the Estate of Mr. Graham ("plaintiff") filed a complaint against Officer Lambert, in his individual and official capacity, the City of Fayetteville, and the Fayetteville Police Department. Plaintiff alleged claims of negligence, gross negligence, and wrongful death. On 19 August 2020, defendants filed an answer to plaintiff's complaint. In their answer, defendants moved to dismiss the claims against defendant Fayetteville Police Department as an improper party, moved to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and asserted defenses of sovereign and governmental immunity, and public official immunity. Defendants also asserted that plaintiff's claims are barred by contributory negligence and

gross contributory negligence. On 11 September 2019, plaintiff responded to defendants' answer.

¶ 6 Defendants filed a motion for summary judgment on 6 March 2020. Defendants reasserted that the claims against the Fayetteville Police Department should be dismissed as an improper party. Defendants also asserted that the claims against the City of Fayetteville and Officer Lambert, in his official capacity, are barred by governmental immunity and that the claims against Officer Lambert, in his individual capacity, are barred by public official immunity. Defendants also argued they are entitled to summary judgment because there is no evidence Officer Lambert acted in a grossly negligent manner, plaintiff's claims are barred by plaintiff's own contributory negligence, plaintiff's claims are barred by the doctrine of sudden emergency, and that punitive damages are not available against a municipality or officers in their official capacity.

¶ 7 Defendants' motion for summary judgment was heard in Cumberland County Superior Court on 13 July 2020. The trial court concluded that the Fayetteville Police Department is not a proper party to the action and, thus, granted summary judgment in favor of defendant Fayetteville Police Department. However, the trial court concluded there are genuine issues of material fact as to the claims against defendants Officer Lambert and the City of Fayetteville and denied their motions for summary judgment. Defendants Officer Lambert and the City of Fayetteville gave written notice of appeal on 7 August 2020.

¶ 8 On appeal, defendants argue the City of Fayetteville has not waived governmental immunity, Officer Lambert is entitled to public official immunity, plaintiff did not present evidence of gross negligence, and plaintiff's contributory negligence bars his suit. We conclude that plaintiff has failed to present evidence of gross negligence and that defendants Officer Lambert and the City of Fayetteville are entitled to summary judgment.

I. Standard of Review

¶ 9 "Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

II. Discussion

A. Interlocutory Appeal

¶ 10 Defendants acknowledge that this appeal is interlocutory. However, defendants assert that the order denying their motion for summary judgment affected a substantial right and is immediately appealable. Typically, the denial of a motion for summary judgment is not immediately appealable, as it is interlocutory. *See Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999). However, denial of a motion for summary judgment on the grounds of governmental immunity is immediately appealable. *Epps v. Duke Univ.*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849, *rev. denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). Additionally, in the interest of judicial economy we will consider the entirety of defendants' appeal. *See Block v. Cnty. of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000); *Houpe v. City of Statesville*, 128 N.C. App. 334, 340, 497 S.E.2d 82, 87 (1998).

B. Governmental Immunity

¶ 11 **[1]** Defendants first argue that the City of Fayetteville has not waived its governmental immunity. "[A] municipality may waive its immunity from tort liability for governmental activities by purchasing liability insurance." *Anderson v. Town of Andrews*, 127 N.C. App. 599, 602, 492 S.E.2d 385, 387 (1997); N.C. Gen. Stat. § 160A-485(a) (2020). To state a claim against the municipality a plaintiff must allege "waiver of immunity by the purchase of insurance." *Id.* (citing *Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 504, 451 S.E.2d 650, 657, *appeal dismissed and disc. review denied*, 339 N.C. 739, 454 S.E.2d 654 (1995)). Defendants argue that plaintiff's complaint failed to allege waiver of immunity, thus immunity was not waived.

¶ 12 The plaintiff does not need to explicitly state the word "waiver" to allege a waiver of immunity by purchase of insurance. *See id.* at 603, 492 S.E.2d at 387. Under the requirements of notice pleading the complaint need only give notice to the defendants so that they understand a waiver of immunity has been alleged. *Id.*

¶ 13 Here, the complaint does not specifically mention waiver of immunity or explicitly mention the applicable insurance policy. However, the complaint does state multiple times that the action is "brought against the Defendant City pursuant to N.C.G.S. § 160A-485" and that "Defendant City shall be held liable pursuant to . . . N.C.G.S. § 160A-485." Section 160A-485 is the statute that gives a municipality the ability to purchase liability insurance and states that if the municipality does purchase

liability insurance governmental immunity is waived. N.C. Gen. Stat. § 160A-485. We hold that the complaint is sufficient to give notice to defendants that plaintiff is alleging a waiver of immunity because it states the action is brought and that defendants are liable pursuant to § 160A-485. Therefore, governmental immunity was waived.

C. Public Official Immunity

¶ 14 **[2]** Defendants next argue that Officer Lambert has public official immunity for the claims brought against him in his individual capacity. "As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability." *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (citations omitted). Public official immunity "serves to protect officials from *individual liability* for mere negligence, but not for malicious or corrupt conduct, in the performance of their official duties." *Thompson v. Town of Dallas*, 142 N.C. App. 651, 655, 543 S.E.2d 901, 904-05 (2001) (citation omitted) (emphasis in original).

¶ 15 The capacity in which a defendant is sued dictates what immunity may be available to them. *See Est. of Long v. Fowler*, 2021-NCSC-81, ¶ 13. A suit against a defendant in their official capacity is subject to the doctrine of sovereign immunity, while a suit against a defendant in their individual capacity is not subject to the doctrine of sovereign immunity. *Id.* However, a suit against a defendant in their individual capacity may be subject to the doctrine of public official immunity if she acts within the scope of her office and acts without malice or corruption. *Smith*, 289 N.C. at 331, 222 S.E.2d at 430.

¶ 16 "It is a simple matter for attorneys to clarify the capacity in which a defendant is being sued. Pleadings should indicate in the caption the capacity in which a plaintiff intends to hold a defendant liable." *Fowler*, at ¶ 14 (quoting *Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 724 (1998)). Here, the caption of the complaint lists Officer Lambert in both his individual and official capacity. The doctrine of governmental immunity is applicable to Officer Lambert in his official capacity and, we acknowledge that public official immunity applies to law enforcement officers acting within the scope of their duties. *See Thompson*, 142 N.C. App. at 655, 543 S.E.2d at 904-05.

¶ 17 In the case *sub judice*, Officer Lambert was responding to an incident within the scope of his official duties at the time of the accident and his conduct was neither malicious nor corrupt. Further, plaintiff concedes that Officer Lambert is entitled to public official immunity. Thus,

we hold public official immunity applies and the trial court erred by not granting summary judgment for the claims brought against Officer Lambert in his individual capacity.

D. Gross Negligence

¶ 18 **[3]** Defendants next argue that plaintiff did not present evidence of gross negligence. Plaintiff argues that Officer Lambert was grossly negligent in the operation of his police cruiser.

¶ 19 Section 20-145 exempts police officers from speed laws when engaged in the apprehension of a law violator. N.C. Gen. Stat. § 20-145. This Court has concluded that the applicability of § 20-145 and the factors considered in its analysis are not only applicable to the pursuit of a law violator, but are also applicable when an officer is "emergency response driving" to the scene of an incident. *Truhan v. Walston*, 235 N.C. App. 406, 413, 762 S.E.2d 338, 343 (2014), *review denied by*, 368 N.C. 272, 772 S.E.2d 863 (2015). Here, Officer Lambert was responding to a domestic violence incident involving a firearm, thus § 20-145 is applicable.

¶ 20 However, the exemption in § 20-145 "does not apply to protect the officer from the consequence of a reckless disregard of the safety of others." *Norris v. Zambito*, 135 N.C. App. 288, 293, 520 S.E.2d 113, 117 (1999) (quotations omitted). Our Supreme Court has held that an officer's liability in a civil action for injuries resulting from the officer's vehicular pursuit of a law violator is to be determined pursuant to a gross negligence standard of care. *Parish v. Hill*, 350 N.C. 231, 238, 513 S.E.2d 547, 551, *reh'g denied*, 350 N.C. 600, 537 S.E.2d 215 (1999). "[G]ross negligence has been defined as wanton conduct done with conscious or reckless disregard for the rights and safety of others . . . an act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Id.* at 239, 513 S.E.2d at 551-52 (internal quotations and citations omitted). "Whether an officer's behavior during pursuit amounted to gross negligence is an issue of law to be determined from the evidence." *Greene v. City of Greenville*, 225 N.C. App. 24, 26, 736 S.E.2d 833, 835, *review denied*, 367 N.C. 214, 747 S.E.2d 249 (2013). "Although issues of negligence are generally not appropriately decided by way of summary judgment, if there are no genuine issues of material fact, and an essential element of a negligence claim cannot be established, summary judgment is proper." *Norris*, 135 N.C. App. at 293, 250 S.E.2d at 116. "North Carolina's standard of gross negligence, with regard to police pursuits, is very high and rarely met." *Eckard v. Smith*, 166 N.C. App. 312, 323, 603 S.E.2d 134, 142 (2004), *aff'd*, 360 N.C. 51, 619 S.E.2d 503 (2005).

¶ 21 "When determining whether an officer's actions constitute gross negligence, we consider: (1) the reason for the pursuit, (2) the probability of injury to the public due to the officer's decision to begin and maintain pursuit, and (3) the officer's conduct during the pursuit." *Greene*, 225 N.C. App. at 27, 736 S.E.2d at 836 (citation omitted).

¶ 22 "Relevant considerations under the first prong include whether the officer was attempting to apprehend someone suspected of violating the law and whether the suspect could be apprehended by means other than high speed chase." *Id.* (cleaned up). Here, Officer Lambert was responding to a domestic violence incident involving a firearm. Thus, Officer Lambert's reason for driving at a speed above the speed limit was valid and lawful.

¶ 23 "When assessing prong two, we look to the (1) time and location of the pursuit, (2) the population of the area, (3) the terrain for the chase, (4) traffic conditions, (5) the speed limit, (6) weather conditions, and (7) the length and duration of the pursuit." *Id.* (citation omitted). Here, the accident occurred just before midnight on a seven-lane road surrounded by commercial buildings. Officer Lambert was driving on a flat, straightaway portion of Raeford Road on a night where the weather was clear. Officer Lambert's vehicle slightly deviated from its lane of traffic twice, but there is no evidence that he lost control of the vehicle. Video footage shows there were at least five other vehicles on the road at the time of the accident. The speed limit on Raeford Road is 45 miles per hour, and Officer Lambert was traveling at a speed of 58 miles per hour. Finally, the record shows that less than two minutes passed from the time Officer Lambert was dispatched to the time of the accident. Therefore, we conclude that these facts are insufficient to establish gross negligence under prong two.

¶ 24 The third prong analyzes the officer's conduct. *Id.* "Relevant factors include (1) whether an officer made use of the lights or siren, (2) whether the pursuit resulted in a collision, (3) whether an officer maintained control of the cruiser, (4) whether an officer followed department policies for pursuits, and (5) the speed of the pursuit." *Id.* at 27-28, 736 S.E.2d at 836 (citation omitted). Courts have discussed facts where an officer failed to use emergency lights, sirens, and headlights, *Young v. Woodall*, 343 N.C. 459, 463, 471 S.E.2d 357, 360 (1996); *Fowler v. N.C. Dep't of Crime Control & Pub. Safety*, 92 N.C. App. 733, 736, 376 S.E.2d 11, 13, *disc. rev. denied*, 324 N.C. 577, 381 S.E.2d 773 (1989), violated generally accepted standards regarding high speed driving and police chases, *Clark v. Burke Cnty*, 117 N.C. App. 85, 91, 450 S.E.2d 747, 750 (1994), and whether the officer was speeding during the pursuit, *Fowler*,

92 N.C. App. at 736, 376 S.E.2d at 13. In these cases, our Courts have concluded that the officers' conduct at most amounted to negligent discretionary acts but did not rise to the level of gross negligence.

¶ 25 In the present case, Officer Lambert did not utilize his lights or sirens, his pursuit resulted in the accident involving Mr. Graham, and Officer Lambert was traveling 13 miles per hour above the speed limit. Plaintiff presents arguments on appeal that Fayetteville Police Department policy required Officer Lambert to utilize his lights and sirens when responding to a scene. Plaintiff also argues that Officer Lambert lost control of his vehicle, however the evidence shows his vehicle only slightly deviated from its lane of travel. Additionally, Officer Lambert did look at his laptop and touch the laptop's trackpad while he was driving on Raeford Road. These facts track closely to those in the above cited cases and demonstrates that Officer Lambert's conduct did not rise to the level of gross negligence. *See Young*, 343 N.C. at 463, 471 S.E.2d at 360; *Fowler*, 92 N.C. App. at 736, 376 S.E.2d at 13; *Clark*, 117 N.C. App. at 91, 450 S.E.2d at 750. We conclude that Officer Lambert's actions were acts of discretion on his part which may have been negligent but were not grossly negligent.

¶ 26 Contrasting the facts in the case *sub judice* to those in *Truhan* further demonstrates that Officer Lambert's conduct did not rise to the level of gross negligence. In *Truhan*, the officer was responding to the scene of a minor car accident involving no injuries, to act as traffic control. *Truhan*, 235 N.C. App. at 413, 762 S.E.2d at 343. The officer began his high-speed response at approximately 7:19 a.m., and drove along a road where a school, a fire station, and multiple residential driveways and side streets are located. *Id.* at 414-15, 762 S.E.2d at 344. The area was not densely populated, but there was a mix of residential, commercial, and governmental buildings along the highway. *Id.* at 415, 762 S.E.2d at 344. The officer was driving along a mostly flat road with some turns and curves. *Id.* There was no evidence of heavy traffic, but there were several automobiles in the area. *Id.* The officer in *Truhan* was traveling at speeds in excess of 100 miles per hour in a 45 miles per hour zone. *Id.* In *Truhan*, the officer also failed to activate his lights and sirens when they should have been utilized. *Id.* at 416, 762 S.E.2d at 344. The Court in *Truhan* concluded these facts did present a genuine issue of material fact as to gross negligence and reversed the trial court's grant of summary judgment. *Id.* at 421, 762 S.E.2d at 347.

¶ 27 We believe the facts in *Truhan* are more egregious than those in the present matter. For example, the officer in *Truhan* was traveling at speeds more than double the speed limit and in excess of 100 miles per

hour while Officer Lambert's speed only exceeded the speed limit by 13 miles per hour. Further, the officer in *Truhan* was traveling on a road with turns and curves in a densely populated area at a time of day when there were numerous other vehicles on the road. In contrast, Officer Lambert was traveling on a multi-lane straightaway road, at night when traffic on that road was sparse. We do not believe the facts in the present case rise to the level of those in *Truhan* which created a genuine issue of material fact as to gross negligence.

III. Conclusion

¶ 28 Our holding on the gross negligence issue is dispositive, thus we decline to consider defendants' contributory negligence argument. We hold there is no genuine issue of material fact as to whether Officer Lambert was grossly negligent, thus defendants are entitled to judgment as a matter of law and we reverse the trial court's order denying summary judgment.

REVERSED.

Judge TYSON concurs.

Judge JACKSON concurs in part and dissents in part.

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

¶ 29 I join the majority opinion except for the portion holding that the trial court erred in denying Defendants' motion for summary judgment on the basis that there was no genuine issue of material fact whether Officer Lambert was grossly negligent when he struck Mr. Graham with his police cruiser. In my view, the record evidence presents a genuine question of whether Officer Lambert was grossly negligent as he used his computer while speeding down Raeford Road in the middle of the night on 24 July 2018 before striking and killing Mr. Graham. The majority in essence holds that Officer Lambert's conduct cannot constitute gross negligence as a matter of law. Because I would hold that there is a genuine issue of material fact regarding whether Officer Lambert was grossly negligent, I respectfully dissent.

I. Governing Law

¶ 30 "[I]ssues of negligence are generally not appropriately decided by way of summary judgment[.]" *Norris v. Zambito*, 135 N.C. App. 288, 293, 520 S.E.2d 113, 116 (1999). Summary judgment is only proper if

> there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. In order to prevail on a summary judgment motion, the moving party must show either (1) an essential element of plaintiff's claim is nonexistent; (2) plaintiff cannot produce evidence to support an essential element of his claim, or (3) plaintiff cannot surmount an affirmative defense which would bar the claim. The trial court must construe all evidence in the light most favorable to the non-moving party, allowing the non-moving party to be given all favorable inferences as to the facts.

Gibson v. Mutual Life Ins. Co. of New York, 121 N.C. App. 284, 286, 465 S.E.2d 56, 58 (1996) (internal marks and citations omitted).

¶ 31 On appeal,

> [w]e review a trial court order granting or denying a summary judgment motion on a de novo basis, with our examination of the trial court's order focused on determining whether there is a genuine issue of material fact and whether either party is entitled to judgment as a matter of law. As part of that process, we view the evidence in the light most favorable to the nonmoving party.

Beeson v. Palombo, 220 N.C. App. 274, 277, 727 S.E.2d 343, 346-47 (2012) (internal marks and citation omitted).

¶ 32 While N.C. Gen. Stat. § 20-145 "exempts police officers from speed laws when engaged in the pursuit of a law violator[,] [t]he exemption . . . does not apply to protect the officer from 'the consequence of a reckless disregard of the safety of others.' " *Norris*, 135 N.C. App. at 293, 520 S.E.2d at 117 (quoting N.C. Gen. Stat. § 20-145). "Our Supreme Court has construed the statute as establishing a general standard of care, as opposed to a simple exemption from speed laws, and has held that an officer's liability in a civil action for injuries resulting from the officer's vehicular pursuit of a law violator is to be determined pursuant to a gross negligence standard of care." *Id.* (citing *Parish v. Hill*, 350 N.C. 231, 513 S.E.2d 547 (1999)). " 'Gross negligence' occurs when an officer consciously or recklessly disregards an unreasonably high probability of injury to the public despite the absence of significant countervailing law enforcement benefits." *Eckard v. Smith*, 166 N.C. App. 312, 319, 603 S.E.2d 134, 139 (2004). "Gross negligence is something less than willful

and wanton conduct." *Smith v. Step*, 257 N.C. 422, 425, 125 S.E.2d 903, 905 (1962) (internal marks omitted).

II. Application

¶ 33 A person's use of a computer or handheld electronic device while operating an automobile presents unique risks to public safety. Our General Assembly recognized as much by enacting N.C. Gen. Stat. § 20-136.1, which prohibits private citizens from "driving any motor vehicle . . . while viewing any television, computer, or video player which is located in the motor vehicle at any point forward of the back of the driver's seat, and which is visible to the driver while operating the motor vehicle." N.C. Gen. Stat. § 20-136.1 (2019). Section 20-136.1 does not apply "to law enforcement or emergency personnel while in the performance of their official duties[.]" *Id.* However, it is a legislative recognition of the simple fact that driving and watching a screen at the same time is dangerous.

¶ 34 Viewing the evidence in the light most favorable to Mr. Graham's estate, as we must on review of the trial court's denial of Defendants' motion for summary judgment, *Beeson*, 220 N.C. App. at 277, 727 S.E.2d at 346-47, I would hold that the evidence presents a genuine issue of material fact regarding whether Officer Lambert was grossly negligent when he struck and killed Mr. Graham. On his first night on patrol by himself while working for the Fayetteville Police Department or any other law enforcement agency, Officer Lambert was one of three officers dispatched to a domestic disturbance call on 24 July 2018. It was Officer Lambert's first night shift, and his first day working alone. He had joined the Fayetteville Police Department the previous October. Both of the other officers responding to the call were closer to where it originated, and Officer Lambert and the other officer responding were backup. In an interview, Officer Lambert later recalled that the status of the domestic disturbance at the time of the collision was that the disturbance was ongoing, and that because he was the farthest away of the three responding officers, he made a standard traffic response. Officer Lambert also admitted at his deposition that the situation was not an emergency. Officer Lambert never activated his blue lights or siren.

¶ 35 Upon initially responding to the call, Officer Lambert used his laptop computer in the front seat of his cruiser to locate the address to which he had been dispatched. He originally stated that he used the computer's touchscreen; however, after reviewing footage from his body-worn camera, he later admitted that he used the computer's track pad. This body-worn camera footage reflects that Officer Lambert found

the address with the computer's track pad 15 seconds before he struck and killed Mr. Graham. Officer Lambert was driving with one hand on the steering wheel and the other on his laptop for 18 of the 23 seconds before he collided with Mr. Graham, and periodically glanced at his computer screen during this timeframe. The body-worn camera footage and the dashcam footage from Officer Lambert's cruiser provides evidence of at least two lane violations by Officer Lambert in the moments leading up to the accident. In each, Officer Lambert passes right on the outside line of his lane or over it, and these lane violations appear to coincide with Officer Lambert looking at his computer. Five seconds before colliding with Mr. Graham, Officer Lambert places his second hand on the steering wheel. Three seconds before the collision, Officer Lambert leans distinctively towards his computer.

¶ 36 From Officer Lambert's body camera footage in the seconds following the accident, it appears Mr. Graham was killed instantly by the impact.

¶ 37 The collision occurred next to a car dealership, and security footage from the dealership highlights just how well-lit the area was even at such a late hour. Enormous floodlights illuminated a large parking lot at the dealership and nearby area, in addition to the lights along the road itself. The dealership security footage shows Mr. Graham crossing the road while using a cane. Mr. Graham was not stumbling as he crossed the road, and he successfully crossed five lanes of traffic before he was hit by Officer Lambert. The dealership footage also shows that Mr. Graham stopped at the median and looked both ways before crossing the side of the road where he was hit by Officer Lambert. From the dealership footage, as well as video footage from Officer Lambert's cruiser and his body camera, Officer Lambert does not appear to brake at all before hitting Mr. Graham. There also were no skid marks on the road after the accident. From the video footage, Officer Lambert does not appear to attempt to avoid hitting Mr. Graham, although he states, in the body camera footage, after hitting Mr. Graham, that he jerked left to try to avoid hitting him—even though he struck Mr. Graham as Mr. Graham was crossing the road in front of him from Officer Lambert's left to his right. In the body-worn camera footage, after the collision, Officer Lambert can also be heard to say, "I looked over, and . . . ." But then the audio cuts out, and in a subsequent interview, Officer Lambert stated that he could not recall what his next words were after "and." Officer Lambert consistently stated that he was going 50 miles an hour at the time of the collision, but his cruiser's black box showed that he was going 58 at one point and was traveling about 53 when he struck Mr. Graham.

¶ 38 As the majority notes, Officer Lambert was speeding, his blue lights and siren were not activated (in violation of Department policy), and the location of his collision with Mr. Graham was well-lit despite the late hour. While no one fact is conclusive, viewing the evidence before the trial court in its totality and in the light most favorable to Mr. Graham's estate, as we must, the evidence before the trial court presented a genuine issue of material fact regarding whether Officer Lambert was grossly negligent. While I cannot say that the evidence shows that Officer Lambert was grossly negligent, it certainly shows that a jury could conclude that he was. I conclude that this evidence, if believed by a jury, tended to show a "high probability of injury to the public despite the absence of significant countervailing law enforcement benefits[,]" and thus raises a genuine issue of material fact on the question of gross negligence. *Jones v. City of Durham*, 168 N.C. App. 433, 444, 608 S.E.2d 387, 394 (2005) (Levinson, J., concurring in part and dissenting in part), *reversed for the reasons stated in the dissent*, 361 N.C. 144, 638 S.E.2d 202 (2006). Moreover, it is difficult, if not impossible, to square the majority's holding that Officer Lambert's conduct *could not* have been grossly negligent with the video footage before the trial court when ruling on Defendants' motion for summary judgment. I believe Mr. Graham's estate is entitled to present this footage to a jury and for it to determine whether Officer Lambert was grossly negligent on 24 July 2018—a task to which we are ill-suited as an appellate court.

¶ 39 The majority distinguishes this case from our decision in *Truhan v. Walston*, 235 N.C. App. 406, 762 S.E.2d 338 (2014), in support of its holding that Officer Lambert could not have been grossly negligent as a matter of law. In my view, however, *Truhan* is not relevantly distinct from this case in any respect. Like the present case, *Truhan* concerned an officer-involved collision, but in *Truhan*, the officer brought an action against a motorist he struck while responding to a call and the motorist then counter-claimed against the officer, alleging that the officer's negligence was the cause of her and the officer's injuries, not her own. *Id.* at 410, 762 S.E.2d at 342. On cross motions for summary judgment filed by the officer and his insurer and the defendant and her husband and their insurer, the trial court granted summary judgment in favor of the officer and his insurer. *Id*. at 410-11, 762 S.E.2d at 342.

¶ 40 While true that the officer in *Truhan* was driving considerably faster than Officer Lambert, unlike in *Truhan*, in this case, viewing the evidence in the light most favorable to Mr. Graham's estate, the evidence shows that (1) the accident occurred on Officer Lambert's first night shift, and first day working alone; (2) Officer Lambert did not have his

blue lights activated at the time of the accident; (3) Officer Lambert was using his computer to find an address in the moments leading up to the collision; (4) Officer Lambert committed two lane violations because he was looking at his computer instead of the road ahead of him in the moments before the crash; (5) Officer Lambert leaned distinctively towards his computer three seconds before the accident; and (6) Officer Lambert collided with Mr. Graham without attempting to avoid Mr. Graham by turning or applying the cruiser's brakes to slow his vehicle down. Because I would hold that the evidence before the trial court presented a genuine issue of material fact regarding Officer Lambert's gross negligence, as in *Truhan* and *Jones*, I respectfully dissent.

IN THE MATTER OF K.W. & M.W.

No. COA21-289

Filed 15 March 2022

Child Abuse, Dependency, and Neglect—adjudication of neglect and dependency—unsupported findings—sufficiency of findings—half-sibling

The trial court's adjudication of respondent-father's two children as neglected and dependent was vacated and remanded for additional findings of fact where the findings that were supported by the evidence pertained mainly to the parents and to the children's half-brother (who was not respondent's son) rather than to respondent's children.

Appeal by respondent-father from order entered 15 February 2021 by Judge Sarah C. Seaton in Onslow County District Court. Heard in the Court of Appeals 19 October 2021.

Leslie Rawls for appellant respondent-father.

Richard Penley for appellee Onslow County Department of Social Services.

Daniel Heyman for Guardian ad Litem.

GORE, Judge.

¶ 1 Respondent-father appeals from an Order on Adjudication and Disposition adjudicating his children Kenneth and Malcolm[1] neglected and dependent and placing the juveniles in the custody of the Onslow County Department of Social Services ("DSS"). On appeal, respondent-father argues the trial court erred in adjudicating Kenneth and Malcolm neglected and dependent. After careful review, we vacate the order of the trial court and remand for entry of a new order.

I. Background

¶ 2 On or about 15 May 2020, DSS initiated an assessment of the family. The family consists of respondent-father, the juveniles' mother, Zeke,[2] Kenneth, and Malcolm. At the time of the initial assessment, DSS's concerns included mental health, improper care and supervision, injurious environment, parenting skills, and housing instability.

¶ 3 At the time DSS initiated their assessment, the family had been evicted from their apartment and was living with another family. On 27 May 2020, the family was asked to leave the home where they were residing with friends. The family began residing in hotels at that time. Over the course of DSS's involvement, the family lived in three different hotels. On the morning of 4 June 2020, the family had insufficient funds to pay for the hotel. On 4 June 2020, Kajsa Williams (a social worker who worked with the family) went to talk to the hotel clerk with the hopes of getting an extension on the family's check-out. By the time Ms. Williams returned, the mother had received her monthly Supplemental Security Income ("SSI") check as well as child support from Zeke's father. The family was able to pay the hotel fee on 4 June 2020 and at no point had to move out of the hotel.

¶ 4 The juvenile's mother is unemployed. She also admitted to Ms. Williams that in 2019 she was diagnosed with bipolar disorder and schizophrenia. During DSS's involvement with the family the mother was not in treatment for her mental health disorders nor was she taking any medication. Additionally, the mother occasionally used cocaine. However, the mother claimed she had a community support person to help with her anxiety and getting the mother back in school, and to assist the mother in becoming more independent with housing. The mother also saw a counselor regarding her use of illegal drugs.

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1. Pseudonyms are utilized to protect the identity of the juveniles.

2. Zeke is Kenneth and Malcolm's half-brother. Zeke was also adjudicated neglected and dependent in the same proceeding as Kenneth and Malcolm. However, because Zeke is not respondent-father's child and respondent-father is the only appellant in this case, Zeke's adjudication and disposition is not at issue on appeal.

¶ 5 On at least two occasions the mother kicked Zeke out of their home. Zeke is autistic and at times would become physical with his mother. At these times the mother was unable to calm Zeke down and would become overwhelmed and tell Zeke he could leave if he wanted to.

¶ 6 Respondent-father suffered from post-traumatic stress disorder. However, respondent-father maintained full-time employment and was the primary caregiver for the juveniles. Respondent-father occasionally uses marijuana, but never in front of the juveniles. Ms. Williams primarily observed respondent-father supervising the juveniles and reported his parenting was always appropriate.

¶ 7 On a few occasions respondent-father and mother engaged in verbal altercations with raised voices. Several of these altercations occurred in front of the juveniles. On at least one occasion the social workers had to separate respondent-father and the mother. Additionally, law enforcement had been called due to the parents' verbal altercations in the past.

¶ 8 DSS filed a Juvenile Petition on 5 June 2020, alleging the juveniles neglected and dependent. An adjudication hearing was held on 18 and 20 November 2020. At the adjudication hearing Ms. Williams, Zeke's community services worker Kim McKay, and the mother testified. The trial court held a disposition hearing immediately following the adjudication hearing. At the disposition hearing, the trial court received testimony from Kiasia Anderson (another social worker who worked on the case) and Dichelot Pierre (a DSS supervisor). On 15 February 2021, the trial court entered an Order on Adjudication and Disposition adjudicating the juveniles neglected and dependent and placing Kenneth and Malcolm in DSS custody. On 5 March 2021, respondent-father entered a written Notice of Appeal to the Supreme Court of North Carolina. Respondent-father amended his Notice of Appeal on 9 March 2021 to give notice of appeal to this Court.

II. Analysis

¶ 9 On appeal, respondent-father argues that certain findings of fact made by the trial court are not supported by competent evidence and that the findings of fact do not support the conclusion of law that Kenneth and Malcolm were neglected and dependent.

A. Standard of Review

¶ 10 "The role of this Court in reviewing a trial court's adjudication of neglect and abuse 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." *In re T.H.T.*, 185 N.C.

App. 337, 343, 648 S.E.2d 519, 523 (2007), *aff'd in part modified in part*, 362 N.C. 446, 665 S.E.2d 54 (2008) (cleaned up). "The clear and convincing standard is greater than the preponderance of the evidence standard required in most civil cases." *In re K.L.*, 272 N.C. App. 30, 36, 845 S.E.2d 182, 188-89 (2020). "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. at 343, 648 S.E.2d at 523. "Unchallenged findings of fact are deemed supported by the evidence and are binding on appeal." *In re K.H.*, 2022-NCCOA-3, ¶ 13.

¶ 11 Whether a child is neglected or dependent is a conclusion of law and we review a trial court's conclusions of law *de novo*. *In re Ellis*, 135 N.C. App. 338, 340, 520 S.E.2d 118, 120 (1999); *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2008). Under a *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *In re A.K.D.*, 227 N.C. App. 58, 60, 745 S.E.2d 7, 8 (2013) (citation omitted).

B. Findings of Fact

¶ 12 Respondent-father argues that the trial court erred in adjudicating Kenneth and Malcolm neglected and dependent because several of the trial court's findings of fact are not supported by clear and convincing evidence. Respondent-father challenges findings of fact 28, 30, and 38.

¶ 13 These challenged findings (or pertinent portions thereof) state:

> 28. . . . The respondent mother received her SSI payment two days later and by June 4, 2020 had no more money to pay for a hotel for the family.
>
> . . .
>
> 30. . . . That the respondent mother's admitted drug habit and mental health issues adversely impacted all three juveniles, creating an environment injurious to their welfare. That the respondent mother improperly supervised the juveniles. That this improper supervision and injurious environment has been shown by the juvenile [Zeke] being kicked out of the family's residence.
>
> . . .
>
> 38. That at the time of the removal of the juveniles, the respondents were unable to provide for the juveniles'

care and supervision and lacked an appropriate alternative childcare arrangement.

¶ 14 As to finding of fact 28, respondent-father argues that the evidence shows they were able to pay for the hotel room on 4 June 2020 and remained living in the hotel for the rest of June, even after the children were removed. A review of the testimony of Ms. Williams shows that on 4 June 2020 the family suggested they did not have funds to stay in the hotel, Ms. Williams went to ask the hotel clerk to extend the family's check-out and when she returned respondent-mother had received that month's SSI payment which was used to pay for the hotel. Ms. Williams also testified that the respondent-parents remained in the hotel for at least another 30 days beyond 5 June 2020. There was no testimony or evidence offered that showed the respondent-parents ever missed a payment for the hotel or moved out of the hotel. Accordingly, we hold that this finding of fact is not supported by clear and convincing evidence insomuch as the family ran out of money to pay for hotels on 4 June 2020, and we are not bound by that portion of the finding.

¶ 15 Respondent-father next challenges finding of fact 30 by arguing the evidence shows Kenneth and Malcolm were well-cared for and safe while living with their family. At adjudication, Ms. McKay testified that she did not have concerns for either parent's mental health. In contrast, Ms. Williams testified that she had concerns for the parent's mental health and that the mother told Ms. Williams that she had previously been diagnosed with bipolar disorder and schizophrenia. Ms. Williams further testified that respondent-father told her that the mother uses cocaine from "time to time," but never in front of the children. Ms. Williams also testified that, prior to the petition being filed, DSS did not ask either parent to submit to a drug screen. The mother testified that she was diagnosed with bipolar disorder and schizophrenia and was not in treatment when her children were in her care, but that she had a community support person to help with her issues. The mother initially invoked her Fifth Amendment rights when asked about her drug use, then she testified that she was seeing a counselor for her drug "issues" and that the counselor "was more focused on [her] drug habit than the mental stage . . . ." There was no testimony or evidence as to the frequency of the mother's drug use, aside from her use of the words "issues" and "habit."

¶ 16 While the evidence presents concerns for the mother's mental health, the trial court's findings of fact did not address any impact her mental health diagnoses or drug use had on the juveniles Malcolm and Kenneth. Although there was no direct evidence the mother used drugs in the presence of the juveniles or while she was supervising the juveniles,

there was evidence that her behavior adversely affected the children. In addition, since Mother invoked her 5th Amendment right not to answer questions regarding her use of illegal drugs, the trial court could infer that her answers would have been damaging to her claims that she did not have any real problem with drugs. Although mother had a right to assert her constitutional right not to answer, this proceeding is a civil case and she is not entitled to use the privilege against self-incrimination as both a "shield and a sword." *See Qurneh v. Colie*, 122 N.C. App. 553, 558, 471 S.E.2d 433, 436 (1996) The privilege against self-incrimination is intended to be a shield and not a sword. *Christenson v. Christenson*, 281 Minn. 507, 162 N.W.2d 194, 200 (1968). Here, the mother attempted to assert the privilege as both a shield and a sword. In an initial custody hearing, it is presumed that it is in the best interest of the child to be in the custody of the natural parent if the natural parent is fit and has not neglected the welfare of the child. *Petersen v. Rogers*, 337 N.C. 397, 403–404, 445 S.E.2d 901, 905 (1994). Respondents sought to take advantage of this presumption by introducing evidence of their fitness. *See Wilson v. Wilson*, 269 N.C. 676, 677, 153 S.E.2d 349, 351 (1967) (holding that in order to be entitled to this presumption, the natural parent must make a showing that he or she is fit). However, when DSS sought to rebut this presumption by questioning the mother regarding her illegal drug activity, the mother asserted her fifth amendment privilege. To allow the mother to take advantage of this presumption while curtailing the opposing party's ability to prove her unfit would not promote the interest and welfare of the child. *See* N.C. Gen. Stat. § 50–13.2(a)(1995).

¶ 17 The trial court's findings of fact do not include sufficient detail for this court to review its finding that Kenneth and Malcolm were affected by improper supervision or that an injurious environment had been created for Kenneth and Malcolm. The primary evidence offered to support the finding that the juveniles were in an injurious environment was that the mother had kicked Zeke out of the residence. However, there was no evidence either Kenneth or Malcolm had been kicked out or that the incident involving Zeke had any impact on his younger brothers.

¶ 18 As to finding of fact 38, respondent-father argues that the evidence shows the juveniles were properly cared for. Ms. Williams testified that after the family was first evicted from their apartment they stayed with a friend and then lived in three different hotels. Father contends there was no testimony the family was homeless at any time, but the evidence does show extreme instability in the family's housing. Father also notes that Ms. Williams testified that in June she saw Malcolm and Kenneth

(age two and four) dressed only in diapers. She also testified that once she had to buy diapers for the children and once bought the kids a meal from McDonalds. When asked about how much food the family had in their hotel room, Ms. Williams testified, "There was some food. . . . there was a small amount. There was little microwavable meals." Ms. Williams testified that she observed respondent-father primarily caring for the children and she had no concerns for respondent-father's parenting. There was testimony that the parents had tried to locate alternative childcare and were unable to. At the disposition phase of the hearing, Ms. Anderson testified that she had no concerns for respondent-father's parenting skills and that respondent-father's presence would negate any concerns with respondent-mother's parenting. There was also testimony the parents had verbal disagreements, and on one occasion the parents had to be separated. But Father contends the testimony also showed that the respondent-parents did not yell at each other or become physical during these disagreements. Father also contends there was no evidence either parent was ever unable to purchase necessities for the juveniles or that the juveniles ever went homeless, hungry, or did not have proper clothing. Although Father highlights the evidence favorable to his position, he overlooks the other unchallenged findings as well as the adverse evidence and inferences which could be drawn from that evidence.

¶ 19 The unchallenged findings of fact show that DSS has a history with the mother and respondent-father for mental health, parenting skills, substance use, housing instability, domestic violence, and improper care and supervision. The Mother needed both substance abuse and mental health treatment but was not receiving either substance abuse or mental health treatment at the time of the petition. Respondent-father and mother had previously engaged in verbal altercations, at times in front of the juvenile children, and on at least one occasion law enforcement was called during the incident. Respondent-father and mother were previously kicked out of a home they were residing in with friends. These unchallenged findings of fact, when viewed in the aggregate, are sufficient for a trial court to base a determination of abuse and neglect. *See In re B.H.*, 2021-NCCOA-710,¶¶ 22, 38-48 (affirming a trial court order adjudicating a juvenile neglected where the findings of fact included domestic violence and untreated mental health by a parent); *see also In re H.D.F.*, 197 N.C. App. 480, 489-92, 677 S.E.2d 877, 883-85 (2009) (concluding that findings of fact which included a finding of a history of substance abuse by respondent-mother supported an adjudication that the juvenile is neglected).

¶ 20 Father is correct that the trial court's findings primarily address Zeke, and not Malcolm and Kenneth, and thus do not sufficiently address the rationale for finding that the parents were unable to provide for the care and supervision of Father's children, but this Court cannot make findings. Only the trial court may assess the credibility and weight of the evidence.

> We note that it is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial. A trial judge "passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968). "[I]ssues of witness credibility are to be resolved by the trial judge. It is clear beyond the need for multiple citation that the trial judge, sitting without a jury, has discretion as finder of fact with respect to the weight and credibility that attaches to the evidence." *Smithwick v. Frame*, 62 N.C.App. 387, 392, 303 S.E.2d 217, 221 (1983). "The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine de novo the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble v. Coble*, 300 N.C. 708, 712–13, 268 S.E.2d 185, 189 (1980).

Phelps v. Phelps, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994).

C. Conclusion of Law

¶ 21 Respondent-father's next argument is that the findings of fact do not support the conclusion of law that Kenneth and Malcolm were neglected and dependent. Under North Carolina law, a neglected juvenile is:

> Any juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker does not provide care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or the custody of whom has been unlawfully transferred under G.S. 14-321.2; or who has been placed for care or adoption in violation of

> law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile . . . has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (2020). 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).

¶ 22 Respondent-father asserts neither the evidence nor the findings of fact in this case show harm or a substantial risk of harm to Kenneth and Malcolm or that the juveniles' parents are unable to provide for their care and supervision. Respondent-father contends that at best the evidence supported the adjudication of Kenneth and Malcolm's half-brother Zeke, who is not subject to this appeal. While the neglect of one juvenile may be considered in the adjudication of another juvenile, the fact that one juvenile is neglected is insufficient to support the adjudication of another without evidence directly pertaining to the second juvenile. *See In re J.C.B.*, 233 N.C. App. 641, 643-44, 757 S.E.2d 487, 489-90, *disc. rev. denied*, 367 N.C. 524, 762 S.E.2d 213 (2014).

¶ 23 But since we have already determined that some of the trial court's findings of fact were not supported by the evidence and that we must remand for additional findings of fact, we need not further address Father's argument regarding the conclusion of law.

¶ 24 The trial court made virtually no findings pertaining directly to Kenneth and Malcolm. The trial court's findings overwhelmingly focused on Zeke and the condition of the juveniles' parents. Parental behavior constituting "neglect" must be "either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile[s]." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003). Additionally, while housing instability may contribute to a juvenile's status as neglected, housing instability cannot support a conclusion of neglect without evidence that the housing instability impeded the care and supervision of the juveniles or exposed

the juveniles to an injurious environment. *In re Adcock*, 69 N.C. App. 222, 226, 316 S.E.2d 347, 349 (1984); *In re J.R.*, 243 N.C. App. 309, 315, 778 S.E.2d 441, 445 (2015).

¶ 25 Further, DSS concedes that the trial court made no specific findings of fact addressing the impact on or risk of neglect regarding Kenneth and Malcolm nor do the findings connect Zeke's neglect to any potential neglect of his two siblings. Therefore, DSS argues the matter should be remanded to the trial court. We agree.

III. Conclusion

¶ 26 For the foregoing reasons, we vacate remand the trial court's adjudication of Kenneth and Malcolm as neglected and dependent for further findings of fact consistent with this opinion.

VACATED AND REMANDED.

Chief Judge STROUD and Judge INMAN concur.

STATE OF NORTH CAROLINA
v.
CONNOR ORION BRADLEY, DEFENDANT

No. COA20-873

Filed 15 March 2022

Probation and Parole—revocation—new drug offense—constructive possession

The trial court did not abuse its discretion by revoking defendant's probation where there was competent evidence that defendant violated his probation by committing the offense of simple possession of illegal drugs, albeit based on constructive rather than actual possession, based on his incriminating behavior during a traffic stop during which he moved around excessively, was found to be in close proximity to three controlled substances (found in the glove box directly in front of his passenger's seat), and was visibly impaired. Although there was insufficient evidence to support an additional basis for revocation, that defendant maintained a place for the sale of a controlled substance, since defendant was only a passenger in the vehicle that was pulled over, the error was not prejudicial because only one offense was necessary to support revocation.

Judge HAMPSON dissenting.

Appeal by Defendant from judgments entered 29 July 2020 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 7 September 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Ebony J. Pittman, for the State.

Stephen G. Driggers, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Defendant Connor Orion Bradley ("Defendant") appeals two judgments revoking his probation. On appeal, Defendant argues the trial court erred by revoking his probation based on the findings he (1) possessed Schedule II and Schedule IV controlled substances and (2) maintained a place for a controlled substance. For the reasons stated herein, we affirm the trial court's revocation of Defendant's probation.

I. Factual and Procedural Background

¶ 2 On September 5, 2019, Defendant entered a guilty plea to one count of indecent liberties with a child in 18 CRS 052027. The trial court sentenced Defendant to a term of 16 to 29 months in confinement, suspended the sentence, and placed Defendant on 30 months of supervised probation.

¶ 3 On September 30, 2019, Defendant's probation officer, Ilissa Epps, filed a probation violation report. In the report, Epps attested under oath

> 1. The Defendant committed the offense of driving while his . . . license was revoked . . . . The Defendant also committed the criminal offenses of driving a vehicle with no registration, no inspection, and [fictitious title / registration card and tag] . . . .
>
> 2. The Defendant committed the criminal offense of failure to register his address within 3 business days of change of address. . . . This is in violation of . . . [N.C. Gen. Stat. §] 14-208.9(A).

¶ 4 On November 6, 2019, Defendant entered another guilty plea to one count of failing to register his new address as a sex-offender in file

number 19 CRS 052656. That same day, the trial court entered an order finding Defendant had violated the terms and conditions of his probation as set out in the violation report. Defendant was sentenced to an intermediate punishment of 38 days in prison and was given credit for 38 days served. Also, on November 6, 2019, the trial court entered judgment against Defendant sentencing him to 17 to 30 months in confinement. The trial court suspended this sentence and placed Defendant on 30 months of supervised probation under the same conditions set forth in 18 CRS 052027.

¶ 5 After Defendant was placed on probation for failure to register his address as a sex offender, he submitted to a risk assessment. The risk assessment found Defendant to be a "high risk offender." As a result, the Division of Community Corrections amended the conditions of Defendant's probation by requiring he submit to a curfew and wear an electronic monitoring device.

¶ 6 Less than five months after Defendant's probation began, Epps once again filed a probation violation report in each case. The violation report for 18 CRS 052027 alleged Defendant had 1) failed to pay any money since being placed on probation, 2) failed to pay any supervision fees since being placed on probation, and 3) committed the criminal offense of possession with the intent to deliver a schedule IV controlled substance, maintaining a place for a controlled substance, simple possession of a scheduled II controlled substance, and simple possession of a schedule IV controlled substance. The violation report for 19 CRS 052656 alleged Defendant 1) failed to pay any money since being placed on probation and 2) committed the criminal offense of possession with the intent to deliver a schedule IV controlled substance, maintaining a place for a controlled substance, simple possession of a scheduled II controlled substance, and simple possession of a schedule IV controlled substance.

¶ 7 The trial court held a hearing on these violation reports on July 29, 2020. At the hearing, Defendant denied he had "knowingly and willfully and without legal justification violated the terms and conditions of his probation."

¶ 8 The State presented evidence which tended to show the following: On March 19, 2020, Amanda Gooch ("Gooch") was driving her grandmother's vehicle in which Defendant was a passenger in the front passenger seat. While driving, Gooch was pulled over by Officer McKenzie for careless and reckless driving. Officer McKenzie then conducted a traffic stop during which time Corporal Faulk and Officer Lucas arrived. Corporal Faulk walked up to the vehicle, retrieved Gooch's driver's

license, and ran the vehicle's registration. Upon observing Defendant to be moving excessively in the passenger seat while the traffic stop was ongoing, Officer Lucas pulled Defendant out of the vehicle. The officers next asked Gooch and Defendant for permission to search the vehicle but were denied consent.

¶ 9 An officer then shined his flashlight into the vehicle's passenger side and observed a plastic container with marijuana on the floorboard. A search of the vehicle ensued. The officers additionally discovered Alprazolam (Xanax) and Oxycodone inside the glove box and Clonazepam, a glass marijuana pipe, and one Cigarillo in the center console. Defendant denied owning any of these substances and alleged the substances belonged to Gooch. Gooch at first claimed all the substances belonged to herself; then claimed the substances belonged to nobody; and thereafter claimed half of the substances belonged to herself and the other half belonged to Defendant.

¶ 10 Defendant remained outside of the vehicle while the search was conducted. Corporal Faulk testified that during the search Defendant appeared "unsteady on his feet" and was "falling in and out." Due to Defendant's appearance and conduct, the officers called Emergency Medical Services to treat Defendant. Defendant refused medical treatment; and, furthermore, at no point was a blood test performed on Defendant to determine what substance, if any, caused Defendant's appearance of impairment.

¶ 11 After conducting a hearing on the probation violations, the trial court revoked Defendant's probation for 18 CRS 052027 and 19 CRS 052656 by written judgments entered July 29, 2020. Defendant gave oral notice of appeal in open court at the hearing.

II. Discussion

¶ 12 In North Carolina, a court may revoke a defendant's probation when the defendant commits a criminal offense in any jurisdiction in violation of N.C. Gen. Stat. § 15A-1343(b)(1); violates a condition of his probation when the defendant has previously "received a total of two periods of confinement" under N.C. Gen. Stat. § 15A-1344(d2) (2021); or "absconds by willfully avoiding supervision or willfully making the defendant's whereabouts unknown to the supervising probation officer" in violation of N.C. Gen. Stat. § 15A-1343(b)(3a) (2021). N.C. Gen. Stat. § 15A-1344(a) (2021). Upon revocation of probation, the sentence the defendant "may be required to serve is the punishment for the crime of which he had previously been found guilty." *State v. Hewett*, 270 N.C. 348, 352, 154 S.E.2d

476, 479 (1967) *rev'd on other grounds*, *Hewett v. North Carolina*, 415 F.2d 1316 (1969).

¶ 13 In reviewing a trial court's decision to revoke a defendant's probation, we review for abuse of discretion. *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014). An abuse of discretion occurs when "a ruling 'is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (quoting *State v. Peterson*, 361 N.C. 587, 602, 652 S.E.2d 216, 227 (2007)). Generally, "when judgment is suspended in a criminal action upon good behavior or other conditions, the proceedings to ascertain whether or not the conditions have been violated are addressed to the sound discretion of the judge . . . ." *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960).

¶ 14 Although Defendant would have us find "substantial evidence" is the standard for evidence in a probation hearing, our Supreme Court established in *State v. Guffey* the evidentiary standard in a probation hearing is "competent evidence." *Id.*, 253 N.C. at 45, 116 S.E.2d at 150 (citations omitted); *see Hewett*, 270 N.C. at 353, 154 S.E.2d at 480 ("[T]he alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt."). Competent evidence is evidence that is admissible or otherwise relevant. *Competent Evidence* BLACK'S LAW DICTIONARY (7th ed. 1999)).

A. Competent Evidence to Support a Judgment of Simple Possession

¶ 15 Defendant first contends the evidence was insufficient for the trial court to find he possessed Oxycodone, Xanax, and Clonazepam. We disagree.

¶ 16 "Possession of any item may be actual or constructive." *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998), *superseded by statute on other grounds*, Act of Aug. 12, 2004, ch. 186, 2004 N.C. Sess. Laws 186; *see State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986) (stating when a defendant is prosecuted for contraband "the prosecution is not required to prove actual physical possession of the materials[,]" rather, "[p]roof of constructive possession is sufficient and that possession need not always be exclusive"); *see also See State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972); *State v. Fuqua*, 234 N.C. 168, 66 S.E.2d 667 (1951). Actual possession occurs when the party has "physical or personal custody of the item." *Alston*, 131 N.C App. at 519, 508 S.E.2d at 318. Constructive possession occurs when the accused "has both the power and intent to control its disposition or use." *Harvey*,

281 N.C. at 12, 187 S.E.2d at 714 (1972); *see Alston*, 131 N.C. App. at 519, 508 S.E.2d at 318. Circumstances which are sufficient to support a finding of constructive possession include "close proximity to the controlled substance and conduct indicating an awareness of the drugs, such as efforts at concealment or behavior suggesting a fear of discovery . . . ." *State v. Turner*, 168 N.C. App. 152, 156, 607 S.E.2d 19, 22-23 (2005).

¶ 17 In *State v. Turner*, our Supreme Court held there was sufficient evidence for constructive possession when the defendant appeared agitated and nervous, his hands were jumbling around, and he appeared to be passing a tube back and forth underneath a blanket. *Id.* The tube was discovered to contain cocaine and though the defendant denied possession of the tube and did not have exclusive control over the premises, our Supreme Court held that a totality of the circumstances constituted "sufficient evidence of constructive possession of cocaine." *Id.* at 154-57, 607 S.E.2d at 21-23.

¶ 18 Here, the trial court found Defendant was in simple possession of Oxycodone, Xanax, and Clonazepam from the evidence presented at the hearing. The State's evidence tended to show Gooch was pulled over for careless and reckless driving and Defendant was seated in the passenger side of the vehicle. While Officer McKenzie was conducting the traffic stop, Defendant, like the defendant in *Turner*, exhibited behavior suggesting his fear of discovery of the drugs therein because he continued to move "a lot . . . in the passenger side." Indeed, Defendant's movement was to the extent that Corporal Faulk ultimately had to remove Defendant from the vehicle. A search ensued when an officer observed marijuana in a clear container on the floorboard of the passenger side. The fruits of this search showed Defendant was in "close proximity to the controlled substance" as a pill bottle containing Xanax, Oxycodone, and Clonazepam was found inside the glove box located *directly in front* of the passenger's seat. *Id.* at 156, 607 S.E.2d at 22.

¶ 19 In addition to Defendant being in "close proximity to the controlled substance" and exhibiting "behavior suggesting a fear of discovery[,]" Defendant also showed obvious signs of impairment. *Id.* at 156, 607 S.E.2d at 22-23. Corporal Faulk stated Defendant was "unsteady on his feet" and "falling in and out" while standing outside of the vehicle. Due to concerns for Defendant because of the signs of obvious impairment, Emergency Medical Services were called "to come check him out[] [and] make sure he did not need to go to the hospital." Notably, most of the State's evidence was admitted by the trial court without objection from Defendant.

¶ 20 In light of the evidence presented by the State, we find competent evidence existed to support the trial court's finding of simple possession of a controlled substance. As such, the trial court's activation of Defendant's previously suspended sentences "are not reviewable on appeal, unless there is a manifest abuse of discretion." *Guffey*, 253 N.C. at 45, 116 S.E.2d at 150; *see Pelley*, 221 N.C. 487, 500, 20 S.E.2d 850, 858 (1942). There is no evidence of abuse of discretion by the trial court in this proceeding. We therefore hold the trial court did not err by revoking Defendant's probation based upon its finding that Defendant committed the offense of simple possession of Oxycodone, Xanax, and Clonazepam while on probation.

¶ 21 While our dissenting colleague correctly identifies that a finding of constructive possession requires more than a defendant merely being present within a vehicle in which drugs are found, *State v. Ferguson*, 204 N.C. App. 451, 459-60, 694 S.E.2d 470, 477 (2010), other incriminating circumstances existed in the case *sub judice* to support the trial court's finding that Defendant violated the terms of his probations by committing the offenses of possessing a schedule II and IV substance. *See id.* ("As a general rule, mere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession." (internal quotation marks omitted)).

B. Competent Evidence of Maintaining a Vehicle for Sale of a Controlled Substance

¶ 22 Defendant next argues there was no substantial evidence to support the trial court's finding Defendant willfully maintained a vehicle for the sale of a controlled substance. We agree, but hold this error was not prejudicial.

¶ 23 Section 90-108(a)(7) of our general statutes states, in relevant parts,

> [i]t shall be unlawful for any person . . . [t]o knowingly keep or maintain any . . . vehicle . . . which is resorted to by persons using controlled substances . . . for the purpose of using such substances, or which is used for the keeping or selling of the same . . . .

¶ 24 N.C. Gen. Stat. § 90-108(a)(7) (2021). The word "keep" in Section 90-108(a)(7) "refers to possessing something for at least a short period of time—or intending to retain possession of something in the future—for a certain use." *State v. Rogers*, 371 N.C. 397, 402, 817 S.E.2d 150, 154 (2018). When determining if a defendant kept a vehicle, the

"focus of the inquiry is on the *use*, not the contents, of the vehicle." *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994), *overruled in part by State v. Rogers*, 371 N.C. 397, 817 S.E.2d 150 (2018). "Maintain" as used in Section 90-108(a)(7) means to "bear the expense of; carry on . . . hold or keep in an existing state or condition." *State v. Allen*, 102 N.C. App. 598, 608, 403 S.E.2d 907, 913 (1991) (quoting Black's Law Dictionary 859 (5th ed. 1979)), *rev'd on other grounds*, 332 N.C. 123, 418 S.E.2d 225 (1992).

¶ 25 Although the definitions of "keep" and "maintain" differ, "they do not describe separate offenses[] . . . [and are] often used interchangeably . . . ." *State v. Weldy*, 271 N.C. App. 788, 791, 844 S.E.2d 357, 361 (2020). When deciding if a defendant violated Section 90-108(a)(7), this court looks to circumstances such as "defendant's use of the vehicle, title to or ownership of the vehicle, property interest in the vehicle, payment toward the purchase of the vehicle, and payment for repairs to or maintenance of the vehicle." *Id.*; *see also State v. Alvarez*, 260 N.C. App. 571, 575, 818 S.E.2d 178, 182 (2018).

¶ 26 In this case, the violation reports purported, amongst other allegations, Defendant had committed the criminal offense of "maintaining a place for a controlled substance." At the hearing, Corporal Faulk's testimony tended to show Gooch was pulled over for careless and reckless driving, Defendant was merely Gooch's passenger, and that the vehicle belonged to neither Gooch nor Defendant, but rather belonged to Gooch's grandmother. The State presented no competent evidence that Defendant possessed any ownership interest in the vehicle, paid for any expenses in connection with the vehicle, or used the vehicle aside from this instance where he was a passenger. Accordingly, no evidence supports the trial court's finding Defendant violated a condition of his probation by "maintaining a place for a controlled substance."

¶ 27 However, the absence of competent evidence to support the trial court's finding Defendant maintained a place for a controlled substance does not necessarily mean the trial court abused its discretion by revoking Defendant's probation. The plain text of N.C. Gen. Stat. § 15A-1343 states the "defendant must[] [c]ommit no criminal offense." N.C. Gen. Stat. § 15A-1343(b)(1) (2021). The word "offense" in Section 15A-1343 is singular, denoting a singular new criminal offense is sufficient to revoke probation. *See* N.C. Gen. Stat. § 15A-1344(a) (2021); *see also State v. Coltrane*, 307 N.C. 511, 516, 299 S.E.2d 199, 202 (1983) ("The evidence in a probation revocation hearing must satisfy the court that defendant has willfully or without lawful excuse violated a condition of probation." (emphasis omitted)).

¶ 28 The trial court is not required under the language of N.C. Gen. Stat. § 15A-1344(a) and N.C. Gen. Stat. § 15A-1343(b)(1) to find more than one new criminal offense exists in order to revoke a defendant's probation. Here, the trial court found Defendant committed multiple probation violations. In its judgment revoking Defendant's probation for 18 CRS 052027, the trial court found Defendant violated his probation by failing to pay any money since being placed on probation; failing to pay any supervision fees; possessing with the intent to deliver a schedule IV substance; maintaining a place for a controlled substance; and simple possession of a schedule II and IV substance. Likewise, in its judgment revoking Defendant's probation for 19 CRS 052656, the trial court found Defendant violated his probation by failing to pay any money since being placed on probation; possessing with the intent to deliver a schedule IV substance; maintaining a place for a controlled substance; and simple possession of a schedule II and IV substance.

¶ 29 As discussed *supra*, sufficient competent evidence existed to support the trial court's finding that Defendant committed the criminal offense of simple possession of a controlled substance. Thus, despite the lack of competent evidence that Defendant maintained a vehicle for sale of a controlled substance, the trial court did not abuse its discretion by revoking Defendant's probation and activating his suspended sentences.

III. Conclusion

¶ 30 After a careful review of the record and applicable law, we hold the trial court did not abuse its discretion by revoking Defendant's probation and activating his sentences. Accordingly, the judgments of the trial court are affirmed.

AFFIRMED.

Judge GORE concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

¶ 31 The majority correctly concludes no evidence supports the trial court's Finding Defendant violated a condition of his probation by "maintaining a place for a controlled substance." However, the evidence in this case is also insufficient to establish Defendant violated a condition of his probation by committing the criminal offense(s) of simple possession of Schedule II and IV controlled substances. Thus, the evidence does

not support the trial court's determination Defendant willfully violated the condition of his probation that Defendant not commit any criminal offense as alleged in the violation report(s). Therefore, the trial court abused its discretion in revoking Defendant's probation on this basis. Consequently, the trial court's Judgments revoking Defendant's probation should be reversed. Accordingly, I dissent.

I.

¶ 32 It is important to first make clear the criminal offense(s) Defendant was alleged to have committed and what offense was not alleged. Defendant was alleged to be in simple possession of Schedule II and IV controlled substances. These offenses apparently correspond to the pill bottle containing alprazolam (Schedule IV), the oxycodone pill (Schedule II), and the clonazepam (Schedule IV) pill found in the glove box of the car. *See* N.C. Gen. Stat. § 90-90(1)(13) (listing oxycodone in Schedule II); N.C. Gen. Stat. § 90-92(a)(1)(a),(i) (listing alprazolam and clonazepam in Schedule IV). Defendant was not alleged to have been in possession of the marijuana found on the passenger side floorboard.[1] *See* N.C. Gen. Stat. § 90-94(1) (listing marijuana in Schedule VI).

¶ 33 The fact Defendant was not alleged to have committed the offense of possession of the marijuana is significant. This is because the State hinged much of its case—if not the majority—on the marijuana. Indeed, after the conclusion of the evidence, the State's argument in full heavily relied on the marijuana:

> Your Honor, I believe Corporal Faulk testified that there was what is believed to be marijuana in the passenger floorboard where Mr. Bradley was seated. Furthermore, that he was unsteady on his feet, and they were concerned for him such that they called EMS, despite the fact that he refused EMS.
>
> Additionally that there were controlled substances in the glove box, that while Ms. Gooch went back and forth about whether or not it was hers, she did implicate that some of them were the defendant's, and that there were -- there was marijuana paraphernalia also found in the vehicle.

1. A critical reviewer of this case may well wonder why—if the State was going to allege possession of anything on a "constructive possession" theory on these facts—it didn't allege constructive possession of marijuana.

> Your Honor, I think that there's sufficient evidence that the defendant was constructively in possession of the marijuana, given that it was on the floorboard in a seat where he was sitting.

The State did so despite the fact the State never alleged Defendant committed this offense in violation of his probation.

¶ 34 Compounding this confusion as to what offense or offenses Defendant was alleged to have committed, in rendering its decision, the trial court did not specifically identify what offenses it found Defendant had committed in violation of his probation, stating: "The Court finds the respondent has unlawfully, willfully and without legal justification violated the terms and conditions of his probation as is alleged in the violation reports, and the Court specifically finds that he's committed subsequent offenses." The trial court's Judgments also do not independently identify the offenses found to have been committed instead reciting violations of paragraph numbers of the violation reports. As such, there is a legitimate question on the existing record as to whether the trial court relied on a non-alleged offense of possession of marijuana, in whole or in part, to find grounds to revoke Defendant's probation. If the trial court—as a result of the State's representations—was acting under a misapprehension Defendant was alleged to have possessed the marijuana, this would constitute an abuse of discretion. At a minimum, this would require a remand to the trial court to clarify its ruling and determine whether the evidence supported a finding Defendant committed the offenses he was actually alleged to have committed.

II.

¶ 35 Indeed, the majority opinion focuses its analysis of whether the evidence supports the trial court's Judgments revoking probation—quite correctly—only on possession of the Schedule II and IV substances. As the majority articulates: "Possession of any item may be actual or constructive." *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). The evidence here does not support a theory of actual possession of the Schedule II and IV substances by Defendant. Nobody in this case argues it does.

¶ 36 Instead, the State contends—and the majority agrees—the evidence was adequate to support a finding Defendant constructively possessed the Schedule II and IV substances. The law related to constructive possession applicable to this case was well-summarized by our prior decision in *State v. Ferguson*:

> "A person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing." *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (citing *State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 374 (1983)). "Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citing *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001)). As a general rule, " 'mere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession.' " *State v. Weems*, 31 N.C. App. 569, 570, 230 S.E.2d 193, 194 (1976) (citations omitted). Accordingly, "the mere presence of the defendant in an automobile in which illicit drugs are found does not, without more, constitute sufficient proof of his possession of such drugs." *Weems*, 31 N.C. App. at 571, 230 S.E.2d at 194.

204 N.C. App. 451, 459–60, 694 S.E.2d 470, 477 (2010).

¶ 37 In this case, the evidence, without more, simply does not support a finding Defendant was in constructive possession of the Schedule II and IV substances found inside of a pill bottle inside of a glove box of a car not owned nor operated by Defendant.[2] In its analysis, the majority correctly summarizes the salient evidence offered by the State: Gooch was pulled over for suspected driving while impaired and Defendant was Gooch's passenger; Defendant was removed from the vehicle due to "a lot of excessive moving in the passenger side"; Defendant was characterized as "unsteady on his feet" and "falling in and out"; after Defendant was removed from the car, a search of the vehicle revealed a pill bottle containing Xanax, Clonazepam, and Oxycodone inside the glove box.[3] Additionally, the evidence showed the car was not registered

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2. Additionally, I am not convinced there is any difference between Defendant's proffered "substantial evidence" standard and the majority's "any competent evidence standard," but to the extent there is any daylight between the two, I reach the same conclusion: there is no competent evidence to support a finding of constructive possession.

3. I note with appreciation that the majority does not rely on the evidence of the out-of-court statements from Gooch concerning who owned the substances in the car. The

to Defendant but rather Gooch's grandmother and there was no evidence Defendant had or exercised any ownership of the car.

¶ 38 First, the mere fact Defendant was a passenger in the car is, by itself, insufficient to establish constructive possession. *Id.* Second, the two additional incriminating circumstances were: (1) Defendant was removed from the car for "excessive moving" and (2) he was unsteady on his feet and appeared to be "falling in and out."

¶ 39 Here, there was no evidence Defendant's "excessive moving" had any connection to the pill bottle or was an attempt to conceal the substances. In prior cases, the suspicious or nervous behavior conduct indicated "an awareness of the drugs, such as efforts at concealment or behavior suggesting a fear of discovery." *State v. Turner*, 168 N.C. App. 152, 156, 607 S.E.2d 19, 22–23 (2005) (evidence two suspects were passing a tube later determined to contain cocaine between each other under a blanket); *see also State v. McNeil*, 359 N.C. 800, 801–02, 617 S.E.2d 271, 272–73 (2005) (defendant acted nervous, ran from police, and admitted possession of some of the drugs that police found); *State v. Butler*, 356 N.C. 141, 147–48, 567 S.E.2d 137, 141 (2002) (taxicab driver felt defendant "struggling" in the backseat behind him and pushing against the front seat, and the police found drugs under the seat 12 minutes later); *State v. Harrison*, 14 N.C. App. 450, 450–51, 188 S.E.2d 541, 542 (1972) (officer noticed the defendant moving around on the back seat and partially concealing a brown envelope with his hand). In this case, there was no evidence that Defendant's excessive moving indicated any awareness of the Schedule II or IV substances in the glove box or that he was attempting to conceal the Schedule II and IV substances. Nor was there evidence Defendant was evasive or non-compliant with law enforcement.

¶ 40 Next, the evidence Defendant was unsteady on his feet and "falling in and out" appears to be used as circumstantial evidence that Defendant was impaired. However, there is no evidence Defendant's impairment was the result of ingesting Schedule II or IV substances. For example: there was no evidence of a blood test, no evidence Defendant's behavior was consistent with one impaired by the Schedule II and/or IV substances, or any evidence from which such impairment might be inferred. Any

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State offering those out-of-court statements to prove the substances belonged, in whole or part, to Defendant constitutes inadmissible hearsay testimony. Even though Defendant did not object to these statements, we also presume the trial court did not rely on them either. *See State v. Allen*, 322 N.C. 176, 185, 367 S.E.2d 626, 631 (1988) ("The presumption in non-jury trials is that the court disregards incompetent evidence in making its decision.").

speculation Defendant was impaired by the Schedule II and IV substances and thus, Defendant was "in possession" of those substances is just that: speculation. *See State v. Angram*, 270 N.C. App. 82, 87, 839 S.E.2d 865, 868 (2020) ("Although circumstantial evidence may be sufficient to prove a crime, pure speculation is not, and the State's argument is based upon speculation.").

¶ 41 Thus, because the evidence of Defendant's "constructive possession" of Schedule II or IV substances is nothing more than speculative, there is no competent evidence to support a finding Defendant committed the offenses of possession of a Schedule II and Schedule IV substances. Thus, the trial court erred in finding Defendant violated conditions of his probation by committing the subsequent offenses alleged in the violation reports. Consequently, the trial court erred in entering its Judgments, revoking Defendant's probation, and activating his sentences. Accordingly, the trial court's Judgments should be reversed.

STATE OF NORTH CAROLINA
v.
TIMOTHY ROBERT GALLION

No. COA21-375

Filed 15 March 2022

1. Search and Seizure—search warrant—probable cause—defendant's residence—murder investigation

In prosecution for the first-degree murder of a victim who was shot in the head in his own home, the trial court did not err in denying defendant's motion to suppress evidence seized during the search of his residence where the search warrant affidavit alleged, among other things, that defendant had two 9-millimeter firearms in his truck when he was arrested, there were blood smears in his truck and on his hands, the ammunition in his truck was consistent with the shell casings around the victim's body, he was arrested near the scene of the crime, he had shown a pistol to a witness while suggesting he had a motive to kill the victim, the witness's description of that pistol matched the pistol in defendant's truck, and an officer had seen bullets on a shelf in defendant's home workshop the previous day—all allowing the reasonable inference that evidence related to the murder could likely be found at defendant's residence. Further, the conclusions of law in the trial court's order

on the motion were supported by the findings of fact, which were supported by competent evidence.

2. Evidence—electronic monitoring data—statutory mechanism for suppression—privilege waived—search warrant

In a first-degree murder prosecution, the trial court did not commit plain error when it denied defendant's motion to suppress his electronic monitoring data obtained from the Department of Public Safety (DPS) where defendant failed to cite a statutory mechanism allowing him to suppress that data (his argument cited N.C.G.S. § 15A-974, which requires suppression for a violation of Chapter 15A, but the alleged violation was to Chapter 15), DPS waived its privilege regarding that data by verbally releasing it to law enforcement, and the data evidence actually admitted at trial was the product of law enforcement's search warrant (rather than the information obtained verbally before issuance of the search warrant).

3. Evidence—hearsay—murder trial—doubt cast on defendant's guilt

In a first-degree murder prosecution, the trial court did not err by preventing defendant from cross-examining a witness regarding a social media message that the victim had sent to his mother indicating that he intended to go somewhere to participate in a fight on the day he was murdered, where the testimony was inadmissible hearsay and, even if it was offered for non-hearsay purposes, it was not relevant because it only created an inference that someone other than defendant could have murdered the victim.

4. Evidence—expert testimony—firearm identification—requirements

In a first-degree murder prosecution, the trial court did not commit plain error by admitting testimony from the State's expert witness on firearm identification and examination where the expert's extensive testimony was based upon sufficient facts and data and was the product of reliable principles and methods, pursuant to Evidence Rule 702(a).

5. Homicide—first-degree murder—sufficiency of evidence—opportunity and capability—motive, premeditation, and deliberation

In a first-degree murder prosecution, the trial court did not err by denying defendant's motion to dismiss his murder charge where the State presented substantial evidence that defendant committed the murder and that he acted with malice, premeditation, and

deliberation. In the light most favorable to the State, defendant's electronic monitoring device showed that he was at the scene of the crime one day before the victim's body was found, which also was the day the victim was last seen alive; on that same day defendant showed a firearm to a witness and stated he was going up the road—on which the victim lived—to take care of some business; defendant possessed the murder weapon and ammunition matching the shell casings found around the victim's body; and the victim was found in a seated position on his couch with multiple gunshot wounds to his head.

Appeal by defendant from judgment entered 11 February 2020 by Judge Carla Archie in Buncombe County Superior Court. Heard in the Court of Appeals 14 December 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert C. Montgomery and Special Deputy Attorney General Daniel P. O'Brien, for the State.

William D. Spence for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Defendant appeals from judgment after a jury convicted him of first degree murder, possession of a firearm by a felon, and driving while impaired. After careful review of the record, we find no error.

I. Factual & Procedural Background

¶ 2 The State's evidence presented at trial tends to show the following: Defendant's wife, Ms. Gallion, testified that on 22 March 2017, Defendant made the following statement to her: "I'm going to kill your mother, I'm going to kill your sister, and I'm going to kill everybody that knows you, and then I'll kill you." Ms. Gallion further testified that on the same day Defendant communicated the threats, she took out a warrant for his arrest.

¶ 3 At around 3:46 p.m. that day, officers of the Buncombe County Sheriff's Department were dispatched to Defendant's home to arrest him. The officers attempted to contact Defendant or Ms. Gallion but could locate neither of them on the property. They observed through the window of a workshop on Defendant's property "a handful of bullets on a shelf."

¶ 4 Sergeant Nathan Ball ("Sergeant Ball") of the Buncombe County Sheriff's Office oversaw the department's Community Enforcement Team, which handles community complaints including warrant services. He testified his team responded to the call to Defendant's home. Upon Sergeant Ball learning from his team Defendant was not at the residence, he went to the nearby intersection of Wittemore Branch Road and Barnardsville Highway, where Defendant might cross if he were to return home. As he was talking with his colleague Captain Elkins regarding the matter, they heard a dispatch for the fire department regarding a structure fire on Dillingham Road.

¶ 5 Sergeant Ball headed to the area of the fire, as he knew Defendant "had a previous address on Dillingham Road." On his way there, Sergeant Ball saw someone getting into a green Dodge pickup truck, matching the description of Defendant's vehicle, parked beside Sheena's Restaurant. Sergeant Ball dispatched other members of his team to the location. The officers left Defendant's home, heading in the direction of the restaurant. Sergeant Ball knew Defendant was a convicted felon.

¶ 6 At around the same time that afternoon, Defendant went to the property of Tommy Carson ("Carson"), the uncle of Defendant's former wife, at 397 Dillingham Road where Carson's house is located and where Carson used to operate a grocery store. Carson testified Defendant approached and first asked him for beer or wine, but when Carson did not have these items, Defendant asked to borrow ten dollars. After Carson responded he did not have any money either, Defendant showed him his "bulletproof" jacket with a Buncombe County Sheriff's Office SWAT team patch affixed to an arm and a "9 millimeter Uzi" firearm.

¶ 7 Carson advised he was heading out but could pick up money for Defendant at the bank if Defendant wanted to follow him there. Defendant declined the offer telling Carson, "he had to go up the road to take care of some business." Carson witnessed Defendant get in his truck and go up the road. Carson drove away with Brooke Blagg ("Blagg") who lived on his property. Defendant ultimately left Carson's property shortly after Carson at 4:24 p.m. At 4:31 p.m. a call came into the fire department regarding a fire in Carson's building. Defendant stated in an interview with investigators on 23 March 2017 that he headed over to Sheena's Restaurant after leaving Carson's house. According to Defendant, he asked the owner of the restaurant for twenty dollars, then went home. He also admitted to drinking six beers and "maybe four" Johny Bootlegger spirited beverages on 22 March 2017.

¶ 8 Blagg saw Defendant on Carson's property on 22 March 2017 and testified she and Carson "left the store and [Defendant] went up to the

church and turned around and came back down" to Carson's property. She confirmed she saw Defendant leave the store and drive towards the house of Bobby Pegg ("Pegg' "), the victim. She added, "because right past the church [on Dillingham Road] is where [Defendant] had lived at with [Pegg]." "The church . . . it's going in the direction" of Pegg's house.

¶ 9 Officers located Defendant traveling on Barnardsville Highway and followed him after he turned on Wittemore Branch Road. Defendant did not stop his vehicle when two police cars pursued him with blue lights and sirens activated.

¶ 10 Officers eventually stopped Defendant via a roadblock. They approached his vehicle with guns drawn and removed Defendant from the vehicle after he refused to show his hands. In Defendant's vehicle, officers found two firearms in plain view. The officers also observed "blood on the steering wheel, on a door, [and on] the driver's seat." Officers arrested Defendant at approximately 4:43 p.m. and took inventory of his truck. They recovered firearms including a Ruger 9-millimeter "shotgun" and a Cobray 9-millimeter pistol as well as three 9-millimeter magazines, one 9-millimeter flash suppressor, and 9-millimeter ammunition. The 9-millimeter ammunition included "silver-colored casings with the headstamp of FC LUGER 9 MM." Officers performed a pat down of Defendant and located a GPS monitoring device on his left ankle. They also "noticed a strong odor of alcohol" coming from Defendant's person. Defendant was transported to a detention center where he refused to perform an alcohol breath test; his blood was drawn for analysis pursuant to a search warrant.

¶ 11 Deputy Leslie Meade ("Deputy Meade") of the Buncombe County Sheriff's Department performed standardized field sobriety tests on Defendant. Deputy Meade testified Defendant showed six of six clues on the horizontal gaze nystagmus ("HGN") test, and seven of eight clues on the walk and turn test. Defendant refused to complete the one-legged stand test.

¶ 12 At approximately 2:00 p.m. the following day—23 March 2017—Pegg's niece, Summer Riddle ("Riddle") and his mother, Jeanette Pegg, arrived at Pegg's house on 665 Dillingham Road to check on him after they had not heard from him since 21 March 2017. Defendant's brother owned the house where Pegg lived, and Defendant had performed carpentry work and repairs on the house.

¶ 13 Pegg was last seen alive on 22 March 2017 at about 1:00 p.m. by his neighbor who witnessed Pegg standing in his driveway. Riddle and Jeanette Pegg found Pegg's deceased body sitting on the couch in the

living room. Riddle testified the kitchen door was unlocked when she arrived at the house, and it was normal for Pegg to leave the house unlocked when he was home. Riddle and Jeanette Pegg called 911 within minutes of arriving on the scene. Law enforcement responded to the 911 call and initiated a homicide investigation. Officers found silver-colored shell casings with the headstamp "FC LUGER 9 MM," matching the description of the bullets found in Defendant's vehicle, around Pegg's body.

¶ 14 An autopsy revealed Pegg died from gunshot wounds to his head, although an exact date or time of death could not be determined from the examination. The autopsy report shows Pegg had three gunshot wounds to his head. Two of the wounds had "soot and stippling" around them, indicating the muzzle of the gun was close to Pegg when fired. The third wound did not have soot or stippling, indicating the gun was fired at an "indeterminate range" from the deceased.

¶ 15 On 29 January 2020, Defendant filed a pretrial motion to suppress any evidence seized during the search of his home address on the basis the search warrant affidavit "fails to implicate the premises," as required by N.C. Gen. Stat. § 15A-244, the North Carolina Constitution, and the United States Constitution. Defendant also moved to suppress evidence of GPS data on the grounds his statutory rights were violated when privileged information, namely GPS data of his movements, was orally provided by the North Carolina Department of Public Safety ('DPS") to law enforcement before a court order was issued. On 3 February 2020, the trial court heard Defendant's motion to suppress and orally announced its findings of facts and conclusions of law in open court. The trial court concluded there had been no substantial violation of Chapter 15A that warranted suppression and denied Defendant's motion.

¶ 16 A jury trial began on 3 February 2020 before the Honorable Carla Archie in Buncombe County Superior Court. Defendant admitted to having been previously convicted of three charges of driving while impaired, resulting in a conviction of habitual driving while impaired.

¶ 17 At trial, Alyssa Tinnin ("Tinnin") was tendered by the State as an expert in the field of forensic toxicology. Tinnin testified she conducted a chemical analysis on the blood sample identified as that taken from Defendant. Tinnin opined Defendant's blood sample contained 0.17 grams of alcohol per 100 milliliters.

¶ 18 Elizabeth Wilson ("Wilson"), is a firearms examiner who, at the time of the hearing, was employed by the North Carolina State Crime Laboratory. Wilson was tendered as an expert in the area of firearms identification and examination. Wilson testified that she performs

all tests on firearms based on reliable facts and data. She examined the Cobray 9-millimeter and Ruger 9-millimeter firearms seized from Defendant's vehicle. Wilson also did comparison examinations of the shell casings, bullets, and projectiles that were collected from the homicide crime scene. Based on the results of her examination, Wilson concluded that seven shell casings found around Pegg's' body, the "caliber .38 class fired copper jacket" fragment that was imbedded in wood at Pegg's home, the "caliber .38 class fired copper jacket" collected from Pegg's temple, and the "caliber .38 class fired jacketed bullet" collected from Pegg's jaw were all fired from the same Cobray 9-millimer pistol seized from Defendant.

¶ 19 On 27 March 2017 at approximately 1:58 p.m., Sergeant Ryan Jordan ("Sergeant Jordan") of the Buncombe County Sheriff's Department obtained a search warrant for Defendant's GPS monitoring data obtained from Defendant's previously mandated post-release electronic monitoring device. The search warrant was executed at 2:13 p.m. that afternoon. Sergeant Jordan testified he obtained the information sought in the search warrant from Joan McCurry ("McCurry"), the Chief Probation and Parole Officer for DPS, approximately three days after he executed the search warrant.

¶ 20 At trial, McCurry testified regarding the GPS communication device Defendant was wearing and the business records created from such a device. McCurry testified at the suppression hearing she verbally provided Defendant's GPS data pinpoints for the date of 22 March 2017 to Captain Elkins and Sergeant Jordan upon their request and before a search warrant was issued.

¶ 21 Michelle Wilson, an account manager for BI Incorporated, also testified. BI Incorporated contracted with the Department of Public Safety of the State of North Carolina to provide an electronic curfew monitoring service that the State uses for its adult probation and parole section. Michelle Wilson explained that due to atmospheric conditions, GPS points could drift but depending on how many satellites are tracking at a given time, the GPS data is generally accurate within a range of 25 to 100 feet. She testified the GPS data for Defendant showed Defendant was at the address of 665 Dillingham Road, Pegg's home, at 4:07 p.m. on 22 March 2017. The State also offered evidence through Michelle Wilson tending to show Defendant was at Pegg's home between the hours of 3:00 p.m. to 4:22 p.m. on 22 March 2017.

¶ 22 A search warrant for Defendant's home was issued on 27 March 2017 at approximately 7:59 p.m. and was executed that evening at 8:29 p.m.

Officers seized 9-millimeter ammunition with the headstamp "FC LUGER 9 MM" from inside Defendant's workshop and seized ammunition, handwritten notes, and numerous firearms from Defendant's home.

¶ 23 On 22 March 2017, Defendant was charged with driving while impaired, driving while license revoked for impaired driving, possession of a firearm by a felon, second degree arson, and first degree murder. On 7 August 2017, a Buncombe County grand jury indicted Defendant on the charges of driving while licensed revoked, in violation of N.C. Gen. Stat. § 20-28(a1); habitual impaired driving, in violation of N.C. Gen. Stat. § 20-138.5; possession of a firearm by a felon, in violation of N.C. Gen. Stat. § 14.415.1; second degree arson, in violation of N.C. Gen. Stat. § 14-58; and first degree murder, in violation of N.C. Gen. Stat. § 14-17.

¶ 24 At the close of the State's evidence, Defendant moved to dismiss the charges of second degree arson and first degree murder based on insufficiency of evidence. The trial court denied his motion. Defendant renewed his motion to dismiss at the close of all evidence, which was also denied. On 11 February 2020, the State dismissed the charge of driving while licensed revoked. On the same day, the jury found Defendant guilty of driving while impaired, possession of a firearm by a felon, and first degree murder; the jury found Defendant not guilty of second degree murder. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

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

III. Issues

¶ 26 The issues before this Court are whether: (1) probable cause existed for the magistrate to issue the search warrant for Defendant's residence; (2) the findings of fact are supported by competent evidence and whether the findings of fact in turn support the conclusions of law in the trial court's ruling on Defendant's motion to suppress evidence seized from his residence; (3) the trial court committed plain error in refusing to suppress electronic monitoring data where the Secretary of DPS allowed Defendant's GPS data to be orally released before a search warrant was issued; (4) the trial court erred by refusing to allow Defendant to cross-examine a witness about a Facebook message; (5) the trial court committed plain error by admitting testimony on firearms identification and examination from the State's expert witness; and (6) the trial court erred by denying Defendant's motion to dismiss the first degree murder charge.

IV. Motion to Suppress Evidence Obtained from Defendant's Residence

¶ 27 **[1]** In his first argument, Defendant challenges the sufficiency of the search warrant application for his residence as well as the trial court's denial of his motion to suppress all evidence seized through a search warrant of this address.

A. Sufficiency of the Search Warrant Application

¶ 28 We first consider Defendant's argument that the search warrant affidavit is defective because it fails to implicate his home address and does not provide a basis to support probable cause.

¶ 29 The Fourth Amendment to the Constitution of the United States, made applicable to the states through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amends. IV, XIV. Under the Fourth Amendment, a search warrant may be issued only "upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

¶ 30 "Article I, Section 20 of the Constitution of North Carolina likewise prohibits unreasonable searches and seizures and requires that warrants be issued only on probable cause," although the language of the North Carolina Constitution differs from that of the United States Constitution. *State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 302–03 (2016); *see* N.C. Const. art. I, § 20; *see also* N.C Gen. Stat. § 15A-245 (2021).

¶ 31 The North Carolina Supreme Court adopted the "totality of the circumstances test to determine whether probable cause exists under Article I, Section 20" of the North Carolina Constitution. *Allman*, 369 N.C. at 293, 794 S.E.2d at 303. "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. Such a connection need not be direct, but it cannot be purely conclusory." *State v. Bailey*, 374 N.C. 332, 335, 841 S.E.2d 277, 280 (2020).

¶ 32 Under North Carolina law, an application for a search warrant must meet certain requirements, including that it "be made in writing upon oath or affirmation." *See* N.C. Gen. Stat. § 15A-244 (2021). Additionally, each application must contain:

(1) The name and title of the applicant; and

> (2) A statement that there is probable cause to believe that items subject to seizure under [N.C. Gen. Stat. §] 15A-242 may be found in or upon a designated or described place, vehicle, or person; and
>
> (3) Allegations of fact supporting the statement. The statements must be supported by 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; and
>
> (4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

N.C. Gen. Stat. § 15A-244(1)–(4).

¶ 33 A search warrant "affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender." *State v. Vestal*, 278 N.C. 561, 575–76, 180 S.E.2d 755, 765 (1971) (citations omitted); *see also* N.C. Gen. Stat. § 15A-244. "A magistrate must make a practical, common-sense decision, based on the totality of the circumstances, whether there is a fair probability that contraband will be found in the place to be searched." *State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015) (citations and internal quotation marks omitted). Additionally, "a magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant." *State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005).

¶ 34 It is well-established that "great deference should be paid a magistrate's determination of probable cause and . . . after-the-fact scrutiny should not take the form of a *de novo* review." *State v. Lewis*, 372 N.C. 576, 584, 831 S.E.2d 37, 43 (2019) (citation omitted). "Instead, a reviewing court is responsible for ensuring that the issuing magistrate had a substantial basis for . . . conclud[ing] that probable cause existed." *McKinney*, 368 N.C. at 165, 775 S.E.2d at 825 (citations and internal quotation marks omitted).

¶ 35 Here, Sergeant Jordan included with his application for a search warrant an affidavit stating his name and title, as well as the following statement regarding probable cause:

> Based on my training and experience, and the facts as set forth in this affidavit, I believe that in records in and around the residence, outbuildings, and curtilage of [Defendant's residence] in Barnardsville, NC there exists evidence of a crime and contraband or fruits of that crime.

¶ 36 After reciting his training and experience in the affidavit, Sergeant Jordan made the following allegations of fact to support his statement of probable cause:

> (1) On 3-23-2017, the Buncombe County Emergency Operations Center received a call on 911 stating that an individual had been discovered with an apparent gunshot [wound] at 665 Dillingham Rd, Barnardsville, NC. First Responders arrived on scene and located Bobby Ray Pegg II deceased in his home. Detectives with the Buncombe County Sheriff's Office (BCSO) responded to the residence and began conducting an investigation.
>
> (2) During the investigation, detectives located several silver colored spent 9mm shell casings in the area around Pegg's body. All the silver colored spent 9mm shell casings were head stamped with "F C LUGER 9MM."
>
> (3) Detectives discovered the last time Pegg had been seen alive, was on 3-22-2017 at approximately 12:30 p.m.
>
> (4) On 3-22-2017 it was reported to the BCSO thatthroughout the day, Timothy Robert Gallion had been making threats to his family stating that he would kill them, kill any law enforcement that attempted to apprehend him, and then kill himself. An arrest warrant was obtained by family members for Communicating Threats.
>
> (5) Deputies traveled to Gallion's residence . . . on 03-22-17 to search for Gallion. While there, deputies went to a workshop just down the driveway from the residence. A deputy looked into the window to see if Gallion was in the workshop and observed a handful of bullets on a shelf.

(6) Gallion was located on Whittemore Branch Rd inBarnardsville, NC, driving a green 1996 Dodge Ram Pickup Truck, where he was arrested for his open warrants. Gallion was located at approximately 4:43 pm on 3-22-2017. Whittemore Branch Rd is in close proximity to 665 Dillingham Rd.

(7) During the arrest, multiple firearms were seen inplain view in the 1996 Dodge Ram Pickup Truck. Two (2) of the firearms located in the pickup truck were 9mm pistols. Also located inside the truck, were multiple boxes of ammunition. All 9mm ammunition had silver colored shell casings with the head stamp of "F C LUGER 9MM." This ammunition is similar to the spent shell casings located in the proximity of Pegg's body.

(8) During the arrest, the arresting officers observed that Gallion was intoxicated. Gallion was subsequently charged with Driving While Impaired.

(9) During the inventory of the 1996 Dodge Ram Pickup, officers observed blood smears inside the vehicle on the steering wheel, driver's seat, and interior portion of the driver's side door. Gallion also had blood on his hands.

(10) Detectives interviewed a witness who stated that on 3-22-2017, he spoke with Gallion at 456 Dillingham Rd. When asked about Adrian Gallion, Timothy Gallion's brother, Timothy Gallion became upset and stated that he was angry for not being paid for work he had done on a home his brother owned. This residence is the home located at 665 Dillingham Rd, Barnardsville, NC where Pegg was found deceased on 3-23-2017.

(11) The witness stated Gallion showed him a pistol during their conversation. The pistol matched the description of one of the 9mm pistols found in the green Dodge Ram Pickup truck when Gallion was arrested.

(12) The witness stated that later in the conversation, Gallion pointed at a Buncombe County Sheriff's Office patch affixed to his shirt and made the comment that the patch could get him out of trouble. At the time of Gallion's arrest, he was wearing clothing with the Buncombe County Sheriff's Office patch affixed to it.

(13) The witness described Gallion as being intoxicated at the time of their conversation.

(14) Detectives spoke with a separate witness who stated they observed Gallion driving in the direction of 665 Dillingham Rd. The time was estimated to be at approximately 3:30 pm.

(15) The affiant knows that Gallion was charged in an incident in 2012 involving the discharge of a firearm at another person, which resulted in a conviction.

¶ 37 Sergeant Jordan included in his description of items to be seized, *inter alia*, bloodstains, DNA evidence, weapons, ammunition, drugs, and drug paraphernalia.

¶ 38 Defendant points to *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972) and *State v. Armstrong*, 33 N.C. App. 52, 234 S.E.2d 197 (1977) to argue the trial court erroneously denied his motion to suppress because Sergeant Jordan's affidavit "fail[s] to reveal any underlying facts or circumstances implicating the premises/outbuildings at [his residence] to any crime." Specifically, Defendant contends "[n]othing connects the [allegation in the affidavit that there were] 'bullets on a shelf' " in his workshop, to the bullets found in his truck or the bullet casings found near the homicide victim. We disagree.

¶ 39 In *Campbell*, officers sought a warrant to search the residence of suspected drug dealers for illegal drugs, but the search warrant did not state any underlying facts about the residence other than the suspects lived in the house. 282 N.C. at 130, 191 S.E.2d at 756. Our Supreme Court held that the search warrant affidavit was "fatally defective" because it "did not provide a sufficient basis for a finding of probable cause to search the premises described in the warrant . . . ." *Id.* at 131–32, 191 S.E.2d at 757. The Court reasoned that "nothing in the . . . affidavit affords a reasonable basis upon which the issuing magistrate could conclude that any illegal possession or sale of narcotic drugs had occurred, or was occurring, on the premises to be searched. *Id.* at 131, 191 S.E.2d at 757.

¶ 40 Similarly, in *Armstrong*, an officer received a warrant to search the residence of a suspect who was alleged to have participated in illegal sales of marijuana. 33 N.C. App. at 55, 234 S.E.2d at 198. Our Court concluded that there was "no allegation [in the search warrant affidavit] that any marijuana was ever seen, kept, sold, or delivered" at the defendant's residence. *Id.* at 55, 234 S.E.2d at 199.

¶ 41 Here, there is no direct evidence linking the "handful of bullets on a shelf" seen in Defendant's workshop to the charge of first degree murder. *See Bailey*, 374 N.C. at 335, 841 S.E.2d 277 at 280. However, other facts alleged in the affidavit show "*some connection or nexus*" to link Defendant's residence to the murder. *See id.* at 335, 841 S.E.2d 277 at 280 (emphasis added). The allegations include: (1) Defendant was arrested and found with two 9-millimeter firearms in his truck; (2) the ammunition found in Defendant's truck, following his arrest, was consistent with the shell casings found around the murder victim's body; (3) there were blood smears inside of Defendant's truck and on his hands when he was arrested; (4) Defendant was arrested near the scene of the crime; (5) Defendant made statements to a witness on the day he was arrested which implied he had motive to kill the victim, and Defendant showed the witness a pistol during the conversation; and (6) the pistol Defendant showed the witness matched the description of the firearm found in Defendant's truck.

¶ 42 We conclude the allegations in Sergeant Jordan's affidavit were sufficient to allow a magistrate to reasonably infer that evidence related to the murder such as weapons, ammunition, bloodstains, and DNA evidence could likely be found at Defendant's residence and would aid in the apprehension or conviction of the offender. *See Vestal*, 278 N.C. at 575–76, 180 S.E.2d at 765; *Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365; *see also State v. Rook*, 304 N.C. 201, 221–22, 283 S.E.2d 732, 745 (1981) (holding an affidavit clearly established probable cause to believe that a wooden club and bloody clothing constituted evidence of the crime being investigated, and that the items were probably located in the defendant's home even though there was no direct evidence linking the crime to the home). Given the totality of the circumstances, "the issuing magistrate had a substantial basis for . . . conclud[ing] that probable cause existed" in this case. *See McKinney*, 368 N.C. at 165, 775 S.E.2d at 824–25.

B. The Trial Court's Findings of Fact & Conclusions of Law

¶ 43 Defendant next contends the evidence and record do not support the trial court's finding of fact stating:

> [b]ased on Officer Jordan's training and experience and facts uncovered as part of law enforcement's investigation, he articulated as part of both search warrants items that he was looking for that were relevant to the investigation and that would aid in the apprehension or conviction of a suspect, namely the defendant.

Moreover, Defendant contends that the remaining findings do not support the trial court's conclusion of law finding sufficient probable cause for the issuance of the search warrant.

¶ 44 This Court's review of a trial court's decision on 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).

¶ 45 Following the hearing on Defendant's motion to suppress, the trial court ruled on the motion, announcing its findings of fact and conclusions of law in open court. The trial court made the following findings of fact:

> (1) On March the 23rd, 2017, Buncombe County Emergency Operations Center received a 911 call stating that an individual had been discovered with an apparent gunshot [wound] at 665 Dillingham Road.
>
> (2) First responders arrived on the scene and located Bobby Pegg deceased in his home. They also located several silver-colored spent 9 millimeter shell casings in the area around Pegg's body.
>
> (3) The shell casing were headstamped with FC LUGER 9 MM.
>
> (4) Officers uncovered that the defendant, Timothy Gallion, was making threats against his wife and that she or someone in the family took out warrants against the defendant for communicating threats.
>
> (5) He was stopped in a green pickup truck on March the 22nd, 2017, in close proximity to the scene of the murder.

(6) He was served with the outstanding warrant for communicating threats. And as part of the search of the pickup truck, officers located two 9 millimeter pistols, as well as 9 millimeter ammunition with silver-colored shell casings and a headstamp of FC LUGER 9 MM. That ammunition was similar to the ammunition located near the homicide victim's body.

(7) Officers also found in the pickup truck blood smears on the steering wheel, driver's seat, and interior portion of the driver's side door. The defendant also had blood stains on his hands.

(8) Officers talked to a witness who had a recent conversation with the defendant. The witness stated that later in the conversation [the defendant] pointed at a Buncombe County Sheriff's Office patch affixed to his shirt and said the comment, and made the comment that the patch could get him out of trouble. At the time of the defendant's arrest, he was wearing clothing with a Buncombe County Sheriff's Office patch affixed to it.

(9) On March the 27th, 2017, at 1:58 p.m. Officer Jordan with the Buncombe County Sheriff's Department obtained a search warrant for GPS monitoring data. That search warrant was executed at 2:13 p.m. on the same day.

(10) At 7:59 p.m. Officer Jordan obtained a search warrant for the defendant's residence at 95 Christy Lane. That search warrant was executed at 8:29 p.m. the same day.

(11) Prior to obtaining the search warrant for GPS data, Detective Elkins contacted Joan McCurry with the Department of Public Safety Probation and Parole Office. Detective Elkins asked for GPS location data of the defendant.

(12) On or about March the 22nd, 2017, Ms. McCurry provided Detective Elkins verbal information that the defendant's location points were clustered around points of interest in the investigation.

(13) After receiving a search warrant, Ms. McCurry provided a spreadsheet to Detective Jordan with detailed location records for the defendant's electronic monitoring.

(14) Prior to locating the defendant as part of the traffic stop, officers went to the defendant's residence searching for him in order to serve the outstanding communicating threats warrant. They looked into the window of a workshop outbuilding and saw bullets on a shelf of unknown type, brand, or caliber.

(15) Based on Officer Jordan's training and experience and facts uncovered as part of law enforcement's investigation, he articulated as part of both search warrants items that he was looking for that were relevant to the investigation and that would aid in the apprehension or conviction of a suspect, namely the defendant.

(16) [T]he Secretary of the North Carolina Department of Public Safety has issued Administrative Memo 01.14 10-13 dated October 24, 2013, and updated by Tip of the Month dated May 2016 directing that Probation and Parole release electronic monitoring information to law enforcement without the need for a court order.

¶ 46 The trial court then made the following conclusions of law:

(1) Based on the foregoing findings of fact, the Court concludes as a matter of law that there was sufficient probable cause for the issuance of both search warrants.

(2) [T]here has been no substantial violation of Chapter 15A that warrants suppression, and, therefore, the defendant's motion to suppress is denied.

¶ 47 At the suppression hearing on 3 February 2020, Sergeant Jordan testified that based on his "training and experience" he knows that "rounds are [typically] stored not only with the weapon, but also typically in the home of an individual." He further testified based on his training and experience, information about a firearm, such as proof of purchase

and documentation, is typically located in residences. Sergeant Jordan's investigation uncovered the fact that Defendant had bullets of an unknown type on the shelf at his residence as well as casings head-stamped with "FC LUGER 9 MM" found inside of his truck on 22 March 2017; Sergeant Jordan found casings matching the same description at the homicide scene of Bobby Pegg on 23 March 2017. Based on these facts, Sergeant Jordan requested items from Defendant's home in the search warrant which he and his team "believed probably existed at [Defendant's] residence," including bloodstain evidence, DNA evidence, electronic and telephonic communications, prescription drugs, controlled substances, photographs, weapons, and other types of evidence such as casings.

¶ 48 In light of Sergeant Jordan's testimony and the affidavit itself, there was competent evidence to support the finding challenged by Defendant. *See Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. The trial court's findings of fact were supported by competent evidence, and thus, conclusively binding on appeal. *See id.* at 134, 291 S.E.2d at 619. Further, the trial court's ultimate conclusions of law are supported by its findings of fact. *See id.* at 134, 291 S.E.2d at 619. Therefore, the trial court did not err in denying Defendant's motion to suppress evidence from his residence.

V. Motion to Suppress Evidence of Defendant's Electronic Monitoring Data

¶ 49 **[2]** In his second argument, Defendant contends the trial court erred in refusing to suppress electronic monitoring data and allowing the State to introduce the data at trial because DPS released Defendant's electronic monitoring information to law enforcement without a court order, in violation of N.C. Gen. Stat. § 15-207. The State argues Defendant is not entitled to a new trial because: "(1) the evidence introduced was obtained pursuant to a court order; (2) the Secretary of [DPS] consented to disclosure of the evidence; (3) the evidence was not subject to suppression; and (4) officers would have sought a search warrant for the records regardless of any statutory violation." As discussed below, we agree with the State that no plain error occurred at trial.

¶ 50 Here, Sergeant Jordan was investigating the death of Bobby Pegg. In the course of the investigation, Sergeant Jordan found out from Captain Elkins, who was also investigating Pegg's death, that Defendant was a suspect and wore an electronic monitoring device. Sergeant Jordan and Captain Elkins spoke with McCurry about obtaining Defendant's GPS information, and she provided the requested data verbally over

the telephone. Sergeant Jordan subsequently prepared and executed a search warrant for the GPS data, which was located in the care, custody, and control of DPS, and he received that information pursuant to the search warrant.

¶ 51 Although Defendant filed a pre-trial motion to suppress the GPS data, he acknowledges he did not object to the introduction of GPS evidence during the trial on the basis DPS released privileged information to law enforcement without a court order. Rather, Defendant objected at trial on the grounds the witness testifying regarding the DPS records did not "lay the proper foundation that th[e] GPS communication device was working properly . . . ." *See State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) ("[A] trial court's evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial."); *see also* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Thus, Defendant did not properly preserve the issue for appeal as to the trial court's alleged statutory violation under N.C. Gen. Stat. § 15-207. *See* N.C. R. App. P. 10(a)(1). Therefore, we review the alleged statutory violation under the plain error standard. *See* N.C. R. App. P. 10(a)(4).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citing *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982) (internal quotation marks omitted).

¶ 52 N.C. Gen. Stat. § 15-207 creates a qualified privilege for:

> [a]ll information and data obtained in the discharge of official duty by any probation officer shall be privileged information, shall not be receivable as evidence in any court, and shall not be disclosed directly or indirectly to any other than the judge or to others entitled under this Article to receive reports, unless and until otherwise ordered by a judge of the court or the Secretary of Public Safety.

N.C. Gen. Stat. § 15-207 (2019); *see State v. Craft*, 32 N.C. App. 357, 361, 232 S.E.2d 282, 285, *disc. rev. denied*, 292 N.C. 642, 235 S.E.2d 63 (1977) (concluding the qualified privilege created by N.C. Gen. Stat. § 15-207 was inapplicable to case where "the items seized were not information and data").

¶ 53 For multiple reasons, we reject Defendant's argument the trial court erred in admitting his GPS data in this case. First, Defendant moved to suppress pursuant to N.C. Gen. Stat. § 15A-974 any evidence related to the search warrant seeking Defendant's GPS data obtained from the monitoring device he was wearing. Under N.C. Gen. Stat. § 15A-974(a)(2), evidence must be suppressed if "[i]t is obtained as a result of a substantial violation of the provisions of [*Chapter 15A*]." N.C. Gen. Stat. § 15A-974(a)(2) (2019) (emphasis added). Thus, Section 15A-974(a)(2) does not provide a mechanism by which Defendant could allege evidence was obtained as a result of a substantial violation of *Chapter 15*, the chapter under which the controlling statute, N.C. Gen. Stat. § 15-207, is found.

¶ 54 Second, the qualified privileged belonged to DPS, and DPS waived that privilege by releasing data to law enforcement as to where Defendant traveled on 22 March 2017. *See Craft*, 32 N.C. App. at 361, 232 S.E.2d at 285; *see also State v. Hardy*, 293 N.C. 105, 126, 235 S.E.2d 828, 841 (stating a qualified privilege can be waived). Pursuant to DPS's Administrative Memorandum 01.14.10-13 effective 24 October 2013, DPS was allowed to "[p]rovide location information [of offenders subject to electronic monitoring] to law enforcement at their request." The policy was re-published in DPS's May 2016 Tip of the Month interoffice memorandum. Copies of both documents were admitted into evidence during the suppression hearing.

¶ 55 Lastly, McCurry, on behalf of DPS, complied with the search warrant in providing the data to law enforcement, and it was this data that was actually admitted at trial. Therefore, we conclude no plain error

occurred at trial with respect to the admission of GPS data concerning Defendant. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

VI. Refusal to Allow Cross-Examination

¶ 56 **[3]** In his third argument, Defendant contends the trial court erred by not allowing him to cross-examine Pegg's niece, Riddle, regarding a Facebook message that Pegg sent his mother. He argues that if the message had "been properly allowed in evidence, it would have cast sufficient doubt upon the State's case to have resulted in the jury having reached a different result." We disagree.

¶ 57 "The trial court's determination as to whether an out-of-court statement constitutes hearsay is reviewed *de novo* on appeal." *State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293 (emphasis added), *appeal dismissed*, 365 N.C. 354, 718 S.E.2d 148 (2011).

¶ 58 "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2021). Hearsay is generally inadmissible. N.C. Gen. Stat. § 8C-1, Rule 802 (2021).

¶ 59 In this case, Riddle attempted to testify regarding a Facebook message sent by Pegg to his mother on 22 March 2017. Pegg's message stated: "Knife to a gunfight it is. Heading to Haw Branch with a knife alone, but I saw Jared heading that way. Two birds, one stone or knife, whatever." The trial court conducted a *voir dire* examination regarding the admissibility of testimony concerning Pegg's message. The trial court ruled Riddle's testimony regarding the Facebook message was hearsay because Riddle's grandmother told her about the Facebook message. The trial court did not err in finding Riddle's testimony about the Facebook message was hearsay because the evidence was being offered for the truth of the matter asserted—to show Pegg headed to Haw Branch to partake in a fight on the day he was murdered. *See* N.C. Gen. Stat. § 8C-1, Rules 801. Therefore, the proposed testimony was inadmissible. *See* N.C. Gen. Stat. § 8C-1, Rule 802.

¶ 60 Defendant relies on *State v. McElrath* in support of his argument that the trial court erred in excluding the Facebook message. 322 N.C. 1, 366 S.E.2d 442 (1988). In *McElrath*, the trial court refused to admit into evidence the defendant's exhibit which was a "drawing found by law enforcement officers among the victim's personal effects [including] a rough map of the area surrounding [the] defendant's North Carolina home and numerous written notations indicating a possible larceny

scheme" targeting the defendant's home. *Id.* at 11, 366 S.E.2d at 448. The defendant also offered evidence to show the victim had argued with several other persons and left with those persons on the date that the victim disappeared. *Id.* at 6–7, 366 S.E.2d at 443. Our Supreme Court held that the trial court erred in refusing to admit the document because it "was relevant to a crucial issue in th[e] case," and the defendant met his burden to show the error was prejudicial. *Id.* at 14, 366 S.E.2d at 449–50.

¶ 61 Defendant argues "this case is the same as *McElrath*," and had the trial court admitted the Facebook message, "it would have cast sufficient doubt upon the State's case to have resulted in the jury having reached a different result; thus, he contends the error was prejudicial. We disagree with Defendant's assessment.

¶ 62 We have previously held:

> [t]he rule of relevancy for evidence of [guilt of one other than the defendant] is that it must do more than cast doubt over the defendant's guilt merely because it is possible some other person could have been responsible for the crime with which he has been charged.
>
> Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401[,] such evidence must tend *both* to implicate another *and* be inconsistent with the guilt of the defendant.

State v. Israel, 353 N.C. 211, 217, 539 S.E.2d 633, 637 (2000).

¶ 63 In this case, the Facebook message indicates Pegg may have headed to Haw Branch at some time on 22 March 2017 with the intention to fight an undisclosed person; however, Pegg's message does no "more than cast doubt over [D]efendant's guilt merely because it is possible some other person could have been responsible for the crime; it does not "point directly to the guilt of [another] party." *See Israel*, 353 N.C. at 217, 539 S.E.2d at 637. This conclusion is particularly bolstered given Pegg was murdered while he was sitting on his living room couch, and the State's evidence tends to show the bullets and shell casings found at Pegg's home matched bullets in Defendant's possession and were fired from a gun that was in Defendant's possession. Furthermore, the

record tends to show Defendant was at the address of Pegg's house on 22 March 2017 during a time when the offense could have been committed and after Pegg was last seen alive. Unlike *McElrath*, Defendant in this case did not present any other evidence to cast doubt upon the State's theory of the case; he solely created an inference that another person was responsible for Pegg's death. *See id.* at 217, 539 S.E.2d at 637. Thus, the proposed evidence is too remote and speculative to be relevant. *See id.* at 217, 539 S.E.2d at 637. Therefore, the trial court properly denied admitting Pegg's Facebook message at trial.

VII. Firearm Identification Evidence

¶ 64 **[4]** In his fourth argument, Defendant contends that the trial court erred by allowing the State's firearm expert to opine the empty, fired, shell casings; the 9mm fired, copper-jacket bullet; and the jacket fragment were all fired from the same Cobray firearm on the basis her opinion lacked a proper foundation. He further contends Wilson did not testify as to how she applied the principles and methods she normally uses in examining firearms and bullets to this case. The State argues Wilson's "extensive testimony showed the principles and methods used by her in identifying the murder weapon were reliable." For the following reasons, we agree with the State.

¶ 65 Defendant acknowledges that he failed to object to the admission of Wilson's expert testimony at trial, but nevertheless argues the trial court committed plain error by allowing her testimony.

¶ 66 "Under the plain error rule, [the] 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. Griffin*, 268 N.C. App. 96, 99, 834 S.E.2d 435, 437 (2019) (citation omitted).

¶ 67 N.C. Gen. Stat. § 8C-1, Rule 702 provides:

> (a) [i]f 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); *see State v. McGrady*, 368 N.C. 880, 889–90, 787 S.E.2d 1, 8–9 (2016). As we explained in *State v. McPhaul*, "[t]he precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony." 256 N.C. App. 303, 313, 808 S.E.2d 294, 303 (2017), *disc. rev. improvidently allowed*, 371 N.C. 467, 818 S.E.2d 102 (2018). "[A] trial court's ruling on the admissibility of expert testimony will not be reversed on appeal absent a showing of abuse of discretion." *State v. Godwin*, 369 N.C. 605, 610–11, 800 S.E.2d 47, 51 (2017) (internal quotation marks omitted).

¶ 68 The State cites to *State v. Griffin* to argue Wilson's testimony was proper, and the trial court did not commit plain error with respect to the admission of her testimony. 268 N.C. App. 96, 834 S.E.2d 435 (2019). In *Griffin*, our Court rejected the defendant's contention that the trial court plainly erred where the expert witness testified:

> (1) she was formally educated and trained in forensic science and in the field of firearms examination;
>
> (2) she tested and analyzed the firearm, bullets, and cartridge casings in keeping with the procedures and methods learned during her specialized training in firearms examination;
>
> (3) her tests generated data, which she analyzed and used to form an opinion on whether or not the bullets and casings came from the recovered firearm; and
>
> (4) the data and conclusion were described in a written report and subsequently peer-reviewed by one of [her] colleagues in the Firearms Unit.

Id. at 108, 834 S.E.2d at 441. Furthermore, the expert witness testified on cross-examination as to national standards set for firearms examination as well as reports and studies conducted in the field of firearms analysis. *Id.* at 108, 834 S.E.2d at 442. We concluded the testimony of the expert witness "show[ed] that her opinion was the product of reliable principles and methods, and that she reliably applied the principles and methods to the facts of the case"; thus, we held the trial court did not abuse its discretion or commit plain error in admitting her testimony. *Id.* at 109, 834 S.E.2d at 442.

¶ 69 In the instant case, Wilson was tendered as an expert in the area of firearms identification and examination without objection upon testifying regarding her formal education and training. According to Wilson, after receiving a master's degree in forensic science, she completed a two-year in-house training program in the firearms section of the North Carolina State Crime Lab. She was a firearms examiner for the North Carolina State Crime Lab from 2011 to 2017. The training involved both written and practical components, and consisted of a wide range of study topics, including: the history of firearms, ammunition, mechanics of firearms, disassembling and reassembling multiple types of firearms, safety features, the manufacture of firearms, microscopic comparisons, class characteristics, individual characteristics, serial number restorations, and distance determinations. The training also included a final, practical competency examination involving forensic firearm identification.

¶ 70 Wilson worked as a firearms examiner for the Minnesota Bureau of Criminal Apprehension since January of 2018. The number of comparisons she has performed as a firearms examiner "go[es] into the thousands." Wilson had testified as an expert in firearms examination and identification in North Carolina courts approximately twenty-five times.

¶ 71 When asked by the State what makes forensic firearm identification possible, Wilson testified:

> The identification is possible because of the marks that are imparted onto a firearm during the manufacturing process. During the manufacturing process, a manufacturer will make some choices about what kind of firearm they're going to manufacture, and there are some characteristics that they choose and they select. Examples of that would be the number of lands and grooves that they are going to put inside a barrel. Those are raised and lowered portions on the inside of the barrel that grip the bullet and they twist to the right or the left, and that's what imparts spin and stability onto the bullet.
>
> So a manufacturer may choose that they want five lands and grooves and they're going to twist to the right, or they may opt to have six lands and grooves and twist to the left. Those are class characteristics. So those are more broad and could apply to multiple firearms, multiple models, et cetera.

Another example would be the shape of the firing pin that they are going to manufacture for that firearm. It may be hemispherical. It may be elliptical. These are all decisions that are made prior to the manufacturing process, and these are the class characteristics, or a much broader group of characteristics.

Additionally, during the manufacturing process, but not controlled by the manufacturer, are the individual characteristics. These are aspects of the firearm that are unique to that particular firearm, and it's because of the manufacturing process, it's because of the tools that are used to manufacture, and the mechanisms used to manufacture.

During the manufacturing process, the tools used to manufacture the firearms are stronger. That's how they're able to cut away from basically a steel tube and turn it into a barrel. But during this process, the tools themselves will change to a small degree. Think of it as a piece of sandpaper on wood. As you brush the sandpaper on the wood, the sandpaper is removing particles of that wood. But over time that sandpaper also changes such that it gets dulled and eventually has to be replaced. It's that same aspect with the manufacturing of firearms. So those tools will change, and therefore, they're imparting different marks onto the firearms, one from the next. And then, as well, the tools have to be changed or resharpened as they dull.

The other way that firearms can take on individual characteristics is after they leave the manufacturer, through use, through abuse, through rust, corrosion; all of those aspects can create individual characteristics.

Those individual characteristics are useful for the comparative process when they are reproducible, meaning that they are copied into multiple bullets or multiple cartridge cases. As a firearms examiner, I'm looking for that detail that can be seen, that gets copied onto the cartridge cases or onto the bullets, for example, from the firearm.

¶ 72 Wilson then testified regarding the process by which she typically examines a firearm when it comes into her office:

> Initially, I would examine the firearm looking for any damaged or missing components, looking at just the overall condition of the firearm. I'm going to do a function test on the firearm. That's going to include examining all the safety features that are present and testing them to see if they are functioning properly. That also includes a trigger-pull determination, which is a measurement of how much weight has to be applied to the trigger in order for the firearm to fire. And then as the final step of the function test, the firearm is test fired. That is where ammunition is placed into the firearm. This is laboratory ammunition, typically, and the firearm is test fired. So the trigger is pulled, the firearm is fired, and the cartridge case and bullets are collected.
>
> Test firing is generally done in a water tank, which is a big steel tank full of water. And by shooting into this tank of water, it slows down the projectiles, the bullets, such that you can retrieve those bullets, and they are in a pristine or near pristine condition for any future comparisons in the case, and this also serves as the last step of the function exam to show that the firearm is capable of firing.

¶ 73 Next, Wilson testified that she performed the tests described above on the Ruger 9-millimeter and Cobray 9-millimeter that she examined and had the following exchange with the State prosecutor regarding her findings:

> [Wilson]: [t]he K-1 Cobray pistol functions properly and has a single action trigger pull greater than four pounds, but less than or equal to five pounds.
>
> The K-2 Ruger pistol functions properly. The K-2 Ruger pistol has a single action trigger pull greater than five pounds, but less than or equal to six pounds and a double action trigger pull greater than 11-and-a-half pounds, but less than or equal to 13 pounds.

[State]: And so did both of those firearms fire properly?

[Wilson]: Yes, that's correct.

[State]: And as part of your firearms examination do you look at – you said you examine the firearm itself; is that right?

[Wilson]: Yes.

[State]: Do you ever examine the firing pin on these weapons?

[Wilson]: Yes.

[State]: Was there anything that you noticed about the firing pin on either of these items?

[Wilson]: Yes. As a part of looking at the class characteristics, I note the – for examination purposes if it's going to be used for comparison, then I will look at the shape of the firing pin to see if that is in agreement on class characteristics to anything else that I would be comparing it to.

[State]: And did you examine the firing pin on the Ruger 9 millimeter?

[Wilson]: I did not end up comparing the Ruger 9 millimeter to anything in this case. So I did not specifically examine the firing pin.

[State]: Did you examine the firing pin on the Cobray?

[Wilson]: Yes, I did.

[State]: And what, if anything, did you notice about the firing pin on the Cobray?

[Wilson]: I noted that it left a rectangular shaped firing pin impression when firing.

[State]: And based on your training and experience in the time you've been doing firearms examinations, is there anything unique about a rectangular firing pin?

> [Wilson]: That is extremely uncommon for a center fire firearm, that would be a firearm that hits the cartridge in the center. While rectangular firing pins are common for your rim-fire caliber firearms, such as your .22 caliber firearms, they are not common for the center-fire firearms such as a 9 millimeter Luger pistol.

¶ 74 Wilson went on to testify regarding how she performs a comparison test:

> A comparison examination is going to be conducted using a comparative microscope. This is a microscope that has a single eyepiece, but it has two separate stages. So you can put one item on one stage and a separate item on the other stage. And when you look through the eyepiece you are able to see both items simultaneously. So you can lay them side-by-side and do essentially, a microscopic comparison between those two.
>
> For the purposes of firearms examination, first what I'll do is I'll look at those test fired bullets or cartridge cases that I acquired through the test firing process. I'm looking at those to see what kind of detail is replicating and suitable for comparison purposes.
>
> When we do comparative examinations, first we look at those class characteristics. So those, as I spoke of earlier, are a more broad category of characteristics. We group items based off of those class characteristics. If all the discernible class characteristics are in agreement, then we continue the examination using the comparative microscope on individual characteristics. However, if there is a difference in the class characteristics, such as a bullet has five land and groove impressions, but the firearm submitted for comparison has six land and groove impressions, or lands and grooves . . . then that is a difference in class characteristics, and that bullet could not have been fired by that firearm, and therefore, it is eliminated and the examination is completed at that time.

> But if those class characteristics are all in agreement, then we move on to the individual comparison, and that is done through the comparative microscope.

¶ 75 Wilson testified she applied the methods and principles of comparison testing, described above, to the items that were received in this case, including the firearms, shell casings, bullets, and projectiles. Based on the data, she prepared a report of her examinations. Wilson concluded items Q-1, Q-2, Q-3, Q-4, Q-5, Q-6, and Q-7, the silver-colored spent shell casings found around Pegg's body, were all fired from the K-1 Cobray pistol. Item Q-13, a one caliber .38 class fired copper jacket collected from Pegg's jaw, "was determined to have been fired from the same firearm as the Q-8 bullet, the Q-11 jacket fragment [found embedded in wood inside Pegg's home], and the Q-15 bullet. And the Q-13 jacket was fired from the K-1 Cobray pistol." Item Q-15, a one caliber .38 class fired copper-jacketed bullet collected from Pegg's jaw, "was fired from the same firearm as the Q-8 bullet, the Q-11 jacket fragment, and the Q-13 jacket. And the Q-15 bullet was fired from the K-1 Cobray pistol."

¶ 76 On cross-examination, Wilson testified regarding ammunition and the type of ammunition she used in performing the comparison tests in the instant case. She further testified it was not possible that two different weapons fired the rounds she examined.

¶ 77 Like the expert witness's testimony in *Griffin*, Wilson's testimony demonstrates it was "based upon sufficient facts or data" and "is the product of reliable principles and methods." *See* N.C. Gen. Stat. § 8C-1, Rule 702(a); *Griffin*, 268 N.C. App. at 108, 834 S.E.2d at 442. We conclude Wilson's testimony shows she "applied the principles and methods reliably to the facts of the case." *See* N.C. Gen. Stat. § 8C-1, Rule 702(a). Therefore, we hold the trial court did not plainly err by admitting Wilson's expert testimony.

VIII. Motion to Dismiss the First Degree Murder Charge

¶ 78 **[5]** In his final argument, Defendant argues the trial court erred in denying his motion to dismiss the charge of first degree murder. Specifically, Defendant contends the State's evidence was insufficient to show malice, premeditation, and deliberation or that he committed the killing. We disagree.

> We review the trial court's denial of a motion to dismiss de novo. A motion to dismiss for insufficient evidence is properly denied if 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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. All evidence, both competent and incompetent, and any reasonable inferences drawn therefrom, must be considered in the light most favorable to the State. Additionally, circumstantial evidence may be sufficient to withstand a motion to dismiss when a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is the jury's duty to determine if the defendant is actually guilty.

State v. Blakney, 233 N.C. App. 516, 518, 756 S.E.2d 844, 846 (2014) (citation omitted). "The State is entitled to every reasonable inference to be drawn from the evidence. Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve. Defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781, 787 (1990) (citations omitted).

¶ 79 To convict a defendant of first degree murder under N.C. Gen. Stat. § 14-17, "the State must prove: (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation." *State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007), *cert. denied*, 552 U.S. 1271, 128 S. Ct. 1682, 170 L. Ed. 2d 377 (2008).

¶ 80 "[T]o overcome a motion [to dismiss in a murder case] and justify a conviction of the defendant, the State must offer evidence from which it can be reasonably inferred (1) that deceased died by virtue of a criminal act, and (2) that the act was committed by the defendant." *State v. Lee*, 294 N.C. 299, 302, 240 S.E.2d 449, 451 (1978) (citations omitted). "In order for the trial court to submit a charge of first degree murder to the jury, there must have been substantial evidence presented from which a jury could determine that the defendant intentionally . . . killed the victim with malice, premeditation and deliberation." *State v. Corn*, 303 N.C. 293, 296, 278 S.E.2d 221, 223 (1981).

¶ 81 Here, the parties do not dispute Pegg "died by virtue of a criminal act"; thus, we turn to the issue of whether the act was committed by Defendant. *See Lee*, 294 N.C. at 302, 240 S.E.2d at 451.

A. Substantial Evidence of Defendant as the Murderer

¶ 82 Our Courts have considered factors such as "proof of motive, opportunity, capability, and identity" when determining whether the evidence shows that a particular person committed a particular crime. *State v. Bell*, 65 N.C. App. 234, 238, 309 S.E.2d 464, 467 (1983), *aff'd*, 311 N.C. 299, 316 S.E.2d 72 (1984). Although these factors are not essential elements of first degree murder, they "are circumstances which are relevant to identify an accused as the perpetrator of a crime." *Id.* at 238, 309 S.E.2d at 467. "[W]here the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed." *State v. Hayden*, 212 N.C. App. 482, 484, 711 S.E.2d 492, 494 (2011) (citation and internal quotation marks omitted).

¶ 83 Relying on North Carolina Supreme Court cases of *State v. Cutler*, 271 N.C. 379, 156 S.E.2d 679 (1967), *State v. White*, 293 N.C. 91, 235 S.E.2d 55 (1977), *State v. Lee*, 294 N.C. 299, 240 S.E.2d 449 (1978), *State v. Jones*, 280 N.C. 60, 184 S.E.2d 862 (1971), and *State v. Hood*, 77 N.C. App. 170, 334 S.E.2d 421 (1985), Defendant argues the State's circumstantial evidence was insufficient to show he committed the murder.

¶ 84 In *State v. Cutler*, the Court held that there was insufficient evidence to establish that the defendant had an opportunity to commit the crime charged, although it could be reasonably inferred from the evidence that the defendant was at the home of the deceased around the time the victim died. 271 N.C. at 383, 156 S.E.2d at 682.

¶ 85 In *State v. White*, the Court held that the State had established that the defendant had an opportunity to commit the crime charged, but there was no other evidence of the defendant's guilt. 293 N.C. at 97, 235 S.E.2d at 59.

¶ 86 In *State v. Lee*, the Court held the defendant's motion to dismiss was erroneously denied because the "State failed to offer substantial evidence that the defendant was the one who shot [the victim]" despite any "inference that the "defendant bore malice toward [the victim]." 294 N.C. at 302–03, 240 S.E.2d at 451.

¶ 87 In *State v. Jones*, the Court reversed a trial court's grant of the defendant's motion to dismiss. 280 N.C. at 67, 184 S.E.2d at 866. The State presented evidence sufficient to show the defendant had an opportunity to commit the crime, but the "State failed to offer substantial evidence that [the] defendant was the one who shot his wife" to link the empty cartridges found in the defendant's pocket to the bullets that killed the victim. *Id.* at 65–67, 184 S.E.2d at 865–66.

¶ 88 Finally, in *State v. Hood*, the Court held that "neither motive nor opportunity" could be reasonably inferred from the evidence of the case. 77 N.C. App. at 173, 334 S.E.2d at 423 (emphasis omitted). A witness heard a gunshot fired in the direction of the victim's residence and then saw the defendant drive away. *Id.* at 173, 334 S.E.2d at 423. The Court noted that "[t]here [was] no evidence that [the] defendant had access to the [victim's residence] or that he otherwise gained entrance to it. There [was] no evidence that [the] defendant was armed or that the deceased was present in [his residence] at the time." *Id.* at 173, 334 S.E.2d at 423.

¶ 89 The above cases are distinguishable from the instant case where there is substantial evidence Defendant had the opportunity to commit the crime and was capable of doing so. *See Bell*, 65 N.C. App. at 238, 309 S.E.2d at 467. Furthermore, there is substantial evidence that Defendant possessed the murder weapon as well as the same ammunition that was used to shoot Pegg, and he was armed at a time when a reasonable jury could find Defendant committed the crime. *See Jones*, 280 N.C. at 67, 184 S.E.2d at 866. Finally, the record shows Pegg's house was unlocked when he was at home; Defendant could have easily gained entrance to the home given it was unlocked, and Defendant was presumably familiar with the home given the prior work he performed at the house. *See Hood*, 77 N.C. App. at 173, 334 S.E.2d at 423. We now discuss Defendant's opportunity and capability of committing the murder of Pegg.

1. Opportunity

¶ 90 Defendant argues there is "absolutely no evidence of . . . opportunity" in this case. The State contends there is sufficient evidence to show Defendant had the opportunity as well as the means to commit murder.

¶ 91 "In order for this Court to hold that the State has presented sufficient evidence of [the] defendant's opportunity to commit the crime in question, the State must have presented at trial evidence not only placing the defendant at the scene of the crime, but placing him there at the time the crime was committed." *Hayden*, 212 N.C. App. at 488, 711 S.E.2d at 497.

¶ 92 In this case, the State's evidence showed Defendant's electronic monitoring device placed Defendant in the vicinity of Pegg's home and at the scene of the crime on 22 March 2017—one day before the deceased body was found and on the same day Pegg was last seen alive, and at a time when a reasonable jury could find the crime could have been committed. *See State v. Miles*, 222 N.C. App. 593, 601, 730 S.E.2d 816, 823 (2012) (holding testimony that the defendant was seen at the victim's house coupled with phone records pinpointing the defendant to

the vicinity of the victim's home and site of the crime established the defendant had the opportunity to commit the murder in light of the State's evidence as a whole), *aff'd*, 366 N.C. 503, 750 S.E.2d 833 (2013).

¶ 93 Additionally, the State presented the testimony of Carson, whom Defendant told he, "was going up the road to take care of some business," while Defendant was located on the same road as the victim's house. Defendant made his statement after he showed Carson a firearm matching the description of the murder weapon. Considering the evidence in the light most favorable to the State, a reasonable jury could conclude that Defendant was in the vicinity of Pegg's home and the scene of the crime at the time of Pegg's death, which would establish Defendant had the opportunity to commit the murder. *See Blakney*, 233 N.C. App. at 518, 756 S.E.2d at 846.

2. Capability

¶ 94 Our courts have held evidence of opportunity by itself is insufficient to carry a first degree murder case to the jury. *See Bell*, 65 N.C. App. at 238–39, 309 S.E.2d at 467. Thus, we next consider whether Defendant was capable of committing the murder. *See id.* at 238, 309 S.E.2d at 467.

¶ 95 In the instant case, silver-colored shell casings with the headstamp of FC LUGER 9 MM found around the victim's body matched the ammunition that was found in Defendant's truck by law enforcement on 22 March 2021, shortly after Defendant was in the vicinity of Pegg's home, based on GPS data provided at trial. The search of Defendant's truck and home also revealed Defendant possessed multiple guns, one of which was later determined to be the murder weapon. Thus, the record contains sufficient evidence to permit a reasonable jury to find he had the capability to commit first degree murder. *See Lee*, 294 N.C. at 302, 240 S.E.2d at 451.

¶ 96 Although the State's evidence was solely circumstantial in this case, the evidence did more than "raise a suspicion or conjecture as to . . . the identity of [D]efendant as the perpetrator of it." *See Hayden*, 212 N.C. App. at 484, 711 S.E.2d at 494. Rather, the evidence was sufficient to survive a motion to dismiss as a reasonable jury could infer Pegg's death was a result of Defendant's criminal act. *See Blakney*, 233 N.C. App. at 518, 756 S.E.2d at 846; *Bell*, 65 N.C. App. at 238, 309 S.E.2d at 467. We hold there was substantial evidence that Pegg's murder was committed by Defendant when we consider all of the evidence in the light most favorable to the State. *See id.* at 518, 756 S.E.2d at 846; *Lee*, 294 N.C. at 302, 240 S.E.2d at 451.

3. Motive, Premeditation, & Deliberation

¶ 97 Defendant asserts the State's case failed to present substantial evidence of malice, premeditation, and deliberation. We disagree.

¶ 98 It is well-established by our Courts that "malice is presumed where the defendant intentionally assaults another with a deadly weapon, thereby causing the other's death." *State v. Leazer*, 353 N.C. 234, 238, 539 S.E.2d 922, 925 (2000) (citation omitted). "Premeditation means that the act was thought over beforehand for some length of time; however, no particular amount of time is necessary for the mental process of premeditation." *State v. Trull*, 349 N.C. 428, 509 S.E.2d 178 (1998), *cert. denied*, 528 U.S. 835, 120 S. Ct. 95, 145 L. Ed. 2d 80 (1999). "Deliberation means an intent to kill carried out by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *State v. Hamlet*, 312 N.C. 162, 170, 321 S.E.2d 837, 842–43 (1984) (citation omitted). "The phrase 'cool state of blood' means that the defendant's anger or emotion must not have been such as to overcome the defendant's reason." *Id.* at 170, 321 S.E.2d at 843 (citation omitted).

¶ 99 "Premeditation and deliberation are mental processes which are ordinarily not susceptible to proof by direct evidence." *State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992). Our Supreme Court

> has identified several examples of circumstantial evidence, any one of which may support a finding of the existence of [premeditation and deliberation]: (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Childress, 367 N.C. 693, 695, 766 S.E.2d 328, 330 (2014) (citation omitted).

¶ 100 Here, there is a presumption of malice given the evidence tends to show Pegg was intentionally killed with a deadly weapon. *See Leazer*,

353 N.C. at 238, 539 S.E.2d at 925. There is also substantial evidence the killing was premeditated and deliberate. *See Blakney*, 233 N.C. App. at 518, 756 S.E.2d at 846; *Childress*, 367 N.C. at 695, 766 S.E.2d at 330. Pegg was found in a seated position on his couch with multiple gunshot wounds to his head. A reasonable jury could conclude Pegg did nothing to provoke Defendant. *See State v. Rose*, 339 N.C. 172, 195, 451 S.E.2d 211, 224 (1994) (stating the victim's position of sitting in a chair with a pillow or blanket on his chest indicated a lack of provocation on his part), *cert. denied*, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995). The multiple shots fired support an inference of Defendant's premeditation and deliberation. *See State v. Taylor*, 362 N.C. 514, 533, 669 S.E.2d 239, 258 (2008), *cert. denied*, 558 U.S. 851, 130 S. Ct. 129, 175 L. Ed. 2d 84 (2009). At around the time that a reasonable jury could infer the murder occurred, Defendant showed Carson a 9-millimeter firearm, consistent with the description of the murder weapon. He also told Carson he "had to go up the road to take care of some business." A reasonable jury could infer that Defendant intended to travel up Dillingham Road to Pegg's house to kill Pegg. *See State v. Williams*, 151 N.C App. 535, 540, 566 S.E.2d 155, 159 (2002) (reasoning that bringing a revolver to a meeting indicated "some preparation and intent to do [the victim] harm").

¶ 101 The evidence tends to show Defendant fired three shots into Pegg's head, two of which were discharged at close range. This indicates Pegg was shot after he had been felled and rendered unconscious, and he was killed in a brutal manner. *See Childress*, 367 N.C. at 695, 766 S.E.2d at 330. In light of such evidence, we hold there was substantial evidence of premeditation and deliberation; thus, the trial court did not err in denying Defendant's motion to dismiss the charge of first degree murder and submitting the charge to the jury. *See Blakney*, 233 N.C. App. at 518, 756 S.E.2d at 846; *Corn*, 303 N.C. at 296, 278 S.E.2d at 223.

IX. Conclusion

¶ 102 We hold the trial court did not err in denying Defendant's motion to suppress any evidence seized during the search of his residence because the affidavit was sufficient on its face. Further, the trial court's findings of fact are supported by competent evidence, and its conclusions of law are supported by findings of fact in its order on the motion to suppress. The trial court did not commit plain error by denying Defendant's motion to suppress any evidence of Defendant's electronic monitoring data because Defendant did not cite to a statutory mechanism allowing him to suppress such evidence, DPS waived its privilege with respect to the data by verbally releasing it to law enforcement, and the GPS evidence actually admitted at trial was the product of law enforcement's search warrant.

¶ 103 The trial court did not err by disallowing the State's witness to testify concerning the murder victim's Facebook message because it was hearsay. Even if the message was offered for a non-hearsay purpose, Defendant failed to show the message was relevant because he did no more than create an inference as to another person's guilt of the crime. The trial court did not plainly err in admitting testimony of the State's expert witness on firearm identification and examination because her testimony met the requirements under N.C. Gen. Stat. § 8C-1, Rule 702(a). Lastly, the trial court did not err in denying Defendant's motion to dismiss because the State presented substantial evidence that Defendant committed the murder, and that he acted with malice, premeditation, and deliberation. Accordingly, we conclude Defendant received a fair trial, free of prejudicial error.

NO ERROR.

Judges TYSON and GORE concur.

STATE OF NORTH CAROLINA
v.
JUANITA MULLINAX, DEFENDANT

No. COA20-536

Filed 15 March 2022

Search and Seizure—motion to suppress—mistaken identity—ID retained—seizure

In a prosecution for possession of methamphetamine, the trial court's order denying defendant's motion to suppress drugs (which were found in defendant's pants pocket after a uniformed officer—believing defendant was another person wanted for arrest—approached her as she sat in a parked car) was vacated where the court's finding that defendant was never seized during her encounter with law enforcement was not supported by the evidence. Where the officer retained defendant's ID for several minutes away from her presence after confirming defendant's identity—and did not return it to her when seeking defendant's consent to search the car—during which time two other officers arrived on the scene and questioned defendant's niece separately, defendant was seized because a reasonable person would not have felt free to leave, and

she remained seized when the drugs were discovered. The matter was remanded for the trial court to determine whether there was any justification to extend the seizure once the initial reason for the encounter had been resolved.

Chief Judge STROUD concurring in result only.

Appeal by Defendant from judgment entered 22 November 2019 by Judge J. Thomas Davis in Cleveland County Superior Court. Heard in the Court of Appeals 7 September 2021.

Attorney General Joshua H. Stein, by Associate Attorney General Robert J. Pickett, for the State.

Shelly Bibb DeAdder for the Defendant.

DILLON, Judge.

¶ 1 Defendant was charged with possession of methamphetamine after drugs were found inside her pants pocket during an encounter with law enforcement officers in a retail store parking lot. She later pleaded guilty to the charge after her motion to suppress was denied. On appeal, she challenges the trial court's denial of her suppression motion. We conclude that some of the trial court's key findings are not supported by the evidence. Accordingly, we vacate and remand to allow the trial court to make additional findings and conclusions consistent with the evidence and this opinion.

I. Appellate Jurisdiction

¶ 2 We note that Defendant's attorney gave oral notice of appeal of the denial of the suppression motion rather than the final judgment. *See State v. McBride*, 344 N.C. 623, 476 S.E.2d 106 (1996) (affirming *per curiam* an opinion holding that the notice of appeal must be from the final judgment rather than from the order denying a suppression motion). Defendant, however, has petitioned our Court for writ of *certiorari*. In our discretion, we grant Defendant's petition.

II. Standard of Review

¶ 3 In reviewing the denial of a motion to suppress, we evaluate whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994). "[I]t is the *appellant* who

has the burden in the first instance of demonstrating error from the record on appeal." *State v. Adams*, 335 N.C. 401, 409, 439 S.E.2d 760, 764 (1994).

III. Factual Background

¶ 4 A uniformed deputy (the "Deputy") approached Defendant while she sat in her car in a parking lot. The Deputy believed Defendant to be a Ms. McConnell, who was the subject of outstanding arrest warrants. During the encounter, Defendant provided the Deputy with her driver's license ID.

¶ 5 Five (5) minutes later (roughly eight (8) total minutes into the encounter), after determining that Defendant was not Ms. McConnell and confirming that Defendant otherwise had no outstanding warrants, the Deputy returned to Defendant's car, but failed to return the ID to her. Defendant was standing outside the vehicle while the Deputy asked for consent to search her vehicle. In any event, a full fifty (50) seconds later, another deputy (the "Backup Deputy") approached Defendant and the Deputy and noticed what he suspected were drugs in Defendant's pocket. The Backup Deputy pulled Defendant aside and asked to search her pocket, whereupon he retrieved a bag containing methamphetamine. She was subsequently placed under arrest.

IV. Analysis

¶ 6 Defendant was clearly in violation of the law by possessing illegal drugs. Defendant, however, argues that the trial court erred in denying her motion to suppress the drugs, contending that she was illegally seized at the point of the encounter when the Backup Deputy saw the drugs in her pocket. Notwithstanding the evidence of her guilt from the body cam videos worn by the deputies, we must review her rights under the Fourth Amendment of the Constitution, which protect all citizens against unreasonable search and seizure from the government. Indeed, the North Carolina Supreme Court has recognized the "exclusionary rule," that "evidence derived from an unconstitutional search or seizure is generally inadmissible in a criminal prosecution of the individual subjected to the constitutional violation." *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006).

¶ 7 The trial court made findings regarding the encounter. Defendant challenges several of them. We focus on two of the findings challenged by Defendant. Specifically, the trial court found that Defendant was never "seized," because she was free to leave at any time. Also, the trial court essentially found that no gap in time occurred between the time the Deputy returned to Defendant's car with Defendant's license in hand,

and the time when the Backup Deputy walked over to Defendant's vehicle and discovered the drugs in Defendant's pocket.

A. Defendant Was Seized

¶ 8 The Supreme Court of the United States has recognized that not every encounter between a citizen and a law enforcement officer is a seizure:

> Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual, and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.

Florida v. Bostick, 501 U.S. 429, 434 (1991) (quotations and citations omitted).

¶ 9 The North Carolina Supreme Court has recognized that the test for determining whether a seizure has occurred is whether, under the totality of circumstances, a "reasonable person would feel free to decline the officer's request or otherwise terminate the encounter." *State v. Icard*, 363 N.C. 303, 308-09, 677 S.E.2d 822, 826 (2009) (citing *Bostick*, 501 U.S. at 436-37). That Court has instructed that "relevant circumstances include, but are not limited to, the number of officers present, whether the officer displayed a weapon, the officer's words and tone of voice, any physical contact between the officer and the individual, whether the officer retained the individual's identification, or property, the location of the encounter, and whether the officer blocked the individual's path." *Id.* at 309, 677 S.E.2d at 827.

¶ 10 The body cam videos are part of the record. Below is a summary of the events as portrayed in the videos. For instance, the videos show the Deputy reapproach Defendant without returning her ID to her at the 8 minute, 19 second (8:19) mark, and the Backup Deputy discovering the drugs fifty (50) seconds later at the 9:09 mark. The body cam videos show as follows:

0:30 The Deputy gets out of his patrol car and approaches Defendant, who is sitting in her car with the driver's side door opened. He asks Defendant if he could speak with her.

Immediately, Defendant receives a cellphone call from her niece. She answers to let her know where in the parking lot

she is. Defendant tells the Deputy that she is meeting her niece in the parking lot to borrow money from her.

1:12 While Defendant is on the phone, the Officer directs Defendant to "ask" her niece to drive over to where they are parked. Defendant then tells her niece that she is parked next to a police vehicle.

1:30 While Defendant is still on the phone, the Deputy directs Defendant to "tell" her niece to drive over to where they are parked.

1:50 Defendant hangs up. Her niece has now pulled up, parked several feet on the other side of the police car from where Defendant is parked and the Deputy is standing.

2:10 Defendant again tells the Deputy she is there to borrow money from her niece. The Deputy then walks over to the niece's car and asks her why she is there. She responds that she is there to lend money to Defendant.

2:35 The Deputy walks back over to Defendant, who is still in her car, and asks her for her name. She responds truthfully. He asks her for identification, which she immediately and freely gives.

2:45 The Deputy tells her why he stopped her, that he recognized the car as one owned by a man who was a person of interest in drug crimes and is also occasionally driven by a Ms. McConnell, the subject of outstanding arrest warrants.

2:57 The Deputy looks at Defendant's ID and states that he sees that Defendant is not Ms. McConnell. He retains the ID.

3:02 Defendant tells the Deputy that she babysits for the car owner, who let her borrow the car to meet her niece, and that she knows Ms. McConnell.

3:40 The Deputy asks Defendant if there are drugs in the car. She states that she has no idea, as the car is not hers.

3:55 The Deputy then leaves Defendant and walks over to her niece and asks her for her name. He then goes to his police car.

4:03 The Deputy gets into his police car and runs a warrants/records check on Defendant's ID. He remains in his car for almost 2 minutes.

5:50 The Deputy gets out of his police car and walks back over to the niece's car.

6:27 The Deputy asks the niece for her ID, which she freely gives. Another marked patrol car pulls up and parks between the niece's car and the Deputy's car. The Backup Deputy and a third deputy (the "Junior Deputy") get out of the second police car. The Deputy tells the Backup Deputy about the vehicle he has pulled over.

7:00 The Deputy gets back into his car with Defendant's ID and the niece's ID and runs a check, presumably on the niece's ID.

8:08 The Deputy goes back to the niece's car and hands the niece's ID to the Backup Deputy. He tells the Backup Deputy that Defendant's story about borrowing money from her niece "adds up" but that he is going to ask Defendant to let him search the car. The Backup Deputy hands the niece her ID, staying with her and engaging in polite conversation with her.

8:19 *(This begins the key point of the encounter, over four (4) minutes after the deputy had last spoken to Defendant.)* The Deputy goes back to Defendant's car and asks if he can search it. He still retains Defendant's ID. He tells Defendant that she needs to be honest as to whether there are drugs in the car. She again tells him that she does not know, as the car is not hers.

At some point the Backup Deputy breaks off his polite conversation with the niece, telling her he is going to see what is going on with the Deputy and Defendant. As he is leaving the niece, he instructs the Junior Deputy to stay with and "watch" the niece. The Junior Deputy can be seen walking toward the niece's car, where the niece's driver door is still opened.

9:09 *(This is also a key point of the encounter, occurring 50 (fifty) seconds after the Deputy asked to search Defendant's car, while retaining Defendant's ID.)* The Backup Deputy arrives at Defendant's car where Defendant is speaking with the Deputy about searching her car. The Backup Deputy testified that at some point after walking over to Defendant's car, he noticed a plastic bag through a hole in Defendant's pocket and that he could see what appeared

to be methamphetamine in the plastic bag. The video is not conclusive on this point, but the trial court found this as fact.

9:44 Defendant gives consent to search the car but then begins to say something, at which point the Backup Deputy asks Defendant to walk about ten (10) feet away next to the passenger side of the Deputy's car so that they could talk. As she walks away, the Deputy begins his search. But before talking to her, the Backup Deputy walks back over to the Deputy and states, "I'm trying to keep her busy. She was about to revoke [unintelligible]."

10:00 The Backup Deputy then asks Defendant if he can search her person. After some talking, she states that she does not mind.

10:30 The Backup Deputy immediately reaches in one of Defendant's pockets and pulls out a plastic bag.

10:55 The Backup Deputy states that he saw the bag when he had walked up to the car a few minutes before. He asks her if that was "dope." She responds, "Apparently."

¶ 11 The initial few moments of the encounter had all the hallmarks of a consensual encounter. The Deputy did not activate his lights, he did not block Defendant's exit, he did not object to Defendant answering her phone, and he asked her politely if he could speak with her.

¶ 12 However, a little over a minute into the encounter, the tenor changed, and some attributes of a seizure began to appear. That is, circumstances developed between the 1:08 mark and the 8:19 mark of the encounter that would cause a reasonable person in Defendant's position to believe she was not free to leave.

¶ 13 The first circumstance that would indicate a seizure occurred a little over a minute into the encounter, was when the Deputy directed Defendant to ask and then tell her niece to drive over to where they were parked. He was calm in his tone, but his desire to have Defendant stay put and have her niece come to where they were parked was stated grammatically in the form of commands. *See State v. Farmer*, 333 N.C. 172, 187, 424 S.E.2d 120, 129 (1993) (whether a seizure has occurred may depend, at least in part, on whether "the use of language . . . indicat[es] that compliance with the officer's request might be compelled").

¶ 14 Around the 2:45 mark, the Deputy walked away from Defendant with her ID in hand *after* stating that he was satisfied she was not the wanted woman (Ms. McConnell) whom he was looking for, but without

asking her for consent to walk away with it. He returned to Defendant more than five (5) minutes later. Case law suggests that a reasonable person who is away from their home in her car would generally not feel free to drive away and go about her business without her license and would, therefore, be seized. *See State v. Parker*, 256 N.C. App. 319, 326-27, 807 S.E.2d 617, 621-22 (2017); *see also State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009).[1] Also, the fact that the Deputy spent almost two minutes inside his patrol car away from Defendant rather than checking on any warrants in Defendant's presence is a circumstance that tends to indicate Defendant would not feel free to leave, as she would not be in a position during those two minutes to ask for her license back. *See*, *e.g.*, *United States v. Analla*, 975 F.2d 119, 124 (4th Cir. 1992) (no seizure occurred because, in part, the officer "did not take the license into his squad car, but instead stood beside the car, near where [the defendant] was standing [such that the defendant] was free at this point to request that his license . . . be returned and to leave the scene"); *see also Golphin v. State*, 945 So.2d 1174, 1200-01 (Fla. 2006) ("The difficulty in securing the return of an identification from an officer who has retreated to a closed police vehicle may contribute to the defendant's sense of being detained.")

¶ 15 Also, during these five (5) minutes, the Backup Deputy and the Junior Deputy arrived on the scene. Our Supreme Court has stated that multiple uniformed officers on the scene would contribute to a defendant's sense of being subject to a seizure. *Icard*, 363 N.C. at 309, 677 S.E.2d 827.

¶ 16 We conclude that the encounter became a seizure at some point prior to the Deputy returning to Defendant's vehicle at the 8:19 mark. This is not to say that the seizure had been illegal. Indeed, it was permissible for the Deputy to determine that Defendant was not Ms. McConnell, and, perhaps take Defendant's license to run a warrants check.

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1. We note that the Fourth Circuit, which includes North Carolina but whose cases are not binding on our Court, has stated that the fact that one's driver's license is retained during a traffic stop "is a highly persuasive factor in determining whether a seizure has occurred." *United States v. Weaver*, 282 F.3d 302, 311 (4th Cir. 2002). In *Weaver*, the Court reasoned that if the police retained one's license during a traffic stop, "the citizen would be [caught] between the Scylla of consent to the encounter [and] the Charybdis of driving away and risk being cited for driving without a license." *Id.* at 311. The Court then cited other circuit cases holding that one is *per se* seized if, during a traffic stop, the officer retains the suspect's license beyond that which is required. *See United States v. Mendez*, 118 F.3d 1426, 1430 (10th Cir. 1997) (noting bright-line rule in the traffic stop context); *United States v. Chan-Jimenez*, 125 F.3d 1324, 1326 (9th Cir. 1997) (same); *United States v. Winfrey*, 915 F.2d 212, 216 (6th Cir. 1990) (same); *United States v. Jefferson*, 906 F.2d 346, 349 (8th Cir. 1990) (same).

B. Discovery of Drugs

¶ 17 The resolution of Defendant's motion, however, turns on what occurred between the 8:19 mark—when the Deputy finally returned to Defendant—and the 9:09 mark, when the Backup Deputy left the niece and arrived at Defendant's car and saw the illegal drugs in Defendant's pocket. Indeed, our Supreme Court has instructed that, based on recent precedent from the United States Supreme Court, "a law enforcement officer may not detain a person even momentarily without reasonable, objective grounds for doing so." *State v. Reed*, 373 N.C. 498, 508, ___ S.E.2d ___, ___ (2020) (internal marks omitted) (citing *Royer*, 460 U.S. at 497-98.).

¶ 18 It is unchallenged that the Deputy retained Defendant's license after reapproaching her at the 8:19 mark. We conclude that she remained seized at this point, as she would not have felt free to ignore the Deputy and leave, even with her niece.[2]

¶ 19 The question then becomes whether the seizure had been unconstitutionally prolonged by the time the Backup Deputy noticed the drugs in her pocket. The trial court found that *at the same time* the Deputy "returned to the defendant with her license to request a search of the car, [the Backup Deputy] was then forming his reasonable suspicion that the defendant possessed illegal narcotics, thereby justifying a change and extension of the scope and purpose of the stop for further investigation." Defendant challenges this finding, and the body cams clearly and conclusively show that the Deputy was alone with Defendant for fifty (50) seconds—from the 8:19 mark to the 9:09 mark—before the Backup Deputy had finished talking with the niece and walked over to where Defendant and the Deputy were standing.

¶ 20 This case is similar to *State v. Parker*. In that case, we held that a motion to suppress should have been allowed where two officers

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2. The trial court found that law enforcement's encounter with the niece "was completed" by the 8:19 mark and, therefore, Defendant was free to leave her car in the parking lot and ride away with her niece without her driver's license. However, the trial court failed to specifically find that a reasonable person in Defendant's position would have known that her niece was free to leave and, therefore, she could (1) ignore the Deputy who had just walked over to her, still retaining her license; (2) walk over to her niece's car several yards away; (3) get into the car with her niece; and (4) be driven away. Indeed, the body cam videos themselves do not show that Defendant had any way of knowing that her niece was not seized. At the 8:19 mark when the Deputy returned to Defendant, the other deputies remained with her niece with the niece's driver's door open, with the Backup Deputy blocking the door at times. When the Backup Deputy left the niece to walk toward Defendant, he tells the Junior Deputy to stay with the niece and to "watch" her.

separated the defendant from a companion during an encounter; the officers checked the defendant's license and determined she had no warrants; the officers, however, retained possession of the license and asked to search her car; and narcotics were found during the search. *Parker*, 256 N.C. App. at 321-23, 807 S.E.2d at 619-20. Specifically, we held that "[a]bsent a reasonable suspicion and articulable suspicion to justify further delay, retaining defendant's driver's license beyond the point of satisfying the purpose of the initial detention . . . was unreasonable." *Id*. at 327, 807 S.E.2d at 622.

V. Conclusion

¶ 21 Defendant's encounter with the deputies became a seizure at some point prior to the drugs being detected by the Backup Deputy. The initial justification for the seizure disbanded fifty (50) seconds before the Backup Deputy discovered the drugs. The trial court never made findings in this regard, as the trial court incorrectly found that Defendant was never seized.

¶ 22 We, therefore, vacate the order and remand to the trial court to make additional findings concerning whether there was any other justification for the deputies to extend the seizure for fifty (50) seconds beyond the time the Deputy reapproached Defendant's car or, otherwise, whether any exception to the exclusionary rule might apply. If not, the trial court will allow Defendant's motion to suppress and strike Defendant's conditional guilty plea.

VACATED AND REMANDED.

Judge TYSON concurs.

Chief Judge STROUD concurs in result only.

STATE v. PORTER

[282 N.C. App. 351, 2022-NCCOA-166]

STATE OF NORTH CAROLINA
v.
DARIUS DEANDRE PORTER, DEFENDANT

No. COA21-275

Filed 15 March 2022

Sentencing—length of probationary period—statutory authorization—specific findings for longer period

The trial court erred by sentencing defendant, who had entered an *Alford* plea on misdemeanor charges of communicating threats and assault on a female, to 24 months of supervised probation—a period longer than prescribed by statute—without making specific findings that a probationary period of longer than 18 months was necessary, as required by statute.

Appeal by Defendant from judgment entered 28 January 2021 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 30 November 2021.

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

Richard Croutharmel for defendant-appellant.

MURPHY, Judge.

¶ 1 Defendant Darius Deandre Porter appeals from a judgment entered upon his *Alford* plea to communicating threats and assault on a female. Defendant argues, and the State concedes, that the trial court erred by sentencing Defendant to 24 months of supervised probation without making a specific finding that a probationary period longer than 18 months was necessary. We agree and remand for resentencing.

BACKGROUND

¶ 2 On 28 January 2021, Defendant was charged with habitual misdemeanor assault, communicating threats, resisting a public officer, two counts of assault inflicting serious injury in the presence of a minor, contributing to the delinquency of a minor, and assault on a female. Defendant entered an *Alford* plea on the misdemeanor charges of communicating threats and assault on a female in exchange for the State's dismissal of the remaining charges.

¶ 3 Pursuant to Defendant's *Alford* plea, the trial court gave Defendant a suspended sentence of 150 days and placed him on 24 months of supervised probation. The trial court, however, made no specific findings regarding the probationary period exceeding 18 months. On 8 February 2021, Defendant timely filed a notice of appeal.

ANALYSIS

¶ 4 Defendant argues the trial court committed reversible error by sentencing him to 24 months of supervised probation without making a specific finding that a probationary period of longer than 18 months was necessary in violation of N.C.G.S. § 15A-1343.2(d)(1).[1] The State concedes that "the trial court erred when it failed to correctly mark the check box on the sentencing form" to indicate that the trial court found a longer period of probation than that specified in N.C.G.S. § 15A-1343.2(d)(1) was necessary. We agree and remand for resentencing.

¶ 5 "Alleged statutory errors are questions of law" reviewed de novo on appeal. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721, *disc. rev. denied*, 365 N.C. 193, 707 S.E.2d 246 (2011). The statutory provision at issue here, N.C.G.S. § 15A-1343.2(d)(1), provides that,

> [u]nless the [trial] court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation for offenders sentenced under Article 81B shall be as follows: (1) [f]or misdemeanants sentenced to community punishment,[2] not less than six nor more than 18 months.

N.C.G.S. § 15A-1343.2(d)(1) (2021). Stated another way, "[N.C.G.S.] § 15A-1343.2(d)(1) . . . provides that a defendant who is sentenced to community punishment for a misdemeanor shall be placed on probation for no less than 6 months and no more than 18 months, unless the trial

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1. Although Defendant did not object to the sentence at trial, we nonetheless have appellate jurisdiction as this issue is preserved for appeal as a matter of law. N.C.G.S. § 15A-1446(d)(18) (2021) (permitting appellate review of whether a "sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law" regardless of whether the defendant objected to the sentence at trial); *see also State v. Love*, 156 N.C. App. 309, 318, 576 S.E.2d 709, 714 (2003) (quoting *State v. Hucks*, 323 N.C. 574, 579, 374 S.E.2d 240, 244 (1988)) ("When a trial court acts contrary to a statutory mandate, the error ordinarily is not waived by the defendant's failure to object at trial.").

2. When Defendant was sentenced to 24 months of supervised probation, Defendant was sentenced to community punishment. *See generally* N.C.G.S. § 15A-1340.11(2) (2021).

court enters specific findings that longer or shorter periods of probation are necessary." *State v. Sale*, 232 N.C. App. 662, 664, 754 S.E.2d 474, 476 (2014).

¶ 6 The Record reveals the trial court did not make specific findings that a probationary period longer than 18 months was necessary as required by N.C.G.S. § 15A-1343.2(d)(1). This omission constitutes error. *See id.* at 664, 754 S.E.2d at 476 (remanding for the trial court to reduce the defendant's probationary period to a term within the statutorily mandated range or enter specific findings as to why a longer period of probation was necessary); *accord State v. Branch*, 194 N.C. App. 173, 179, 669 S.E.2d 18, 22 (2008); *State v. Mucci*, 163 N.C. App. 615, 625, 594 S.E.2d 411, 418 (2004); *Love*, 156 N.C. App. at 318, 576 S.E.2d at 714. We vacate the judgment below and remand for the reduction of Defendant's probation to a length of time authorized by N.C.G.S. § 15A-1343.2(d)(1) or entry of specific findings as to why a longer period of probation was necessary.

CONCLUSION

¶ 7 The trial court erred by sentencing Defendant to a probationary period longer than that prescribed by N.C.G.S. § 15A-1343.2(d)(1) without making specific findings that the length of the probationary period was necessary. Accordingly, we vacate the judgment below and remand for resentencing.

VACATED AND REMANDED FOR RESENTENCING.

Judges DIETZ and WOOD concur.

TOWN OF MIDLAND, A NORTH CAROLINA MUNICIPAL CORPORATION, PLAINTIFF
v.
TONEY L. HARRELL, AND T.L. HARRELL'S LAND DEVELOPMENT COMPANY, INC., A NORTH CAROLINA BUSINESS CORPORATION, DEFENDANTS

No. COA21-46

Filed 15 March 2022

1. Jurisdiction—subject matter jurisdiction—standing—town—enforcement of zoning ordinance

The trial court had subject matter jurisdiction over a town's lawsuit seeking a mandatory injunction, abatement order, and collection of civil penalties from developers of a residential subdivision, who had violated a zoning ordinance requiring them to repair certain roads within the subdivision. Under N.C.G.S. § 160A-12, the town could exercise its power to enforce its ordinances, including through legal action, "as provided by ordinance or resolution of the city council." Therefore, the town's failure to adopt a resolution authorizing the lawsuit until two years after filing the complaint did not deprive the town of standing to bring the lawsuit where the town's ordinances granted it the necessary authority to do so.

2. Cities and Towns—violation of zoning ordinance—civil penalties—enforcement of prior judgment—no right of appeal

In a town's lawsuit to collect civil penalties from developers for failure to repair certain roads within a residential subdivision, which the developers had refused to do despite a prior judgment ordering the repairs after finding the developers in violation of the town's zoning ordinance, the trial court properly granted summary judgment in the town's favor. The civil penalties did not constitute a final judgment or order that the developers could appeal from, but rather they were the means through which the town enforced the prior judgment. Therefore, because the developers had already unsuccessfully appealed the prior judgment and the town's ordinances did not establish a separate right to appeal civil penalties, the developers had no available avenue to challenge the town's imposition of those penalties.

3. Injunctions—zoning enforcement action—abatement and mandatory injunction order—description of enjoined acts—"reasonable detail" requirement

In a town's lawsuit against developers of a residential subdivision, who had violated a zoning ordinance requiring them to repair

certain roads within the subdivision, the trial court's order granting a mandatory permanent injunction and order of abatement was remanded for a more specific decree because it did not comply with Civil Procedure Rule 65(d)'s requirement to describe in "reasonable detail" the acts enjoined. Specifically, the order directed the developers to submit to the town a "proposed repair plan" for bringing the roads into compliance with N.C. Department of Transportation (NCDOT) standards, but the order did not specify which NCDOT standards the developers had failed to meet or what types of repairs would be necessary to bring the roads into compliance with those standards.

4. Cities and Towns—zoning enforcement action—civil penalties assessed while appeal pending—stayed under statutory amendment

In the second appeal arising from a dispute between a town and the developers of a residential subdivision, where, in the first appeal, the developers challenged the notice of violation of the town's zoning ordinance, an order denying the developer's request for attorney fees—incurred to contest the nearly 200 civil penalties the town assessed while the first appeal was still pending—was reversed and remanded because it did not comply with N.C.G.S. § 160A-388(b1)(6) ("An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from . . ."), which was amended to prohibit the accrual of fines while a zoning enforcement action is pending. Because the amendment was intended to clarify rather than alter the statute, the trial court's failure to award attorney fees to the developers was improper under both versions of the statute.

Judge TYSON dissenting in part and concurring in part.

Appeal by Defendants from orders entered 17 August 2020 and 18 December 2020 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 5 October 2021.

Parker Poe Adams & Bernstein LLP, by Anthony Fox & La-Deidre D. Matthews, for Plaintiff-Appellee.

Scarbrough, Scarbrough & Trilling, PLLC, by James E. Scarbrough, for Defendants-Appellants.

INMAN, Judge.

¶ 1 This is the second appeal arising from a dispute about substandard roads in a residential subdivision in the Town of Midland ("the Town") in Cabarrus County. Five years ago, this Court held that the subdivision's developers bore responsibility for repairing the roads subject to the Town's enforcement of road standards, and that only after those repairs were made would the Town assume responsibility to maintain the roads. The developers still failed and refused to repair the roads and contested penalties and fees assessed against them by the Town. The Town sued and obtained relief from which the developers now appeal.

¶ 2 Defendants-Appellants, Harrell's Land Development Company, and its president, Toney L. Harrell (collectively "Developers"), developed a residential subdivision in Midland, NC. The claims brought by the Town against Developers in this case arise out of a notice of zoning violation—substandard maintenance of privately owned roads—previously upheld by this Court. *See In re Harrell v. Midland Bd. of Adjustment*, 251 N.C. App. 526, 796 S.E.2d 340, 2016 WL 7984233, at *7 (2016) (unpublished).

¶ 3 In this appeal, Developers argue the trial court erred in: (1) granting summary judgment to the Town on the issue of civil penalties for Developers' failure to repair the roads; (2) granting the Town a permanent mandatory injunction and order of abatement requiring Developers to repair and maintain the roads; and (3) denying Developers' motion for attorney's fees. After careful review, we affirm the trial court's entry of summary judgment in the Town's favor regarding civil penalties. We remand the mandatory permanent injunction and order of abatement for additional findings of fact and a more specific decree. Finally, we reverse the trial court's denial of Developers' motion for attorney's fees and remand for further proceedings.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 4 We rely on our previous decision's summary of the underlying facts giving rise to the dispute between the Town and Developers over road maintenance in the development.

¶ 5 In 2004, while Developers were constructing Bethel Glen ("the development" or "the subdivision"), Developers filed an application with the North Carolina Department of Transportation ("NCDOT") requesting the agency "assume responsibility for the maintenance of the subdivision roads." *In re Harrell*, 2016 WL 7984233, at *1. A District Engineer with NCDOT, D. Ritchie Hearne ("Mr. Hearne"), relayed Developers' request to the Town, writing "I have informed [Developers] that acceptance of these roads would be a Town function under our normal policy . . . . The review of the street plans, inspection, and ultimate takeover

of the roads would be the Town's responsibility" because the Town had incorporated earlier the same year. *Id.* In December 2005, Mr. Hearne advised the Town that he had again spoken with Developers and had informed Developers that NCDOT would not take responsibility for maintenance of the subdivision roads and that because the roads were within the Town's corporate limits, Developers would have to petition the Town for takeover. *Id.* In January 2006, the Town wrote to Mr. Hearne requesting a letter verifying that the roads were built to NCDOT standards. *Id.* The Town concluded, "When we receive this letter, we will proceed with adoption of said streets." *Id.* Nothing in the record reflected that the Town sent a copy of this letter to Developers or otherwise represented directly to Developers that the Town would take over maintenance of the subdivision roads. *Id.*

¶ 6 In April 2006, Mr. Hearne wrote in response to the Town, in a letter copied to Developers, that damage to the subdivision roads in the course of construction had left them in need of repair, and that until all phases of the subdivision had been completed, NCDOT generally would not assume responsibility for their maintenance. *Id.* at *2. This Court noted: "There is no indication [Developers] followed up with [the Town] in order to petition the Town to take over maintenance of the subdivision roads, or to check on the status of any process of taking over the subdivision roads that [the Town] might have initiated themselves." *Id.*

¶ 7 Beginning in 2012, after receiving complaints from residents about poor road conditions in the development, the Town asked Developers to repair the roads on at least three separate occasions. *Id.* at *2-3. Despite a meeting and notice, Developers did not take corrective action to repair the roads. *Id.* at *3.

¶ 8 On 18 March 2014, the Town's Zoning Administrator issued a notice of violation to Developers for failure to properly construct and maintain the roads in the development in violation of a local ordinance. The notice warned that if Developers did not repair deficiencies in the roads, the Town could assess penalties and deny permits for further construction in the development.

¶ 9 Developers appealed the notice of violation to the Town's Board of Adjustment, which affirmed the Zoning Administrator's decision. Developers unsuccessfully appealed to Superior Court, and then unsuccessfully appealed to this Court and the North Carolina Supreme Court. *In re Harrell*, 2016 WL 7984233, at *7, *disc. review denied by Harrell v. Midland Bd. of Adjustment*, 369 N.C. 751, 800 S.E.2d 418 (2017). This Court held the notice of violation was valid:

> The ordinance in question states that, until privately owned streets are accepted by the Town for public maintenance, "the developer shall be responsible for maintenance of those areas." Midland Development Ordinance, Article 16, § 16.1-8(A) (adopted 13 September 2011). It is undisputed that, at the time [the Town] filed the notice of violation, [the Town] had not taken over responsibility for maintenance of the subdivision roads.
>
> . . . .
>
> Once [the Town] received complaints from subdivision residents, investigated the complaints, and failed to reach an agreement with [Developers] for the needed repairs, [the Town] correctly sent [Developers] the notice of violation.

Id. at *5.

¶ 10 While the Developers' appeal was pending, on 14 October 2016, the Town's Zoning Administrator hand-delivered to Mr. Harrell a civil citation and a letter entitled "Bethel Glen Subdivision Streets and Covenants." It read:

> This letter is to inform you that, pursuant to Article 23 of the Midland Development Ordinance, specifically subsections 23.6-2 Civil Penalties and 23.6-3 Denial of Permit or Certificate, the Town of Midland ("Midland") hereby assesses you civil penalties and will deny future permits and certificates based on your refusal to address inadequate street construction and inadequate maintenance of the streets within the Bethel Glen subdivision ("Development").

The citation assessed a penalty of $100 for the first violation and notified Developers that they would be assessed a penalty of $300 for a second violation and $500 for a third and all subsequent violations. The citation notified Developers that citations would continue "for each day the offense continues until the prohibited activity is ceased or abated."

¶ 11 By letter dated 22 December 2016, Developers' counsel notified the Zoning Administrator that Developers were appealing the civil citation to the Town's Board of Adjustment. The Zoning Administrator responded via e-mail: "This matter was appealed previously to the Board of Adjustment in 2014 . . . . You can't appeal something twice."

¶ 12 On 17 January 2017, the Zoning Administrator hand-delivered to Mr. Harrell another letter referencing "Demand for Payment & Notice of Legal Action." The letter notified Developers that they owed $18,900 in penalties, and if not paid within 30 days, the Town would file a civil action "for the collection of the penalties, attorney's fees, interest, court costs, and other such relief as permitted by law." The letter was delivered with a batch of civil citations dating from 9 December 2016 to 17 January 2017.

¶ 13 On 6 March 2017, the Zoning Administrator hand-delivered a second batch of civil citations to Mr. Harrell's residence for violations dating 18 January 2017 through 2 March 2017. On 13 April 2017, the Zoning Administrator delivered a third batch of citations for 3 March 2017 through 13 April 2017. And on 16 June 2017, she delivered a final batch of citations for 14 April 2017 through 15 June 2017.

¶ 14 In total, the Town issued 189 civil citations against Developers. Counsel for Developers sent letters to the Town asserting appeals from each and every citation.

¶ 15 On 22 June 2017, the Town filed a civil action seeking an order of abatement and mandatory injunction against Developers as well as collection of civil penalties, costs, and attorney's fees. The parties filed cross-motions for summary judgment in June 2018; the motions came on for hearing a year later in June 2019.

¶ 16 After the hearing but before the trial court entered an order, Developers filed a motion to dismiss the action for lack of subject matter jurisdiction because the Town had not properly authorized the filing of the complaint. The Town Council then adopted, more than two years after the complaint had been filed, a resolution retroactively authorizing the lawsuit.

¶ 17 On 17 August 2020, the trial court entered orders denying Developers' motion for summary judgment, allowing the Town's motions, and imposing a permanent injunction and an order of abatement. Developers filed notice of appeal from these orders. Developers also filed a motion for relief from judgment on the same grounds as those presented in their motion to dismiss for lack of subject matter jurisdiction, which the trial court had not addressed. In addition, Developers filed a motion to stay the judgment and a motion for an award of attorney's fees pursuant to N.C. Gen. Stat. § 6-21.7 (2021), alleging that the Town had exceeded its "unambiguous limits on its authority" by imposing civil penalties on Developers while their appeal was pending, in violation of the automatic stay provided by N.C. Gen. Stat. § 160A-388(b1)(6) (2017).

¶ 18 On 18 December 2020, the trial court entered an order noting that the Town had agreed to dismiss all civil penalties issued prior to the conclusion of Developers' pending appeal and denying any relief to Developers.

II. ANALYSIS

A. Subject Matter Jurisdiction

¶ 19 **[1]** Developers argue the trial court lacked subject matter jurisdiction to hear this action because the Town did not demonstrate it had standing. Specifically, Developers argue Midland's Town Council was required to adopt a resolution prior to the Town filing its complaint in this lawsuit, and in failing to do so until two years after the commencement of the suit, the Town did not have standing. We disagree.

¶ 20 "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *In re Foreclosure of a Deed of Trust Executed by Raynor*, 229 N.C. App. 12, 16, 748 S.E.2d 579, 583 (2013). Standing is required to confer subject matter jurisdiction upon a court, *Myers v. Baldwin*, 205 N.C. App. 696, 698, 698 S.E.2d 108, 109 (2010), and the complaining party bears the burden of proving standing, *Am. Woodland Indus., Inc. v. Tolson*, 155 N.C. App. 624, 627, 574 S.E.2d 55, 57 (2002).

¶ 21 As solely a creature of legislative charter, our General Statutes provide that a city or town may exercise its powers only as delegated from the General Assembly. *See* N.C. Gen. Stat. § 160A-4 (2021). A "[c]ity must follow the requirements of the statutes and [its] charter, and the ordinances and procedures it establishe[s]." *State ex rel. City of Albemarle v. Nance*, 266 N.C. App. 353, 361, 831 S.E.2d 605, 611 (2019), *disc. review denied*, 373 N.C. 585, 838 S.E.2d 182 (2020). A power or limitation "that is conferred or imposed by charter or general law without directions or restrictions as to how it is to be exercised or performed shall be carried into execution as provided *by ordinance or resolution of the city council*." N.C. Gen. Stat. § 160A-12 (2021) (emphasis added).

¶ 22 The power the Town seeks to exercise here is set out in the "general law" under Section 160A-175 of our General Statutes, which grants that the Town has the "power to impose fines and penalties for violation of its ordinances, and may secure injunctions and abatement orders to further insure compliance with its ordinances as provided by this section." *Id.* § 160A-175(a) (2021). Here, the Town seeks fines, a mandatory injunction, and an order of abatement. The "general law" does not set out "directions or restrictions as to how it is to be exercised or performed,"

so the Town can exercise its corporate power "as provided by ordinance or resolution of the city council." *Id.* § 160A-12.

¶ 23 The relevant portions of the Town's ordinances are in our record on appeal. Article 16 of the ordinances governs "Subdivisions" and includes requirements for "Streets and utilities," "street design," and "street construction." Midland, N.C., Midland Dev. Ordinance, Art. 16, §§ 2-6, 2-7, 2-9. This Article includes a section for "Violations," which provides that "Violations of the provision of this section shall be subject to the enforcement and penalty provisions set forth in Article 23 of this Ordinance." *Id.*, Art. 16, § 1-7.

¶ 24 Article 23, entitled "Administration and Enforcement," describes the Town's Planning, Zoning & Subdivision Administrator as the "Enforcement Officer with the duty of administering and enforcing the provisions of this Ordinance." *Id.*, Art. 23, § 2-1. Article 23 further provides the steps and procedures of enforcement proceedings. Section 23.5-6, in particular, provides:

> If [an] owner or occupant of a property fails to comply with a Notice of Violation from which no appeal has been taken, or an order of Corrective Action following an appeal, the owner or occupant shall be subject to such remedies and penalties as may be provided for by state law and Section 23.6 (Remedies).

Id., § 5-6. "If the owner or occupant fails to comply with the remedies and penalties prescribed, enforcement shall be sought through an order of a court of competent jurisdiction." *Id.* The remedies provided in Section 23.6 include injunctive relief such as an order of abatement or a mandatory injunction. *Id.*, § 6-1. Section 23.6-2 also authorizes assessment of civil penalties. *Id.*, § 6-2. In addition, under the Town's ordinances, when a fine has not been paid, "the matter shall be referred to legal counsel for institution of a civil action in the appropriate division of the General Courts of Justice for recovery of the civil penalty." *Id.*, Art. 23, § 7-6. The ordinance provides that the matter shall be referred to town counsel to file suit.

¶ 25 Thus, under our General Statutes, the Town carried out this enforcement action "as provided by ordinance or resolution of the city council." § 160A-12. The ordinances provide the authority of the Town's Zoning Administrator to "administer" and "enforce" the ordinances, and the ordinances specifically grant the authority for referral to legal counsel to institute a civil action. Midland, N.C., Midland Dev. Ordinance, Art. 23, §§ 2-1, 7-6. Based upon Midland's ordinances, Midland's Town Council

was not required to adopt a resolution before the Town filed its complaint. Although the Town adopted a resolution two years after commencement of the suit, that resolution was not required to confer jurisdiction because Midland's ordinances alone granted the necessary authority.

¶ 26 Developers compare this case to our recent decision in *State ex rel. City of Albemarle v. Nance*, 266 N.C. App. 353, 831 S.E.2d 605 (2019). The facts of that case are inapposite. In *Albemarle*, the City of Albemarle engaged outside counsel to file a nuisance action against a local hotel but not before its city council had adopted a resolution authorizing the suit. 266 N.C. App. at 360, 831 S.E.2d at 610. Pursuant to its ordinances, Albemarle City Council was required to adopt a resolution to bring suit through outside counsel. *Id.* at 361, 831 S.E.2d at 610-11 ("Albemarle's ordinances require that either the city attorney or outside counsel selected by the council prosecute this action. In order to bring suit through outside counsel, the city council must adopt a resolution.") (citing City of Albemarle, N.C., Code of Ordinances, Art. IV, § 4.3). Albemarle's ordinances further provided, "[City] Council may employ other legal counsel from time to time, in addition to the City Attorney, as may be necessary to handle adequately the legal affairs of the City." *Id.* at 359, 831 S.E.2d at 610 (citing City of Albemarle, N.C., Code of Ordinances, Art. IV, § 4.3). Because Albemarle did not follow our statutes and its own ordinances, this Court held Albemarle lacked standing to bring suit. *Id.* at 361, 831 S.E.2d at 611.

¶ 27 Contrary to Developers' argument, we do not interpret *Albemarle*'s holding to require that every time a municipality files suit it must first seek a resolution from its council. Instead, *Albemarle* reaffirms our statutory mandate that municipalities execute their authority pursuant to their own ordinances or by resolution of city council. *See* § 160A-12 (providing a municipality's statutory authority "shall be carried into execution as provided by ordinance or resolution of the city council.").

¶ 28 Here, the Town filed suit pursuant to N.C. Gen. Stat. § 160A-175(e) (2021), which provides "the city may apply to the appropriate division of the General Court of Justice for a mandatory or prohibitory injunction and order of abatement[.]". Unlike the City of Albemarle's ordinances, the Town's ordinances contain specific authorization to bring suit to recover civil fines assessed for violation of its provisions and to seek injunctive relief. And unlike the ordinance in dispute in Albemarle, Section 23-7.6 of the Town's ordinances does not require approval by the Town's Council before filing suit and there is no issue relating to outside counsel in this case. Because the Town complied with its own ordinances in

the execution of its municipal powers, we hold the trial court properly exercised jurisdiction over this matter.

¶ 29 Developers further rely on *Shearon Farms Townhome Owners Ass'n II, Inc. v. Shearon Farms Dev., LLC*, 272 N.C. App. 643, 847 S.E.2d 229 (2020) to argue that the Town Council's authorization of the initial filing two years later cannot remedy the Town's lack of standing or confer subject matter jurisdiction upon the Court. Surely, subject matter jurisdiction is determined by "the state of affairs existing at the time it is invoked." *Id.* at 655, 847 S.E.2d at 238 (citation omitted). However, in *Shearon Farms*, this Court rejected the homeowners' association's argument it had standing to bring suit because "[t]he affidavit that Shearon Farms sought to introduce into the trial record documented assignments that occurred after it commenced this lawsuit." *Id.* As we have held, the Town acted within its authority to bring suit in this case—it did not require assignments of rights to causes of action or any other authorization to grant standing.

B. Summary Judgment for the Town

¶ 30 **[2]** Developers argue the trial court erred in granting the Town's motion for summary judgment for civil penalties and denying Developers' motion for summary judgment. Again, we disagree.

¶ 31 We review a trial court's orders for summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

¶ 32 Contrary to Developers' contention, the civil penalties imposed by the Zoning Administrator do not constitute a "final and binding order, requirement, or determination made in writing." N.C. Gen. Stat. § 160A-388(b1) (recodified as N.C. Gen. Stat. § 160D-705(b) (2021)). Instead, the civil penalties simply enforced the judgment finding a zoning violation, which Developers had previously appealed and this Court upheld five years ago. *See In re Harrell*, 251 N.C. App. 526, 796 S.E.2d 340, 2016 WL 7984233, at *7. As the Town's Zoning Administrator advised Developers five years ago, "You can't appeal something twice."

¶ 33 Based on this Court's prior decision, the Town had the authority by local ordinance to issue civil penalties for Developers' failure to comply with that judgment:

> If the owner or occupant of a property *fails to comply with a Notice of Violation* from which no appeal has been taken, or an Order of Corrective Action following an appeal, the owner or occupant shall be subject to such remedies and penalties as may be

> provided for by state law and Section 23.6 (Remedies). *If the owner or occupant fails to comply with the remedies and penalties prescribed, enforcement shall be sought* through an order of a court of competent jurisdiction.

Midland, N.C., Midland Dev. Ordinance, Art. 23, § 5-6 (emphasis added). Article 23 of the Town's ordinances governs civil penalties:

> Any of the following shall be a violation of this Ordinance and *shall be subject to the enforcement remedies and penalties provided by this Article* and by state law[:] . . . [t]o erect, construct, reconstruct, alter, repair, convert, *maintain, or use any building or structure or to use any land in violation or contravention of this Ordinance*, or any other regulation made under the authority conferred thereby.

Id. § 3-4 (emphasis added). The ordinance provides for appeal of a *notice of violation*. *Id.* § 5-3 ("Any owner or occupant who has received a Notice of Violation may appeal in writing the written decision of the *Planning, Zoning & Subdivision Administrator* to the Board of Adjustment." (emphasis in original)). It does not, however, establish a right to appeal civil penalties. *See Fort v. Cnty. of Cumberland*, 218 N.C. App. 401, 407-08, 721 S.E.2d 350, 355 (2012) ("[W]e find instructive this Court's use of the long-standing rule of statutory construction: '*expressio unius est exclusio alterius*,' meaning the expression of one thing is the exclusion of another." (citations omitted)).

¶ 34 Developers unsuccessfully appealed the judgment arising from the initial zoning violation. Pursuant to the Town's ordinances, no other avenue was available to Developers to challenge the enforcement of that judgment in the form of civil penalties.[1] Perhaps Developers could have sought injunctive or other relief from the civil penalties through our courts; they did not. Instead, they apparently ignored the judgment and failed to comply with its terms.

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1. Even if we were to classify the civil penalties assessed as a final judgment or order, which we do not, Developers did not properly appeal those penalties pursuant to the Town's ordinances. *See* Midland, N.C., Midland Dev. Ordinance, Art. 6, § 2-6(A)-(B) ("(A) The appeal shall be filed with the Midland Town Clerk on an application form provided by him/her and contain the information as required on the application form. (B) The appeal application shall be accompanied by a fee as established by the Town of Midland."). Instead of submitting the required appeal form to the Board of Adjustment with an accompanying filing fee, Developers sent a letter to the Zoning Administrator purporting to appeal the civil citations.

¶ 35 For all these reasons, we hold the trial court did not err by awarding summary judgment for civil penalties in the Town's favor.

C. Order of Abatement & Mandatory Injunction

¶ 36 **[3]** Developers contend that even if the trial court had jurisdiction, the trial court's order granting a mandatory permanent injunction and order of abatement should be vacated because the orders did not comply with Rule 65(d) of the North Carolina Rules of Civil Procedure. We remand to the trial court for additional findings of fact and a more specific decree.

1. Law of the Case

¶ 37 Before we address Developers' challenge to the specific mandate of the trial court's order, we address our dissenting colleague's assertion that Developers' obligation to maintain the subdivision roads has not yet been established. This question was settled by this Court's prior opinion on this issue, and we cannot revisit it.

¶ 38 The order of abatement seeks to enforce the notice of violation for Developers' failure to maintain the subdivision streets. This Court previously upheld the Town's notice of violation against Developers and concluded Developers have an "ongoing obligation to *maintain* the subdivision streets pursuant to [Town] ordinance." *In re Harrell*, 2016 WL 7984233, at *5 (emphasis added). This Court's prior determination that Developers, and not the Town, are obligated to maintain the subdivision roads until the Town has approved a petition by Developers to assume responsibility, is binding on our decision today. *See N.C. Nat'l Bank v. Va. Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983) ("Once a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case. Further, since the power of one panel of the Court of Appeals is equal to and coordinate with that of another, a succeeding panel of that court has no power to review the decision of another panel on the same question in the same case.").

¶ 39 The Town's past communication with Mr. Hearne about the street maintenance takeover process cannot relieve Developers of their obligation to maintain the subdivision roads, as it has been previously determined by this Court on the same record relied upon by our dissenting colleague. Further, the record before us does not reflect that Developers have either officially petitioned the Town to adopt the maintenance of the streets in the development or alleged that the original land plats themselves may replace the adoption process pursuant to the Town's ordinance. "The scope of review on appeal is limited to issues so

presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned." N.C. R. App. P. 28(a) (2021).

2. Rule 65(d) Compliance

¶ 40 We now turn to Developers' argument about the contents of the order.

¶ 41 We review a mandatory permanent injunction and order of abatement *de novo*. *Wilner v. Cedars of Chapel Hill, LLC*, 241 N.C. App. 389, 392, 773 S.E.2d 333, 336 (2015). When we review the evidence in injunction cases, "there is a presumption that the judgment entered below is correct, and the burden is upon [the] appellant to assign and show error." *W. Conf. of Original Free Will Baptists of N.C. v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 627 (1962) (citation omitted).

¶ 42 The Town sought a mandatory injunction and order of abatement pursuant to Section 160A-175(e) of our General Statutes, which is governed by Rule 65 of our Rules of Civil Procedure. § 160A-175(e) ("The action shall be governed in all respects by the laws and rules governing civil proceedings, including the Rules of Civil Procedure in general and Rule 65 in particular."). Rule 65(d) provides: "Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained[.]" N.C. Gen. Stat. § 1A-1, Rule 65(d) (2021). For the rule's reasonable detail requirement, the question is "whether the party enjoined can know from the language of the order itself, and without having to resort to other documents, exactly what the court is ordering it to do." *Auto. Dealer Res., Inc. v. Occidental Life Ins. Co. of N.C.*, 15 N.C. App. 634, 641-42, 190 S.E.2d 729, 734 (1972).

¶ 43 The "acts enjoined" section of the trial court's order for mandatory injunction and abatement provides:

> 1. Within thirty calendar days of the entry of this order, [Developers] shall submit to the Town a proposed plan to bring the Bethel Glen streets into compliance with NCDOT standards ("Proposed Repair Plan").
>
> 2. [Developers]' Proposed Repair Plan shall be sealed and submitted by an engineer licensed in the State of North Carolina and approved by the Town Engineer. The Town Engineer shall provide written approval, revisions, or rejection of the Proposed Repair Plan.

> The Proposed Repair Plan shall be revised until the Town Engineer provides written approval. The Proposed Repair Plan must be revised and approved within thirty calendar days of the date of submission.
>
> 3. [Developers] shall complete the repairs to the Bethel Glen streets within 180 calendar days of the date of the Town Engineer's written approval of the Proposed Repair Plan.
>
> 4. Following completion of all required repairs, the Town Engineer shall inspect the repairs and determine whether the repairs have been completed to NCDOT standards.
>
> 5. Following completion of all required repairs in compliance with NCDOT standards, [Developers] shall continue to maintain the roads to the standards set forth by the NCDOT until the respective government agency takes over this responsibility.

Developers argue the trial court's reference to the "Proposed Repair Plan" as a not-yet-finalized "outside document" and the order's vagueness about which NCDOT standards must be met and what repairs must be made violate Rule 65(d), leaving Developers without clear direction about how to remedy the conditions of the roads in the subdivision.

¶ 44 The parties do not dispute the roads were constructed according to NCDOT standards. The parties also agree that, as part of the final plat approval process, Developers certified, on each of the nine plats in the development, that they would "maintain the roads to the standards set forth by the NCDOT until the respective government agency takes over this responsibility."

¶ 45 But, before the trial court and on appeal, Developers allege they do not know how to maintain or repair the development roads in compliance with NCDOT standards. The Town asserts the roads have not been maintained to meet NCDOT standards and must be repaired before the Town assumes responsibility for their maintenance. The Town engineer's affidavit and report outline base failure, pavement settlement, pothole formation, and gutter and drainage issues. Mr. Hearne's inspection of the streets in 2006 also revealed that "there were parts of the streets, along with some possible curb and gutter sections, that needed repair." *In re Harrell*, 2016 WL 7984233, at *2. He further explained "generally [NC]DOT will not take over maintenance of any subdivision roads

until the majority of homes in the subdivision are built and the developer must perform any needed repairs to the road infrastructure" because roads are "often damaged and broken by the construction traffic when the homes are being built." *Id.*

¶ 46 The record reveals the parties have a long history of disagreement about exactly *how* to bring the roads in compliance with NCDOT standards. The Town's engineer estimated the cost of necessary upgrades will be $833,775, while Developers' expert estimated the cost will be $214,935. In 2017, Developers tried, and failed, to bring the roads into compliance with NCDOT standards to the satisfaction of the Town engineer.

¶ 47 The trial court recognized this disagreement could give rise to "a disputed fact[,] . . . that [Developers] made an effort to correct these [roads] and they're now where they should be." The trial court failed to resolve this dispute. The trial court's order requires Developers "to submit to the Town a proposed plan to bring [the development] streets into compliance with NCDOT standards." As written, Developers cannot know from the terms of the order itself "exactly what the court is ordering [them] to do," *Auto. Dealer Res., Inc.*, 15 N.C. App. at 642, 190 S.E.2d at 734, namely what NCDOT standards have not been met and what repairs Developers must make to bring the development roads into compliance. While the trial court may order that Developers draft a plan for repairs, outline a review process, and impose a timeline for the work, the order must also identify which NCDOT standards are at issue and what repairs are sufficient to bring the roads into compliance.

¶ 48 Accordingly, we remand the mandatory permanent injunction and order of abatement for the trial court to make further findings of fact identifying the specific NCDOT standards that Developers have failed to meet and to provide a specific decree for repairs necessary to bring the roads into compliance. In its discretion, the trial court may take additional evidence, including expert testimony, to assist in its determination.

D. Attorney's Fees

¶ 49 **[4]** Developers argue the trial court erred in denying their motion for attorney's fees incurred contesting penalties assessed during the pendency of the first appeal. We agree.

¶ 50 We review a trial court's decision to award mandatory attorney's fees *de novo*. *Willow Bend Homeowners Assoc., Inc. v. Robinson*, 192 N.C. App. 405, 418, 665 S.E.2d 570, 578 (2008).

¶ 51 Our General Statutes provide:

> In any action in which a city or county is a party, upon a finding by the court that the city or county violated a statute or case law setting forth unambiguous limits on its authority, the court shall award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action.

§ 6-21.7.

¶ 52 While Developers' first appeal regarding the notice of violation was pending, the Town assessed nearly 200 civil penalties against them from 14 October 2016 to 8 June 2017. At that time, our General Statutes provided: "An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from . . . ." N.C. Gen. Stat. § 160A-388(b1)(6) (2017). In July 2019, our legislature adopted an amendment to "clarify and restate the intent of the existing law and apply to ordinances adopted before, on, and after the effective date." S.L. 2019-111, S.B. 355, *An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State*, Part III, sec. 3.1 (July 11, 2019). Our General Assembly further amended Section 160A-388(b1)(6) to expressly prohibit the accrual of fines while a zoning enforcement action is pending. S.L. 2020-25, § 10 (recodified as § 160D-405(f) (2021) ("An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from *and accrual of any fines assessed* during the pendency of the appeal to the board of adjustment and any subsequent appeal in accordance with G.S. 160D–1402 or during the pendency of any civil proceeding authorized by law." (emphasis added))).

¶ 53 Our Supreme Court has explained, "A clarifying amendment, unlike an altering amendment, is one that does not change the substance of the law but instead gives further insight into the way in which the legislature intended the law to apply from its original enactment." *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 9, 727 S.E.2d 675, 681 (2012) (citation omitted). The General Assembly's addition of the words, "and accrual of any fines assessed," to this statute further echoes the legislature's stated intent to clarify the meaning of the existing statute since its enactment. Thus, under both versions of the statute, the Town was not authorized to impose penalties between 14 October 2016 and 8 June 2017, while Developers' first lawsuit was on appeal.

¶ 54 Our attorney's fees statute provides fees shall be awarded when the trial court finds "that the city or county violated a statute or case law setting forth *unambiguous limits* on its authority." § 6-21.7 (emphasis

added). The statute defines "unambiguous" to mean the "limits of authority are not reasonably susceptible to multiple constructions." *Id*. We are not persuaded by the Town's argument that the previous version of the statute, Section 160A-388(b1)(6), is ambiguous because it is "reasonably susceptible to multiple constructions." Section 160A-388(b1)(6) made it clear the Town could not enforce a violation against a party while that same party's appeal of a notice of violation was pending. § 160A-388(b1)(6) (2017). We cannot comprehend a reading of the word enforcement to exclude the imposition of civil penalties, fines, or punishments otherwise. *See State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970) ("It is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law."). By its own account, the Town issued civil citations in order to enforce the notice of violation.

¶ 55 In its order denying Developers' motion for attorney's fees, the trial court found "that the Town did not run afoul of unambiguous limits on its authority in violation of [Section] 6-21.7." We disagree and hold that, applying both versions of the board of adjustment provision, the Town had "run afoul" of limits on its authority, so the trial court was required to award reasonable attorney's fees. § 6-21.7.

¶ 56 The Town's agreement to dismiss the penalties imposed upon Developers from 14 October 2016 to 8 June 2017 during the pendency of the first appeal does not relieve the Town of its liability for Developers' attorney's fees incurred contesting those penalties. We reverse the order denying Developers' motion and remand to the trial court to determine and make appropriate findings regarding what attorney's fees Developers reasonably incurred in challenging the civil penalties imposed during the pendency of their first appeal.

III. CONCLUSION

¶ 57 For the reasons outlined above, we affirm the trial court's entry of summary judgment in the Town's favor regarding civil penalties, but we remand the mandatory permanent injunction and order of abatement for additional findings of fact and a more specific decree. We reverse the trial court's denial of Developers' attorney's fees and remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Chief Judge STROUD concurs.

Judge TYSON dissents in part and concurs in part.

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

¶ 58 The claims brought by the Town against Harrell Builders in this appeal arise out of multiple notices of zoning violations asserting substandard construction and deferred repair and maintenance of subdivision streets. In a prior appeal, this Court held Harrell Builders bore responsibility for constructing the streets to NCDOT road standards at the time when that condition was agreed to and for the Town to assume responsibility to maintain the roads. *In re Harrell v. Midland Bd. of Adjustment*, 251 N.C. App. 526, 796 S.E.2d 340, 2016 WL 7984233 (2016) (unpublished), *disc. review denied*, 369 N.C. 751, 800 S.E.2d 418 (2017). The trial court's conclusions and holdings in its order are erroneous. I concur in part with the majority opinion and respectfully dissent in part.

I. Background

¶ 59 Harrell Builders built Bethel Glen subdivision (the "Development") in 2003. Included on each plat is the following provision expressing its agreement to the condition: "I (we) hereby certify that I (we) will maintain the roads to the standards set forth by the North Carolina Department of Transportation until the respective governmental agency takes over this responsibility." *In re Harrell*, 2016 WL 7984233 *1 (emphasis supplied). Harrell Builders never agreed to any other conditions with the Town of Midland.

¶ 60 The following facts are taken from this Court's earlier opinion:

> Petitioners completed an application with the North Carolina Department of Transportation [NCDOT] requesting that [NCDOT] assume responsibility for the maintenance of the subdivision roads. By letter dated 28 October 2004, D. Ritchie Hearne ("Hearne"), a District Engineer for [NCDOT], wrote the Town, stating that Petitioners "contacted my office regarding acceptance of the [subdivision roads]. I have informed [Petitioners] that acceptance of these roads would be a Town function under our normal policy . . . The review of the street plans, inspection, and ultimate takeover of the roads would be the Town's responsibility."

In re Harrell, 2016 WL 7984233 *1.

¶ 61 Hearne again contacted Harrell Builders to advise them he had spoken with Petitioners to notify them NCDOT was not responsible for the street maintenance because those streets were now located within the Town's corporate limits. *Id.* The Town responded by letter and stated it was "willing to take the [subdivision] streets ... into the Town with some verification from you. [We request] a letter from you stating that the roads ... are built to NCDOT standards. *When we receive this letter, we will proceed with adoption of said streets*." *Id.* (emphasis supplied). The Town is bound by this acceptance.

¶ 62 No record evidence shows the Town sent a copy of the 19 January 2006 letter to Harrell Builders. The Town hired an engineering firm to inspect the roads. It was alerted *via* email that certain repairs were needed in January 2006. The email stated:

> As you can see on the map, there were multipl[e] phases recorded over the past few years. According to my inspection, there are a number of items that need to be fixed prior to the Town taking over the streets, i.e., settlement of pavement at utility ditches, manholes, storm drainage lines etc. According to the Town of Midland Subdivision Ordinance, Section 60-40-C-5, either the developer or a Homeowner's Association is responsible for *maintenance of the streets until they are accepted by [NCDOT]* or the Town. It appears that T.L. Harr[ell]'s Land Development Co. Inc. is responsible for the maintenance. How do you want to handle this?
>
> I would assume that the Town would want the developer to make a formal request to the Town for acceptance of the streets. However, *this step could be omitted since these are already platted. Upon receiving the request, the Town would inspect the development and provide the developer with a list of items that need to be corrected*. Once these items are fixed to the Town's satisfaction, the Town Board could accept the streets for maintenance.

The Town responded to this email by stating, *inter alia*, that the Town's "concern (and it[']s obvious) is that with the continuing construction with both

phases, there are heavy work vehicles in/out of the development daily adding wear and tear to the roads, etc." The only record evidence of the issue of taking over maintenance of the subdivision roads having been discussed by the Midland Town Council is from the minutes of a 14 February 2006 meeting. Following are the relevant minutes:

> Mayor Pro Tem Page said our engineer inspected the roads and found discrepancies. He added that *the Town is still waiting on a letter from NCDOT verifying that the roads have been built to [NCDOT] standards*.
>
> Mayor Pro Tem Page said that the Town needs to talk with the developer on the discrepancies and future phase plans. He noted for Council that, even if the Town takes over the streets, there is a clause stating the developer is still responsible for the streets for 1 year after takeover. He ended by saying *the Town should take the streets in* after it gets a formal request from the developer to do so.
>
> [Town] Engineer Jeff Moody said upon his inspection of the streets he found 15-18 places where ditches had settled including around manholes. Also there are places in roads that had been patched and were now in need of repair.
>
> . . . .

[NCDOT Engineer] *Hearne responded to the Town's 19 January 2006 letter by letter dated 25 April 2006, in which he stated that "[t]o this point, the roads within [the] subdivision have been designed, built, and inspected according to NCDOT standards."* Hearne then went on to state that generally [NCDOT] will not take over maintenance of any subdivision roads until the majority of homes in the subdivision are built "and the developer must perform any needed repairs to the road infrastructure." Hearne stated he had inspected the subdivision streets and there were parts of the streets, along with some possible curb and gutter sections, that needed repair.

> Hearne explained that "[i]t is often damaged and broken by the construction traffic when the homes are being built. There appears to be at least one more phase of construction to complete the subdivision." Hearne's 25 April 2006 letter indicated that a copy of the letter was sent to [Harrell Builders].

In re Harrell, 2016 WL 7984233 *2 (emphasis supplied). The record does not show Harrell had agreed to be "responsible for the streets for 1 year after takeover" or that "the Town . . . inspect[ed] the development and provide[d] the developer with a list of items that need to be corrected." *Id.*

¶ 63 Eight years after construction of the subdivision and beginning in 2011, the Town demanded Harrell Builders *to repair the streets* after receiving complaints from residents about street conditions within the development. On 18 March 2014, the Town's Zoning Administrator issued a notice of violation to Harrell Builders for failure to properly construct and maintain the roads in the development in violation of a local ordinance. The notice warned that if Harrell Builders did not repair deficiencies in the roads, the Town could enforce the local ordinance by, among other things, assessing penalties and denying permits for any further construction in the development.

¶ 64 Harrell Builders appealed the notice of violation to the Town's Board of Adjustment, which affirmed the zoning administrator's decision. Harrell Builders appealed to superior court, and then unsuccessfully appealed to this Court, which failed to address the underlying issue that is now before us. Harrell Builders sought discretionary review before the Supreme Court of North Carolina. *See In re Harrell*, 2016 WL 7984233 *7.

¶ 65 While the earlier appeal was pending, the Town's Zoning Administrator hand-delivered to Mr. Harrell a civil citation and a letter entitled "Bethel Glen Subdivision Streets and Covenants" on 14 October 2016. It read:

> This letter is to inform you that, pursuant to Article 23 of the Midland Development Ordinance, specifically subsections 23.6-2 Civil Penalties and 23.6-3 Denial of Permit or Certification, the Town of Midland . . . hereby assesses you civil penalties and will deny future permits and certificates based on your refusal to address inadequate street construction and inadequate maintenance of the streets within the Bethel Glen subdivision[.]

¶ 66 The citation assessed a purported penalty of $100 for the first violation and notified Harrell Builders it would be assessed a penalty of $300 for a second violation and $500 for a third and all subsequent violations. The citation notified Harrell Builders that citations would continue "for each day the offense continues until the prohibited activity is ceased or abated."

¶ 67 By letter dated 22 December 2016, Harrell Builders' counsel notified the Zoning Administrator that Harrell Builders were appealing the civil citation to the Town's Board of Adjustment. Notwithstanding that each citation asserted a new violation, the Zoning Administrator responded via e-mail: "This matter was appealed previously to the Board of Adjustment in 2014 . . . . You can't appeal something twice."

¶ 68 The Zoning Administrator hand-delivered another letter referencing "Demand for Payment & Notice of Legal Action" to Mr. Harrell on 17 January 2017. That letter notified Harrell Builders they owed a purported $18,900 in penalties with a note the Town would file a civil action if not paid within 30 days.

¶ 69 The Zoning Administrator continued the *seriatim* citations with a second, third and fourth batch to Mr. Harrell's residence for purported violations. The Town issued 189 civil citations against Harrell Builders in total. Harrell Builders appealed each citation.

¶ 70 The Town filed a civil action seeking an order of abatement and mandatory injunction against Harrell Builders on 22 June 2017. Harrell Builders filed a motion to dismiss the action for lack of subject matter jurisdiction, asserting a statutory amendment had invalidated the accrued civil penalties assessed by the Town.

¶ 71 Harrell Builders' motion also alleged the Town had not properly authorized the filing of the complaint by resolution of the Town Council, as statutorily required. *See* N.C. Gen. Stat. § 160D-405(b),(d) (2021). The Town Council then adopted a resolution, purporting to retroactively authorize the filing of the complaint (*more than two years* after the complaint had been filed).

¶ 72 The trial court entered orders denying Harrell Builders' motion for summary judgment, allowing the Town's motions, and imposing a permanent injunction and an order of abatement on 17 August 2020. Harrell Builders appealed.

¶ 73 Harrell Builders filed a motion for relief from judgment on the same grounds as those presented in their motion to dismiss for lack of subject matter jurisdiction, which the trial court had not addressed.

¶ 74 The trial court entered an order noting that the Town had dismissed all civil penalties issued prior to the conclusion of Harrell Builders' pending appeal and denying further relief to Harrell Builders on 18 December 2020. Harrell Builders appeal.

II. Subject Matter Jurisdiction

¶ 75 Harrell Builders argue the trial court lacked subject matter jurisdiction to hear this matter because the Town failed to show standing when it filed its complaint. Harrell Builders argue the Town did not have standing because no resolution was adopted until two years after the commencement of the suit. I agree.

A. Standard of Review

¶ 76 "Whether a trial court has subject matter jurisdiction is a question of law, reviewed de novo on appeal." *In re Foreclosure of a Deed of Trust Executed by Raynor*, 229 N.C. App. 12, 16, 748 S.E.2d 579, 583 (2013). Standing is required to confer subject matter jurisdiction upon a court. *Myers v. Baldwin*, 205 N.C. App. 696, 698, 698 S.E.2d 108, 109 (2010). The complaining party bears the burden of proving standing. *American Woodland Indus. v. Tolson*, 155 N.C. App. 624, 627, 574 S.E.2d 55, 57 (2002).

B. N.C. Gen. Stat. § 160A-12

¶ 77 A "[c]ity must follow the requirements of the statutes and [its] charter, and the ordinances and procedures it establishe[s]." *State ex rel. City of Albemarle v. Nance*, 266 N.C. App. 353, 361, 831 S.E.2d 605, 611 (2019), *disc. review denied*, 373 N.C. 585, 838 S.E.2d 182 (2020). A power or limitation "that is conferred or imposed by charter or general law without directions or restrictions as to how it is to be exercised or performed shall be carried into execution *as provided by ordinance or resolution of the city council*." N.C. Gen. Stat. § 160A-12 (2021) (emphasis supplied).

¶ 78 As the majority opinion notes, in *City of Albemarle*, the City Council was required to adopt a resolution to bring suit through outside counsel, pursuant to its own ordinances. *City of Albemarle*, 266 N.C. App at 361, 831 S.E.2d at 610-11. The city manager involved outside counsel prior to Albemarle's adoption of this new resolution. *Id.* at 354, 831 S.E.2d at 607. Because Albemarle had failed to follow our statutes and its own ordinances, this Court held Albemarle lacked standing to bring suit. *Id.* at 361, 831 S.E.2d at 611.

¶ 79 This Court held subject matter jurisdiction is determined by "the state of affairs existing at the time it is invoked." *Shearon Farms*

Townhome Owners Ass'n II, Inc. v. Shearon Farms Dev., LLC, 272 N.C. App. 643, 655, 847 S.E.2d 229, 238 (2020) (citation omitted). In *Shearon Farms*, this Court rejected the homeowners' association's standing because "[t]he affidavit that Shearon Farms sought to introduce into the trial record documented assignments that occurred *after* it commenced this lawsuit." *Id.*

¶ 80 Harrell Builders argue the Town Council's resolution of authorization of the initial filing two years *after* the fact cannot remedy the Town's lack of standing or does not relate back to confer subject matter jurisdiction upon the Court. *See id.* I agree and vote to vacate the trial court's award of summary judgment for the Town. *City of Albemarle*, 266 N.C. App. at 361, 831 S.E.2d at 611.

III. NCDOT Standards

¶ 81 The parties disagree about Harrell Builders' compliance with NCDOT standards at the time the streets were completed. Those standards must be reviewed and applied objectively and under the standards agreed to by the parties and that are in effect at the time the condition was imposed and agreed to.

¶ 82 An applicant that accepts and enjoys the benefits of a permit may be estopped from challenging the rules of the permit or the conditions imposed. *Goforth Properties, Inc. v. Town of Chapel Hill*, 71 N.C. App. 771, 773, 323 S.E.2d 427, 429 (1984). N.C. Gen. Stat. § 160A-393.2 provides an important clarification and limitation on this estoppel. If the applicant did not expressly consent to the condition in writing, or if the condition is altered or enlarged, and the applicant is challenging the unconsented to condition, then the applicant may proceed with the development and the local government may not assert the defense of estoppel against the applicant. N.C. Gen. Stat. § 160A-393.2 (2019) (repealed effective January 1, 2021 and recodified in N.C. Gen. Stat. § 160D-1403.2 (2021) by Session Laws 2019-111, s 2.3, as amended by Session Laws 2020-3, s. 4.33(a), and Session Laws 2020-25, s. 51(a), (b), (d), effective June 19, 2020). This statute requires local governments to ensure notice to and obtain written consent from the applicant for all imposed conditions. *Id.*

¶ 83 The Town's engineer now estimates the cost of "necessary upgrades" to be $833,775, while Harrell Builders' expert engineer offered a much lower figure of $214,935. Harrell Builders originally built the streets according to agreed-to NCDOT standards and worked to bring the roads into compliance therewith. What repairs would objectively satisfy NCDOT standards at the time of construction is entirely relevant

to the form and scope requirements of Rule 65(d). *See* N.C. Gen. Stat. § 1A-1, 65 (2021).

¶ 84 The terms of the order appealed from rely entirely on the Town's engineer's subjective determination of current Town of Midland ordinances, and not the NCDOT objective standards Harrell Builders agreed to, which were in effect at the time of completion. Harrell Builders cannot know "exactly what the court is ordering it to do." *Resources, Inc. v. Insurance Co.*, 15 N.C. App. 634, 642, 190 S.E.2d 729, 734 (1972).

¶ 85 Per the order, Harrell Builders must submit a repair plan, following specific criteria, for review by the Town's engineer within thirty days of the order. The order mandates a timeline for subsequent approvals, revisions, and rejections of the plan, and a process for resolving potential disagreements about them. It further requires the roads be repaired to the "subjective satisfaction of the Town's engineer." Harrell Builders never agreed to be bound to this condition and are not estopped from doing so now. *Goforth Properties*, 71 N.C. App. at 773, 323 S.E.2d at 429; N.C. Gen. Stat. § 160D-1403.2.

¶ 86 The trial court cannot enlarge nor delegate to the Town's subjective discretion whether Harrell Builders satisfied the condition it expressly agreed to at the time the plats were recorded: "I (we) hereby certify that I (we) will maintain the roads to the standards set forth by the North Carolina Department of Transportation until the respective governmental agency takes over this responsibility." We all agree the order erroneously leaves room for "misunderstanding" or "confusion," as Harrell Builders allege.

¶ 87 Harrell Builders rely upon *Resources, Inc. v. Insurance Co.*, 15 N.C. App. 634, 190 S.E.2d 729. In that case, the trial court entered a preliminary injunction enjoining a party from refusing to perform its obligations under a contract. *Id.* at 638, 190 S.E.2d at 732. This Court explained the "[d]efendant cannot insist now that the court speak with more clarity than did plaintiff and defendant in establishing the relationship which the court now seeks to preserve." *Id.* at 641, 190 S.E.2d at 734.

¶ 88 The first appeal addressed a separate issue from whether the streets were built to NCDOT standards at the time of construction. "The general purpose of the [NCDOT] is to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of people and goods as provided for by law." N.C. Gen. Stat. § 143B-346 (2021).

¶ 89 A road can be initially built to NCDOT design and construction standards, but not be so later maintained. The streets develop potholes or

other deficiencies, through normal wear or use, which need to be repaired. A road can be built to non-NCDOT standards and be maintained in perfect condition or deteriorate into poor condition.

¶ 90 It appears neither the Town nor the trial court understood this distinction from the beginning. This helps to explain the reason for the big difference in the party's engineers' estimates of costs to repair the roads.

¶ 91 An estimate to bring the streets to NCDOT standards at the time they were built is wholly different from an estimate to "repair" any current defects years after the construction. The mandatory injunction means for Harrell Builders to bring to NCDOT standards, whatever they were, to repair.

¶ 92 What is clear and undisputed under the facts is the Town wrote NCDOT engineer Hearne on 19 January 2006 stating that the Town was " 'willing to take the [subdivision] streets ... into the Town with some verification from you. [We request] a letter from you stating that the roads ... are built to NCDOT standards. *When we receive this letter, we will proceed with adoption of said streets*.' " *In re Harrell*, 2016 WL 7984233 *1.

¶ 93 In response, Hearne certified to the Town on 25 April 2006, that "*[t]o this point, the roads within [the] subdivision have been designed, built, and inspected according to NCDOT standards.*" *In re Harrell*, 2016 WL 7984233 *2 (emphasis supplied). The facts also show Harrell Builders had petitioned for acceptance as required and was provided a copy of Hearne's letter. *Id.*

¶ 94 The real issue appears to be who is responsible for the repairs and maintenance for the normal wear and tear to the streets in Bethel Glen subdivision *since* Hearne's letter dated 25 April 2006. If repairs were needed to meet NCDOT standards *on that date*, those would be Harrell Builders' responsibility. The Town had expressly agreed to be bound by Hearne's determination of Harrell Builders' compliance with NCDOT standards, which he certified, and to accept maintenance of the streets. The record does not show "the Town . . . inspect[ed] the development and provide[d] the developer with a list of items that need[ed] to be corrected," until over eight years later. *In re Harrell*, 2016 WL 7984233 *2.

¶ 95 The Town has collected *ad valorem* taxes from Harrell Builders and the property owners of Bethel Glen subdivision since bringing the subdivision into the Town's limits. The Town cannot now shirk its maintenance and repair obligations for normal wear and tear to the streets and shift them onto Harrell Builders. Those obligations and costs are rightfully the Town's responsibility.

¶ 96 If the trial court proposes to enter a mandatory injunction requiring "NCDOT standards," in effect at the time of construction, which is all Harrell Builders agreed to provide, we all agree the trial court on remand must objectively say what they were in this particular case. The trial court's order is entirely too vague and leaves the matter entirely within the Town engineer's subjective discretion.

IV. Attorney's Fees

¶ 97 Harrell Builders argue the trial court erred in denying their motion for attorney's fees incurred contesting penalties assessed during the pendency of the first appeal. We all agree the Town's agreement to dismiss the penalties illegally imposed upon Harrell Builders from 14 October 2016 to 8 June 2017 during the pendency of the first appeal does not relieve the Town of its liability for Harrell Builders' attorney's fees incurred in contesting those additional unlawful notices and penalties. The Town grossly, deliberately, and unambiguously exceeded the limits of its authority. The trial court is required to award Harrell Builders' reasonable attorney's fees. N.C. Gen. Stat. § 6-21.7(2021).

¶ 98 The order denying Harrell Builders' motion is properly reversed and remanded to the superior court to make appropriate findings and conclusions regarding what attorney's fees Harrell Builders reasonably incurred in challenging the *seriatim* civil penalties wrongfully imposed during the pendency of their first appeal.

V. Conclusion

¶ 99 I vote to vacate in part and reverse in part the trial court's award of summary judgment. The trial court's mandatory injunction and order of abatement and the trial court's denial of Harrell Builders' attorney's fees are properly vacated, reversed, and remanded for further proceedings. I concur in part and respectfully dissent in part.

UNIFUND CCR PARTNERS v. YOUNG

[282 N.C. App. 381, 2022-NCCOA-168]

UNIFUND CCR PARTNERS, PLAINTIFF
v.
DELORES L. YOUNG, DEFENDANT

No. COA20-916

Filed 15 March 2022

1. Judgments—renewal of default judgment—fraud defense—collateral attack—time-barred even if treated as motion for relief

In an action to renew a default judgment against defendant for a debt on a purchased credit account nine years after entry of default, defendant's purported defense that the default judgment was obtained by fraud constituted a collateral attack. Even if the fraud argument—which would have entailed intrinsic, and not extrinsic, fraud—was treated as a motion for relief pursuant to Civil Procedure Rule 60, it was time-barred for defendant's failure to file within one year of entry of the judgment pursuant to subsection 60(b)(3).

2. Creditors and Debtors—debt on purchased credit account—renewal of default judgment—Consumer Economic Protection Act—applicability

In an action to renew a default judgment against defendant for a debt on a purchased credit account nine years after entry of default, defendant's argument that the default judgment violated the Consumer Economic Protection Act was without merit where the initial complaint was filed prior to the effective date of the Act. Further, the action to renew the default judgment was a new, distinct action that did not implicate the heightened pleading requirements of the Act.

3. Creditors and Debtors—entry of default judgment—jurisdiction of clerk—debt on purchased credit account—claim for sum certain

In an action to renew a default judgment against defendant for a debt on a purchased credit account, defendant's argument that the clerk of court lacked jurisdiction to enter default and judgment by default—on the basis that the complaint failed to allege a sum certain—was without merit where plaintiff's complaint alleged that defendant owed the principal sum that had been outstanding for a particular length of time, interest at a given contract rate, and calculable attorney fees and costs.

4. Creditors and Debtors—debt on purchased credit account—renewal of default judgment—usury defense—debt of record

In an action to renew a default judgment against defendant for a debt on a purchased credit account, defendant's argument that the interest rate applied (23.99%) exceeded the allowable statutory rate had no merit where defendant had not challenged the interest rate prior to entry of the default judgment. Since the default judgment settled the amount owed plus interest and became the debt of record, usury could not be asserted as an affirmative defense to the separate action seeking to renew the existing judgment.

Appeal by Defendant from order entered 19 October 2020 by Judge Ned Mangum in Wake County District Court. Heard in the Court of Appeals 19 October 2021.

Sessoms & Rogers, P.A., by Andrew E. Hoke, for Plaintiff-Appellee.

J. Jerome Hartzell for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Delores L. Young appeals the trial court's order granting summary judgment to Plaintiff Unifund CCR Partners on Plaintiff's 2019 action to renew a default judgment entered in 2010 against Defendant. Defendant argues that the default judgment is void because it was procured by fraud and the clerk lacked jurisdiction to enter the default judgment for various reasons. Defendant also argues that Plaintiff's interest rates on Defendant's debt violate North Carolina law.

¶ 2 We affirm the trial court's order.

I. Factual and Procedural Background

¶ 3 The facts are not in dispute. Defendant entered into a written credit agreement with Citibank (South Dakota), N.A., establishing a credit card account. Defendant failed to make the required payments. On 1 February 2008, Citibank "charged off" the outstanding balance on Defendant's account as bad debt, and sold the account to Plaintiff.

¶ 4 Plaintiff commenced a civil action against Defendant by filing an unverified complaint, dated on or about 31 August 2009, in Wake County District Court.[1] Plaintiff attached a copy of the Citibank credit card

1. The file stamp on Plaintiff's complaint is illegible, rendering it difficult to determine when the action was instituted. The date given on the signature page of the complaint

agreement to the complaint. Plaintiff served the complaint and summons on Defendant on or about 23 October 2009, alleging in part:

> 6. Pursuant to the terms and provisions of the note or credit agreement, the defendant is lawfully indebted to the plaintiff in the principal sum of $10,500.69 together with interest thereon at the contract rate of 23.99% per annum. Said sum has been outstanding since February 1, 2008.
>
> 7. The credit agreement between the parties contains provisions for the payment of attorneys fees in the event of default. The balance outstanding is currently $14,413.95. Pursuant to the provisions of [N.C. Gen. Stat.] § 6-21.2, the plaintiff hereby gives notice to the defendant that it intends to enforce those provisions of the credit agreement calling for the payment of attorneys fees. . . .
>
> WHEREFORE, the plaintiff prays the court as follows:
>
> 1. That the plaintiff have and recover from the defendant the sum of $10,500.69.
>
> 2. That the plaintiff further have and recover from said defendant interest on said sum at the contract rate of 23.99% per annum from February 1, 2008 to the date of judgment, and at the rate of 8% per annum thereafter until paid.
>
> 3. That the plaintiff further have and recover from said defendant its reasonable attorneys fees in the sum of $2,162.09 which sum is fifteen (15%) percent of $14,413.95, the current balance outstanding, pursuant to [N.C. Gen. Stat.] § 6-21.2.

¶ 5 After Defendant failed to file an answer or any other pleading, or appear in court, Plaintiff filed a motion on 17 February 2010 for entry of default and default judgment. The motion was accompanied by an affidavit from Plaintiff's attorney, stating, "[m]ore than thirty (30) days have passed since service was had upon [D]efendant, and the time allowed for the [D]efendant to respond to the complaint has expired," and that "[D]efendant is indebted to the [P]laintiff herein in the principal sum of

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is 21 August 2009. The 2010 Default Judgment states that "Plaintiff instituted this action against the defendant on August 31, 2009."

$10,500.69, together with interest thereon on the contract rate of 23.99% per annum from and after February 1, 2008, and the costs of this action." The motion was also accompanied by an affidavit from Steve Ballman, Plaintiff's "duly authorized representative," stating:

> He is familiar with the books and records of Unifund CCR Partners, and particularly with the account of Delores L. Young, . . . the Defendant in this action, and is cognizant of the facts constituting and underlying this cause of action.
>
> The Defendant entered into a promissory note or written credit agreement with Citibank (South Dakota), N.A.[] The Plaintiff is the assignee of the account referred to herein. A true and accurate copy of the terms of the promissory note or account agreement between the parties was attached to the Complaint filed herein. The Defendant is in default under the terms thereof for failure to make the required payments. As a result of the Defendant's default, [Plaintiff] has declared the entire outstanding balance due and payable.
>
> . . . .
>
> [Defendant] is currently indebted to [Plaintiff] in the principal sum of $10,500.69, together with interest thereon at the rate of 23.99% per annum from and after February 1, 2008, reasonable attorneys fees, and costs.

¶ 6 On 25 February 2010, the assistant clerk of superior court ("clerk") entered default and judgment by default ("2010 Default Judgment") against Defendant. *See* N.C. Gen. Stat. § 1A-1, Rule 55(a)-(b) (2009). In the 2010 Default Judgment, the clerk found that "the time allowed for [D]efendant to respond to the complaint has expired" and that the action was "for a sum certain or a sum which can by computation be made certain," and ordered recovery for Plaintiff of the principal sum of $10,500.69 plus interest at a rate of 23.99% per annum calculated to the date of entry of the judgment, and interest accrued at 8% per annum after the date of entry of the judgment until paid. Costs of the action were also awarded to Plaintiff.[2]

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2. It is not clear from the 2010 Default Judgment whether Plaintiff was awarded attorneys' fees. Neither party raises an issue in this appeal regarding attorneys' fees.

¶ 7 On 5 September 2019, Plaintiff filed an unverified complaint in Wake County District Court ("2019 Action") seeking to renew the 2010 Default Judgment. The complaint alleged that Plaintiff had obtained a default judgment against Defendant on 25 February 2010 and that no payments had been received since entry of that judgment. Plaintiff attached to the complaint the 2010 Default Judgment and an affidavit signed by counsel, swearing to the remaining balance.

¶ 8 Defendant filed an amended answer on 13 August 2020 wherein she did not challenge the existence of the underlying debt or the 2010 Default Judgment, but stated that she "does not know whether payments have been made" on that debt since entry of the 2010 Default Judgment. She further alleged in her answer that the 2010 Default Judgment was "not a proper basis for a new judgment," based on various legal theories.

¶ 9 Plaintiff filed a motion for summary judgment and a memorandum of law in support of its motion. Defendant filed a brief in opposition to Plaintiff's motion for summary judgment and in support of summary judgment in her favor. On 19 October 2020, the trial court held a hearing and entered an order granting Plaintiff summary judgment and denying Defendant summary judgment ("2020 Order"). Defendant timely appealed to this Court.

II. Discussion

A. Standard of Review and Legal Background

¶ 10 Summary judgment is proper "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) (2019). The court must consider the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Caswell Realty Assocs. v. Andrews Co.*, 121 N.C. App. 483, 484, 466 S.E.2d 310, 311 (1996). The burden is on the moving party to show that the non-moving party has failed to establish the existence of an element essential to that party's case, such that there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. *Leiber v. Arboretum Joint Venture, LLC*, 208 N.C. App. 336, 344, 702 S.E.2d 805, 810 (2010).

¶ 11 An order granting summary judgment is reviewed de novo on appeal. *Unifund CCR Partners v. Loggins*, 270 N.C. App. 805, 808, 841 S.E.2d 835, 838 (2020). Likewise, whether a trial court has subject matter jurisdiction to enter judgment is a question of law, reviewed de novo on appeal. *Id.* at 808, 841 S.E.2d at 837-38.

¶ 12 "A challenge to jurisdiction may be made at any time." *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) (citation omitted). "A judgment is void, when there is a want of jurisdiction by the court . . . ." *Id.* (citation omitted). A void judgment "is a nullity [and i]t may be attacked collaterally at any time [because] legal rights do not flow from it." *Cunningham v. Brigman*, 263 N.C. 208, 211, 139 S.E.2d 353, 355 (1964).

¶ 13 The owner of a judgment may obtain a new judgment to collect any unpaid amount due on the prior judgment by bringing "an independent action on the prior judgment, which . . . must be commenced and prosecuted as in the case of any other civil action brought to recover judgment on a debt." *Raccoon Valley Inv. Co. v. Toler*, 32 N.C. App. 461, 463, 232 S.E.2d 717, 718 (1977) (citation omitted). An independent action seeking to renew a judgment must be brought within ten years of entry of the original judgment, and such renewal action can be brought only once. N.C. Gen. Stat. § 1-47(1) (2019). In an action to renew a judgment, a plaintiff should allege the existence of a prior judgment against the defendant; the fact that full payment on the judgment has not been made; and an accounting of the unpaid balance due and any applicable interest. *See Raccoon Valley*, 32 N.C. App. at 463-64, 232 S.E.2d at 718-19.

B. Procurement by Fraud

¶ 14 **[1]** Defendant first argues that the 2010 Default Judgment could not be the basis of the 2019 Action because the 2010 Default Judgment was "procured by fraud." Defendant's specific argument is that Plaintiff's submission of "in-house" affidavits, those signed by a Unifund representative to support its claim on the acquired Citibank credit card account and its amount, contravenes this Court's unpublished decision in *Unifund CCR Partners v. Dover*, 198 N.C. App. 406, 681 S.E.2d 565 (2009) (unpublished). Defendant's argument is misplaced.

¶ 15 First, *Dover* involved the sufficiency of the evidence of an "account stated" in an action to collect an amount of money allegedly owed to plaintiff, and its analysis is inapplicable to the case before us. Additionally, although Defendant labels this argument as a "fraud" defense, Defendant's argument is instead an objection to the admissibility and sufficiency of the evidence at the 2010 Default Judgment proceedings. Moreover, even if we construe Defendant's collateral attack on the 2010 Default Judgment as a Rule 60(b) motion for relief from judgment on the basis that the judgment was procured by fraud, the attack is time-barred under Rule 60(b)(3). *See* N.C. Gen. Stat. § 1A-1, Rule 60(b) (2019).

¶ 16 The process by which a party may seek relief from "a judgment in a prior judicial proceeding that allegedly was tainted by fraud, depends upon whether the fraud at issue is extrinsic or intrinsic." *Hooks v. Eckman*, 159 N.C. App. 681, 684, 587 S.E.2d 352, 354 (2003). Fraud is extrinsic when it deprives the unsuccessful party of the opportunity to present their case to the court, thus preventing a court from making a judgment on the merits of a case. *Id.* (citing *Stokley v. Stokley*, 30 N.C. App. 351, 354-55, 227 S.E.2d 131, 134 (1976)). "If an unsuccessful party to an action has been prevented from fully participating therein, there has been no true adversary proceeding, and the judgment is open to attack at any time." *Stokley*, 30 N.C. App. at 354, 227 S.E.2d at 134; *cf.* N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (directing that motions for relief from a void judgment must be made within a "reasonable time," but that "[t]his rule does not limit the power of a court to entertain an independent action . . . to set aside a judgment for fraud upon the court").

¶ 17 Intrinsic fraud occurs "within the proceeding itself and concern[s] some matter necessarily under the consideration of the court upon the merits." *Scott v. Farmers Co-op. Exch., Inc.*, 274 N.C. 179, 182, 161 S.E.2d 473, 476 (1968). Unlike extrinsic fraud, intrinsic fraud does not prevent a party from full participation in the action. *Stokley*, 30 N.C. App. at 354, 227 S.E.2d at 134. When the alleged fraud complained of is intrinsic, it can only be the subject of a motion under N.C. Gen. Stat. § 1A-1, Rule 60(b)(3) and must be filed within one year of entry of the judgment. *Hooks*, 159 N.C. App. at 685, 587 S.E.2d at 354 (citing N.C. Gen. Stat. § 1A-1, Rule 60(b)(3) (2001)); *Stokley*, 30 N.C. App. at 355, 227 S.E.2d at 134.

¶ 18 Here, Defendant does not allege that she was deprived of the opportunity to present her case to the court. Instead, the alleged submission of inadmissible materials to the trial court concerns a matter "involved in the determination of a cause on its merits" and would constitute intrinsic fraud. *See Hooks*, 159 N.C. App. at 684, 587 S.E.2d at 354. As Defendant's attack on the 2010 Default Judgement alleging fraud was filed more than nine years after entry of the judgment, it is time-barred.

C. Applicability of the Consumer Economic Protection Act

¶ 19 **[2]** Defendant next argues that Plaintiff was not entitled to summary judgment because Plaintiff's "underlying judgment failed to comply with N.C. Gen. Stat. § 58-70-155."

¶ 20 The Consumer Economic Protection Act of 2009, N.C. S.L. 2009-573, § 8 (2009), amended Article 70 of Chapter 58 of the General Statutes by adding N.C. Gen. Stat. § 58-70-155 (the "Act"). The Act states, "Prior to

entry of a default judgment or summary judgment against a debtor in a complaint initiated by a debt buyer, the plaintiff shall file evidence with the court to establish the amount and nature of the debt." N.C. Gen. Stat. § 58-70-155(a) (2009). The statute specifies the type of evidence required. N.C. Gen. Stat. § 58-70-155(b) (2009). The Act specifically provides: "This act becomes effective October 1, 2009, and applies to foreclosures initiated, debt collection activities undertaken, and actions filed on or after that date." N.C. S.L. 2009-573, § 11. It is undisputed that Plaintiff's 2009 action was filed prior to 1 October 2009, on or about 31 August 2009. Accordingly, the Act did not apply to that action.

¶ 21 Defendant points out that although Plaintiff's complaint was filed prior to 1 October 2009, Plaintiff filed its motion for default judgment in February 2010. As the motion for default judgment was a "debt collection activity" within the meaning of the Act, Defendant argues, the Act applied. We disagree.

¶ 22 The plain language of the statute provides that the Act applies to "actions filed" on or after 1 October 2009. Plaintiff's motion for default judgment was part of prosecuting its "action[] filed" and was not a "debt collection activity" within the meaning of the Act.

¶ 23 Defendant likewise argues that Plaintiff was required to comply with the pleading requirements of the Act in its 2019 Action. However,

> [o]nce a judgment is entered, other evidence of indebtedness is extinguished by the higher evidence of record. Essentially, the judgment merges the debt upon which it was rendered. When this merger occurs, the judgment becomes the evidence, and the only evidence that can be used in a court, of the existence of the original debt.
>
> Additionally, any cause of action on a judgment is independent from the action that resulted in a judgment, and a new suit must be filed. An independent action must be brought to recover judgment on a debt. Thus, the same procedure of issuing a summons, filing of complaint, serving the complaint must be performed to recover on a judgment debt.

Unifund CCR Partners v. Hoke, 273 N.C. App. 401, 404-05, 848 S.E.2d 508, 510 (2020), *disc. review denied*, 379 N.C. 161, 863 S.E.2d 612 (2021) (quotation marks and citations omitted).

¶ 24 Here, the 2019 Action on the 2010 Default Judgment "is a new, distinct action." *Id.* "Because the original debt has merged into the judgment, this is not an action on a purchased credit account, but rather, an action on a judgment." *Id.* Thus, "the present action does not implicate the heightened pleading requirements set forth" in the Act. *Id.* at 405, 848 S.E.2d at 510-11.

D. Sum Certain

¶ 25 **[3]** Defendant next argues that the clerk lacked subject matter jurisdiction to enter the underlying 2010 Default Judgment because Plaintiff's claim was not for a sum certain and thus, the 2010 Default Judgment is void.

¶ 26 The clerk shall enter default "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise[.]" N.C. Gen. Stat. § 1A-1, Rule 55(a) (2009). After the clerk's entry of default, and "[w]hen the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant[.]" *Id.* § 1A-1, Rule 55(b)(1) (2009). "A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain." *Id.* "Absent a certain dollar amount, the default judgment must be entered by a judge who may conduct a hearing to adequately determine damages." *Basnight Constr. Co. v. Peters & White Constr. Co.*, 169 N.C. App. 619, 622, 610 S.E.2d 469, 471 (2005) (citing N.C. Gen. Stat. § 1A-1, Rule 55(b)(2) (2003)). If the clerk lacked the authority to enter a default judgment because the claim was not for a sum certain, the judgment is void as a matter of law. *Id.* at 624, 610 S.E.2d at 472.

¶ 27 In this case, Plaintiff's 2009 unverified complaint alleged that Defendant was lawfully indebted to Plaintiff for the principal sum of $10,500.69 together with interest at a contract rate of 23.99% per annum, that the unpaid amount had been outstanding since 1 February 2008, and that Plaintiff was entitled to calculable attorneys' fees and costs under N.C. Gen. Stat. § 6-21.2. Plaintiff attached the Citibank credit card agreement to the complaint.

¶ 28 Defendant failed to file an answer or any other pleading, and failed to appear in court. That fact was made to appear by Plaintiff's attorney's

affidavit and motion for entry of default. *See* N.C. Gen. Stat. § 1A-1, Rule 55(a). The clerk entered default.

¶ 29 Upon Plaintiff's motion for default judgment and Unifund representative Ballman's affidavit wherein he averred that the amount due is "$10,500.69, together with interest thereon at the rate of 23.99% per annum from and after February 1, 2008, reasonable attorneys fees, and costs," the clerk entered judgment for that amount against Defendant. *See id.* § 1A-1, Rule 55(b)(1). As Plaintiff's claim was for a sum certain, the clerk had the authority to enter the 2010 Default Judgment, and the judgment is not void. *See Loggins*, 270 N.C. App. at 811-12, 841 S.E.2d at 839-40 (concluding the clerk had authority to enter default judgment in a case presenting the same issue with nearly identical facts).

¶ 30 Defendant argues that *Loggins* does not control because in that case the parties did not raise, and this Court did not address, N.C. Gen. Stat. § 1A-1, Rule 8(d) (2009), which Defendant argues is the "controlling statute" on questions of default judgment. But as Rule 8(d) was not relevant to the analysis in *Loggins* or in this case, Defendant's argument is inapposite.

¶ 31 "When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment . . . and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default." N.C. Gen. Stat. § 1A-1, Rule 55(a). Pursuant to N.C. Gen. Stat. § 1A-1, Rule 8(d), "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." N.C. Gen. Stat. § 1A-1, Rule 8(d).

¶ 32 Upon entry of default, "[w]hen the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant." N.C. Gen. Stat. § 1A-1, Rule 55(b)(1). "A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain." *Id.*

¶ 33 Accordingly, after entry of default, a sum certain or sum which can by computation be made certain must be proven by affidavit or verified pleading and the limitations of Rule 8(d) regarding the admission of damages were not relevant to the analysis in *Loggins* or in the present case.

¶ 34 Defendant also cites cases from other jurisdictions to support an argument that credit card debt is of such a complex, incalculable nature

that it can never constitute a sum certain. That argument is contrary to the plain language of our statutes and *Loggins*, and lacks merit.

¶ 35 As Plaintiff's claim was for a sum certain, the clerk had authority to enter the 2010 Default Judgment, and thus, the judgment was not void. *See Loggins*, 270 N.C. App. at 812, 841 S.E.2d at 840. Defendant's argument is overruled.

E. Usury

¶ 36 **[4]** Finally, Defendant argues that the 23.99% interest rate charged on Defendant's debt between 2008 and 2010 violates N.C. Gen. Stat. § 24-1 (2009). Defendant argues that because 23.99% interest is well-above the legal rate of 8% interest per annum, both the 2010 Default Judgment and the 2020 Order are barred under North Carolina law.

¶ 37 "[U]sury is an affirmative defense and must be pleaded." *Wallace Men's Wear, Inc. v. Harris*, 28 N.C. App. 153, 156, 220 S.E.2d 390, 392 (1975) (citing N.C. Gen. Stat. § 1A-1, Rule 8(c)). "When not raised by the pleading the issue may still be tried if raised by the express or implied consent of the parties at trial." *Id.* (citing N.C. Gen. Stat. § 1A-1, Rule 15(b)). Here, Defendant did not attack the 23.99% interest rate prior to entry of the 2010 Default Judgment on 25 February 2010. As Defendant failed to raise the defense of usury to the 2010 Default Judgment in a timely manner, "[D]efendant cannot now present this defense before this Court." *Id.* (citing *Grissett v. Ward*, 10 N.C. App. 685, 179 S.E.2d 867 (1971)).

¶ 38 Likewise, Defendant cannot attack the 2020 Order, which renewed the 2010 Default Judgment.

¶ 39 An action on a judgment is an established means by which the owner of a judgment may obtain a new judgment to collect any unpaid amount due on the prior judgment. *Raccoon Valley*, 32 N.C. App. at 463, 232 S.E.2d at 718. To file an action on a judgment, the plaintiff need allege only "the existence of a prior judgment against the defendant, the fact that full payment on the judgment has not been made, and an accounting of the unpaid balance due and any applicable interest." *Loggins*, 270 N.C. App. at 809, 841 S.E.2d at 838.

> Once a judgment is entered, other evidence of indebtedness is extinguished by the higher evidence of record. Essentially, the judgment merges the debt upon which it was rendered. When this merger occurs, the judgment becomes the evidence, and the only evidence that can be used in a court, of the existence of the original debt.

Hoke, 273 N.C. App. at 404, 848 S.E.2d at 510 (quotation marks and citations omitted).

¶ 40 Accordingly, when the clerk entered the 2010 Default Judgment, that judgment became the *only evidence of the existing debt*. Under *Hoke*, the outstanding debt plus 23.99% interest was settled by the 2010 Default Judgment and is now the debt of record. The 2019 Action simply renewed the existing judgment declaring that Plaintiff is entitled to that established amount.[3] We conclude that Defendant cannot assert usury as an affirmative defense to the 2019 Action on a judgment.

III. Conclusion

¶ 41 For the reasons set forth herein, the clerk had jurisdiction to enter the 2010 Default Judgment and the 2010 Default Judgment was not void. Further, Defendant's "fraud" argument is time-barred and her usury arguments are without merit. Plaintiff was entitled to judgment as a matter of law in its 2019 Action to renew its 2010 Default Judgment. We affirm the trial court's 2020 Order granting summary judgment to Plaintiff.

AFFIRMED.

Judges ZACHARY and MURPHY concur.

3. The additional 8% interest per annum charged on the existing debt, which covers the debt accrued from 2010-2019, has not been challenged by Defendant, and cannot be challenged, as 8% is the legal rate under N.C. Gen. Stat. § 24-1 (2019).

VAITOVAS v. CITY OF GREENVILLE

[282 N.C. App. 393, 2022-NCCOA-169]

MARY SUE VAITOVAS, PLAINTIFF
v.
CITY OF GREENVILLE; PITT COUNTY BOARD OF EDUCATION; PHIL BERGER, IN HIS CAPACITY AS PRESIDENT PRO TEMPORE OF THE SENATE; AND TIM MOORE, IN HIS CAPACITY AS SPEAKER OF THE HOUSE OF REPRESENTATIVES, DEFENDANTS

No. COA20-889

Filed 15 March 2022

Constitutional Law—North Carolina—local act—funding for red light camera enforcement program—not related to health

A three-judge panel correctly determined that a local act regarding funding to operate a red light camera enforcement program did not relate to health and therefore did not violate the North Carolina Constitution's limitation on local laws relating to health and sanitation. The act, which was limited to prescribing how the city could hire and pay a private entity to run the program, did not shift responsibility for administering the program from the municipality nor change how the program would operate—aspects which were governed by a separate act. The Court of Appeals declined to address the constitutionality of the underlying act authorizing red light cameras, which had not been challenged.

Appeal by plaintiff from judgment entered 25 June 2019 and order entered 30 October 2020 by Judges Richard S. Gottlieb, William H. Coward, and Imelda J. Pate in Wake County Superior Court. Heard in the Court of Appeals 8 September 2021.

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

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Robert J. King, III, Jill R. Wilson, and Elizabeth L. Troutman, for defendants-appellees City of Greenville and Pitt County Board of Education.

Attorney General Joshua H. Stein, by Solicitor General Ryan Y. Park, for defendants-appellees Phil Berger and Tim Moore.

DIETZ, Judge.

¶ 1 Some cities and towns in North Carolina have automated traffic cameras that document vehicles running red lights and record the necessary information so that the driver later can be cited for a traffic violation. But importantly, this is only in *some* cities and towns in North Carolina. The General Statutes permit these traffic cameras in Greensboro and High Point, for example, but not Winston-Salem. They are permitted in small towns across the State such as Nags Head, Pineville, and Spring Lake, but not in countless other, similar towns.

¶ 2 The North Carolina Constitution prohibits the General Assembly from enacting "local" laws "[r]elating to health, sanitation, and the abatement of nuisances." N.C. Const. art. II, § 24(1)(a). Plaintiff Mary Sue Vaitovas received a red-light camera citation from the City of Greenville, one of the cities permitted by statute to operate red-light traffic cameras. She brought a constitutional challenge under the local laws provision of our Constitution, but not against the statute authorizing Greenville to implement a red-light traffic camera program. Instead, Vaitovas challenged a separate local law, enacted years later, that permits Greenville to "enter into a contract with a contractor for the lease, lease-purchase, or purchase of" a red-light traffic camera system for the municipality.

¶ 3 Under controlling precedent from our Supreme Court, the challenged statute is not one relating to health. In *City of Asheville v. State*, the Court limited the phrase "relating to" in this portion of our Constitution to those laws with a "material" connection to health and not those with a "tangential or incidental connection." 369 N.C. 80, 102–03, 794 S.E.2d 759, 776 (2016). The challenged act, which does not shift responsibility for the program (it is Greenville's responsibility) and does not change the health-related aspects of the program (those are governed by a separate, unchallenged statute) has, at most, an incidental connection to health. Accordingly, we affirm the three-judge panel's determination that the challenged act "providing for the funding of Greenville's red light camera program, does not relate to health."

¶ 4 The three-judge panel also determined that the underlying, unchallenged red-light traffic camera statute does not relate to health. That issue was not properly before the trial court and we decline to endorse that portion of the trial court's reasoning. Whether the underlying red-light traffic camera legislation is an unconstitutional local law relating to health is a question that must wait for another day.

Facts and Procedural History

¶ 5 In 1997, the General Assembly enacted N.C. Gen. Stat. § 160A-300.1, a law authorizing the City of Charlotte to set up an automated red-light

camera program for the enforcement of traffic laws. Over time, the General Assembly slowly added more cities and towns to the statute and it now applies "only to the Cities of Albemarle, Charlotte, Durham, Fayetteville, Greensboro, Greenville, High Point, Locust, Lumberton, Newton, Rocky Mount, and Wilmington, to the Towns of Chapel Hill, Cornelius, Huntersville, Matthews, Nags Head, Pineville, and Spring Lake, and to the municipalities in Union County." N.C. Gen. Stat. § 160A-300.1(d). The General Assembly added the City of Greenville to the statute in 2000. 2000 N.C. Sess. Laws 37, § 1.

¶ 6 In 2016, the City of Greenville adopted a resolution stating that the city did not believe it was "financially viable" to implement a red-light traffic program under existing law and requesting legislation from the General Assembly, modeled on a similar piece of legislation for the City of Fayetteville, that would authorize the city to contract with a private party to lease or purchase the necessary camera equipment and reporting functionality.

¶ 7 City officials and proponents of the legislation within the General Assembly repeatedly referenced the importance of red-light traffic cameras to "reduce traffic accidents and save lives." But during debate in the House, responding to a legislator's observation that the bill "makes no change or difference to the legality or the ability for cities to use a system like this," the bill sponsor explained that the bill was needed for financial reasons because "the feasibility was not profitable or not—was not at zero sum game for the city itself. Now the city's expenses will be taken care of so they want to put forward with the bill."

¶ 8 The General Assembly enacted the challenged act, N.C. Session Law 2016-64. For ease of reference, we include the entire challenged act below:

> AN ACT TO MAKE CHANGES TO THE LAW GOVERNING RED LIGHT CAMERAS IN THE CITY OF GREENVILLE.
>
> The General Assembly of North Carolina enacts:
>
> SECTION 1. Section 3 of S.L. 2007-341 reads as rewritten:
>
> "SECTION 3. Section 1 of this act applies to the Cities of Albemarle, Charlotte, Durham, Fayetteville, Greenville, Locust, and Rocky Mount and to the municipalities in Union County."

SECTION 2. G.S. 160A-300.1(c), as amended by S.L. 2007-341, is amended by adding a new subdivision to read:

"(4a) A municipality enacting an ordinance implementing a traffic control photographic system may enter into a contract with a contractor for the lease, lease-purchase, or purchase of the system. The municipality may enter into only one contract for the lease, lease-purchase, or purchase of the system, and the duration of the contract may be for no more than 60 months. After the period specified in the contract has expired, the system shall either be the property of the municipality, or the system shall be removed and returned to the contractor."

SECTION 3. G.S. 160A-300.1(c)(2), as amended by S.L. 2007-341, and by Section 1 of this act, reads as rewritten:

"(2) A violation detected by a traffic control photographic system shall be deemed a noncriminal violation for which a civil penalty of ~~seventy-five dollars ($75.00)~~one hundred dollars ($100.00) shall be assessed, and for which no points authorized by G.S. 20-16(c) shall be assigned to the owner or driver of the vehicle nor insurance points as authorized by G.S. 58-36-65."

SECTION 4. The City of Greenville and the Pitt County Board of Education may enter into an interlocal agreement necessary and proper to effectuate the purpose and intent of G.S. 160A-300.1 and this act. Any agreement entered into pursuant to this section may include provisions on cost-sharing and reimbursement that the Pitt County Board of Education and the City of Greenville freely and voluntarily agree to for the purpose of effectuating the provisions of G.S. 160A-300.1 and this act.

SECTION 5. This act applies only to the City of Greenville and the Pitt County Board of Education.

> SECTION 6. Section 3 of this act becomes effective October 1, 2016, and applies to violations committed on or after that date. The remainder of this act becomes effective July 1, 2016.

2016 N.C. Sess. Laws 64, §§ 1–6.

¶ 9 In February 2018, Plaintiff Mary Sue Vaitovas received a notice of violation for allegedly running a red light. On 17 April 2018, Vaitovas appealed the imposition of the civil penalty at an administrative hearing and lost. She later filed this action in the trial court, alleging that Session Law 2016-64 violates the North Carolina Constitution's limitation on local laws relating to health. Vaitovas sued the State (through official capacity suits against officials in the General Assembly), the City of Greenville, and the Pitt County Board of Education.

¶ 10 The case eventually was assigned to a three-judge panel of superior court judges. Before that assignment, the State moved to dismiss and the trial court declined to rule on the motion, instead indicating that it should be resolved by the three-judge panel. Later, on cross-motions for summary judgment from Vaitovas and the municipal defendants, the trial court granted summary judgment in favor of the City of Greenville and the Pitt County Board of Education in a reasoned order discussing the background and constitutionality of the challenged statute. Vaitovas appealed.

¶ 11 We dismissed the appeal because the three-judge panel had not yet resolved the claims against the State—something that now appears to have been an oversight by all involved. *Vaitovas v. City of Greenville*, 271 N.C. App. 578, 844 S.E.2d 317 (2020). On remand, the trial court dismissed the claims against the State in a one-paragraph order incorporating its reasoning from the summary judgment ruling in favor of the municipal defendants. Vaitovas again appealed.

Analysis

¶ 12 We review a trial court's ruling on state constitutional question *de novo*. *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 110–11 (2018). "It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case." *Glenn v. Bd. of Educ. of Mitchell County*, 210 N.C. 525, 529, 187 S.E. 781, 784 (1936). "In performing our task, we begin with a presumption that the laws duly enacted by the General Assembly are valid." *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015). Accordingly, "a law will be

declared invalid only if its unconstitutionality is demonstrated beyond reasonable doubt." *Id.*

¶ 13 It also is well settled that the North Carolina Constitution confers to our General Assembly plenary power "to pass all needful laws, except when barred by constitutional restrictions." *Town of Shelby v. Cleveland Mill & Power Co.*, 155 N.C. 196, 200, 71 S.E. 218, 219–20 (1911). Vaitovas argues that Session Law 2016-64 is unconstitutional because it is barred by Article II, Section 24(1)(a) of the North Carolina Constitution, which prevents the General Assembly from passing any local acts related to health:

> (1) Prohibited Subjects. The General Assembly shall not enact any local, private, or special act or resolution:
>
> (a) Relating to health, sanitation, and the abatement of nuisances
>
> . . .
>
> (3) Prohibited acts void. Any local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void.

N.C. Const. art II, § 24(1)(a), (3).

¶ 14 In *City of Asheville v. State*, our Supreme Court held that, to determine whether a law is one "relating to" health, sanitation, or the abatement of nuisances, a court must examine whether "in light of its stated purpose and practical effect, the legislation has a material, but not exclusive or predominant, connection to issues involving health, sanitation, and the abatement of nuisances." 369 N.C. 80, 103, 794 S.E.2d 759, 776 (2016). When there is merely the "existence of a tangential or incidental connection between the challenged legislation and health and sanitation," the law is not one relating to health or sanitation. *Id.* at 102, 794 S.E.2d at 776.

¶ 15 So, for example, "a local act that shifts responsibility for enforcing health and safety regulations from one entity to another clearly relates to health and sanitation." *Id.* at 104, 794 S.E.2d at 777. This is so, our Supreme Court explained, because a law changing the government entity or "officers to whom is given the duty of administering the health laws" has a material connection to how that health law will be administered. *Id.* at 105, 794 S.E.2d at 777.

¶ 16 Vaitovas cites various evidence in the record as proof of the purpose of the challenged statute. For example, she cites public statements by city officials, affidavits from the city's police chief, and statements on the floor of the State House by proponents of the legislation. But what individual legislators think about the purpose of a statute is rarely (if ever) helpful in interpreting the intent of the General Assembly as a whole. And what local officials think about a statute is even less so. That is why our Supreme Court emphasized that while the General Assembly's "stated purpose"—a phrase implying a statement from the legislature as a whole—might be relevant to the analysis, it is the law's *effect* that is "pertinent to, and perhaps determinative of, the required constitutional inquiry." *Id.* at 102, 794 S.E.2d at 775.

¶ 17 Here, the effect of the challenged act is quite different from those our Supreme Court determined are relating to health. The challenged act concerns the mechanics of how Greenville can hire and pay a private firm to assist with its red-light camera program. It does not change *who* is responsible for administering the program—it is still the City of Greenville's responsibility. And it does not change *how* the red-light traffic program operates—that is governed by a separate, unchallenged statute.

¶ 18 Were we to hold that this local act relates to health, our ruling would conflict with the Supreme Court's holding in *City of Asheville*. There, the Court rejected the argument that "relating to" means "[c]onnected in some way" or "having a relationship to or with something else." *Id.* The Court found that interpretation too broad. Instead, the Court limited the term to those local acts having a "material" connection to health but not those with a "tangential or incidental connection." *Id.* at 102–03, 794 S.E.2d at 775–76.

¶ 19 The challenged act falls squarely into the latter category, as a law with only an incidental effect on health. Whatever impact red-light traffic cameras have on the health of those in Greenville, that effect is governed by a separate statute and, both before and after the challenged act, Greenville remains solely responsible for administering all health-related aspects of a red-light traffic camera program as the General Assembly has instructed. We therefore affirm the three-judge panel's determination that the challenged act, "as a means of providing for the funding of Greenville's red light camera program, does not relate to health."

¶ 20 The three-judge panel also determined that "even if this Court needs to address the more fundamental question of whether red light cameras

themselves relate to health, this Court determines that they do not." The trial court did not need to address that question. Vaitovas, for whatever reason, did not challenge the underlying statute authorizing red light cameras in some parts of North Carolina but not other, similarly situated areas. *See* N.C. Gen. Stat. § 160A-300.1. North Carolina courts do not pass on the constitutionality of state statutes not challenged by the litigants, and for good reason. *Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931). Accordingly, we leave for another day the question of whether the General Assembly's red-light traffic camera legislation is an unconstitutional local law relating to health.

Conclusion

¶ 21 For the reasons stated above, the judgment of the three-judge panel is affirmed.

AFFIRMED.

Judges GORE and GRIFFIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 MARCH 2022)

STATE v. BROWN 2022-NCCOA-73 No. 20-737	Wake (17CRS219568) (17CRS2340)	No Error
BEAR WALLOW SPRINGS AT LAKE TOXAWAY PROP. OWNERS ASS'N v. LAKE TOXAWAY CMTY. ASS'N 2022-NCCOA-170 No. 21-94	Transylvania (18CVS352)	Vacated and Remanded
COATES v. DURHAM CNTY. 2022-NCCOA-171 No. 21-281	Durham (17CVS2906)	Dismissed in Part, Vacated in Part, and Remanded
DCW CLASSROOM DESIGNS, INC. v. SWARTZ 2022-NCCOA-172 No. 21-288	Cabarrus (16CVS2797)	Affirmed
DIVINE PURPOSE INT'L v. DELLINGER 2022-NCCOA-173 No. 21-30	Cleveland (20CVD371)	Affirmed
HEDGECOCK LUMBER CO. v. APPLE 2022-NCCOA-174 No. 21-376	Forsyth (20CVS3420)	Affirmed
IN RE D.C-F. 2022-NCCOA-175 No. 21-343	Durham (20SPC2122)	Affirmed
IN RE D.K.B. 2022-NCCOA-176 No. 21-562	New Hanover (20JB118)	Affirmed
IN RE K.L.L. 2022-NCCOA-177 No. 21-529	Gaston (18JT287)	Affirmed
IN RE M.R.R. 2022-NCCOA-178 No. 21-520	Yadkin (19JT26)	Affirmed
IN RE N.J.D.K. 2022-NCCOA-179 No. 21-569	Franklin (19JT70)	Affirmed

KOCHILLA v. MATTAMY CAROLINA CORP. 2022-NCCOA-180 No. 21-410	Mecklenburg (19CVS21763)	Modified and affirmed in part; affirmed in part; vacated in part.
OCEAN ISLE W. HOMEOWNERS ASS'N, INC. v. OCEAN POINT UNIT OWNERS ASS'N, INC. 2022-NCCOA-181 No. 21-131	Brunswick (19CVS1430)	Affirmed
PATTON v. PATTON 2022-NCCOA-182 No. 21-256	Buncombe (18SP845)	Affirmed
SARVIS v. DURHAM CNTY. 2022-NCCOA-183 No. 21-282	Durham (18CVS3010)	Dismissed in Part, Vacated in Part, and Remanded
SPLAWN v. BRADSHAW 2022-NCCOA-184 No. 21-412	Wake (19CVD16207)	Dismissed
STATE v. DAUGHERTY 2022-NCCOA-185 No. 21-448	Buncombe (19CRS89087)	Vacated and Remanded
STATE v. GURKIN 2022-NCCOA-186 No. 21-487	Martin (09CRS413)	Affirmed
STATE v. HARRIS 2022-NCCOA-187 No. 21-103	Rutherford (09CRS50256-59) (09CRS50289)	Vacated and Remanded
STATE v. HARRISON 2022-NCCOA-188 No. 21-197	Guilford (14CRS86171) (17CRS24427) (18CRS24331-33)	AFFIRMED IN PART; DISMISSED IN PART.
STATE v. HAYNER 2022-NCCOA-189 No. 20-784	Randolph (15CRS54303)	No Error
STATE v. HOLLEY 2022-NCCOA-190 No. 20-760	Washington (17CRS50253) (17CRS50256)	No Error
STATE v. JACKSON 2022-NCCOA-191 No. 20-694	Harnett (18CRS53507-08) (18CRS53509-10)	No prejudicial error.

STATE v. PATTERSON 2022-NCCOA-192 No. 21-224	Mecklenburg (17CRS30256)	Vacated and remanded for resentencing.
STATE v. ROBINSON 2022-NCCOA-193 No. 21-382	Catawba (19CRS2639) (19CRS53322)	Dismissed
STATE v. STINSON 2022-NCCOA-194 No. 20-890	Mecklenburg (18CRS3019-22) (18CRS3030) (18CRS3032)	No Error
STATE v. SWANSON 2022-NCCOA-195 No. 21-393	Catawba (10CRS53269-71) (10CRS53273) (11CRS5844-45) (11CRS5847)	Vacated
STATE v. WALL 2022-NCCOA-196 No. 20-538	Catawba (16CRS1233) (16CRS170)	No Error
STATE v. WILLIAMS 2022-NCCOA-197 No. 21-232	Wake (19CRS214424)	Affirmed.

BARRINGTON v. DYER

[282 N.C. App. 404, 2022-NCCOA-198]

JAMES R. BARRINGTON, PLAINTIFF
v.
JEAN CANDY DYER, EXECUTRIX FOR THE ESTATE OF WILLIAM D. BARRINGTON, JR., DEFENDANT

No. COA21-269

Filed 5 April 2022

1. Collateral Estoppel and Res Judicata—res judicata—similar claims—based on same facts as previous action

The trial court properly dismissed plaintiff's complaint (for breach of trust and breach of fiduciary duty) pursuant to Rule 12(b)(6) based on res judicata, where plaintiff's claims were similar to and stemmed from the same factual basis as the claims he had raised in a previous action, which the trial court had dismissed, and where plaintiff did not pursue further review once the Court of Appeals dismissed his appeal in the previous action.

2. Injunctions—gatekeeper order—imposing pre-filing injunction—factors—narrowly tailored

In plaintiff's fourth action against his deceased father's estate relating to his father's conveyance of real property from a revocable trust (of which plaintiff was the sole beneficiary), the trial court did not abuse its discretion by entering a gatekeeper order enjoining plaintiff from filing any further complaints, motions, or papers relating to the property, issues, and parties involved in all four actions. The court properly considered relevant factors to support imposing the order, including the burden plaintiff's numerous filings placed on the judicial system, the frivolous nature of those filings, and the fact that plaintiff never asserted a claim against the estate during the applicable statutory period. Further, the order's scope was narrowly tailored to address the specific circumstances at issue and therefore would not preclude plaintiff from filing legitimate, unrelated actions in the future.

3. Attorney Fees—Rule 11 sanctions—attorney fees from prior appeal—vacated and remanded

In plaintiff's fourth action against his deceased father's estate relating to his father's conveyance of real property from a revocable trust (of which plaintiff was the sole beneficiary), the trial court properly sanctioned plaintiff under Civil Procedure Rule 11 by ordering him to pay attorney fees to the estate's executrix after finding that his pleadings lacked factual sufficiency and were made for

an improper purpose (as evidenced by plaintiff's repeated filings). Nevertheless, the attorney fees award was vacated and remanded because the trial court improperly included fees for plaintiff's prior appeal to the Court of Appeals, which only the Court of Appeals itself had authority to order under Appellate Rule 34.

Appeal by plaintiff from order entered 3 December 2020 by Judge Paul Quinn in Carteret County Superior Court. Heard in the Court of Appeals 11 January 2022.

White & Allen, P.A., by E. Wyles Johnson, Jr., for plaintiff-appellant.

Schulz Stephenson Law, by Bradley N. Schulz, for defendant-appellee.

TYSON, Judge.

¶ 1 James R. Barrington ("Plaintiff") appeals from an order which granted the executrix of William D. Barrington, Jr.'s estate, Jean Candy Dyer's ("Defendant") Rule 12(b)(6) motion to dismiss, a gatekeeping order against Plaintiff, and an award of attorney's fees. We affirm in part, vacate in part, and remand.

I. Background

¶ 2 William D. Barrington, Jr. ("Decedent") and wife, Barbara L. Barrington ("Barrington), owned two parcels of real property located in Carteret County and real property located in Massachusetts. Decedent and Barrington are the parents of three children, including Plaintiff and Defendant.

¶ 3 On 8 June 2011, Decedent and Barrington executed the William D. Barrington and Barbara L. Barrington Revocable Trust ("Revocable Trust") and the William D. Barrington and Barbara L. Barrington Irrevocable Trust ("Irrevocable Trust"). Under the terms of both Revocable and Irrevocable Trusts, all of the trust property was to be distributed to Plaintiff *per stirpes*.

¶ 4 Decedent and Barrington executed a quit-claim deed conveying a 99.99% remainder interest in real property into the Revocable Trust, which was recorded in the Carteret County Registry at Book 1379, Page 265 on 29 June 2011. Decedent and Barrington reserved a life estate for themselves.

¶ 5 Barrington died 28 March 2012. Three years later, Decedent terminated the remainder interest in the revocable trust and conveyed the

property to himself in fee simple absolute on 9 February 2015. This conveyance was recorded in the Carteret County Registry in Book 1501, Pages 267-268.

¶ 6 Decedent died two years later on 23 March 2017. Decedent's will was probated with the Carteret County Clerk of Superior Court on 25 April 2017. Plaintiff did not assert or file any claim against Decedent's estate during the statutory period.

¶ 7 Plaintiff filed an action for breach of trust and breach of fiduciary duty relating to the 2015 transfers of real estate against Decedent's estate on 9 February 2018 in Carteret County Superior Court. Plaintiff voluntarily dismissed the action on 26 February 2018. That same day Plaintiff filed another action in Carteret County Superior Court alleging similar claims against Decedent's estate. Plaintiff also pleaded claims against attorney Jana Wallace ("Wallace"), who had prepared the deeds at issue. Plaintiff voluntarily dismissed the claims against Wallace. Following a hearing, the trial court granted the estate's motion to dismiss on 14 August 2018.

¶ 8 Plaintiff filed a notice of appeal to this Court, which was voluntarily dismissed following Plaintiff's failure to comply with the Rules of Appellate Procedure. Plaintiff filed another action with nearly identical claims related to the same real property on 27 July 2018. Following a hearing, the trial court entered an order dismissing Plaintiff's action on 16 April 2019.

¶ 9 Plaintiff appealed to this Court, which dismissed Plaintiff's appeal by opinion dated 21 April 2020. *See Barrington v. Dyer*, 271 N.C. App. 179, 840 S.E.2d 540 (2020) (unpublished).

¶ 10 Plaintiff filed the underlying action on 13 January 2020 alleging similar claims as were asserted in his prior three actions. Defendant filed a motion to dismiss, motion to stay, motion for gatekeeper order, and motion for attorney's fees on 16 March 2020.

¶ 11 The trial court entered an order allowing Defendant's Rule 12(b)(6) motion to dismiss, based upon res judicata. The trial court also entered a gatekeeping order against Plaintiff and awarded attorney's fees to Defendant on 3 December 2020. Plaintiff appeals.

II. Jurisdiction

¶ 12 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

¶ 13 Plaintiff argues the trial court erred by: (1) allowing Defendant's motion to dismiss; (2) entering the gatekeeper order against him; and, (3) awarding Defendant attorney's fees.

IV. Motion to Dismiss

A. Standard of Review

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

¶ 15 This Court, on appeal from an order allowing a motion to dismiss under Rule 12(b)(6), reviews *de novo* "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]" *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (ellipses original) (citation and quotation marks omitted). This Court also "consider[s] the allegations in the complaint true, construe[s] the complaint liberally, and only reverse[s] the trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Id.* (citation omitted).

B. Res Judicata

¶ 16 **[1]** Plaintiff asserts the trial court erred in dismissing his complaint for res judicata. Dismissal of a complaint under Rule 12(b)(6) for failure to state a claim is proper when one of the following conditions is met: "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985).

¶ 17 "The doctrine of *res judicata* provides that a final judgment on the merits in a prior action precludes a second suit based on the same cause of action between the same parties or those in privity with them." *Holly Farm Foods, Inc. v. Kuykendall*, 114 N.C. App. 412, 416, 442 S.E.2d 94, 97 (1994). Res judicata not only bars "the relitigation of matters determined in the prior proceeding but also all material and relevant

matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence could and should have brought forward." *Id.* (citation and internal quotation marks omitted). "The defense of res judicata may not be avoided by shifting legal theories or asserting a new or different ground for relief[.]" *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 30, 331 S.E.2d 726, 735 (1985) (citation omitted).

¶ 18 Plaintiff's claims all stem from the same factual basis: Decedent's conveyances from the revocable trust and Plaintiff's claims in the parcels. When Plaintiff did not pursue an appeal or further review from this Court's 21 April 2020 opinion, res judicata precludes Plaintiff from relitigating the same or similar claims in a subsequent action. Plaintiff's complaint was properly dismissed for failure to state a claim upon which relief could be granted for res judicata.

V. Gatekeeper Order

A. Standard of Review

¶ 19 This Court reviews the trial court's imposition of a sanction, including a gatekeeper order, under an abuse of discretion standard. *See Fatta v. M & M Properties Mgmt., Inc.*, 224 N.C. App. 18, 26, 735 S.E.2d 836, 841 (2012). A trial court may be reversed for abuse of discretion only upon a showing that its actions are "manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

B. Analysis

¶ 20 **[2]** Plaintiff argues the trial court erred by entering a gatekeeper order against him. The gatekeeper order prohibits Plaintiff:

> from filing any further complaints, motions or papers in the courts of Carteret County, North Carolina, related in any way to the Estate of William Barrington Jr., the real estate or personal property at issue in this Estate or previously owned by Mr. Barrington, or claims of Breach of Trust or Breach of Fiduciary Duty related in any way to the Revocable Trust of William D. Barrington, Jr., William D. Barrington Jr., the Estate of William D. Barrington Jr., or Jean Candy Dyer, Executrix, or individually.

Plaintiff asserts this gatekeeper order is overbroad, based upon improper findings of fact, and fails to include a method by which he could file legitimate actions in the future.

¶ 21 In *Cromer v. Kraft Foods North America*, the United States Court of Appeals for the Fourth Circuit stated that prior to the imposition of a prefiling injunction the trial court is required to:

> weigh all the relevant circumstances, including (1) the party's history of litigation, in particular whether he has filed vexatious, harassing or duplicative lawsuits; (2) whether the party had a good faith basis for pursuing the litigation, or simply intended to harass; (3) the extent of the burden on the courts and other parties resulting from the party's filings; and (4) the adequacy of alternative sanctions.

Cromer v. Kraft Foods N. Am., Inc., 390 F.3d 812, 818 (4th Cir. 2004).

¶ 22 Here, the trial court's order contains specific findings of fact, reciting the history of Plaintiff's litigation against Defendant and Decedent's estate, and its conclusion that no basis exists in law for the underlying complaint. The trial court concluded "Plaintiff's numerous filings were frivolous, amounted to harassment, have caused the Defendant to incur needless expense, and have placed an undue burden on the judicial system. The four cases have no merit."

¶ 23 The trial court further noted Plaintiff never asserted a claim against Decedent's estate and the creditor notice and claim period have long expired. Plaintiff pursued four separate actions in North Carolina, including two prior appeals to this Court, plus two actions filed in the Commonwealth of Massachusetts. The trial court properly considered these four factors, and its conclusions are supported by the record. *See id.*

¶ 24 The Court of Appeals for the Fourth Circuit noted in *Cromer* that a trial court must also narrowly tailor a pre-filing injunction "to fit the specific circumstances at issue." *Id.* Plaintiff contends the trial court failed to do so. We disagree.

¶ 25 The trial court limited the scope of the gatekeeper order to those papers filed in Carteret County, which are solely related to the real and personal property of Decedent, Decedent's estate, and the Executrix. Unlike in *Cromer*, where the injunction forbade "any and all filings" in the United States District Court for the Western District of North Carolina, which applied to unrelated litigation, the scope of the gatekeeping order before us is narrow and focused on Plaintiff's prior actions in the same matters. *Id.* at 819.

¶ 26 Plaintiff has failed to show the trial court abused its discretion by imposing the gatekeeper order after it properly considered and applied the factors necessary to support imposition of the order. The trial court's findings and conclusions are supported by the record, and the order is narrowly tailored to address the specific circumstances and Plaintiff's actions at issue. Plaintiff's argument is overruled.

VI. Attorney's Fees

A. Standard of Review

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).
>
> Finally, in reviewing the appropriateness of the particular sanction imposed, an abuse of discretion standard is proper because the rule's provision that the court shall impose sanctions for motions abuses . . . concentrates the court's discretion on the *selection* of appropriate sanction rather than on the *decision* to impose sanctions.

Turner v. Duke Univ., 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989) (citation and internal quotation marks omitted).

B. Sanctions

¶ 27 **[3]** Plaintiff argues the trial court erred in awarding Defendant attorney's fees pursuant to Rule 11. *See* N.C. Gen. Stat. § 1A-1, Rule 11 (2021).

¶ 28 "According to Rule 11, the signer certifies that three distinct things are true: the pleading is (1) well grounded in fact; (2) warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law (legal sufficiency); and (3) not interposed for any improper purpose." *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d

327, 332 (1992) (internal quotation marks omitted). Our Supreme Court further held: "[a] breach of the certification to any one of these three prongs is a violation of the Rule." *Id.*

¶ 29 The trial court found a lack of factual sufficiency in the pleadings and the pleadings were made for an improper purpose. Plaintiff's improper purpose can be inferred from his repetitive behavior. *See Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992). The trial court did not err by sanctioning Plaintiff under Rule 11.

C. Amount

¶ 30 Plaintiff further asserts the trial court erred in awarding attorney's fees for a prior appeal to this Court. The trial court held "the time spent on the appeal to the N.C. Court of Appeals . . . to be fair and reasonable." The trial court awarded attorney's fees totaling $28,833.25 to Defendant, including for the previous appeal to this Court.

¶ 31 "The authority to sanction frivolous appeals by shifting expenses incurred on appeal . . . onto appellants is *exclusively granted* to the appellate courts under N.C. R. App. P. 34." *Hill v. Hill*, 173 N.C. App. 309, 317, 622 S.E.2d 503, 509 (2005) (emphasis supplied) (citation and internal quotation marks omitted).

¶ 32 "[A] trial court's award of attorneys' fees must be supported by proper findings considering 'the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.' " *ACC Const., Inc. v. SunTrust Mortg., Inc.*, 239 N.C. App. 252, 271, 769 S.E.2d 200, 213 (2015) (citation omitted). The North Carolina State Bar has issued a conjunctive eight-factor rule concerning attorney fees:

> (a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

27 N.C. Admin. Code 2.1.05 (Supp. 2021).

¶ 33 We vacate the inclusion of fees awarded for Defendant in the prior appeal, the amount awarded, and remand to the trial court. "On remand, the trial court shall rely upon the existing record, but may in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the instant opinion." *Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999).

VII. Conclusion

¶ 34 We affirm the trial court's conclusion to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) based upon res judicata. We also affirm the trial court's conclusion to sanction Plaintiff for violations of Rule 11 and the imposition of the gate keeping order.

¶ 35 We vacate the trial court's award of attorney's fees for Plaintiff's prior appeal to this Court. We vacate the amounts awarded pursuant to Rule 11 and remand to the trial court for further hearing. *It is so ordered.*

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Chief Judge STROUD and Judge GORE concur.

BIO-MED. APPLICATIONS OF N.C. INC. v. N.C. DEP'T OF HEALTH & HUM. SERVS.

[282 N.C. App. 413, 2022-NCCOA-199]

BIO-MEDICAL APPLICATIONS OF NORTH CAROLINA INC D/B/A BMA OF SOUTH GREENSBORO AND FRESINIUS KIDNEY CARE WEST JOHNSTON, PETITIONER
v.
NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING & CERTIFICATE OF NEED SECTION, RESPONDENT
AND
TOTAL RENAL CARE OF NORTH CAROLINA, LLC, D/B/A CENTRAL GREENSBORO DIALYSIS AND CLAYTON DIALYSIS, RESPONDENT-INTERVENOR

No. COA21-318

Filed 5 April 2022

Hospitals and Other Medical Facilities—certificate of need—contested case—burden of showing substantial prejudice—increased competition—insufficient

After the Department of Health and Human Services (DHHS) partially denied petitioner's certificate of need applications, allowing the relocation of some but not all of petitioner's kidney dialysis stations, an administrative law judge properly entered summary judgment against petitioner in its contested case where petitioner had the burden under N.C.G.S. § 150B-23(a) to demonstrate that DHHS's decision substantially prejudiced its rights and failed to meet that burden by showing only that it would face increased competition as a result of the partial denial of its applications.

Appeal by Petitioner from final decision entered 3 November 2020 by Administrative Law Judge Stacey Bice Bawtinhimer in the Office of Administrative Hearings. Heard in the Court of Appeals 14 December 2021.

Fox Rothschild LLP, by Marcus C. Hewitt and Elizabeth Sims Hedrick, for Petitioner-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Derek L. Hunter and Assistant Attorney General Kimberly M. Randolph, for Respondent-Appellee.

Wyrick Robbins Yates & Ponton LLP, by Lee M. Whitman and J. Blakely Kiefer, for Respondent-Intervenor-Appellee.

GRIFFIN, Judge.

¶ 1 Petitioner Bio-Medical Applications of North Carolina, Inc., appeals from a final decision granting summary judgment in favor of Respondent North Carolina Department of Health and Human Services and Respondent-Intervenor Total Renal Care, LLC. BMA argues that the administrative law judge erred by granting summary judgment in favor of DHHS and TRC. After review, we affirm the ALJ's decision.

I. Factual and Procedural Background

¶ 2 BMA and TRC own and operate kidney dialysis clinics across North Carolina. N.C. Gen. Stat. § 131E-178(a) provides that any entity seeking to "offer or develop a new institutional health service[,]" including dialysis clinics, must first apply for and obtain a certificate of need ("CON") from DHHS. N.C. Gen. Stat. § 131E-178(a) (2019).

¶ 3 In July 2019, a "Semiannual Dialysis Report ('SDR') identified a deficit of 20 dialysis stations in Guilford County" and "a deficit of 12 dialysis stations in Johnston County." Pursuant to the SDR, DHHS could approve no more than the number of stations necessary to satisfy the deficit in each county.

¶ 4 On 15 July 2019, BMA and TRC each "submitted competing applications to the CON Section[s]" for Guilford and Johnston Counties. In its application for the Guilford County service area, "BMA proposed to relocate 12 existing dialysis stations" to Guilford County, and "TRC proposed to develop a new 10-station dialysis facility in Guilford County[.]" Because the total number of stations proposed by BMA and TRC exceeded the deficit identified in the SDR, BMA's and TRC's applications "could not both be approved as proposed." Similarly, BMA's and TRC's CON applications for the Johnston County service area could not both be approved because, collectively, the number of proposed stations in their applications exceeded the deficit identified in the SDR.

¶ 5 On 20 December 2019, "the CON Section found both Guilford County applications conforming to all applicable statutory and regulatory criteria." DHHS approved TRC's application in full and partially approved BMA's application, allowing BMA to "develop 10 of the 12 dialysis stations it proposed." DHHS also "found both Johnston County applications conforming to all applicable statutory and regulatory criteria." DHHS again approved TRC's application in full and partially granted BMA's application, allowing BMA to "relocate 2 of the 4 requested dialysis stations" to Johnston County.

¶ 6 On 17 January 2020, BMA appealed DHHS's decisions as to both its Guilford and Johnston County applications by filing petitions for contested case hearings with the Office of Administrative Hearings. BMA subsequently filed a motion for summary judgment, arguing that its "rights were substantially prejudiced by [DHHS's] decisions" and that DHHS erred by granting TRC's applications. DHHS and TRC, as a party intervenor, jointly filed a cross-motion for summary judgment, contending that BMA could not "show that it was substantially prejudiced by [DHHS's] decision[s.]"

¶ 7 On 6 October 2020, a hearing was held on the parties' motions for summary judgment, after which the ALJ entered a final decision granting DHHS's and TRC's joint motion for summary judgment because BMA failed to establish that DHHS substantially prejudiced BMA by denying its CON applications. BMA timely filed notice of appeal from the final decision.

II. Analysis

¶ 8 BMA argues that the ALJ erred by granting DHHS's and TRC's motion for summary judgment because (1) requiring BMA to demonstrate substantial prejudice violated its "unconditional statutory right to administrative review" and (2) even if BMA was required to demonstrate substantial prejudice, the ALJ erred in finding that BMA did not demonstrate substantial prejudice. We hold that BMA is required to demonstrate substantial prejudice pursuant to N.C. Gen. Stat. § 150B-23(a) and that BMA has not met its burden. We therefore affirm the ALJ's final decision.

¶ 9 "As summary judgment is a matter of law, review by this Court in this matter is *de novo*." *Presbyterian Hosp. v. N.C. Dep't of Health & Hum. Servs.*, 177 N.C. App. 780, 782, 630 S.E.2d 213, 214 (citation omitted).

> The burden is upon the moving party to show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. To meet its burden, the movant is required to present a forecast of the evidence available at trial that shows there is no material issue of fact concerning an essential element of the non-movant's claim and that the element could not be proved by the non-movant through the presentation of further evidence.

Id. at 782–83, 630 S.E.2d at 215 (citation and internal quotation marks omitted).

A. Substantial Prejudice Requirement

¶ 10 BMA argues that it is not required to demonstrate substantial prejudice "or other injury in fact because the legislature has granted it an unconditional right to administrative review[.]" We disagree.

¶ 11 "After a decision of the Department to issue, deny or withdraw a certificate of need[,] . . . , any affected person . . . shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes." N.C. Gen. Stat. § 131E-188(a) (2019). Applicants for a certificate of need are considered "affected persons" under the CON statutes. *Id.* § 131E-188(c). "In addition to meeting this prerequisite to filing a petition for a contested case hearing regarding CONs, the petitioner must also satisfy the actual framework for *deciding* the contested case as laid out in section 150B-23(a) of . . . the General Statutes." *Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Hum. Servs.*, 235 N.C. App. 620, 623, 762 S.E.2d 468, 471 (2014) (internal quotation marks and brackets omitted).

¶ 12 N.C. Gen. Stat. § 150B-23(a) provides in pertinent part:

> A party that files a petition shall . . . state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, *or has otherwise substantially prejudiced the petitioner's rights* and that the agency did any of the following:
>
> (1) Exceeded its authority or jurisdiction.
>
> (2) Acted erroneously.
>
> (3) Failed to use proper procedure.
>
> (4) Acted arbitrarily or capriciously.
>
> (5) Failed to act as required by law or rule.
>
> The parties in a contested case shall be given an opportunity for a hearing without undue delay. Any person aggrieved may commence a contested case under this section.

N.C. Gen. Stat. § 150B-23(a) (2019) (emphasis added). "This Court has interpreted subsection (a) to mean that the ALJ in a contested case hearing must determine whether the petitioner has met its burden in showing that the agency substantially prejudiced the petitioner's rights."

Surgical Care Affiliates, 235 N.C. App. at 624, 762 S.E.2d at 471 (internal quotation marks and brackets omitted); *see also Parkway Urology, P.A. v. N.C. Dep't of Health & Hum. Servs.*, 205 N.C. App. 529, 536–37, 696 S.E.2d 187, 193 (2010) ("Under N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine *whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights*. . . . [The petitioner's] contention that it was unnecessary for it to show substantial prejudice to be entitled to relief is contrary to our case law and is without merit." (emphasis in original)). BMA is thus required to demonstrate substantial prejudice pursuant to N.C. Gen. Stat. § 150B-23(a) and our caselaw construing its requirements.

¶ 13 BMA likens the substantial prejudice requirement to an "injury in fact" requirement for purposes of standing, citing *Committee to Elect Dan Forest v. Employees Political Action Committee*, 376 N.C. 558, 2021-NCSC-6. This contention is misguided. Unlike standing, a petitioner has to demonstrate substantial prejudice as part of the merits of its case. *See Parkway Urology*, 205 N.C. App. at 536, 696 S.E.2d at 193 (describing substantial prejudice as one of "the statutory requirements that must be met in order for a petitioner to be entitled to relief" and part of "[t]he actual framework of *deciding* the contested case" (emphasis in original)). BMA's argument is an attempt to avoid proving the merits of its case by asking this Court to hold that it is exempt from the substantial prejudice requirement. This argument is without merit.

B. Proof of Substantial Prejudice

¶ 14 BMA next argues that the ALJ "erroneously concluded that BMA did not forecast evidence of" substantial prejudice. By "limit[ing] the number of its own stations that [BMA] could move[,]" BMA contends that DHHS "infringed and deprived [BMA] of its liberty and property rights[,] thereby preventing [BMA] from conducting business as it chooses." We disagree.

¶ 15 "In order to establish substantial prejudice, the petitioner must provide specific evidence of harm resulting from the award of the CON . . . that went beyond any harm that necessarily resulted from additional . . . competition[.]" *Surgical Care Affiliates*, 235 N.C. App. at 631, 762 S.E.2d at 476 (citation omitted). "The harm required to establish substantial prejudice cannot be conjectural or hypothetical" and instead must be "concrete, particularized, and actual or imminent." *Id.* (internal quotation marks omitted).

¶ 16 We hold that BMA did not forecast sufficient evidence of substantial prejudice to survive summary judgment. BMA argues that it was substantially prejudiced by the partial denial of its CON application because it "limited the number of its own stations that [BMA] could move[.]" However, this Court has previously held in multiple cases that a petitioner's "mere status as a denied competitive CON applicant alone is insufficient [to establish substantial prejudice] as a matter of law." *Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Hum. Servs.*, 237 N.C. App. 99, 766 S.E.2d 699, 2014 WL 5770252, at *3 (2014) (unpublished) (citing *CaroMont Health, Inc. v. N.C. Dep't of Health & Hum. Servs.*, 231 N.C. App. 1, 4–5, 751 S.E.2d 244, 248 (2013); *Parkway Urology*, 205 N.C. App. at 536–37, 696 S.E.2d at 193); *Bio-Medical Apps. Of N. Carolina v. N.C. Dep't of Health & Hum. Servs.*, 247 N.C. App. 899, 788 S.E.2d 684, 2016 WL 3166601, at *3–4 (2016) (unpublished) (holding that the petitioner did not establish substantial prejudice where "the Agency approved [the petitioner] to develop seven dialysis stations instead of the 11 it requested" in its CON application). Accordingly, BMA's argument that partial denial of its CON application constitutes substantial prejudice is without merit.

¶ 17 We note that "[t]his Court has previously held that, as material questions of fact will always exist, summary judgment is never appropriate" where, as here, "two or more applicants conform to the majority of the statutory criteria." *Presbyterian Hosp.*, 177 N.C. App. at 783, 630 S.E.2d at 215 (citing *Living Centers-Southeast v. N.C. Dep't of Health & Hum. Servs.*, 138 N.C. App. 572, 580–81, 532 S.E.2d 192, 197 (2000)). In *Living Centers*, however, the Court held that summary judgment is never appropriate as to the *statutory criteria*, not as to substantial prejudice. *See Living Centers*, 138 N.C. App. at 580–81, 532 S.E.2d at 197 ("[W]e believe that it is inherent that where two or more certificate of need applicants *conform to the majority of the criteria in N.C. Gen. Stat. § 131E-183*, as in the case at bar, and are reviewed comparatively, there will always be genuine issues of fact *as to who is the superior applicant*." (emphasis added)). Substantial prejudice, which was not at issue in *Living Centers*, is a distinct and separate element of a petitioner's claim; agency error as to the statutory criteria is another element. *See, e.g.*, *Britthaven, Inc. v. N.C. Dep't of Hum. Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995) ("Under N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, *and that the agency also* acted outside its authority, acted erroneously, acted arbitrarily and

capriciously, used improper procedure, or failed to act as required by law or rule." (emphasis added)).

¶ 18 Material questions of fact will of course always exist when both applicants for a competitive CON meet all of the statutory criteria. *Living Centers*, 138 N.C. App. at 580–81, 532 S.E.2d at 197. However, the same cannot be said as to substantial prejudice. The standard for substantial prejudice in our caselaw is clear. The mere fact that BMA will face increased competition because of the partial denial of its CON application is insufficient to establish substantial prejudice as a matter of law. *Surgical Care Affiliates*, 235 N.C. App. at 631, 762 S.E.2d at 476 ("In order to establish substantial prejudice, the petitioner must provide specific evidence of harm resulting from the award of the CON . . . that went beyond any harm that necessarily resulted from additional . . . competition[.]" (citation omitted)).

III. Conclusion

¶ 19 For the reasons stated herein, we affirm the final decision granting summary judgment in favor of DHHS and TRC.

AFFIRMED.

Judges ZACHARY and WOOD concur.

JOLIN BRADY, PLAINTIFF
v.
ERRON BRADY, DEFENDANT

No. COA20-827

Filed 5 April 2022

1. Divorce—alimony—reasonable needs and expenses of supporting spouse—ability to pay—lack of findings

The trial court's alimony award was vacated and remanded for further findings where, although the court properly concluded that the wife was entitled to alimony for a period of ten years, its conclusion that the husband had the ability to pay the particular amount listed was not supported by the evidence, since the court did not make a finding regarding what the husband's reasonable monthly needs and expenses were and did not take into account the husband's monthly child support obligation.

2. Divorce—equitable distribution—distributive award—refinancing of mortgage on business—unequal distribution

In an equitable distribution matter in which two of the three main marital assets pertained to the husband's dental practice, the trial court did not abuse its discretion in ordering the husband to pay a distributive award to the wife by refinancing the mortgage on the dental office where the court's findings supported its determination that an in-kind distribution was not feasible and that the husband had sufficient ownership of and equity in the dental office to refinance. Sufficient evidence also supported the court's conclusion that certain bank accounts were not part of the valuation of the dental practice and therefore should be distributed to the husband as personal property. Finally, the trial court was not required to state with specificity the weight given to each factor contained in N.C.G.S. § 50-20(c) before ordering an unequal distribution of marital property.

Appeal by Defendant from order entered 20 May 2020 by Judge Paulina Havelka in Mecklenburg County District Court. Heard in the Court of Appeals 22 September 2021.

Sodoma Law, by Amy E. Simpson, and Hamilton Stephens Steele and Martin, PLLC, by Kyle W. LeBlanc, for Plaintiff-Appellee.

Myers Law Firm, PLLC, by Matthew R. Myers, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals the trial court's Order for Alimony and Child Support, Equitable Distribution Judgment, and Order Denying Contempt ("Order"). Defendant argues that there are various deficiencies in the findings of fact and conclusions of law regarding the alimony award and equitable distribution. We discern merit in Defendant's challenge to the sufficiency of the findings of fact to support the amount of alimony awarded. We discern no merit in his remaining arguments. We vacate the alimony award and remand for further findings of fact and conclusions of law supported by those findings. We affirm the remainder of the Order.

I. Background

¶ 2 Plaintiff Jolin Brady and Defendant Erron Brady were married 26 April 1997, separated 11 June 2017, and divorced 26 September 2018. They are the parents of four children: a son born on 21 January 2002 and triplets born on 18 July 2005. Defendant was in undergraduate school at Brigham Young University when the parties married. The parties moved to Kentucky where Defendant went to dental school at the University of Kentucky. While Defendant was in dental school, Plaintiff worked as a paralegal and then stopped working when the parties' eldest son was born. The parties moved to Charlotte, North Carolina, in 2002 after Defendant finished dental school. Defendant worked for several dental offices in the Charlotte area until opening his own dental practice on 2 May 2005, two months before the birth of the parties' triplets.

¶ 3 Defendant is the sole owner of the dental practice, Erron S. Brady, DMD, PA ("Brady Family & Cosmetic Dentistry"). Defendant owns the office suite in which the dental practice is located through an LLC, Erron Brady Properties, LLC. The dental practice pays rent for the office suite to the LLC. In 2014, Plaintiff began working part-time as a yoga instructor.

¶ 4 Plaintiff commenced this action by filing a complaint for equitable distribution on 12 January 2018 under file number 18-CVD-937. Defendant filed an answer and counterclaim for equitable distribution on 19 February 2018. Plaintiff filed a complaint for child custody, child support, postseparation support, alimony, motion for physical and mental examination, appointment of expert, interim distribution, appointment

for business evaluation, and attorney fees on 21 February 2018 under file number 18-CVD-3737. Defendant filed an answer and counterclaim for custody in 18-CVD-3737 on 4 May 2018. A consent order to consolidate the two pending actions into file number 18-CVD-937 was entered. Plaintiff filed a reply to Defendant's counterclaim for custody on 5 July 2018. A consent order for child custody was entered 4 June 2019.

¶ 5 A trial was held on 19 September 2019, 20 September 2019, and 15 October 2019 on contempt, equitable distribution, child support, alimony, and limited custody issues. At the start of the trial on 19 September 2019, the trial court entered a final pre-trial order which contained the contentions of the parties as to the various items of property to be distributed by the trial court. The parties ultimately agreed to the distribution of household goods. The agreement assigned a value of $23,000.00 in the equitable distribution to Plaintiff for the household goods, and a consent order regarding household goods was entered 18 December 2019.

¶ 6 In the final pre-trial order, the parties agreed on the distribution of most assets, with Plaintiff receiving $537,732.04 and Defendant receiving $587,049.68 of the agreed-upon assets. Four items were left for a determination by the trial court: (1) the valuation of Defendant's dental practice; (2) whether a Bank of America savings account ending in 3803 with $4,804.82 should be treated as Defendant's personal asset or part of his dental practice; (3) whether a Bank of America checking account ending in 0148 with $33,000.01 should be treated as Defendant's personal asset or part of his dental practice; and (4) how to distribute a checking account ending in 0293 in the amount of $8,738.68.

¶ 7 Plaintiff contended the value of the dental practice was $520,000 and Defendant contended the value of the practice was $400,000. Both sides presented experts at the trial on the value of the business. The total marital estate outlined in the final pre-trial order was $1,690,607.90, based on Plaintiff's figures, or $1,570,607.90, based on Defendant's figures. Once the agreed-upon $23,000.00 for household goods was added in, the total marital estate was $1,713,607.90, based on Plaintiff's figures, or $1,593,607.90 based on Defendant's figures.

¶ 8 The trial court entered its Order on 20 May 2020. The Order found the total marital estate to be $1,713,605 and distributed 54% of the estate to Plaintiff. The Order requires Defendant to refinance the office suite and cash out the equity to make a distributive award payment to Plaintiff of $364,000. The Order found Defendant's net monthly income to be $10,922.01, ordered him to pay alimony of $5,250 per month for

10 years from October 2019, and ordered child support of $3,483.83 per month.

¶ 9 Defendant timely appealed.

II. Discussion

A. Amount and Duration of Alimony

¶ 10 **[1]** Defendant first argues that the trial court erred in setting the amount and duration of alimony.

¶ 11 The amount of alimony is determined by the trial judge in the exercise of his sound discretion and is reviewed on appeal only for an abuse of discretion. *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982) (citation omitted).

> In determining the amount of alimony[,] the trial judge must follow the requirements of the applicable statutes. Consideration must be given to the needs of the dependent spouse, but the estates and earnings of both spouses must be considered. "It is a question of fairness and justice to all parties."

Id. (quoting *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E.2d 407, 410 (1976)).

> A trial court's award of alimony is addressed in N.C. Gen. Stat. § 50-16.3A . . . , which provides in pertinent part that in "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) (reciting factors listed in N.C. Gen. Stat. § 50-16.3A(b)). In its order, "the court shall set forth . . . the reasons for its amount, duration, and manner

of payment [and] . . . shall make a specific finding of fact on each of the factors in [N.C. Gen. Stat. § 50-16.3A(b)] if evidence is offered on that factor." N.C. Gen. Stat. § 50-16.3A(c) (2019).

> Unless the supporting spouse is deliberately depressing his or her income or indulging in excessive spending because of a disregard of the marital obligation to provide support for the dependent spouse, the ability of the supporting spouse to pay is ordinarily determined by his or her income at the time the award is made. If the supporting spouse is deliberately depressing income or engaged in excessive spending, then capacity to earn, instead of actual income, may be the basis of the award.

Quick, 305 N.C. at 453, 290 S.E.2d at 658 (citations omitted).

¶ 12 The trial court in this case made the following findings of fact relevant to the amount and duration of the alimony award:

> 1. The parties were married on April 26, 1997, legally separated on June 11, 2017 ("DOS") and were divorced on September 26, 2018.
>
> . . . .
>
> 6. Plaintiff/Mother and Defendant/Father were both raised in the Mormon religion. Due to Defendant/Father's affairs, he has been excommunicated from the Mormon church two (2) times and is currently excommunicated. . . .
>
> 7. Plaintiff/Mother was a stay at home mother for the majority of the parties' marriage. Plaintiff/Mother worked full time while Defendant/Father finished his last year at BYU through the first 3.5 years of dental school. Once the parties had their first child, Plaintiff/Mother stopped working and focused her efforts on raising a family. In 2005, the parties had triplets and Plaintiff/Mother continued in her role as a stay-at-home parent. This allowed Defendant/Father to focus on working full days, earning substantial money, and advancing his career.
>
> 8. Defendant/Father is a self-employed dentist who works for a practice known as Brady Family and Cosmetic Dentistry. . . .

9. Defendant/Father's gross salary is approximately $18,364.42 per month.

10. Defendant/Father is able to access his dental practice funds when he needs and/or wants the money. He bought a $25,000 dining room table and chairs from the business account when he wanted it, he spent over $10,000 flying first class and staying at the Ritz Carlton (with surf lessons, valet service, meals, etc.) because he wanted a "write off"; he spent over $9,000 in just over 2 months on guns and gun related paraphernalia; he has spent over $13,000 traveling to see his new wife in foreign locations, etc.; he spent over $6,300 in 4 months in 2018 traveling to Utah; he spent over $5,600 taking the children on vacation in 2017 (and upgrading their flight to first class). In fact, he was able to afford to take 15 trips within 2 years and 3 months.

. . . .

13. Defendant/Father and Plaintiff/Mother are both of good health and have the ability to continue working for the foreseeable future. No evidence was presented to indicate that Defendant/Father will not continue to earn the same income, if not more, than he is currently making.

14. Plaintiff/Mother has plans to go back to school to obtain her degree following the youngest children graduating from high school.

. . . .

16. Plaintiff/Mother is primarily a stay-at-home parent for the minor children and has been for many years. She works part-time as a yoga instructor but derives very little income from said employment. Her gross income at the time of trial was $564.17 as stated in her verified Affidavit of Financial Standing filed herein.

17. Although Plaintiff/Mother's income has decreased during since the date of separation, Plaintiff/Mother has not acted in bad faith. She is not underemployed nor is she intentionally suppressing her income to skirt her family support responsibilities.

. . . .

22. Plaintiff/Mother's monthly reasonable needs and expenses are $5,400.00.

23. Defendant/Father's monthly expenses as listed on his filed Affidavit of Financial Standing were not reasonable.

24. Defendant/Father's net monthly income is $10,922.01.

25. Defendant/Father's net income exceeds his reasonable needs and expense resulting in him having a monthly surplus of $5,250.00. He has the ability to pay $5,250.00 per month in spousal support.

26. Based on the respective incomes of the parties and their relative reasonable needs and expenses, Plaintiff/Mother is a dependent spouse who is actually substantially dependent upon Defendant/Father and Defendant/Father is the supporting spouse.

. . . .

28. Defendant/Father engaged in the following marital misconduct pursuant to N.C. Gen. Stat. § 50-16.3A: He lied to Plaintiff/Mother.

> a. He engaged in illicit sexual conduct with at least 4 women during his marriage.

30. Plaintiff/Mother has not engaged in marital misconduct pursuant to N.C. Gen. Stat. § 50-16.3A.

31. Defendant/Father's earnings capacity exceed that of Plaintiff/Mother's.

. . . .

33. When Plaintiff/Mother Jolin is not working, she is caring for the parties' 4 children from the time they get up for school until the[y] go to sleep.

. . . .

35. The parties entered into a Consent Order for Custody on June 4, 2019 establishing the physical custody arrangement of the parties' minor children.

> Pursuant to that Order, Plaintiff/Mother was given primary physical custody. . . .
>
> . . . .
>
> 43. The amount of child support pursuant to Worksheet A of the Child Support Guidelines is $3,483.83 and the reasonable needs of the children do not exceed the Guideline amount.
>
> . . . .
>
> 52. The total net value of the marital and divisible property is $1,713,605.00 . . . .
>
> . . . .
>
> 56. . . . Plaintiff/Mother is distributed marital and divisible assets and debts having a net value of $560,732.00, while Defendant/Father is distributed marital and divisible assets and debts having a net value of $1,152,874.00. In addition, Defendant/Father owes a distributive award to Plaintiff/Mother of $364,000.00. This results in Plaintiff/Mother's share being 54% of the total net marital and divisible estate compared to Defendant/Father's 46% share. The Court finds this unequal distribution to be equitable in light of the distributional factors as set forth above.

Based upon these findings, the trial court concluded, in relevant part, as follows:

> 3. The provisions below are fair, reasonable, adequate, and necessary and the parties are capable of complying with them.
>
> . . . .
>
> 17. Husband is the supporting spouse as defined in N.C.G.S. § 16.1A.
>
> 18. Wife is a dependent spouse as defined in N.C.G.S. 16.1A.
>
> 19. Husband had the ability to pay such spousal support as set forth herein.
>
> 20. After considering all the relevant factors upon which evidence was presented, Plaintiff /Mother is

> entitled to the sum of $5,250.00 per month in alimony for a period of ten (10) years (120 months).

¶ 13 Defendant argues that findings of fact 10, 22, 23, 25 and 26 are not supported by competent evidence. The remaining, unchallenged findings of fact are thus binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). While we determine from our review of the record that findings of fact 10, 22, 23, and 26 are supported by competent evidence, we agree that finding of fact 25 lacks evidentiary support in the record.

¶ 14 Based on the trial court's unchallenged findings, Defendant's gross monthly salary was approximately $18,364.42 and his net monthly income was approximately $10,922.01. The trial court found Plaintiff's reasonable monthly needs and expenses to be $5,400.00. Although the trial court found that Defendant's monthly expenses as listed on his filed Affidavit of Financial Standing–which totaled $11,974.43–were not reasonable, the trial court did not make a finding of fact as to what his reasonable monthly needs and expenses were.

¶ 15 It could be inferred from the finding that "Defendant/Father's net income exceeds his reasonable needs and expense[s] resulting in him having a monthly surplus of $5,250.00," that the trial court determined that his monthly reasonable needs and expenses were $5,672.01.[1] However, the trial court made no such finding. Additionally, although the trial court found Defendant "has the ability to pay $5,250.00 per month in spousal support," it does not appear that the trial court considered Defendant's monthly child support obligation of $3,483.83 when making this finding. If Defendant's net monthly income is approximately $10,922.01, monthly reasonable needs and expenses are $5,672.01, and monthly child support obligation is $3,483.83, Defendant's monthly surplus is $1,766.17. Thus, the finding that he has the ability to pay $5,250.00 per month in spousal support is not supported by the findings of fact.

¶ 16 The trial court found that Defendant "is able to access his dental practice funds when he needs and/or wants the money" and this finding is supported by the evidence. However, it is unclear from the findings of fact if, and if so to what extent, the trial court considered Defendant's access his dental practice funds when determining Defendant's ability to pay $5,250 per month in spousal support.

---

1 $10,922.01 – $5,250 = $5,672.01

¶ 17 The unchallenged findings of fact, together with the findings of fact that are supported by the evidence, support the trial court's conclusion that Plaintiff is entitled to alimony for a period of ten years. However, because the findings of fact are insufficient to support the conclusion that Defendant has the ability to pay $5,250.00 in monthly alimony, we vacate the order as to alimony and remand for further findings of fact and conclusions of law based on those findings.

B. Equitable Distribution

¶ 18 **[2]** Defendant next challenges the equitable distribution on several bases.

¶ 19 We review a trial court's order for equitable distribution for abuse of discretion. *Robinson v. Robinson*, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011). N.C. Gen. Stat. § 50-20(j) "mandates that written findings of fact be made in any order for the equitable distribution of marital property made pursuant to" N.C. Gen. Stat. § 50-20. *Armstrong v. Armstrong*, 322 N.C. 396, 403, 368 S.E.2d 595, 599 (1988) (emphasis omitted). "The purpose for the requirement of specific findings of fact that support the court's conclusion of law is to permit the appellate court on review 'to determine from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of the law.' " *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986) (quoting *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)). "When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Dechkovskaia v. Dechkovskaia*, 232 N.C. App. 350, 356, 754 S.E.2d 831, 836 (2014) (quoting *Kelly v. Kelly*, 228 N.C. App. 600, 601, 747 S.E.2d 268, 272 (2013)). The trial court's "findings of fact are conclusive if they are supported by any competent evidence from the record." *Robinson*, 210 N.C. App. at 322, 707 S.E.2d at 789.

1. Distributive Award

¶ 20 Defendant argues that the trial court erred in awarding a distributive award. Specifically, Defendant argues that the trial court erred by failing to allow Defendant to transfer to Plaintiff two Individual Retirement Accounts ("IRAs") that were distributed to Defendant to offset the distributive award.

¶ 21 "Subject to the presumption of subsection (c) of [N.C. Gen. Stat. § 50-20] that an equal division is equitable, it shall be presumed in every action that an in-kind distribution of marital or divisible property is

equitable." N.C. Gen. Stat. § 50-20(e) (2019). "In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties." *Id.*

¶ 22 "[I]n equitable distribution cases, if the trial court determines that the presumption of an in-kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination." *Urciolo v. Urciolo*, 166 N.C. App. 504, 507, 601 S.E.2d 905, 908 (2004) (quotation marks and citation omitted). "Further, N.C. Gen. Stat. § 50-20(c) enumerates distributional factors to be considered by the trial court." *Id.* "One of those factors is '[t]he liquid or nonliquid character of all marital property and divisible property.' " *Id.* (quoting N.C. Gen. Stat. § 50-20(c)(9)). "The trial court is required to make findings as to whether the defendant has sufficient liquid assets from which he can make the distributive award payment." *Id.* (citing *Embler v. Embler*, 159 N.C. App. 186, 188-89, 582 S.E.2d 628, 630 (2003)).

¶ 23 Here, the trial court found and concluded that an unequal distribution was equitable and ordered Defendant to pay Plaintiff a distributive award of $364,000. The trial court also made the following relevant findings of fact:

> 54. Given two of the three main assets (the dental office suite and the dental practice) must be distributed to Defendant/Father, an in-kind distribution is not feasible. The dental practice is a business entity that cannot be shared by the parties and Defendant/Father needs the dental office suite in order to operate his dental practice. As such, the court finds that a distributive award is necessary to achieve equity between the parties.
>
> . . . .
>
> 57. Further, given the amount of equity in the dental suite, the Court finds that Defendant/Father accomplish the distributive award in a lump sum payment by refinancing the dental suite.

The trial court made the following relevant conclusions of law:

> 7. The Court has considered all distributional factors raised by the evidence.
>
> 8. It is equitable for each party to be distributed the items of marital and divisible property and debt which

> are distributed to that party by this ED Judgment. An unequal division of the marital and divisible property and debt in Plaintiff/Mother's favor as set forth herein is equitable.
>
> 9. An in-kind distribution is impractical given the dental practice and property needed to run the dental practice. The most equitable way to distribute this asset is by Defendant/Father refinancing the dental suite and providing a distributive award from Defendant/Father to Plaintiff/Mother.

¶ 24 The trial court made the requisite findings of fact and conclusions of law to support a determination that the presumption of an in-kind distribution had been rebutted. The record contains evidence that neither Defendant's dental practice, which was a closely held corporation, nor the dental suite was susceptible to division. Such evidence supports the finding that the in-kind presumption was rebutted. *See Fountain v. Fountain*, 148 N.C. App. 329, 339, 559 S.E.2d 25, 33 (2002) ("When . . . the property is an interest in a closely held corporation, this in-kind presumption may be rebutted." (citation omitted)). Moreover, the $520,000 value of the dental practice, as found by the trial court, plus the $384,495 equity in the dental suite, as stipulated to by the parties, comprised a bulk of the $1,152,874 distributed to Defendant. The remaining value of the assets distributed to Defendant, including Defendant's two IRAs worth a combined value of $195,683.34, was $248,372, short of the $364,000 distributive award ordered. The evidence supports the trial court's finding and conclusion that Defendant refinance the dental suite to fund the distributive award.

¶ 25 Defendant also argues that the trial court erred by ordering him to refinance the mortgage when there was no evidence that he would be able to do so.

¶ 26 The trial court made the following relevant findings of fact:

> 8. Defendant/Father is a self-employed dentist who works for a practice known as Brady Family and Cosmetic Dentistry. The practice was created during the marriage of the parties and prior to their separation. The practice operates out of an office suite located at 11030 Golf Links Drive, Unit 201, Charlotte, North Carolina 28277 (hereinafter the "Suite"). The Suite is owned by a limited liability corporation called Erron Brady Properties LLC. Erron Brady Properties

> LLC was created during the marriage and in existence on the date of separation. The LLC purchased the Suite during the marriage and prior to the parties' date of separation.
>
> . . . .
>
> 10. Defendant/Father is able to access his dental practice funds when he needs and/ or wants the money. . . .
>
> 11. Defendant/Father took out a loan after the DOS for the purpose of expanding the dental office to allow him to hire another dentist and he has done so. . . .
>
> 12. Defendant/Father did not knowingly lie to the Court about taking out a signature loan to renovate the dental suite. . . .
>
> . . . .
>
> 46. The parties filed a signed Final Pretrial Order whereby they stipulated to the classification, valuation and distribution of the majority of their property acquired during the marriage.
>
> . . . .
>
> 51. The parties stipulated to the classification, valuation, and distribution of the remainder of the marital property. The court incorporates herein the attached Asset and Debt Spreadsheet marked as [Schedule] "A."

¶ 27 In Schedule A, the parties agreed that the dental suite had a value of $675,000 with a corresponding loan of $290,504.78, and that both the suite and the loan would be distributed to Defendant. The findings of fact show that Defendant had sufficient ownership, control, and equity interest in the suite to allow him to refinance the suite. These findings of fact supported the trial court's finding and conclusion that Defendant refinance the office suite to fund the distributive award.

2. Distribution of Bank Accounts

¶ 28 Defendant argues that the trial court erred by distributing certain bank accounts to Defendant as personal property rather than including those accounts in the value of his dental practice.

¶ 29 The trial court found the following:

> 49. The parties stipulate that the Bank of America Checking Account #[0148] and Savings Account #3803 are marital property and that they should be distributed to Defendant/Father. Plaintiff/Mother contended the funds should be distributed to Defendant/Father. Defendant/Father contended the funds were related to the businesses and should be included in the business values.
>
> 50. The Court finds that the Bank of America Checking Account #[0148] had a value of $33,000[.]01 on the date of separation and the Bank of America Savings Account #3803 had a value of $4,984.82 on the date of separation.

¶ 30 At trial, the following colloquy took place between Plaintiff's attorney and Plaintiff's expert, Victoria Coble, about the accounts in question:

> [Q.] What do you recall about whether or not these two particular accounts were actually considered by you in valuing this practice as of the date of separation?
>
> A. So we picked-up -- if you go to Page 22, the very top, what we have included in the business valuation is the checking account for the business, which was the Bank of America account ending in, 9013. These we did look at, information was given to us on them. They do relate to a business, but it's the rental business and so, for sure, we did include them in this valuation.
>
> Q. Okay.
>
> A. We only picked-up the, 9013.
>
> Q. And the rental business is the ownership of the suite for which Dr. Brady pays rent to the LLC that owns the rental property, which is also owned by him.
>
> A. Yeah, but its outside of this. This is just the operations.

Page 22 of Coble's report states the following: "As of May 31, 2017, the balance sheet reported total cash of $26,641. The balance in the

Company's Bank of America checking account 9013 was $27,061 as of June 11, 2017." This evidence supports a conclusion that the bank accounts at issue were not included in Coble's valuation of Defendant's dental practice and was sufficient to support the trial court's decision to exclude the accounts from the value of the dental practice and instead to distribute them to Defendant as personal property.

3. Unequal Division of Property

¶ 31 Defendant argues that the trial court erred in ordering an unequal distribution of marital property where the order failed to make sufficient findings to support an unequal distribution. Specifically, Defendant argues that that the trial court's findings are insufficient because "the trial court's order does not make specific [f]indings setting forth how the court weighed the factors." However, "[i]t is within the trial court's discretion to determine the weight attributed to any of the N.C. Gen. Stat. § 50-20(c) factors on which evidence was presented" and "[i]t is not required that the trial court make findings revealing the exact weight assigned to any given factor." *Finkel v. Finkel*, 162 N.C. App. 344, 349, 590 S.E.2d 472, 476 (2004) (quotation marks and citations omitted). Defendant's argument is without merit.

III. Conclusion

¶ 32 We vacate the alimony award and remand for further findings of fact and conclusions of law supported by those findings. We affirm the remainder of the Order.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judge DILLON and Judge WOOD concur.

BRYAN v. KITTINGER

[282 N.C. App. 435, 2022-NCCOA-201]

ANTONIO LAMAR BRYAN AND WIFE UVETIA BRYAN, PLAINTIFFS
v.
WILLIAM KITTINGER AND WIFE HANNAH SUH KITTINGER, DEFENDANTS

No. COA21-98

Filed 5 April 2022

1. Associations—restrictive covenants—keeping of chickens—exception for household pets with no commercial purpose

The trial court erred by granting summary judgment to plaintiffs, who sought to enjoin their neighbors from keeping chickens. Although the subdivision's restrictive covenants prohibited the keeping of livestock or poultry, the trial court did not consider whether an exception to that prohibition applied—that is, whether defendants kept the chickens as household pets not kept for a commercial purpose. Where there was a genuine issue of material fact as to that issue, summary judgment was not appropriate for either party.

2. Associations—planned community—restrictive covenants—validity of amendment

In an action by residents to enjoin their neighbors (defendants) from keeping chickens in their backyard, the trial court did not abuse its discretion by denying defendants' motion for relief, which they filed after the community amended its covenants to allow each homeowner to keep up to five hens for a non-commercial purpose. The court's determination that the amendment was not properly executed and was therefore not valid was supported by the application of N.C.G.S. § 41-58, which limits one spouse's ability to encumber property held as tenants by the entirety without the other spouse's consent. Although the Planned Community Act allows for amendments to covenants by either affirmative vote or written agreement (N.C.G.S. § 47F-2-117), there was no evidence that the covenant was voted on at a duly-called meeting, at which one spouse could bind a non-attending spouse. On remand, defendants were free to amend their answer to assert the validity of the changed covenant.

Appeal by Defendants from judgment entered 9 December 2019 by Judge Alma Hinton in Granville County Superior Court. Heard in the Court of Appeals 20 October 2021.

Wilkinson & Carpenter, P.A., by A. Chance Wilkinson, for the Plaintiffs-Appellees.

Adams and Reese LLP, by Lydney R. Z. Bryant, for the Defendants-Appellants.

DILLON, Judge.

¶ 1 "The issue is, what is chicken?" This is the opening line in *Frigaliment Importing Co. v. B. N. S. Int'l Sales Corp.*, 190 F. Supp. 116, 117 (S.D.N.Y 1960), a case studied by most law students when learning about principles of interpreting contract provisions. This present appeal involves the fate of four chickens and whether their presence in a residential planned community violates the private restrictive covenants governing that community.

I. Background

¶ 2 Plaintiffs and Defendants are next-door neighbors in the Sleepy Hollow Subdivision, a planned community established in 1998.

¶ 3 In 2016, Defendants moved into a house in Sleepy Hollow. They keep four hens (female chickens) in a coop in their backyard.

¶ 4 In 2018, Plaintiffs commenced this action to enjoin Defendants from keeping the hens, claiming that their presence violated Sleepy Hollow's restrictive covenants prohibiting the keeping of "poultry" and that their presence otherwise constituted a nuisance. Defendants answered, admitting to keeping the chickens but denying that their presence violated the covenants or constituted a nuisance.

¶ 5 In late 2019, the trial court granted Plaintiffs' summary judgment motion, concluding that the chickens violated the covenants as a matter of law, and enjoined Defendants from keeping them at their home.

¶ 6 However, in early 2020, Sleepy Hollow recorded an amendment to their covenants that allows each homeowner to keep up to five (5) hens for non-commercial use. Based on this new covenant, Defendants sought relief from the injunction. The trial court concluded that the 2020 covenant was not valid and denied the motion.

¶ 7 Defendants timely appealed.

II. Analysis

¶ 8 The trial court's order granting summary judgment was based on its interpretation that owning chickens violated Sleepy Hollow's covenants

that were recorded in 1998 (hereinafter the "1998 covenant"). The trial court made no determination as to whether their presence otherwise constituted a nuisance. Accordingly, the nuisance claim is not before us.

¶ 9 On appeal, Defendants argue that the trial court erred in granting Defendants' motion for summary judgment and denying their subsequent motion based on the new covenant. We address each in turn.[1]

A. Granting Plaintiffs' Summary Judgment Motion

Our standard of review from an order granting summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

¶ 10 **[1]** In its summary judgment order, the trial court concluded that the presence of the hens in Defendants' backyard violated the 1998 covenant which prohibited the keeping of poultry on one's property. Specifically, the covenant provides as follows:

> No animals, livestock or poultry of any kind shall be raised, bred or kept on the building site, except that dogs, cats or other household pets may be kept, provided that they are not bred or maintained for any commercial purpose.

Because the first clause states that no "poultry of any kind" is allowed, the trial court concluded that Defendants' hens were in violation. But the court did not consider whether the fowl fell under the "household pets" language in the second clause.

¶ 11 As we evaluate this 1998 covenant, we are cognizant of the following principles from our Supreme Court regarding the interpretation of private restrictive covenants:

¶ 12 We are "to give effect to the original intent of the parties[.]" *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 555, 633 S.E.2d 78, 85 (2006). But if there is ambiguity in the language, the covenant is to be "strictly construed in favor of the free use of land[.]" *Id.* at 555, 633 S.E.2d at 85 (emphasis in original). This "rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent." *J.T. Hobby & Sons v. Family Homes Inc.*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981). However, as parties have

1. On appeal, Defendants also argue that the trial court erred in denying their Rule 12(b)(6) motion concerning Plaintiffs' claim based on the 1998 covenant. We disagree, concluding that Plaintiffs adequately stated this claim in their complaint.

the freedom to agree on restrictions in their neighborhood, the canon favoring the free use of land "should not be applied in such a way as to defeat the plain and obvious purposes of a restriction." *Southeastern Jurisdictional Admin. Council, Inc. v. Emerson*, 363 N.C. 590, 595, 683 S.E.2d 366, 369 (2009) (citation omitted).

¶ 13 Turning to the 1998 covenant, we conclude that the keeping of poultry is clearly forbidden by the covenant's first clause, as chickens are "poultry." However, we must determine whether the covenant's second clause could reasonably be construed to allow poultry if kept as "household pets." We conclude that it does: While the first clause forbids the keeping of any "animals," the second clause clearly allows the keeping of animals, so long as they are "household pets" and otherwise not used for a commercial purpose. In the same way, where the first clause forbids the keeping of "poultry," the second clause could be reasonably read to allow poultry—which, we note, are animals—kept as "household pets" and otherwise not kept for any commercial purpose.

¶ 14 This case is similar to *Steiner v. Windrow Estates Home Owners Ass'n*, 213 N.C. App. 454, 713 S.E.2d 518 (2011). In that case, our Court determined that two Nigerian Dwarf goats could fall within a "household pet" exception of a restrictive covenant. The covenant in that case provided that "[n]o animals, livestock or poultry of any kind shall be raised, bred or kept on any lot except that horses, dogs, cats or other [household] pets may be kept provided they are not kept, bred, or maintained for any commercial purposes[.]" *Id.* at 459, 723 S.E.2d at 522. We held that this covenant allowed "virtually *any animal* which may be treated as a 'household pet' to be kept on the homeowner's property[.]" *Id.* at 464, 713 S.E.2d at 525 (emphasis added). We further held that the term "household pets" could include pets kept outdoors in the yard. *Id.* at 462, 723 S.E.2d at 525 (explaining why "the fact that the goats do not literally live *inside* the house [is not] dispositive of the issue").

¶ 15 Though we conclude that the keeping of hens is not *per se* forbidden by the 1998 covenant, we also conclude that *Defendants* were likewise *not* entitled to summary judgment. There is still a genuine issue as to whether they indeed keep their hens as household pets and not otherwise for any commercial purpose. It is true that Defendants put on evidence tending to show that they consider their hens as household pets and that they do not sell the eggs laid by the hens. But our Supreme Court has instructed that a summary judgment motion should "ordinarily be denied even though the opposing party makes no response" where the "witness is inherently suspect [ ] because he is interested in the

outcome of the case and the facts are peculiarly within his knowledge." *Kidd v. Early*, 289 N.C. 343, 366, 222 S.E.3d 392, 408 (1976). Here, though Defendants state that they consider their hens as pets, the fact-finder could disbelieve them. In any event, Plaintiffs did put on evidence that the only interaction Defendants have with the hens is when Defendants retrieve eggs from the coop.

B. Denial of Defendants' Rule 59/Rule 60(b)(5) Motion

¶ 16 **[2]** In early 2020, an amendment to Sleepy Hollow's covenants was recorded that allows each homeowner to keep up to five (5) hens. Based on this amendment, Defendants sought relief from the injunction contained in the 2019 summary judgment. Defendants cited Rule 60(b)(5) of our Rules of Civil Procedure that allows relief where "it is no longer equitable that the judgment should have prospective application."

¶ 17 In denying the motion, the trial court concluded that the 2020 covenant was not valid because it had not been "properly executed." The trial court erroneously recognized Defendants' motion as one made under Rule 59, which allows "[a] motion to alter or amend the judgment" in certain situations, rather than under Rule 60(b)(5). *See Doe v. City of Charlotte*, 273 N.C. App. 10, 15-16, 848 S.E.2d 1, 6 (2020) (recognizing that "Rule 59 is not an appropriate means of seeking reconsideration of interlocutory, pre-trial rulings of the trial court").

¶ 18 Our standard of review, however, is the same whether the motion was one made under Rule 59 or Rule 60. *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) ("As with Rule 59 motions, the standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion.").

¶ 19 In 2020, Sleepy Hollow recorded an amendment to its covenants that allows each homeowner to "keep up to five (5) hens provided that they are not bred or maintained for any commercial purpose." The recorded document was executed by eleven (11) individuals, each of whom own a different lot in Sleepy Hollow.

¶ 20 The trial court's determination that the covenant was not properly executed was based on the interplay of two statutes: N.C. Gen. Stat. § 47F-2-117 (2018) and N.C. Gen. Stat. § 41-58 (2018).

¶ 21 Subsection (a) of Section 47F-2-117 provides that a declaration may be amended "by affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) of the votes in the association are allocated[.]" Subsection (d) provides that

"[a]ny amendment passed pursuant to the provisions of this section or the procedure provided for in the declaration are presumed valid and enforceable."[2]

¶ 22 Sleepy Hollow is made up of sixteen (16) lots.[3] Accordingly, the affirmative vote of eleven (11) lot owners would be needed to amend a covenant under Section 47F-2-117(a).[4] The 2020 covenant was signed by eleven (11) individuals, each purportedly having an ownership in a different lot within Sleepy Hollow.

¶ 23 As the 2020 covenant is "presumed valid," the burden is on Plaintiffs to show why it is not. The only argument advanced by Plaintiffs that the 2020 covenant is *not* valid is based on their contention that some of those who signed the covenant own their lots as tenants by the entireties with their respective spouses. Plaintiffs rely on Section 41-58, which provides that "[n]either spouse may . . . encumber any property held by them as tenants by the entirety without the written joinder of the other spouse." It was on this basis that the trial court denied Defendants' motion.

¶ 24 Defendants, though, argue that the consent of the spouses is not required based on another provision of the Planned Community Act, which allows one owner of a lot to bind his co-owner(s) when voting on

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2. This right to amend covenants in this manner, though, is not unfettered. Our Supreme Court has held that only those amendments which are "reasonable" are enforceable. *Southeastern v. Emerson*, 363 N.C. 590, 596-97, 683 S.E.2d 366, 370 (2009).

3. Neither party argues that Sleepy Hollow, which was established in 1998, is not a "planned community" subject to some of the provisions of the Planned Community Act, enacted in 1999. Section 47F-1-102(b)(1) states that the Act is not applicable to planned communities established *in or after 1999* with 20 or less lots. Section 47F-1-102(c), however, subjects planned communities established before 1999 to certain provisions of the Act, without any language limiting its application to only those older communities with more than 20 lots.

Indeed, perhaps because it is not a contested issue on appeal it is not clear from the Record whether Sleepy Hollow is, in fact, a "planned community" as defined by the Act. The Act requires that for a neighborhood to be considered a planned community, its lot owners must "expressly [be] obligated by a declaration to pay [at least some] expenses to maintain, improve, or benefit other lots[.]" N.C. Gen. Stat. § 47F-1-103(23). It is unclear if the lot owners are obligated to pay for any such expenses. But we note that the 1998 covenants are self-described as a "Declaration" and contain a provision that the "individual lot owners" may be required to make "continuing monthly payments" for the maintenance of "underground electric cables" and "street lighting." As the parties make no argument that Sleepy Hollow does not fit the Act's definition of a "planned community," and as it does not appear otherwise from the Record, we assume for purposes of this appeal that Sleepy Hollow fits the Act's definition.

4. The vote would pass the threshold at 68.75%.

a matter at a meeting of the association if the co-owner(s) choose not to be present at the meeting:

> If only one of the multiple owners of a lot is present at a meeting of the association, the owner who is present is entitled to cast all the votes allocated to that lot. If more than one of the multiple owners are present, the votes allocated to that lot may be case only in accordance with the agreement of a majority in interest of the multiple owners[.]

N.C. Gen. Stat. § 47F-3-110(a).

¶ 25 We hold that the trial court did not err for the following reasoning.

¶ 26 Section 47F-2-117 states that an amended covenant may be adopted by *either* "affirmative vote" *or* by "written agreement." We note that the Planned Community Act does not require those in favor of amendment, under either method, to execute the document that is ultimately recorded. *See* N.C. Gen. Stat. § 47F-2-117(e) (describing how the recorded document may be executed).

¶ 27 When an amendment is sought by vote at a duly called meeting, one spouse may bind the other where the other chooses not to attend, pursuant to Section 47F-3-110(a). We do not think that Section 41-58 would have any application to prevent this result since there is no requirement in the Planned Community Act that *any* owner sign anything to cast an affirmative vote and the spouse's signature is not otherwise required on the instrument to be recorded.

¶ 28 The recorded 2020 covenant states its adoption was by "written agreement," with no indication that it was the product of a vote from a duly called meeting. And Section 47F-3-110(a) does not apply to attempts to amend covenants *by written agreement*, where other owners would not necessarily have notice and have an opportunity to dissent.[5]

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5. Where one enters into a written agreement *as part of a duly called meeting*, such action may be considered an "affirmative vote" and therefore binding on the non-attending spouse. But there is no indication in the recorded instrument or otherwise that the written agreement was the result of a vote at a meeting.

We do not suggest that, where a single lot has multiple owners, the *only* way one owner could agree on behalf of the other owners is through a vote at a duly called meeting. For instance, the bylaws of the association or an agreement among the co-owners may authorize a single owner to vote on behalf of all co-owners through a written agreement. However, absent this sort of separate authorization, the Act does not allow proponents of an amendment to gain a vote of a lot by presenting a written agreement to only one of multiple co-owners. Otherwise, proponents of an amendment could bypass a potentially dissenting co-owner by procuring the signature of another co-owner on a written agreement.

¶ 29 And since a restrictive covenant is an encumbrance/interest on real estate, *see Hege v. Sellers*, 241 N.C. 240, 248, 84 S.E.2d 892, 898 (1954) (holding that restrictive covenants fall within our Statute of Frauds), we hold that Section 41-58 applies. Indeed, there is nothing in the Planned Community Act that allows one owner to bind his co-owners outside of a vote taken at a duly called meeting. Otherwise, those in favor of an amendment could strip the right of a spouse/co-owner to dissent at a meeting by procuring the signature of the approving spouse on a written document outside of a called meeting.

¶ 30 We are not holding that the 2020 covenant is invalid. It may be that the covenant was voted on at a meeting. On remand, Defendants are free to move the trial court for leave to amend their answer to assert the 2020 amendment as a defense. However, the recorded document that was before the trial court and that is in our record states that the document was adopted by "written agreement." Accordingly, we cannot say that the trial court abused its discretion in denying Defendants' motion based on the 2020 amendment.

III. Conclusion

¶ 31 We conclude that the 1998 covenant does not prevent a homeowner in Sleepy Hollow to keep hens as "household pets" and not otherwise for some "commercial purpose." There is a genuine issue of material fact on this issue. Accordingly, the trial court erred in granting summary judgment in favor of Plaintiffs.

¶ 32 We further conclude that the trial court did not err by denying Defendants' motion for relief based on the 2020 covenant.[6]

¶ 33 We remand the matter for further litigation of Plaintiffs' claim based on the 1998 covenant and of Plaintiffs' private nuisance claim.[7]

In any event, there is nothing in the Record before us that indicates, one way or the other, whether the married owners who signed the 2020 covenant had the authority to bind their spouses.

6. Our holdings here are not binding on any other lot owner within Sleepy Hollow, as they are not parties to this action. We leave to the trial court and the parties on remand to examine whether, if appropriate, other lot owners should be joined as parties.

7. In their complaint, Plaintiffs have essentially also alleged a private nuisance claim. Specifically, they have alleged that Defendants' owning of chickens "prevents and interferes in the Plaintiffs' lawful use and peaceful enjoyment of their property, and that said chickens create such noise as to interfere with the Plaintiffs' sleep and rest . . . and as a result thereof the Plaintiffs have incurred damages[.]" *See Jones v. Queen City Speedways, Inc.*, 276 N.C. 231, 239, 172 S.E.2d 42, 47 (1970) (recognizing a private action against a neighbor who is engaging in a lawful enterprise on her property but in a manner as to disrupt the plaintiff's ability to enjoy his property).

AFFIRMED IN PART, VACATED IN PART, REMANDED.

Judges DIETZ and HAMPSON concur.

JULIANA CAULEY, PLAINTIFF
v.
CHARLES BEAN, DEFENDANT

No. COA21-219

Filed 5 April 2022

Emotional Distress—negligent infliction—reasonable foreseeability—severe emotional distress—failure to state a claim

In a case arising from a hit-and-run incident, where defendant's car fatally struck plaintiff's father while plaintiff and her father were riding their bicycles on the highway, the trial court properly dismissed plaintiff's complaint for negligent infliction of emotional distress for failure to state a claim. Although the complaint sufficiently alleged that it was reasonably foreseeable that defendant's negligence would cause plaintiff severe emotional distress (plaintiff was the crash victim's daughter; the impact ejected her father from his bicycle and onto the roadway; plaintiff personally observed the crash from a few feet away and remained with her father as he lay dying while waiting for help to arrive), plaintiff did not sufficiently plead that she suffered severe emotional distress where she failed to allege specific facts describing the type, manner, or degree of emotional distress she experienced.

Appeal by Plaintiff from order entered 4 January 2021 by Judge Robert C. Ervin in Caldwell County Superior Court. Heard in the Court of Appeals 1 December 2021.

Johnson & Groninger, PLLC, by Jennifer Iliana Segnere and Ann Groninger, for Plaintiff-Appellant.

Caudle & Spears, P.A., by L. Cameron Caudle, Jr., and Christopher P. Raab, for Defendant-Appellee.

COLLINS, Judge.

¶ 1 Plaintiff appeals the trial court's order granting Defendant's Rule 12(b)(6) motion to dismiss Plaintiff's complaint for negligent infliction of emotional distress. Because we are bound by this Court's precedent in *Holleman v. Aiken*, 193 N.C. App. 484, 668 S.E.2d 579 (2008) and *Horne v. Cumberland Cnty. Hosp. Sys., Inc.*, 228 N.C. App. 142, 746 S.E.2d 13 (2013) to conclude that Plaintiff's complaint failed to sufficiently allege that she suffered severe emotional distress, we affirm the trial court's order.

I. Facts

¶ 2 Plaintiff, Juliana Cauley; her father, Ignacio Giraldo; and two friends took a bicycle ride on Blowing Rock Highway on 10 October 2019. Plaintiff was in front, followed by her father, while the two friends rode some distance behind. Plaintiff and her father were riding generally north on Blowing Rock Highway. At the same time, Defendant was driving south in his minivan. Defendant was driving erratically as he approached the bicycle riders from the opposite direction. As Defendant came around a curve, he crossed the center lane and continued across the road to the opposite shoulder, before veering right, back onto the road. Plaintiff saw Defendant's erratic driving as he approached and steered her bicycle to her right onto a nearby gravel pull out. When Defendant veered back to his right, he did not hit Plaintiff. Plaintiff's father, however, had veered to his left. Defendant struck Plaintiff's father. He was ejected from his bicycle and landed in the road. After the impact, Defendant fled the scene. Plaintiff witnessed the incident and injuries which resulted in her father's death; she waited with her father for help to come.

¶ 3 Plaintiff filed a complaint against Defendant on 24 April 2020 alleging negligence, negligent infliction of emotional distress ("NIED"), and gross negligence, seeking punitive damages. Defendant filed a Rule 12(b)(6) motion to dismiss for failure to state a claim on which relief could be granted. Following a hearing, the trial court dismissed each of Plaintiff's claims by order entered 4 January 2021. Plaintiff appealed.

II. Discussion

¶ 4 Plaintiff argues that the trial court erred by granting Defendant's motion to dismiss her NIED claim, because her complaint adequately pled a legally viable claim against Defendant.[1]

1. Plaintiff makes no argument concerning the trial court's dismissal of her negligence, gross negligence, and punitive damages claims. The dismissal of those claims is not before this Court and any issue relating to those claims is deemed abandoned. N.C. R. App. P. 28(a).

¶ 5 The standard of review of a trial court's order granting a Rule 12(b)(6) motion is whether the complaint states a claim on which relief can be granted when the complaint is liberally construed and all factual allegations in the plaintiff's complaint are taken as true. *Country Club of Johnston Cnty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002). Dismissal is proper only "when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). We review de novo a trial court's order on a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). *Cheryl Lloyd Humphrey Land Inv. Co. v. Resco Prods., Inc.*, 377 N.C. 384, 2021-NCSC-56, ¶ 8. A complaint must contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]" N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2020). Furthermore, "[e]ach averment of a pleading shall be simple, concise, and direct." *Id.* § 1A-1, Rule 8(e)(1). "Pleadings should be construed liberally and are sufficient if they give notice of the events and transactions and allow the adverse party to understand the nature of the claim and to prepare for trial." *Haynie v. Cobb*, 207 N.C. App. 143, 148-49, 698 S.E.2d 194, 198 (2010).

¶ 6 To state a claim for negligent infliction of emotional distress under North Carolina law, the plaintiff must allege that: "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress, and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990).

¶ 7 Here, the parties do not disagree that Plaintiff's complaint sufficiently alleged that Defendant negligently engaged in conduct. We thus confine our discussion to whether Plaintiff's complaint sufficiently alleged both that it was reasonably foreseeable that such negligence would cause Plaintiff severe emotional distress, and that such negligence did in fact cause Plaintiff severe emotional distress.

A. Reasonable Foreseeability

¶ 8 Plaintiff first argues that she sufficiently pled that it was reasonably foreseeable that Defendant's negligence would cause Plaintiff severe emotional distress.

¶ 9 "Factors to be considered on the question of foreseeability in cases such as this include the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act." *Id.* at 305, 395 S.E.2d at 98. These factors are not exhaustive and no single factor is determinative in all cases. *Riddle v. Buncombe Cnty. Bd. of Educ.*, 256 N.C. App. 72, 77, 805 S.E.2d 757, 762 (2017); *see also Ruark Obstetrics*, 327 N.C. at 291, 395 S.E.2d at 89 ("[O]ur law includes no arbitrary requirements to be applied mechanically to claims for negligent infliction of emotional distress."). Rather, "[q]uestions of foreseeability and proximate cause must be determined under all the facts presented, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury." *Ruark Obstetrics*, 327 N.C. at 305, 395 S.E.2d at 98 (citations omitted); *Newman v. Stepp*, 376 N.C. 300, 306, 852 S.E.2d 104, 109 (2020), *reh'g denied*, 376 N.C. 673, 852 S.E.2d 629 (2021) (quoting *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 334 N.C. 669, 672-73, 435 S.E.2d 320, 322 (1993)) (alteration omitted).

¶ 10 In this case, Plaintiff alleged, in relevant part, the following:

> 4. On October 10, 2019 at approximately 11:42 a.m., Ignacio Giraldo was riding his bicycle in a general northernly direction on US 221, also known as Blowing Rock Highway, in Blowing Rock, North Carolina. This section of Blowing Rock Highway is a winding two-lane road with one lane of travel in each direction.
>
> . . . .
>
> 6. Riding with Giraldo that day were his daughter [Plaintiff] Juliana Cauley and two other bicycle riders. As the group rode along Blowing Rock Highway, [Plaintiff] was in front followed by Giraldo. The other two riders were some distance behind the first two.
>
> . . . .
>
> 8. At the same time that Giraldo and [P]laintiff were riding generally North on Blowing Rock Highway, [D]efendant was driving South in a 2009 Toyota minivan . . . .
>
> 9. Defendant was driving erratically in his Toyota minivan when he approached the bicycle riders from the opposite direction. As [D]efendant came around

a curve, he crossed over the center line and went off the road on the opposite side, then veered back onto the road.

10. [Plaintiff] saw [D]efendant's erratic driving as [D]efendant approached and had steered her bicycle to the right toward a small gravel pull out in an attempt to steer clear of the [D]efendant. Thus, when [D]efendant veered back to his right, he missed [Plaintiff]. Their actions were simultaneous, and it was simply luck that [Plaintiff] was not struck.

11. Ignacio Giraldo had veered left, opposite to where [D]efendant appeared to be heading. When [D]efendant veered back to the right, [D]efendant struck Ignacio Giraldo head on.

12. The impact ejected Ignacio Giraldo from his bicycle, causing him to land in the roadway. Defendant fled the scene.

13. Plaintiff witnessed the incident and injuries which resulted in her father's death; she waited with her father as he lay, dying and waiting for help to come.

14. Defendant's negligence and gross negligence was the sole cause of the collision and the death of Ignacio Giraldo.

. . . .

18. Defendant's negligent and reckless behavior caused the violent death of Ignacio Giraldo and caused [Plaintiff] to suffer severe emotional distress.

. . . .

22. Defendant knew, or in the exercise of reasonable care should have known that the operation of a motor vehicle in a reckless manner or at excessive speeds could cause severe injuries and even death to other users of the highways. Defendant further knew, or in the exercise of reasonable care should have known, that inflicting death or serious injury to others on the roadways was likely to cause severe emotional distress to family members of those so injured.

. . . .

> 24. Plaintiff was only a few feet away from her father when [Defendant] struck [P]laintiff's father head on and killed him.

¶ 11 Weighing in favor of foreseeability is the allegation that the direct victim and person for whose welfare Plaintiff was concerned was Plaintiff's father. *Ruark Obstetrics*, 327 N.C. at 305-06, 395 S.E.2d at 98; *see*, *e.g.*, *Wrenn v. Byrd*, 120 N.C. App. 761, 464 S.E.2d 89 (1995) (wife-husband); *Fox-Kirk v. Hannon*, 142 N.C. App. 267, 542 S.E.2d 346 (2001) (mother-child); *Newman*, 376 N.C. 300, 852 S.E.2d 104 (parents-child). Also weighing in favor of foreseeability are Plaintiff's allegations of close proximity to Defendant's negligent act and that she personally observed the negligent act. *Ruark Obstetrics*, 327 N.C. at 305-06, 395 S.E.2d at 98; *Riddle*, 256 N.C. App. at 77, 805 S.E.2d at 762 ("That plaintiff 'was physically present in the immediate[] vicinity of, and contemporaneously observed' [the direct victim's] injuries favors foreseeability."); *see*, *e.g.*, *Wrenn*, 120 N.C. App. at 766, 464 S.E.2d at 93 (plaintiff in same room as direct victim and "personally observed" negligent act); *Fox-Kirk*, 142 N.C. App. at 275, 542 S.E.2d at 352 (plaintiff in same car as direct victim); *cf. Andersen v. Baccus*, 335 N.C. 526, 532-33, 439 S.E.2d 136, 140 (1994) (emotional distress not reasonably foreseeable where plaintiff arrived at scene after accident occurred); *Sorrells*, 334 N.C. at 674, 435 S.E.2d at 323 (emotional distress not reasonably foreseeable where plaintiffs were not at scene of and did not witness accident). Further weighing in favor of foreseeability are Plaintiff's allegations that Defendant "struck Ignacio Giraldo head on, ... [and] the impact ejected Ignacio Giraldo from his bicycle, causing him to land in the roadway." After hitting her father, "Defendant fled the scene."

¶ 12 Considering the totality of the facts and circumstances alleged, we conclude Plaintiff's allegations are sufficient to establish the reasonable foreseeability of her severe emotional distress. *See Newman*, 376 N.C. at 313, 852 S.E.2d at 113 ("[W]e reiterate . . . [that] the question of reasonable foreseeability must be determined under all of the facts presented and should be resolved on a case-by-case basis instead of mechanistic requirement[s] associated with the presence or absence of the [*Ruark*] factors.").

¶ 13 Citing *Fields v. Dery*, 131 N.C. App. 525, 509 S.E.2d 790 (1998), Defendant argues that because Plaintiff did not allege that Defendant had actual knowledge of Plaintiff's relationship to her father when Defendant hit her father, Plaintiff's allegations regarding reasonable foreseeability are insufficient to support her claim for negligent infliction of emotional distress. Defendant's argument is misplaced.

¶ 14 In *Fields*, plaintiff alleged, in part, that she was following her mother, driving her own vehicle several car lengths behind her mother's vehicle. Defendant drove his truck through a stop sign and hit plaintiff's mother's car. Her mother's car rolled approximately three times before stopping and her mother was thrown from her vehicle and killed. Plaintiff witnessed the collision and was the first person to come to her mother's assistance. *Id.* at 526, 509 S.E.2d at 790.

¶ 15 Although the Court noted that the "plaintiff did not allege that defendant had any knowledge of plaintiff's relationship to the decedent[,]" the Court specified that "cases of negligent infliction of emotional distress must be determined on a case-by-case basis, considering all of the relevant facts." *Id.* at 527, 509 S.E.2d at 791 (citations omitted). Ultimately, the Court concluded that "the possibility in the case before us that decedent might have had a child following her in a separate vehicle, who might witness the collision and suffer severe emotional distress because of defendant's alleged negligence, could not have been reasonably foreseeable to defendant." *Id.* at 529, 509 S.E.2d at 792.

¶ 16 Unlike in *Fields*, where plaintiff alleged she was driving her own car several car lengths behind her mother's car, Plaintiff in this case alleged that she and her father were riding bicycles together on the highway; Defendant came around a curve, crossed over the center line, veered back onto the road, and struck Plaintiff's father "head on"; "Plaintiff was only a few feet away from her father" when Defendant struck her father; the impact ejected Plaintiff's father from his bicycle and he landed on the road; Plaintiff witnessed the incident and injuries which resulted in her father's death; and Defendant fled the scene. Considering all the relevant facts, including allegations of facts that implicate the *Ruark* factors, as well as the unique facts of this case, we conclude that Plaintiff alleged sufficient facts for a jury to conclude that her emotional distress was a reasonably foreseeable consequence of Defendant's negligence.

B. Severe Emotional Distress

¶ 17 Plaintiff next argues that she sufficiently pled that Defendant's negligence caused her severe emotional distress.

¶ 18 "An allegation of severe emotional distress is sufficient to overcome dismissal under Rule 12(b)(6) so long as it provides the defendant with 'notice of the nature and basis of plaintiff['s] claim so as to enable him to answer and prepare for trial.' " *Demarco v. Charlotte-Mecklenburg Hosp. Auth.*, 268 N.C. App. 334, 343, 836 S.E.2d 322, 328 (2019) (quoting *Acosta v. Byrum*, 180 N.C. App. 562, 570, 638 S.E.2d 246, 252 (2006)). Severe emotional distress has been defined as "any emotional or

mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Ruark Obstetrics*, 327 N.C. at 304, 395 S.E.2d at 97.

¶ 19 Our Supreme Court has not required a plaintiff to plead severe emotional distress with great detail. In *McAllister v. Ha*, 347 N.C. 638, 496 S.E.2d 577 (1998), Plaintiffs alleged that defendant-physician had negligently failed to inform them of the possibility that their future child could suffer from sickle-cell disease. Plaintiffs gave birth to a child carrying the disease. *Id.* at 640, 496 S.E.2d at 580. In support of their NIED cause of action, plaintiff-wife alleged that she had been unable to sleep due to concerns about the child's health. Plaintiffs' complaint also alleged "that defendant's negligence caused them 'extreme mental and emotional distress, and financial loss.' " *Id.* at 641, 496 S.E.2d at 580. The Court concluded that plaintiffs' allegations, "while sparse, are sufficient to state a claim for negligent infliction of emotional distress." *Id.* at 646, 496 S.E.2d at 583.

¶ 20 Likewise, prior to 2008, opinions from this Court did not require a plaintiff to plead severe emotional distress with great detail. For example, in *Chapman ex. rel. Chapman v. Byrd*, 124 N.C. App. 13, 475 S.E.2d 734 (1996), plaintiffs alleged that they "suffered severe emotional distress, mental anguish, and ridicule as a proximate result of" defendant's negligence. *Id.* at 22, 475 S.E.2d at 740. Although these allegations were "somewhat conclusory," *id.* at 20, 475 S.E.2d at 739, they were "sufficient to satisfy the pleading requirements set forth in [*Ruark Obstetrics*] and . . . the trial court therefore erred by dismissing plaintiffs' NIED claims." *Id.* at 22, 475 S.E.2d at 740. Similarly, in *Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987), plaintiff's allegations that defendant's acts "were intended to cause and did in fact cause plaintiff to suffer extreme emotional distress" were "sufficient to apprise the defendant of what the claim is and what events produced it." *Id.* at 340, 354 S.E.2d at 759 (discussing severe emotional distress in the context of an IIED claim); *see also Acosta*, 180 N.C. App. at 570, 638 S.E.2d at 252 ("[P]laintiff here claimed that defendant's negligence caused severe emotional distress, humiliation, and mental anguish. This allegation alone, when combined with her other factual claims, placed defendant on notice of the nature and basis of plaintiff's claim." (quotation marks and citation omitted)).

¶ 21 More recently, however, this Court has required a complaint for NIED to contain some factual allegations to support an allegation of severe emotional distress. In *Holleman v. Aiken*, this Court affirmed the

dismissal of plaintiff's NIED claims where the complaint did "not make any specific factual allegations as to [plaintiff's] 'severe emotional distress.' " 193 N.C. App. at 502, 668 S.E.2d at 591. In *Horne v. Cumberland Cnty. Hosp. Sys., Inc.*, plaintiff alleged that she suffered severe emotional distress "without any factual allegations, regarding the type, manner, or degree of severe emotional distress she claims to have experienced." 228 N.C. App. at 149, 746 S.E.2d at 20. Following *Holleman*, this Court held in *Horne* that without such factual allegations describing the emotional distress, "plaintiff's complaint fails to state a valid claim for NIED." *Id.*

¶ 22 We are bound by *Holleman* and *Horne* and conclude that Plaintiff's allegations in this case are insufficient. *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."). The only allegations in Plaintiff's complaint regarding her emotional distress are that Defendant's actions "proximately caused the negligent infliction of emotional distress of [P]laintiff" and that "[P]laintiff suffered severe emotional distress." These allegations arguably suffice under *McAllister*, *Chapman*, *Dixon*, and *Acosta*. Moreover, Defendant did not argue at the hearing on his motion to dismiss that he did not have notice of the nature and basis of Plaintiff's claim of severe emotional distress, raising this argument for the first time on appeal. Nonetheless, under *Holleman* and *Horne*, "without any factual allegations regarding the type, manner, or degree of severe emotional distress she claims to have experienced[,]" we are constrained to hold that Plaintiff's complaint "fails to state a valid claim for NIED." *Horne*, 228 N.C. App. at 149, 746 S.E.2d at 20.

III. Conclusion

¶ 23 We conclude that Plaintiff's allegations are sufficient to allege that it was reasonably foreseeable that Defendant's negligence would cause Plaintiff severe emotional distress. However, as Plaintiff's complaint is devoid of factual allegations regarding the type, manner, or degree of severe emotional distress she claims to have experienced, Plaintiff has not sufficiently pled that Defendant's negligence caused her severe emotional distress. Accordingly, we affirm the trial court's dismissal of Plaintiff's NIED claim.

AFFIRMED.

Judges DILLON and ZACHARY concur.

DAEDALUS, LLC, AND EPCON COMMUNITIES CAROLINAS, LLC, PLAINTIFFS
v.
CITY OF CHARLOTTE, DEFENDANT

No. COA21-329

Filed 5 April 2022

1. Appeal and Error—interlocutory order—insufficient Rule 54 certification—no substantial right—certiorari granted

Although the trial court's purported Civil Procedure Rule 54(b) certification of an interlocutory order (which only partially disposed of issues in a dispute over water and sewer capacity fees) was not valid to invoke the appellate court's jurisdiction—because the certification was not included in the court's original order but was added to a second amended order under Rule 60(a)—and there was no substantial right affected which would make the order ripe for appellate review (since the amount of damages had yet to be determined, the order did not compel the immediate payment of a significant amount of money), the Court of Appeals nevertheless exercised its discretion to grant certiorari. Given the numerous parties involved and the potential for a significant amount of potential liability, immediate review was necessary to aid in the efficient administration of justice by resolving important threshold issues before the remainder of the litigation commenced.

2. Cities and Towns—water and sewer—capacity fees—not used for contemporaneous services—imposed without authority

A city exceeded its authority under N.C.G.S. § 160A-314(a) by collecting water and sewer capacity fees from two developers as a mandatory precondition to connecting new users to the existing city water and sewer system, because the fees, although purportedly charged to pay for the capacity costs associated with new development, were not used for the provision of contemporaneous services (a separate tapping fee was charged to cover the connection cost) but were placed in a general water and sewer fund for future discretionary spending.

Appeal by Defendant from Order entered 18 March 2021 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 January 2022.

Milberg Coleman Bryson Phillips Grossman, PLLC, by James R. DeMay, Daniel K. Bryson, Martha A. Geer, Mark R. Sigmon, John Hunter Bryson, and Scarbrough, Scarbrough & Trilling, PLLC, by James E. Scarbrough, John F. Scarbrough, and Madeline J. Trilling, and Shipman & Wright, LLP, by Gary K. Shipman and William G. Wright, for Plaintiffs-Appellees.

Cranfill Sumner LLP, by Steven A. Bader, Patrick H. Flanagan, and Stephanie H. Webster, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 City of Charlotte (Defendant) appeals from Order entered in favor of Daedalus, LLC, Epcon Communities, LLC, and NVR, INC., (collectively Plaintiffs) on 18 March 2021 partially granting Plaintiffs' Motion for Summary Judgment. The Record before us reflects the following:

¶ 2 Defendant, a municipality organized under the laws of North Carolina, enacted an ordinance for the collection of water and sewage capacity fees.

¶ 3 At all relevant times, this Ordinance—Charlotte's City Ordinance § 23-12—mandated:

> Each applicant for water or sewer service shall pay the applicable capacity charge for the type and size of service connection requested. The capacity charge shall be arrived at in accordance with the water and sewer rate methodology documents as set forth in the schedule of current rates, fees, and charges.

As provided for in the Ordinance, Defendant determines the capacity fee amount utilizing the water and sewer rate methodology set forth in the Charlotte-Mecklenburg Utility Department Revenue Manual (Revenue Manual). The Revenue Manual provides:

> Capacity fees are one time fees paid at the time of application for a new service and are charged to pay for a portion of the capital costs associated with providing capacity to serve new growth.

The Revenue Manual also instructs Defendant to calculate the fees using the "buy-in" method. The "buy-in" method establishes the amount of the

fee based on "the unit cost of capacity of the water and sewer system in a way that results in the cost of capacity being equal to that which existing customers of the system have paid."

¶ 4 The capacity fees are calculated and paid at the time property owners apply for new water and sewer service. Defendant also required property owners to pay a separate "connection fee" or "tap fee" to cover the cost of actually connecting the property to the water and sewer systems. Upon receipt of the capacity fee and connection/tap fee, Defendant began working to establish the connection—a process that typically took between four to six weeks. After property owners connect to the water and sewer system, they pay user rates based on their use of the water and sewer system. Defendant's ordinances state user rates should be used to pay for the debt incurred for construction of the water and sewer system, as well as for operation and maintenance expenses:

> Sec. 23-126. —Water System Operation.
>
> The amount necessary to meet the annual interest payable on the debt incurred for the construction for the water system; the amount necessary for the amortization of the debt; and the amount necessary for repairs, for fire protection, maintenance and operation of the system shall comprise the rate for water service collected by the city.
>
> Sec. 23-41. — System Operations.
>
> The amount necessary to meet the annual interest payable on the debt incurred for construction of the sewer system; the amount necessary for the amortization of the debt; and the amount necessary for repairs, maintenance, and operation for the system shall comprise the user charge for sewer service collected by the city.

¶ 5 While Defendant used the connection/tap fees to cover the costs associated with connecting the property to the infrastructure and the user fees to cover the costs associated with maintaining the infrastructure, Defendant does not have a stated use for the capacity fees. Instead, Defendant deposits the fees into its general water and sewer fund and "carries [the monies] forward over time." Defendant does not currently have a plan for spending the carried over monies, and instead, merely stated the funds would be spent by Defendant to "fund future operations."

¶ 6 Plaintiffs are developers/home builders who paid these capacity fees to Defendant in the fiscal years 2016-2018 as a mandatory precondition of connecting to Defendant's existing water and sewer infrastructure. The current litigation arose when Plaintiffs filed a Complaint on 5 November 2018, alleging Defendant's collection of capacity fees for the fiscal years 2016-2018 constituted an unlawful ultra vires action. On 13 September 2019, Plaintiff filed a Second Amended and Supplemental Complaint,[1] alleging the collection of capacity fees for the fiscal years 2019-2020 constituted an unlawful ultra vires action, or in the alternative, the fees violated Plaintiffs' equal protection and substantive due process rights because the fees charged had no reasonable relationship or rational nexus to the impact, if any, that new customers have on Defendant's water or sewer systems.

¶ 7 After Plaintiffs filed their Second Amended Complaint on 13 September 2019, Defendant filed an Answer on 23 October 2019. Thereafter, both parties filed motions for summary judgment. The trial court heard the matter on 18 December 2019 and issued an Order Partially Granting Plaintiffs' Motion for Summary Judgment and Partially Granting Defendant's Motion for Summary Judgment on 2 October 2020. With regard to the capacity fees collected during the fiscal years 2016, 2017, and 2018, the trial court found "there are no genuine issues of material fact[,]" and concluded the assessment and collection of capacity fees during the fiscal years 2016, 2017, and 2018 were ultra vires. With regard to Plaintiffs' Second Claim for Relief, the alleged ultra vires action of collecting capacity fees during fiscal years 2019 and 2020, the trial court found "there are genuine issues" of material fact and scheduled the matter for trial. However, the trial court also concluded Defendant's assessment and collection of capacity fees during the fiscal years 2019 and 2020 are "not an exaction constituting a governmental taking and Plaintiffs have an adequate remedy at law."

¶ 8 After the entry of the Order, Plaintiffs, with Defendant's consent, filed a Motion to Amend Order to Correct Clerical Error pursuant to Rule 60(a) on 27 October 2020. In the Motion to Amend, Plaintiffs identified several clerical errors in the Order, including references to fiscal years 2018 and 2019, as opposed to fiscal years 2019 and 2020, and references to "Defendant's Claims for Relief," instead of "Plaintiffs' Claims for Relief." In response to the Rule 60(a) Motion, the trial court issued an Amended Order on 4 November 2020.

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1. Plaintiff filed a Motion to Amend the Complaint on 6 August 2019, which was granted on 10 September 2019.

¶ 9 On the same day, Defendant filed a Motion for Certification of Judgment requesting the trial court certify the Order for immediate appeal with no just reason for delay pursuant to Rule 54(b). Plaintiffs consented to the Motion to Certify in a Joint Motion to Amend Order filed on 17 March 2021. The Joint Motion to Amend also moved for amendment of the Order pursuant to Rule 60(a) in order to clarify that "a neutral, third-party Referee under Rule 53 [should] calculate the amount of refunded capacity fees plus interest to class members" and add language stating, "that this Order is certified for appeal with no just reason for delay pursuant to Rule 54(b) of the Rules of Civil Procedure." In response to the Joint Motion, the trial court entered the Second Amended Order on 18 March 2021. Thereafter, on 14 April 2021, Defendant filed Notice of Appeal from the Second Amended Order.

Appellate Jurisdiction

¶ 10 **[1]** Plaintiffs and Defendant acknowledge the Order appealed from is interlocutory, as the referee has not yet calculated the damages for the years 2016-2018 and the ultra vires claim for the years 2019-2020 has not yet been resolved. Nevertheless, Defendant contends they are entitled to immediate appellate review because (1) the trial court certified the order for immediate review under Rule 54(b); (2) the Order affects a substantial right because after the referee's final ruling, Defendant will be required to pay a significant sum of money to Plaintiffs; and (3) Defendant filed a separate petition for a writ of certiorari under North Carolina Rule of Civil Procedure 21 contemporaneously with this brief.

A. Rule 54(b) certification

¶ 11 "[A]ppeal lies of right directly to the Court of Appeals . . . from any final judgment of a superior court . . ." N.C. Gen. Stat. § 7A-27(b)(1) (2021). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citation omitted). Whereas, "[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* at 362, 57 S.E.2d at 381.

¶ 12 Generally, there is no right to appeal from an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). "However, immediate appeal of interlocutory orders and judgments is available in at least two instances: when the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal; and when the interlocutory order

affects a substantial right under N.C.G.S. §§ 1-277(a) and 7A-27(d)(1)." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citation and quotation marks omitted).

¶ 13 Here, the trial court did not certify this case for immediate review in its initial Summary Judgment Order, but rather attempted to add a certification in its Second Amended Order under Rule 60(a). N.C. Gen. Stat. § 1A-1, Rule 60(a) provides "[c]lerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge . . ." N.C. Gen. Stat. § 1A-1, Rule 60(a) (2021). Thus, "[w]hile Rule 60[a] allows the trial court to correct clerical mistakes in its order, it does not grant the trial court the authority to make substantive modifications to an entered judgment." *Food Serv. Specialists v. Atlas Rest. Mgmt.*, 111 N.C. App. 257, 259, 431 S.E.2d 878, 879 (1993). "A change in an order is considered substantive and outside the boundaries of Rule 60(a) when it alters the effect of the original order." *Buncombe Cnty. ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784 (1993). This Court has previously held "Rule 60(a) is not an appropriate means for seeking an amendment to an order or judgment to add the trial court's Rule 54(b) certification" because a Rule 54(b) certification substantially alters the effect of the original order and allows the party "to circumvent the established procedural rules governing the bringing of an appeal." *Pratt v. Staton*, 147 N.C. App. 771, 774-75, 556 S.E.2d 621, 624 (2001). *See e.g.*, *Newcomb v. Cnty. of Carteret*, 207 N.C. App 527, 701 S.E.2d 325 (2010); *Branch Banking & Trust Co. v. Peacock Farm, Inc.*, 241 N.C. App. 213, 219, 772 S.E.2d 495, 500 (2015).

¶ 14 Here, since the trial court did not include the Rule 54(b) certification in the original Order and did not have the authority under Rule 60(a) to make a substantive modification to the Order by adding a Rule 54(b) certification, the subsequent Rule 54(b) certification is ineffective to vest appellate jurisdiction.

B. Substantial Right

¶ 15 Defendant next contends the Second Amended Order affects a substantial right because it involves the payment of a significant sum of money. A substantial right is one "materially affecting those interests which a person is entitled to have preserved and protected by law . . . ." *Gunter by Zeller v. Maher*, 264 N.C. App. 344, 346, 826 S.E.2d 557, 560 (2019) (citation and quotation marks omitted). "Whether or not a substantial right will be prejudiced by delaying an interlocutory appeal must be decided on a case-by-case basis." *Walden v. Morgan*,

179 N.C. App. 673, 677, 635 S.E.2d 616, 620 (2006) (citation and quotation marks omitted).

¶ 16 Orders that compel the *immediate* payment of a significant amount of money may affect a substantial right. *Est. of Redden v. Redden*, 179 N.C. App. 113, 116-17, 632 S.E.2d 794, 798 (2006) (emphasis added). However, "an order determining only the issue of liability and leaving unresolved other issues such as that of damages cannot be held to 'affect a substantial right.' " *Johnston v. Royal Indem. Co.*, 107 N.C. App. 624, 625, 421 S.E.2d 170, 171 (1992) (citing *Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979)). *But c.f.*, *Beck v. Am. Bankers Life Assurance Co.*, 36 N.C. App. 218, 221, 243 S.E.2d 414, 416 (1978) (concluding defendant's filing of supersedeas bond for $21,500.73 was sufficient to convert the partial summary judgment into a final judgment that defendant could appeal from even though the order left it up to the parties to determine the exact amount defendant had to pay). Furthermore, our Supreme Court has held an appeal from "the order of compulsory reference, before judgment upon the report of the referee, is premature and fragmentary and must be dismissed." *Rudisill v. Hoyle*, 254 N.C. 33, 46, 118 S.E.2d 145, 154 (1961) (citing *LeRoy v. Saliba*, 182 N.C. 757, 108 S.E. 303 (1921)).

¶ 17 Here, the referee has not submitted their report with the damage calculation and Defendant has not filed any subsequent documents, like a supersedeas bond, representing the amount of Defendant's liability. Thus, although it appears the trial court's Order would result in Defendant eventually being required to pay Plaintiffs a significant sum of money, the Order does not compel the *immediate* payment of money. Consequently, the Order does not affect a substantial right and is therefore, subject to dismissal because the appeal is "fragmentary and premature." *See Rudisill*, 254 N.C. at 46, 118 S.E.2d at 154.

C. Writ of Certiorari

¶ 18 Nevertheless, Defendant has also filed a Writ of Certiorari. Under Rule 21 of the North Carolina Rules of Appellate Procedure:

> The writ of certiorari may be issued in appropriate circumstances by either appellate court 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, or when no right of appeal from an interlocutory order exists . . . .

N.C. R. App. P. 21(1). Thus, "[i]t is an appropriate exercise of this Court's discretion to issue a writ of certiorari in an interlocutory appeal where

. . . there is merit to an appellant's substantive arguments, and it is in 'the interests of justice' to treat an appeal as a petition for writ of certiorari." *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 606, 596 S.E.2d 285, 289 (2004) (quoting *Sack v. N.C. State Univ.*, 155 N.C. App. 484, 490, 574 S.E.2d 120, 126 (2002)).

¶ 19 In this case, a writ of certiorari may be appropriately considered because no right of appeal exists from the trial court's interlocutory Order. Furthermore, it is plainly apparent the Order affects numerous parties and involves a substantial amount of potential liability. Moreover, it appears the central issue presented in this appeal is a vital threshold issue upon which the remaining and extensive litigation to follow hinges. Consequently, because of the significant impact of this lawsuit and the need for efficient administration of justice, we exercise our discretion to reach the merits of Defendant's appeal from the trial court's interlocutory Order and grant the petition for Writ of Certiorari.

Issues

¶ 20 **[2]** The dispositive issue on appeal is whether the trial court erred, as a matter of law, in concluding Defendant's collection of capacity fees for fiscal years 2016-2018 was an ultra vires action.[2]

Analysis

¶ 21 Defendant contends the capacity fees it charged during fiscal years 2016-2018 were not ultra vires because Defendant (1) provided users with contemporaneous service at the time they paid the capacity fee; and (2) used revenue from capacity fees to pay existing debt on revenue bonds.

¶ 22 In North Carolina, cities "exist solely as political subdivisions of the State and are creatures of statute." *Davidson Cnty. v. City of High Point*, 321 N.C. 252, 257, 362 S.E.2d 553, 557 (1987). As such, cities have "no inherent powers, and can exercise only such powers as are expressly conferred by the General Assembly and such as are necessarily implied by those expressly given." *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 654, 142 S.E.2d 697, 701 (1965). "All acts beyond the scope of the power granted to a municipality are void." *City of Asheville v. Herbert*, 190 N.C. 732, 735, 130 S.E. 861, 863 (1925) (citations omitted).

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2. Because of our decision in this case, it is not necessary for us to reach the issue presented in Plaintiffs' cross-appeal that the trial court erred in granting Summary Judgment for Defendant on Plaintiffs' Alternative Claims for Relief that the capacity fees charged prior to 1 July 2018 were unreasonable under *Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 442 S.E.2d 45 (1994).

¶ 23 The General Assembly expressly conferred the power to charge water and sewer fees upon cities in N.C. Gen. Stat. § 160A-314(a). *Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 19, 789 S.E.2d 454, 458 (2016). The version of N.C. Gen. Stat. § 160A-314(a) in effect during the fiscal years 2016-2018 provided, in relevant part, "[a] city may establish and revise . . . rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise." N.C. Gen. Stat. § 160A-314(a) (2013).

¶ 24 Our Supreme Court interpreted this version of the statute in *Quality Built Homes*. There, the city of Carthage charged impact fees to "offset . . . costs to expand the system to accommodate development." *Quality Built Homes*, 369 N.C. at 17, 789 S.E.2d at 456 (alteration in original). The impact fees were charged either: (1) at the time of final subdivision plat approval if the development required the subdivision of land; or (2) if the subdivision had already occurred, either at the time of tap fees or the issuance of a building permit. *Id.* The Court concluded the enabling statute, N.C. Gen. Stat. § 160A-314(a), conferring upon cities the power to charge water and sewer fees "for the use of or the services furnished[,]" used language "operative in the present tense[,]" and thus, only authorized cities to charge fees "for the contemporaneous use of its water and sewer services—not to collect fees for future discretionary spending." *Id.* at 20, 789 S.E.2d at 458. Applying this interpretation of the enabling statute to the fees at issue, the Court held Carthage's impact fees were not for any "contemporaneous use" because: (1) the fees were charged to a property "to be served" by the town and were "not assessed at the time of actual use" of the water and sewer system; and (2) the fees were not "tap fees" to pay for the actual cost of the connection. *Id.* at 21, 789 S.E.2d at 458-59.

¶ 25 Following *Quality Built Homes*, the General Assembly enacted HB 436, the Public Water and Sewer System Development Fee Act, N.C. Gen. Stat. § 162A-201, *et seq.*, effective 1 October 2017, which prospectively authorized cities to charge water and sewer impact fees, called "system development fees," in order "to fund the costs of capital improvements necessitated by and attributable to such new development, to recoup costs of existing facilities which serve such new development, or a combination of those costs . . ." N.C. Gen. Stat. § 162A-201(9) (2021). However, "[n]othing in [the] act provides retroactive authority for any system development fee . . . ." An Act to Provide for Uniform Authority to Implement System Development Fees for Public Water and Sewer Systems in North Carolina and to Clarify the Applicable Statute of Limitations, S.L. 2017-138, § 11, 2017 N.C. Sess. Laws 996, 1002. Thus, the statute does not apply to fees charged before 1 October 2017.

¶ 26 After the enactment of N.C. Gen. Stat. § 162A-201 in 2017, this Court decided *Kidd Constr. Grp., LLC v. Greenville Utils. Comm'n*, 271 N.C. App. 392, 845 S.E.2d 797 (2020). There, starting in 2008, the city of Greenville began charging capacity fees at the time of a developer's application for water and sewer service. *Id.* at 395, 845 S.E.2d at 798. According to Greenville, they began charging the fees to "recover a proportional share of the cost of capital facilities constructed to provide service capacity for new development or new customers connecting to the water/sewer system." *Id.* Just as in *Quality Built Homes*, the capacity fees were charged in addition to a tapping fee, which covered the cost for physically making a service tap. *Id.*

¶ 27 We held Greenville lacked the authority to charge the capacity fees prior to the enactment of N.C. Gen. Stat. § 162A-201 in 2017 because even though the city did not condition final plat approval and the issuance of building permits upon the payment of fees, like in *Quality Built Homes*, the fees were still not for "contemporaneous use" as contemplated by the enabling statute. *Id.* at 399, 845 S.E.2d at 801. This Court reasoned the fees were not contemporaneous because the sole purpose of the fee was "to provide service capacity for new development or new customers connecting to the water/sewer system" and another fee is imposed simultaneously to cover the cost of actually connecting the property to the water and sewer systems. *Id.* at 395, 845 S.E.2d at 798-99. Thus, new customers did not receive any concurrent service for the capacity fee and N.C. Gen. Stat. § 160A-214(a) only empowered Greenville to charge fees for "services rendered"—not "for future discretionary spending on water and sewer expansion projects." *Id.* at 401, 845 S.E.2d at 802.

¶ 28 Defendant contends its capacity fee is "distinct, in all material respects, from the fees in both *Quality Built Homes* and *Kidd*." Specifically, Defendant contends its capacity fee differs from the fees in *Quality Built Homes* and *Kidd* because Defendant collected the fee at the time a user requested service, not at the time the property owner sought building approval, and upon receipt of the fee Defendant "reserved" specific capacity space. However, Defendant's capacity fees are identical in relevant part to Greenville's capacity fees we held were ultra vires, as both fees were charged to pay for the capacity costs associated with serving new growth; the fees were paid at the time of the application for a new service; and the service connection fees consisted of two components: a tapping fee and a capacity fee.

¶ 29 Furthermore, Defendant cannot identify any contemporaneous use of the water and sewer system property owners receive for the payment of the fees. Although Defendant argues the fees were used to pay

for existing debt on revenue bonds, Defendant's City Ordinance § 23-12 mandates *user rates* should be used to pay for this debt—not capacity fees. Likewise, the capacity fees were not used to pay for the actual cost of tapping into the system, as a separate tap fee covers that cost. Capacity fees, by Defendant's own admission, are merely deposited into Defendant's general water and sewer fund and "carrie[d] forward over time" to "fund future operations."

¶ 30 Thus, the undisputed evidence shows Defendant's fees were charged for future discretionary spending and not for contemporaneous use of the system or for services furnished. Therefore, in accordance, with *Quality Built Homes* and *Kidd*, we necessarily conclude Defendant's action of charging capacity fees for the fiscal years 2016-2018 was not authorized by the previous version of N.C. Gen. Stat. § 160A-314(a) and was ultra vires. Consequently, the trial court did not err in partially granting Plaintiff's Motion for Summary Judgment.

Conclusion

¶ 31 Accordingly, for the foregoing reasons, we affirm the trial court's 18 March 2021 Order.

AFFIRMED.

Judges ARROWOOD and CARPENTER concur.

HALL v. WILMINGTON HEALTH, PLLC

[282 N.C. App. 463, 2022-NCCOA-204]

SUSAN B. HALL, PLAINTIFF
v.
WILMINGTON HEALTH, PLLC, DEFENDANT

No. COA20-864

Filed 5 April 2022

1. Appeal and Error—interlocutory order—substantial right—deposition limits—counsel's physical presence barred—due process implications

The Court of Appeals had jurisdiction to hear an appeal from a discovery order in which the trial court, in granting plaintiff's motion to hold depositions remotely by videoconference (due to the public health concerns of the ongoing coronavirus pandemic and related travel restrictions), also barred counsel from both sides from being physically present with clients or witnesses, even their own, at any deposition. Although the order was interlocutory, where the restriction on the right to counsel implicated constitutional due process rights, the order affected a substantial right requiring immediate review.

2. Appeal and Error—preservation of issues—deposition limits—counsel's physical presence barred—due process implications—no opportunity to object

In an appeal from a discovery order in a medical malpractice case in which the trial court's written order barred counsel from being physically present at any deposition, even to attend to their own clients or witnesses, the argument by defendant medical practice that its constitutional due process rights were violated was preserved where defendant neither waived its rights nor invited error because it had no notice or opportunity to object to an issue that neither party raised and which was not argued or ruled on at the discovery hearing.

3. Appeal and Error—standard of review—deposition limits—constitutional implications—de novo review

In an appeal from a discovery order in a medical malpractice case, the Court of Appeals reviewed defendant's constitutional argument—that the trial court's prohibition on counsel's physical presence at any deposition, without regard to the location or particular circumstances of the deposition, violated its due process rights—de novo, rather than for an abuse of discretion, given the constitutional implications involved.

4. Appeal and Error—mootness—public interest exception—deposition limits—counsel's physical presence barred

In an appeal from a discovery order in a medical malpractice case, in which the trial court barred counsel on both sides from being physically present with clients or witnesses, even their own, during depositions due to the public health concerns of the ongoing coronavirus pandemic and related travel restrictions, and applied those limitations to all depositions without regard to the location or particular circumstances of the people involved, the appellate court rejected plaintiff's argument that defendant's due process challenge only applied to depositions already conducted and that she did not plan to depose any more of defendant's employees. Where plaintiff essentially argued the issue raised by defendant was moot, the public interest exception applied given the importance of this issue of first impression, and a party's voluntary cessation of challenged conduct did not foreclose the issue arising anew if circumstances changed or the party were to change their mind, especially since defendant had not yet designated its expert witnesses.

5. Constitutional Law—due process—right to counsel—deposition limits—counsel's physical presence barred

In an issue of first impression, the Court of Appeals determined that the trial court violated a medical practice's constitutional due process rights in a medical malpractice case by issuing a discovery order that, in granting plaintiff's motion to hold depositions remotely by videoconference (due to the public health concerns of the ongoing coronavirus pandemic and related travel restrictions), also barred counsel from both sides from being physically present with clients or witnesses, even their own, at any deposition. The due process right to retained counsel in civil cases extended to the discovery context, given the importance of having access to and free communication with counsel in developing a factual record and to prevent the disclosure of privileged material. Where the court had less restrictive means available to achieve the same goals, its limitations were not narrowly tailored and failed to take into account the particular circumstances of the timing, location, or persons involved in any given deposition.

Judge DILLON dissenting.

Appeal by defendant from order entered 14 July 2020 by Judge J. Stanley Carmical in Superior Court, New Hanover County. Heard in the Court of Appeals 7 September 2021.

Reiss & Nutt, PLLC, by Kyle J. Nutt, for plaintiff-appellee.

Walker, Allen, Grice, Ammons, Foy & Klick, LLP, by Norman F. Klick, Jr. and Jerry A. Allen, Jr., and Robinson, Bradshaw & Hinson, P.A., by Robert E. Harrington, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 This case involves a discovery order intended to address concerns regarding safety and travel during the COVID-19 pandemic. The issue here arose at the very start of the pandemic, and since then, judges and attorneys have learned a great deal about COVID-19, proceedings by remote video-conference, and juggling the ever-changing guidelines, emergency orders, and recommendations regarding COVID-19. Hindsight is 20/20, and we recognize this Court has the benefit of hindsight but the trial court did not. Instead, the trial court was dealing with a discovery dispute in the context of an unprecedented public health emergency. But the Courts "shall be open" and the Constitution is not suspended by any pandemic or emergency directives.

¶ 2 Defendant, Wilmington Health, appeals from the trial court's order requiring all depositions to be taken by "remote videoconferencing in separate locations from the witness" and that "no counsel shall be physically present with the witness at any deposition." Under the Rules of Civil Procedure, the trial court generally has broad discretion in resolving discovery disputes and entering orders limiting or setting guidelines for discovery, but here, the trial court's order went beyond the relief requested by Plaintiff, Susan Hall, and imposed a limitation upon depositions of all witnesses which would also prevent Defendant's counsel from being present in person at depositions of Defendant's own witnesses and employees.

¶ 3 This wholesale ban on personal attendance of Defendant's counsel at depositions of its own employees and witnesses presented the constitutional issue Defendant asserts in this appeal and was not supported by existing law, emergency orders, or evidence. The trial court's order violated Defendant's constitutional right by prohibiting counsel from being physically present at depositions of its own employees and witnesses. We reverse and remand for further proceedings.

I. Background

¶ 4 This appeal arises from a discovery dispute in a medical malpractice action. On 29 April 2019, Plaintiff filed a complaint against Defendant

alleging medical malpractice as defined by North Carolina General Statute § 90-21.11(2) (2017), asserting claims of negligence, gross negligence, and punitive damages, arising from Defendant's alleged failure to timely diagnose skin cancer. Plaintiff alleged the delay in diagnosis and treatment of her cancer reduced her life expectancy. The issue presented here arises from the procedural history of the case and specifically from limitations placed upon depositions in the case, so we focus on that procedural history.

¶ 5 The trial court held a hearing regarding the discovery schedule in October 2019 and rendered its ruling regarding the deadlines for the Discovery Scheduling Order ("DSO") at the same time, but the DSO was not entered until 17 January 2020. Despite the delay in the issuance of the written order, the parties began complying with the schedule as set forth by the trial court in October 2019 prior to formal entry of the order. For example, the DSO required Plaintiff to designate her expert witnesses on or before 4 January 2020, and Plaintiff designated them on 3 January 2020. Under the DSO, the deadline for depositions of Plaintiff's expert witnesses was 4 March 2020. Due initially to scheduling conflicts for Defendant's counsel, the depositions of Plaintiff's designated experts did not take place by the 4 March 2020 deadline with Plaintiff instead offering the expert's availability on 27 May 2020.

¶ 6 By early March, 2020, the COVID-19 pandemic reached our shores, abruptly changing daily life and even the legal system's processes. On 10 March 2020, Governor Roy Cooper entered Executive Order No. 116, the first of many emergency orders entered in response to the COVID-19 pandemic.[1] This order declared a state of emergency under North Carolina General Statute § 166A-19.3(6) and (19) based on "the public health emergency posed by COVID-19," and also pertinently: (1) created the "Governor's Novel Coronavirus Task Force on COVID-19"; (2) authorized state agencies to "cancel, restrict or postpone travel of state employees as needed to protect the wellbeing of others"; (3) ordered state and local health authorities to "implement public health surveillance and control measures" for people who "have been diagnosed with or are at risk of contracting COVID-19 in order to control or mitigate spread of the disease"; and (4) took a variety of other measures to secure and allocate resources to combat the spread of COVID-19 in the state. E.O. 116, Cooper, 2020, § 1 (state of emergency), § 10 (taskforce), § 11(b) (travel restrictions), § 12 (public health measures), §§ 5–9, 11(a),

1. With the consent of the parties as noted during oral argument, we take judicial notice of the Executive Orders entered by Governor Roy Cooper.

13–22 (other measures). On 14 March 2020, Governor Cooper entered Executive Order No. 117, which, pursuant to his powers under North Carolina General Statute § 166A-19.30, prohibited "mass gatherings" of more than 100 people in certain locations, closed schools, and encouraged social distancing, hand washing and sanitizing, and the practice of "proper respiratory etiquette" in line with guidance from the Centers for Disease Control and Prevention (CDC). E.O. 117, Cooper, 2020, §§ 1–3.

¶ 7 On 1 June 2020, Plaintiff filed a motion to require depositions to be taken by telephonic or virtual means under North Carolina Rules of Civil Procedure 30(b)(7) and 26(c). Plaintiff based her motion upon the COVID-19 pandemic, specifically safety concerns regarding being in a room with several people for in-person depositions and the travel required to attend depositions. Plaintiff alleged depositions were set for 21 July 2020 of Dr. Steven Feldman in Wake Forest, North Carolina, and for 30 July 2020 of Dr. Jeffery Wayne, in Chicago, Illinois. Plaintiff further alleged in-person depositions would require air travel, putting people in close proximity in rooms for extended periods of time, and that masks may impair questioning and transcription of testimony. Plaintiff also noted Chief Justice Cheri Beasley had encouraged virtual depositions.[2] On 12 June 2020, Defendant moved to amend the Discovery Scheduling Order due to COVID-19 and responded to Plaintiff's motion for virtual depositions. Defendant specifically noted the parties had already agreed the deadline for Defendant to identify its expert witnesses would be extended from 15 June 2020 to 15 August 2020.

¶ 8 On 9 July 2020, Defendant filed a response to Plaintiff's motion for virtual depositions. Defendant noted it had requested amendment of the Discovery Scheduling Order and alleged there would be sufficient time

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2. We have reviewed all the emergency directives issued by Chief Justice Beasley in effect on the 1 June 2020 filing date of Plaintiff's motion (Emergency Directives 1 to 19), and we did not find any instance in which she encouraged virtual depositions. Order of the Chief Justice Extending and Modifying Emergency Directives 2 to 8 (30 May 2020); Order of the Chief Justice Emergency Directives 9 to 16 (21 May 2020); Order of the Chief Justice Emergency Directives 17 to 19 for Staying all Pending Evictions and Establishing New Mediation Program (30 May 2020); *see also* Order of the Chief Justice Extending Emergency Directives 1 to 8 until May 30 (1 May 2020) (indicating Emergency Directive 1 would expire May 30 but the terms of the directive required rescheduling most court proceedings until no sooner than 1 June 2020 or conducting them remotely). Rather, the emergency directives focused on remote court proceedings (Emergency Directives 1, 9), which are different because courthouses would bring more people together typically than a deposition. Order of the Chief Justice Extending Emergency Directives 1 to 8 until May 30 (1 May 2020); Order of the Chief Justice Emergency Directives 9 to 16 (21 May 2020). If Plaintiff was referring to encouragement by Chief Justice Beasley outside of the emergency directives, she did not include citation to such in her motion.

to do in-person depositions when pandemic restrictions were lifted. Defendant also highlighted that Rule 30 provides that attendance at a deposition may be compelled and a deponent may be required to attend a deposition only in the county of residence. In addition, Defendant contended none of the Chief Justice's Emergency Directives prohibited standard in-person depositions. Defendant further noted civil jury trials were not being held and it was unknown when jury trials would resume, so the trial would not be able to proceed as scheduled on 8 February 2021.

¶ 9 By a remote videoconference hearing via WebEx, the trial court heard the Plaintiff's motion for virtual depositions on 9 July 2020. At the hearing, Plaintiff's counsel noted his concerns regarding his personal health and potential exposure to COVID-19 as well as restrictions on travel. He also discussed the various technologies available for remote videoconferencing. As to the deposition scheduled in Chicago, he noted that restrictions on travel had recently been imposed, requiring travelers entering Chicago to quarantine for a period of 14 days.[3] Plaintiff's counsel also emphasized the need to proceed expeditiously with the case due to his contention Plaintiff's life expectancy may be limited due to her skin cancer.

¶ 10 Defendant responded by noting Plaintiff's medical records did not indicate she was unlikely to survive until the trial date and her recent evaluations were favorable, according to Defendant's experts. He also noted depositions by videoconference in this case would be difficult due to the length of the depositions and need to refer to many exhibits. Defendant's counsel then discussed the difficulty the parties had in scheduling Plaintiff's deposition, which was delayed from April 2020 to July 2020 because she was not feeling well in April. He indicated the case is factually complex, and considering the progression of the pandemic

3. We take judicial notice of Public Health Order No. 2020-10, Quarantine Restrictions on Persons Entering Chicago from High Case-Rate States, issued on 2 July 2020. As Plaintiff explained at the hearing, Public Health Order No. 2020-10 required anyone coming to Chicago from a "High Incidence State"—defined as "a COVID-19 new case rate greater than 15 COVID-19 cases per 100,000 resident population per day, over a 7- day rolling average"—quarantine for 14 days or the duration of their time in Chicago, whichever was shorter. Public Health Order No. 2020-10, Quarantine Restrictions on Persons Entering Chicago from High Case Rate States, § 1. As of the 9 July 2020 hearing date, Plaintiff argued North Carolina counted as a High Incidence State, so any travelers to Chicago from North Carolina would be subject to the mandatory 14-day quarantine including the attorneys in this case if they traveled for an in-person deposition of Dr. Wayne. Our record does not include the North Carolina case rate statistics from July 2020, but Defendant does not dispute this characterization of the travel limitations at the time and we will assume it is correct.

and cancellation of jury trials across the state, the case would not be able to be heard in February 2021 as scheduled. Defendant argued that in-person depositions have inherent benefits lacking in the videoconference setting: "There is definitely an advantage to evaluating someone by meeting them in person. I think that's just common sense. If we all met our wives over a videoconference, things may have gone differently, and look what happened."

¶ 11 After the hearing, the trial court rendered a ruling on both Plaintiff's motion to hold depositions virtually and Defendant's motion to amend the Discovery Scheduling Order. The trial court noted there were:

> two separate issues: One is defendant's motion to be able to take the deposition telephonically or by virtual means -- the plaintiff's motion, rather -- and then the defendant not only responds that I should not allow that, but also that we revisit the scheduling order.

The trial court further explained:

> I think the chief justice's concern is that the Courts try to accomplish more, and it seems to me, if nothing else, there's no reason for the depositions to be on hold. They can be conducted remotely, safely, and, it seems to me, an additional benefit is saving great expense for a number of folks that would have to travel, be housed somewhere. Even apart from the pandemic, though. If the witness came from Chicago, that's some expense. If the lawyers go there or retain counsel in Illinois to depose the witness, that's going to involve expense.

The trial court then allowed Plaintiff's motion for virtual depositions and ordered depositions by both parties would be taken by videoconference. It also denied, without prejudice, Defendant's motion to amend the Discovery Scheduling Order explaining, "I can't predict what the pandemic is going to look like" so the court would consider revising the schedule based upon future developments.

¶ 12 Following its rulings at the hearing, the trial court issued its written order on the motions for remote depositions and to amend the DSO on 14 July 2020. The written order addressed a subject not raised before in the parties' filings or at the hearing: whether deponents could have counsel present in-person with them. None of the previous filings and proceedings had mentioned any particular restrictions upon the

deponent or limitation on the ability of a deponent to have counsel present at a deposition in person. Plaintiff's motion did not request such a restriction. At the hearing, neither party addressed any limitations on counsel's presence with a witness being deposed,[4] and the trial court did not issue any ruling on this issue. Despite that lack of prior mention of the subject, the trial court's order barred physical presence of counsel with any witness as follows:

> IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion to Require Depositions be Taken by Telephonic or Virtual Means is GRANTED, and all counsel shall appear at any and all depositions solely by remote videoconferencing and *counsel shall not physically appear in the presence of the witness*. The witness shall also appear by remote videoconferencing *outside the physical presence of any counsel for any party*. This Order shall apply equally to all parties and their counsel. Furthermore, all depositions by remote videoconferencing methods shall afford audio and visual interaction, with information to access and participate provided in the Notice of Deposition.

(Emphasis added.) The same order also denied, without prejudice, Defendant's motion to amend the DSO. Defendant filed notice of appeal on 10 August 2020.

II. Jurisdiction

¶ 13 **[1]** Before reaching the merits of this case, we must address whether this court has jurisdiction to hear the appeal. *See, e.g.*, *Dogwood Development and Management Co., LLC v. White Oak Transport Co., Inc.*, 362 N.C. 191, 197, 657 S.E.2d 361, 364–65 (2008) (explaining an appellate court must have jurisdiction to hear an appeal). Because the order from which Defendant appeals is not a final order resolving all claims, it is interlocutory. *See Veazey v. City of Durham*, 231 N.C. 357,

4. While Plaintiff's counsel noted that in his experience the technology used for remote depositions has been "designed for one person to attend from a closed office, from their screen with a mike [sic] and a camera" as part of an argument about "technology logistical issues" if only he was remote but a witness and Defendant's counsel were in the same room, Plaintiff ultimately concluded "[w]e've got to get the technology coordinated" where he could see Defendant's counsel "and not to have that technology conflicting with each other." Thus, Plaintiff's counsel merely noted it may be technologically more difficult to have him as the only person remote rather than arguing for an order that everyone had to be separate.

361–62, 57 S.E.2d 377, 381–82 (1950) (laying out the distinction between final judgments and interlocutory orders).

¶ 14 While in general parties may not seek immediate appeal of an interlocutory order, they can appeal when the interlocutory order "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Department of Transp. v. Rowe*, 351 N.C. 172, 174–75, 521 S.E.2d 707, 709 (1999) (quoting *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381); *see also* N.C. Gen. Stat. § 1-277(a) (2019) (allowing appeal from every judicial order in district or superior court "which affects a substantial right claimed in any action or proceeding"); N.C. Gen. Stat. § 7A-27(b)(3)(a) (2019) (allowing appeal from any interlocutory order of a superior or district court in a civil proceeding that "[a]ffects a substantial right").

¶ 15 Here, in its Rule of Appellate Procedure 28(b)(4) "Statement of Grounds for Appellate Review," Defendant argues the order on appeal affects a substantial right and is therefore immediately appealable under North Carolina General Statutes §§ 1-277 and 7A-27(b)(3)(a) because the order deprives Defendant of its constitutional rights to due process and counsel and these rights will "be lost forever if uncorrected before appeal from final Judgment."

¶ 16 Plaintiff filed a motion to dismiss the appeal on the grounds the order on appeal "is interlocutory, does not affect a substantial right, and is not immediately appealable." In response to Plaintiff's motion to dismiss and in the alternative to finding the order on appeal affects a substantial right, Defendant filed a petition for writ of certiorari ("PWC") under Rule of Appellate Procedure 21 to permit review. Defendant argues issuing the writ "will avoid undue delay, [and] promote judicial economy and the administration of justice . . . while preventing manifest injustice, avoiding unnecessary delays[,] and saving judicial resources." Defendant later moved to amend the PWC to add two additional paragraphs emphasizing the novel nature of the order's ban on all physical presence at depositions and addressing a preservation issue first raised in Plaintiff's response brief. Plaintiff's motion to dismiss and Defendant's PWC and motion to amend the PWC all turn on our decision as to jurisdiction, so we turn to that issue now.

¶ 17 The first issue affecting our jurisdiction is whether the order on appeal affects a substantial right; if it does, we have jurisdiction and need not reach Defendant's PWC. A substantial right is "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled

to have preserved and protected by law: a material right." *Oestreicher v. American Nat. Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (quotations and citation omitted). To help apply that definition, "a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citing *Wachovia Realty Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977)).

¶ 18 "Admittedly the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). Still, we do not need to decide whether the party claiming a substantial right would win on the merits; it is enough that a substantial right would be impacted if the party had to suffer the alleged harm. *See Sharpe v. Worland*, 351 N.C. 159, 164–65, 522 S.E.2d 577, 580–81 (1999) (in a case where a party claimed statutory privilege as to certain documents, explaining the court, at the jurisdictional stage, did not need to determine whether the statutory privilege applied only whether it could apply).

¶ 19 Here, Defendant argues the trial court's order impairs its due process right by preventing its attorney from being physically present at depositions of its own representative witnesses and experts. This Court has recognized "that civil litigants have a due process right to be heard th[r]ough counsel that they themselves provide." *Tropic Leisure Corp. v. Hailey*, 251 N.C. App. 915, 920, 923–24, 796 S.E.2d 129, 133, 135 (2017) (explaining the due process right has been widely recognized and then finding a due process violation when a litigant had no opportunity to be represented by counsel in small claims court in a foreign jurisdiction). Since counsel at depositions represent clients by objecting to improper questions and protecting privileges, among other things, that due process right could apply here. Especially in the realm of privileges, which protect the other side from ever knowing the privileged information, *see* N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (stating privileged material is not even discoverable), Defendant could suffer harm—namely the inability to assert privilege and subsequent revelation of privileged information—if this order is not addressed before final judgment.

¶ 20 We have also previously recognized the "constitutional right to due process is a substantial right." *Savage Towing Inc. v. Town of Cary*, 259

N.C. App. 94, 99, 814 S.E.2d 869, 873 (2018). As a result, we find the order on appeal affects a substantial right in that it threatens Defendant's constitutional due process rights. Therefore, we have appellate jurisdiction pursuant to North Carolina General Statutes §§ 1-277(a) and 7A-27(b)(3)(a).

¶ 21 Given the order on appeal affects a substantial right thereby granting appellate jurisdiction, we deny Plaintiff's motion to dismiss the appeal. Because we have found Defendant has a right to appeal, we deny his PWC. We cannot grant a PWC based on Rule of Appellate Procedure 21 once we have found a right of appeal from an interlocutory order because the two are mutually exclusive. *See* Rule of Appellate Procedure 21(a)(1) (only allowing a writ of certiorari when, *inter alia*, "no right of appeal from an interlocutory order exists"). Because we deny Defendant's PWC, we also deny as moot his motion to amend the PWC. Having clarified the grounds for our jurisdiction and addressed the outstanding motions and petition, we turn to the merits of the case.

III. Deprivation of Due Process and Right to Presence of Counsel

¶ 22 Defendant first contends the trial court erred "in entering an order that patently violates [Defendant]'s constitutional rights by, among other things, prohibiting counsel from being physically present at depositions of their clients, witnesses they represent[,] and witnesses they designate as expert witnesses." Specifically, Defendant argues the order infringed on its due process right to "retained counsel being present at critical stages of litigation" without substantial justification. (Capitalization altered.) Defendant further asserts prejudice from this error is presumed.

A. Preservation

¶ 23 **[2]** Before reaching Defendant's substantive arguments, we address whether the issue was preserved. Plaintiff contends Defendant waived its right to raise a constitutional argument on appeal by its failure to make this argument to the trial court. But Defendant responds it never had a chance to raise an objection or a constitutional argument regarding the trial court's order that counsel not be allowed to be present with a witness or client during a deposition, as Plaintiff's motion did not request such a restriction and the trial court did not mention this restriction when rendering the ruling at the hearing on the motion. Defendant is correct, as the trial court's order goes beyond the relief requested by Plaintiff by ordering restrictions on attendance at depositions and requiring that no attorney be present in the same room as a witness during a deposition. Plaintiff requested only that depositions be held by remote videoconference based upon Plaintiff's counsel's concerns regarding his

own health and potential exposure to COVID-19 as well as restrictions on travel applicable to the deposition scheduled to be held in Chicago, Illinois. As a result, Defendant had no notice or opportunity to raise the issue of restrictions on its own counsel's attendance. Until the trial court issued the order, Defendant had no reason to think such restrictions were forthcoming and would need to be the subject of an objection.

¶ 24 We also reject Plaintiff's argument Defendant invited the error in this case. Plaintiff points to Defendant's acceptance of the trial court's discretion in the matter as invited error. Plaintiff isolates a single phrase, but looking at the whole paragraph, it is clear Defendant acknowledged the court's discretion in the context of arguing it should exercise that discretion to deny Plaintiff's motion and allow in person depositions to move forward:

> It's just not fair for him to be able to say yeah, those four months of COVID, I want to dictate that you have to do everything by videoconference, and you're not going to be able to move the trial. It's just patently unfair, Your Honor, and we do agree -- the Court obviously has discretion, but we would submit that that rule, if you look at how it's applied, has never been applied in this fashion, where Rule 30 was used to prevent -- at least as far as I'm aware of any appellate case, to prevent in-person depositions.

On top of this, the full quote above does not mention any restrictions on deposition attendance that Defendant allegedly invited, which it could not have done since those never came up at the hearing or at any time before the issuance of the written order on appeal. Thus, we reject both of Plaintiff's arguments that Defendant failed to preserve the issue before us.

B. Standard of Review

¶ 25 **[3]** "As a general rule, we review the trial court's rulings regarding discovery for abuse of discretion." *Myers v. Myers*, 269 N.C. App. 237, 240, 837 S.E.2d 443, 447 (2020); *see also Hartman v. Hartman*, 82 N.C. App. 167, 180, 346 S.E.2d 196, 203 (1986) (indicating protective orders under Rule 26(c), the basis for Plaintiff's motion, are subject to review for abuse of discretion). However, the restrictions imposed by the trial court in this case go beyond the typical discretionary matters involved with discovery orders.

¶ 26 For example, Rule of Civil Procedure 30(b)(7), upon which Plaintiff relied in arguing for remote depositions, allows a trial court upon a

motion to order a deposition be taken by telephone. N.C. Gen. Stat. § 1A-1, Rule 30(b)(7) (2019). It does not provide any guidance on whether a trial court could also bar a deposed party's attorneys from being physically present with their own client during the call, which is the appropriate analogy to the court's order here.

¶ 27 The general rule that *de novo* review is appropriate "in cases where constitutional rights are implicated," as they are here, reinforces our determination that the de novo standard of review applies here. *See Piedmont Triad Regional Water Authority v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) ("It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated."). Under the *de novo* standard of review, "the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Cooper v. Berger*, 256 N.C. App. 190, 193, 807 S.E.2d 176, 178 (2017) (quoting *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009)); *see also Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) (explaining *de novo* appeals involve the appellate court using the trial court's record but reviewing the evidence and law "without deference to the trial court's rulings" (quotations and citation omitted)).

C. Analysis

¶ 28 **[4]** Before analyzing the trial court's order, we note it has three relevant elements. First, the trial court ordered that all depositions had to be held by remote videoconference. Second, the trial court ordered that no attorney and witness could be present in the same room during a deposition. Third, the trial court imposed the same restrictions on all depositions without regard to where the deposition would be held or the particular circumstances of the deponent and counsel involved in a particular deposition.

¶ 29 The first of the two depositions in question in Plaintiff's motion involved a doctor in Wake Forest, North Carolina, which would not involve substantial travel for counsel for either party. The other deposition was scheduled to be held in Chicago, and at the time, travel restrictions imposed by Chicago would have effectively prevented counsel from going to Chicago for the deposition, since anyone who travelled to the city would be required to quarantine for 14 days before being allowed to take the deposition in person. *See* Footnote 3, *supra* (explaining the relevant Chicago quarantine rules). And Defendant does not contend the trial court abused its discretion or violated any constitutional right by requiring the deposition of the expert witness in Chicago to be done

by remote videoconference. That out-of-state deposition clearly presented different challenges than a deposition of a witness in North Carolina.

¶ 30 Despite only those two depositions being scheduled, our analysis includes potential depositions of Defendant's employees and expert witnesses because the third part of the trial court's order applied it to *all* depositions in the case. Plaintiff disputes this characterization, arguing "[t]he issue before the Court . . . only concerns the taking of expert and non-Defendant witness depositions." To support that argument, Plaintiff contends she had already taken depositions "of the only two employees of Defendant who had any involvement in the Plaintiff's care" and nothing in the record "disclosed that Plaintiff has expressed any intention to seek depositions of the corporate Defendant or other employees not involved in Plaintiff's care." Plaintiff's argument amounts to a claim that the right to counsel's presence issue is moot. *See Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003) (defining moot as when "a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy" (quoting *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996))).

¶ 31 Presuming *arguendo* a mootness concern, mootness doctrine has a number of exceptions including, *inter alia*, a party's voluntary cessation of the challenged conduct and questions of public interest. *Thomas v. North Carolina Dept. of Human Resources*, 124 N.C. App. 698, 705, 478 S.E.2d 816, 820–21 (1996). Voluntary cessation is an exception to mootness because of the risk the party could restart their offending practice once an appeal were dismissed. *Id.*, 124 N.C. App. at 706, 478 S.E.2d at 821. Here, while Plaintiff says she would not have further deposed Defendant's employees, circumstances can change and she could change her mind if this appeal were dismissed. And Plaintiff still had not taken depositions of Defendant's expert witnesses, who have not yet been designated.

¶ 32 Alternately, "even if an appeal is moot, we have a duty to 'consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution.' " *In re Brooks*, 143 N.C. App. 601, 605, 548 S.E.2d 748, 751 (2001) (quoting *N.C. State Bar*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989)). In the past, this Court and our Supreme Court have ruled the public interest exception applies based on the case involving issues of first impression, the gravity and "far reaching" nature of the issue, and significant public debate on the issue. *Id.*, 143 N.C. App. at 606, 548 S.E.2d at 752 (first impression, gravity); *Chavez v. McFadden*, 374 N.C. 458, 468, 843 S.E.2d 139, 147 (2020) (public debate).

¶ 33 Here, the public interest exception applies because the issue of banning counsel from being present in-person with their clients during depositions is a matter of first impression with a potentially far-reaching effect. The impact of COVID-19 and myriad restrictions imposed by various jurisdictions and entities is a still subject of significant public interest as demonstrated by a recent Proclamation from our Chief Justice on the subject. *E.g.*, Proclamation, Supreme Court of North Carolina Chief Justice Paul Martin Newby, Restoration of Full Court Operations (Feb. 24, 2022) (recent proclamation advising judicial officials "to resume immediately full courthouse operations").[5] As a result of these exceptions to mootness doctrine, the issue of attorney presence with Defendant's representatives or witnesses during their depositions is properly before us.

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5. The Chief Justice's Proclamation was distributed to the entire State judicial branch, but it is not formally published. Despite the lack of publication, courts are intended to use and rely on the proclamation in restoring full court operations. In recognition that the proclamation was not published, we reproduce its text in full here:

"WHEREAS, Article I, Section 18 of the North Carolina Constitution provides that '[a]ll courts shall be open' and that 'justice shall be administered without favor, denial, or delay[;]'

WHEREAS, the emerging COVID-19 pandemic necessitated the temporary suspension of some court operations in early 2020;

WHEREAS, these limitations of court operations were extended multiple times throughout 2020 by administrative orders;

WHEREAS, I entered an order on 14 January 2021 allowing local court officials to resume in-person proceedings;

WHEREAS, the Governor lifted all mass gathering limits on 14 May 2021 and announced that masking and social distancing requirements would no longer be needed in most places; and

WHEREAS, I terminated all remaining emergency directives by an administrative order dated 7 June 2021;

WHEREAS, federal and state officials have stated that COVID-19 will not be eliminated and that communities should return to their normal activities;

WHEREAS, North Carolina is experiencing a significant decline in COVID-19 cases, vaccines remain readily available, and people are returning to normal daily life in other areas of society;

WHEREAS, the Governor and state health officials have recently encouraged schools and local governments to end mask mandates and most municipalities and school boards have ended mask mandates;

WHEREAS, some judicial districts are still limiting their court operations which impairs their ability to administer timely and impartial justice.

NOW, THEREFORE, I advise all judicial officials to resume immediately full courthouse operations and administer justice without further delay as mandated by the North Carolina Constitution."

(Alterations in original.)

¶ 34 In a similar vein to the mootness argument, Plaintiff contends the order on appeal "provided Defendant a mechanism to request a modification in the event Plaintiff's counsel did seek additional depositions of Defendant or its employees." (Italics removed.) Plaintiff's argument rehashes the issue of whether the order on appeal is a final judgment or whether it is something less than final. We reject this argument because we have already ruled Defendant is entitled to an interlocutory appeal since the order on appeal affects a substantial right.

¶ 35 **[5]** Turning to the primary issue, Defendant argues the trial court erred "by, among other things, prohibiting counsel from being physically present at dispositions of their clients, witnesses they represent and witnesses they designate as expert witnesses" because that infringes on Defendant's due process right to "retained counsel being present at critical stages of litigation" without substantial justification. (Capitalization altered.) Defendant then argues prejudice from this error is presumed. We agree with Defendant that the trial court's order violated its rights under the Constitution of the United States' Fourteenth Amendment's Due Process Clause.[6]

¶ 36 We first note the relevant provisions of the Rules of Civil Procedure. Plaintiff's motion was based upon Rules 26(c) and 30 of the North Carolina Rules of Civil Procedure. Under Rule 30(b)(7):

> The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(a)(1) and 45(d), a deposition taken by telephone is taken in the district and the place where the deponent is to answer questions propounded to him.

N.C. Gen. Stat. § 1A-1, Rule 30(b)(7). Under Rule 26(c), a trial court has discretion, upon good cause shown, to enter orders to protect a party or person from "unreasonable annoyance, embarrassment, oppression, or undue burden or expense" including an order "(v) that discovery be

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6. Defendant also argues the order violates its rights under the North Carolina Constitution. Defendant argues the order violates both Article I, Section 25's right of jury trial in civil cases and Article I, Section 19's "law of the land" clause. The "law of the land" clause "is synonymous with 'due process of law' as used in the Fourteenth Amendment," *In re Moore's Sterilization*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976), so we find a violation of Defendant's rights under the North Carolina Constitution on the same grounds as the Fourteenth Amendment Due Process Clause violation. As a result of finding that violation, we do not reach Defendant's argument the order violates his right to trial by jury under Article I, Section 25.

conducted with no one present except persons designated by the court." N.C. Gen. Stat. § 1A-1, Rule 26(c). This Court has noted:

> In order to determine whether a party or deponent has shown "good cause" for an order protecting him "from unreasonable annoyance, embarrassment, oppression, or undue burden or expense," the trial court must consider the specific discovery sought and the factual circumstances of the party from whom discovery is sought. *See, e.g., Guessford v. Pa. Nat'l Mut. Cas. Ins. Co.*, 2013 WL 2242988, *3, 2013 U.S. Dist. LEXIS 71636, *9–10 (M.D.N.C., May 21, 2013) ("Rule 26(c)'s requirement of a showing of 'good cause' to support the issuance of a protective order . . . contemplates a particular and specific demonstration of fact[.]") (quoting *Jones v. Circle K Stores*, 185 F.R.D. 223, 224 (M.D.N.C.1999) (internal quotation omitted)), *partial summary judgment granted in part and denied in part on other grounds*, 963 F.Supp.2d 652, 2013 WL 5708053 (M.D.N.C. Oct. 18, 2013).

In re Accutane Litigation, 233 N.C. App. 319, 323, 758 S.E.2d 13, 17 (2014).

¶ 37 The limitation on personal attendance of a deposition by counsel is unusual; no North Carolina case has previously addressed this type of limitation. Under Rule 26, this type of limitation is normally intended to "protect the deponent from embarrassment or ridicule intended by the calling party." *Galella v. Onassis*, 487 F.2d 986, 997, n.17 (2d Cir. 1973). Very few federal cases address this type of limitation, but when imposed, the rationale normally has been the protection of the deponent from some sort of personal harassment or threat.

¶ 38 For example, in *Gallela v. Onassis*, under Rule 26(c) of Federal Rules of Civil Procedure, the trial court ordered that the plaintiff Mr. Gallela could not personally attend the deposition of defendant, Jacqueline Onassis, the widow of President John F. Kennedy, due to his long history of harassment of Ms. Onassis and the Kennedy family as a paparazzo and his violation of prior court orders.[7] *Id.* at 991, 996–97. The United States Court of Appeals, Second Circuit, held the trial court

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7. As the Court of Appeals noted, "Galella fancies himself as a 'paparazzo' (literally a kind of annoying insect, perhaps roughly equivalent to the English 'gadfly.') Paparazzi make themselves as visible to the public and obnoxious to their photographic subjects as possible to aid in the advertisement and wide sale of their works." *Galella*, 487 F.2d at 991–92 (footnote omitted).

acted within its discretion in excluding the plaintiff from Ms. Onassis's deposition, noting:

> At the time the order was issued, Galella had already been charged with violation of the court's temporary restraining order which was entered to protect the defendant from further harassment. Such conduct could be deemed to reflect both an irrepressible intent to continue plaintiff's harassment of defendant and his complete disregard for judicial process. Anticipation of misconduct during the examination could reasonably have been founded on either.

Id. at 997. Certainly, this case presents a very different situation, but the trial court had discretion to address the circumstances of the depositions under Rule 26(c). Plaintiff did not claim to need protection from "unreasonable annoyance, embarrassment, oppression." N.C. Gen. Stat. § 1A-1, Rule 26(c). Plaintiff's concerns arose from "undue burden or expense" caused by health risks posed by COVID-19 and limitations on travel created by COVID-19 emergency orders. Thus, the trial court had discretion to enter an order limiting discovery under Rules 26 and 30, for good cause shown, but the question presented here is whether those limitations went so far as to infringe upon Defendant's due process rights to representation by counsel in the depositions of its own employees and expert witnesses.

¶ 39 In pertinent part, the Fourteenth Amendment provides no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This Court has previously recognized "that civil litigants have a due process right to be heard th[r]ough counsel that they themselves provide." *Tropic Leisure*, 251 N.C. App. at 920, 923–24, 796 S.E.2d at 133, 135 (explaining the due process right has been widely recognized and then finding a due process violation when a litigant had no opportunity to be represented by counsel in small claims court in a foreign jurisdiction). *Tropic Leisure* also provides guidance for future explanations of the contours of the right. First, the *Tropic Leisure* Court lists "[a] number of state and federal courts" that "have expressly recognized this principle over the past few decades." *Id.*, 251 N.C. App. at 921, 796 S.E.2d at 133–34. Second, as pertinent here, the court explained the due process right to be heard through retained counsel includes assistance at "the critical fact-finding phase of the litigation." *Id.*, 251 N.C. App. at 923, 796 S.E.2d at 135. There "is simply no substitute for the opportunity to have his chosen counsel develop a factual record at trial." *Id.* While *Tropic Leisure* focused on

the trial context at issue in that case, its emphasis on the importance of access to the legal assistance of retained counsel in developing a factual record extends to the discovery context at issue here.

¶ 40 Our extension of the right to retained counsel in civil cases to the discovery context finds additional support in the federal cases to which *Tropic Leisure* cites. 251 N.C. App. at 921, 796 S.E.2d at 133–34. In *Danny B. ex rel. Elliott v. Raimondo*, the First Circuit explained the "fundamental principle" that "[c]ivil litigants have a constitutional right, rooted in the Due Process Clause, to retain the services of counsel" and how that right "safeguards a litigant's interest in communicating freely with counsel *both in preparation for* and during trial." 784 F.3d 825, 831 (1st Cir. 2015); *see also Tropic Leisure*, 251 N.C. App. at 921, 796 S.E.2d at 133 (citing *Danny B.*). "After all, the right to retain counsel would be drained of meaning if a litigant could not speak openly with her lawyer about her case and how best to prosecute it." *Danny B.*, 784 F.3d at 831. Given *Danny B.*'s emphasis on safeguarding a litigant's interest in communicating freely in preparation for trial, it further supports extending the due process right to retain counsel to the discovery context.

¶ 41 Another case cited by *Tropic Leisure*, *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (5th Cir. 1980), also supports Defendant's position. *See Tropic Leisure*, 251 N.C. App. at 921, 796 S.E.2d at 133–34 (citing *Potashnick*). In that case, the Fifth Circuit first provided a historical overview of how the right to retain counsel in civil litigation is implicit in the concept of due process.[8] *Potashnick*, 609 F.2d at 1117 (citing *Powell v. Alabama*, 287 U.S. 45, 69, 53 S. Ct. 55 (1932)).[9] The *Potashnick* Court further explained the Due Process Clause's right to retain civil counsel reflects that "the litigant usually lacks the skill and knowledge to adequately prepare his case, and he *requires the guiding hand of counsel at every step in the proceedings against him*." *Id.* at 1118

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8. The *Potashnick* court relied on the Fifth Amendment Due Process Clause, but the promise of due process in that clause is the same as in the Fourteenth Amendment's Due Process Clause. *E.g.*, *Malinski v. New York*, 324 U.S. 401, 415, 65 S. Ct. 781, 788 (1945) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.").

9. While *Powell* was a criminal case, its decision "was based on the due process clause rather than the Sixth Amendment (which had not yet been held applicable to the states), and its logic embraces civil litigation." *Guajardo-Palma v. Martinson*, 622 F.3d 801, 803 (7th Cir. 2010). This distinction between the Due Process Clause's right to civil counsel and the Sixth Amendment's right to criminal counsel also leads us to reject Defendant's argument that "the well recognized constitutional right to have counsel physically present in criminal cases applies to this case." (Capitalization altered.)

(emphasis added). Thus, *Potashnick* also supports extending the right to discovery proceedings.

¶ 42 Based on *Tropic Leisure* and the cases upon which it relied, we hold the due process right to retain and have counsel heard in civil cases extends to having the assistance of retained counsel at depositions. *Tropic Leisure* and the federal cases it relied upon emphasize the importance of having retained counsel's assistance throughout the legal process including fact-finding phases such as discovery. *See Tropic Leisure*, 251 N.C. App. at 923, 796 S.E.2d at 135 (emphasizing the importance of retained counsel's assistance with fact-finding phase of litigation); *Danny B.*, 784 F.3d at 831 (highlighting the need to freely communicate with counsel in preparation for trial); *Potashnick*, 609 F.2d at 1118 (explaining a litigant "requires the guiding hand of counsel *at every step in the proceedings*") (emphasis added); *see also King v. Koucouliotes*, 108 N.C. App. 751, 755, 425 S.E.2d 462, 464 (1993) (explaining one purpose of discovery is to sharpen factual issues for trial).

¶ 43 As Defendant asserts, discovery is a particularly pertinent stage to ensure the right to assistance of retained counsel in civil cases because depositions can be used at trial to impeach witnesses or even in place of witness testimony in certain circumstances. *See* N.C. Gen. Stat. § 1A-1, Rule 32(a) (listing ways depositions can be used at trial or at hearings for motions). Rule 32(a)(3) is particularly significant because it allows the deposition of an organizational representative under Rule 30(b)(6) or 31(a) to be "used by an adverse party for any purpose, whether or not the deponent testifies at the trial or hearing" and Defendant here is an organization. *Id.*, Rule 32(a)(3). Thus, the assistance of retained counsel at depositions supports the core right to have retained counsel at trial.

¶ 44 While it extends to depositions, the due process right to the assistance of retained counsel in civil cases has limits. *See Adir International, LLC v. Starr Indemnity and Liability Company*, 994 F.3d 1032, 1040 (9th Cir. 2021) (explaining the "narrow scope of the due process right to retain counsel" by contrasting it to the Sixth Amendment's "much more robust" right to counsel and by looking to the "original public meaning of the term 'due process' ").

¶ 45 We find the approach in *Danny B.* to analyzing the boundaries of the due process right persuasive: "[A] court may not restrain a litigant's access to counsel without some substantial justification, and any such restraint should be narrowly tailored to respond to the concern that prompted it." *Danny B.*, 784 F.3d at 832. We find this test persuasive for two reasons. First, the examination's focus on a substantial interest and

narrow tailoring involve a heightened scrutiny analysis common in the area of due process, albeit in a substantive rather than procedural sense. *See, e.g.*, *M.E. v. T.J.*, 275 N.C. App. 528, 549–51, 854 S.E.2d 74, 95–96 (2020) (explaining the interrelation between substantive and procedural due process before explaining state action encroaching on fundamental rights triggers strict scrutiny analysis as part of substantive due process), *aff'd*, 2022-NCSC-23.[10] Second, it ensures a case and fact-specific analysis of the due process issues. *See Anderson v. Sheppard*, 856 F.2d 741, 749 (6th Cir. 1988) (explaining the importance of focusing on "the circumstances present in every case" when determining whether a litigant's due process rights to retain counsel were violated) (quotations and citation omitted).

¶ 46 Here, the issue is slightly more nuanced than just whether there is a due process right to retained counsel at depositions that we recognized above. The trial court order does not ban litigants from having counsel at their depositions; it bans deponents from having counsel physically present in the same space as them. In this case, the trial court's order banning retained counsel from being physically present with their client during depositions, without consideration of the circumstances of the particular deposition or preferences of the deponent and attorney involved in the deposition, violates the Due Process Clause.

¶ 47 The reasoning supporting the due process right to retained counsel at depositions in general supports a narrower right to have counsel physically present. *Danny B.* emphasizes a "litigant's interest in communicating freely with counsel." 784 F.3d at 831. Further, *Potashnick* recognizes a litigant "requires the guiding hand of counsel at every step in the proceedings against him." 609 F.2d at 1118. In the context of depositions, an attorney may need to step in to object to the form or substance of questions or even to protect privileged material. The attorney's role in protecting privileged material is especially important because privileges

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10. *Danny B.*'s test blends two versions of heightened scrutiny. It draws the substantial government interest from First Amendment law. *See Malecek v. Williams*, 255 N.C. App. 300, 307, 804 S.E.2d 592, 598 (2017) (explaining content-neutral laws will be upheld if "narrowly drawn to further a substantial governmental interest . . . ." (quoting *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 294, 104 S. Ct. 3065 (1984))). It draws the narrow tailoring requirement from strict scrutiny, which applies to substantive due process claims, among others. *See, e.g.*, *State v. Fowler*, 197 N.C. App. 1, 21, 676 S.E.2d 523, 540 (2009) ("If the right is constitutionally fundamental, then the court must apply a strict scrutiny analysis . . . ."); *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 2268 (1997) (explaining the Fourteenth Amendment protects fundamental liberty interests "unless the infringement is narrowly tailored to serve a compelling state interest") (quotations and citation omitted).

aim to ensure privileged information is never revealed to the other side. *See* N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (stating privileged material is not discoverable). In these situations, an attorney's physical presence provides greater protection to a client than interacting remotely.

¶ 48 As Defendant contends, some deponents are more skilled at using the technology required for a remote deposition than others; some may require in-person assistance even to set up and operate the computer, camera, and microphone. Or a technological glitch could occur when counsel was trying to tell her client not to answer a question on the ground of privilege, thereby risking the privileged information is disclosed in spite of Rule 26(b)(1)'s protections from discovery. The attorney and deponent should normally be able to make their own decision of their physical proximity during a deposition. An attorney may choose to participate apart from her client, but a court order forcing an attorney to participate remotely, physically apart from the client, implicates the client's due process rights.

¶ 49 Our conclusion is reinforced by persuasive caselaw from other jurisdictions that emphasize allowing a litigant's counsel to participate in-person in depositions helps ensure effective representation. In a pre-pandemic case, *Redmond v. Poseidon Personnel Services, S.A.*, the trial court found denying a corporate client "the opportunity to have its attorney present during the Rule 30(b)(6) deposition would inhibit defense counsels' duty to effectively and competently represent their foreign clients." 2009 WL 3486385, *3, 2009 U.S. Dist. LEXIS 104749, *10 (E.D. La. 2009). Similarly in *State v. Purdue Pharma L.P.*, issued in August 2020, close in time to when the dispute here occurred, the trial court relied on *Redmond*'s emphasis on the greater effectiveness of counsel in person in determining deponents "should still have access to in-person counsel if they wish." 2020 R.I. Super. LEXIS 69, *5–6 (R.I. Superior Ct. 2020). While these cases do not rely on the Due Process Clause specifically, they support the overall point that in-person access to counsel has benefits over counsel merely participating in depositions remotely apart from their clients. As a result, the trial court's order banning litigants' attorneys from assisting in person at all depositions, which could include depositions of their clients, without any consideration of the circumstances of the particular deposition, implicates Defendant's due process rights as laid out above.

¶ 50 Given Defendant's due process rights are implicated here, we conduct the interest and tailoring inquiry adopted from *Danny B.* Presuming *arguendo* the COVID-19 pandemic constitutes a substantial interest, the trial court order barring attorneys from attending a deposition in person

with their own clients and witnesses during otherwise remote depositions was in error because it was not narrowly tailored. The trial court could have used a less restrictive approach to achieve the same outcomes. *See Doe v. District of Columbia*, 697 F.2d 1115, 1120 (D.C. Cir. 1983) (explaining narrow tailoring means that there were no means less restrictive of a party's access to their lawyer); *see also Danny B.*, 784 F.3d at 832 (citing *Doe* when announcing its narrow tailoring requirement).

¶ 51 Here, Plaintiff's motion sought remote depositions due primarily to her counsel's personal health concerns. The trial court could have allowed remote depositions to account for the health concerns of Plaintiff's counsel without also preventing Defendant's counsel and parties who may not have the same health concerns from being together during a deposition. Further, to the extent Plaintiff's motion was based on travel restrictions, the trial court could have also made clear there was no need for Plaintiff's counsel or witness to travel.[11] Again, that measure could have been taken without barring Defendant's counsel and willing witnesses from traveling to attend depositions together in the future. Since the trial court possessed less restrictive means at its disposal to achieve the same goals, it did not narrowly tailor its restriction on Defendant's due process rights to retained counsel and to have retained counsel physically present.

¶ 52 Further, the trial court erred because it failed to consider the specific circumstances of the particular witnesses and locations at issue. *See Anderson*, 856 F.2d at 749 (emphasizing the need to focus on "the circumstances present in every case" when determining whether a litigant's due process rights to retain counsel were violated). For example, Chicago had travel restrictions due to COVID-19 that made it impossible, in practice, for the attorneys to travel there because they would have had to quarantine for 14 days upon arrival. *See* Footnote 3, *supra* (explaining Chicago's COVID-19 travel restrictions at the time). In that situation, the trial court could allow a remote deposition, and it also would not have impacted Defendant's right to retained counsel because it was a deposition of one of Plaintiff's experts. However, the other deposition of a local doctor in Wake Forest would not have raised the same concerns because North Carolina did not have state or local travel restrictions for in-state residents such as the parties' counsel. *See Crawford v. Blue Ridge Metals Corporation*, 2020 WL 4001093, *2–3, 2020 U.S.

11. Defendant notes that Plaintiff selected her expert witness in Chicago prior to the pandemic. Plaintiff would have been aware of the potential expenses for travel when she selected the expert and the pandemic did not change this factor; the pandemic only made travel impractical at the time that deposition was scheduled in July 2020.

Dist. LEXIS 125918, *5–7 (W.D.N.C. 2020) (federal case denying a litigant's motion for remote depositions in partial reliance on the fact that the deposition would comply with all state and local public health guidelines, which would therefore have not banned in-person depositions since North Carolina was in phase two of reopening). Further, none of the executive orders or emergency directives from the Chief Justice noted above restricted in-person depositions.

¶ 53 In addition to those two depositions, which were the basis of Plaintiff's motion, the trial court entered an order affecting "any and all depositions" in the case without regard for possible changes in circumstances arising from the COVID-19 pandemic.[12] The trial court's order came at a time before vaccines were available, but by Spring 2021 vaccines became available for any adults who wanted them. *E.g.*, *Governor Cooper Announces Accelerated Timeline for Vaccination Eligibility*, North Carolina Governor Roy Cooper (Mar. 25, 2021), https://governor.nc.gov/news/press-releases/2021/03/25/governor-cooper-announces-accelerated-timeline-vaccination-eligibility (announcing all adults would be eligible for vaccines by 7 April 2021).

¶ 54 The impact of COVID-19 on the operations of the courts has also changed in the time since the trial court entered its order. For example, when the trial court entered its order on 14 July 2020, sixteen emergency directives issued by the Chief Justice were in effect to address the impact of COVID-19 on the courts. Order of the Chief Justice Extending Emergency Directives 2 to 8 (29 June 2020) (extending emergency directives 2 to 8 until 29 July 2020); Order of the Chief Justice Extending Emergency Directives 9 to 16 (20 June 2020) (extending emergency directives 9 to 16 until 20 July 2020); Order of the Chief Justice Extending Emergency Directives 18 (29 June 2020) (extending emergency directive 18 until 24 July 2020). Less than a year later, the Chief Justice had revoked the final emergency directive. *See* Order of the Chief Justice Revocation of the June 7 Order (21 June 2021) ("No more Emergency Directives remain in place.").

¶ 55 Recently, the Chief Justice issued a proclamation that all judicial officials should "resume immediately full courthouse operations and administer justice without further delay as mandated by the North Carolina Constitution." Proclamation, Restoration of Full Court Operations, *supra*; *see also* Footnote 5, *supra* (providing full text of proclamation).

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12. Indeed, Defendant does not contend the trial court order would have presented any constitutional issue if it had addressed only the two depositions addressed by Plaintiff's motion, of Plaintiff's expert witnesses, even with the same limitations on attendance.

The trial court could not be expected to foresee these developments, but it erred by restricting Defendant's right to the presence of retained counsel at *all* depositions without regard to the circumstances of a particular deposition and without allowance for changes in the restrictions related to COVID-19.

¶ 56 Finally, as to its constitutional rights argument, Defendant argues "prejudice is presumed in this case." (Capitalization altered.) We agree. As *Danny B.* explained, denial of the right to assistance of retained counsel frustrates the right to counsel, which "is a right of the highest order of importance." 784 F.3d at 834. As such, prejudice "can fairly be presumed." *Id.* Given we have found the trial court order here failed the test from *Danny B.*, prejudice can be fairly presumed. On *de novo* review, the trial court erred in ordering the witnesses had to be physically separate from their attorneys during all depositions.

IV. Motion to Amend Discovery Scheduling Order

¶ 57 In addition to his constitutional argument, Defendant asserts the trial court erred by denying its motion to amend the Discovery Scheduling Order. We do not need to address this argument. The trial court's order denying the motion to amend the DSO to continue the scheduled trial was made "without prejudice to address these issues in the future." The DSO set the trial date for 8 February 2021, which has obviously passed due to the delay from this appeal. On remand and consistent with this opinion, the trial court will have to address the discovery and trial schedule again.

V. Conclusion

¶ 58 After *de novo* review, we hold the trial court erred by ordering counsel could not be in the physical presence of their own witnesses or clients during remote depositions, without consideration of the particular circumstances of the deposition's timing, location, or persons involved, because this restriction violates Defendant's due process right to retained counsel.

¶ 59 Because the trial date in the original Discovery Scheduling Order has already passed, we do not address Defendant's argument the trial court erred in denying, without prejudice, his motion to continue the trial date. On remand, the trial court must address the discovery schedule and trial date.

REVERSED AND REMANDED.

Judge TYSON concurs.

Judge DILLON dissents.

DILLON, Judge, dissenting.

¶ 60 Plaintiff commenced this malpractice suit in 2019. In July 2020, during the early days of the COVID-19 pandemic, the trial court entered an order, directing that depositions be taken remotely *and* that no counsel be allowed to be physically present with any deponent. The next month, in August 2020, Defendant appealed this order, specifically the directive prohibiting any counsel to be in the same room as the deponent. In December 2020, Plaintiff filed her motion to dismiss the appeal so that the matter could proceed in the trial court. The matter was ultimately heard by our Court in September 2021.

¶ 61 The majority concludes that Defendant's appeal, though interlocutory, affects a substantial right. The majority further concludes that the trial court's order should be reversed, contending that the order violates Defendant's due process rights. I disagree on both counts. My vote is to grant Plaintiff's motion to dismiss based on my conclusion that the discovery order is interlocutory and does not affect a substantial right (and I would not grant Defendant's PWC). Even if the order does affect a substantial right, I do not see how that right was forever lost by the order.

¶ 62 The majority cites numerous cases for the proposition that a party has a due process right to counsel at depositions. I do not disagree. But these cases are not relevant to this appeal, as there is nothing in the appealed order prohibiting Defendant's counsel to be present and fully participate in depositions, albeit remotely.

¶ 63 And I do not believe that the order's prohibition of Defendant's counsel to be physically present in the same room as any deponent violates Defendant's *due process rights*, which is the basis of Defendant's "substantive right" argument.

¶ 64 The majority recognizes that this issue is one of first impression in North Carolina. The majority then cites the *Redmond* case, a pre-COVID-19 case from a federal court in Louisiana, and the *Purdue* case, a 2020 case from Rhode Island, to support its position. *See Redmond v. Poseidon Pers. Servs., S.A.*, 2009 U.S. Dist. LEXIS 104749 (E.D. La. Oct. 19, 2009); *see also State v. Purdue Pharma L.P.*, 2020 R.I. Super. LEXIS 69 (R.I. Super. Ct. Aug. 18, 2020). The majority, though, fully recognizes that neither case was decided on due process grounds. Further, in *Purdue*, the court recognized that there was no absolute right

to have counsel present, leaving open the door for the trial court to require depositions to proceed if there was some pandemic-based barrier to prevent counsel from being able to be physically present in the deponent's location. *Purdue*, 2020 R.I. Super. LEXIS 69, at *6. Of *Redmond*, another federal court during the height of the COVID-19 pandemic found the pre-COVID-19 *Redmond* decision distinguishable:

> The Court is not blind to nor is it ignoring the very real challenges involved in conducting remote video depositions in a case like this with so many parties and lawyers. But unless the Court is going to stay all depositions that cannot proceed by agreement (whether in-person or remotely) until there is a cure or a vaccine for COVID-19, or something approaching so-called herd immunity, which it is unwilling to do on a blanket basis, the parties and their counsel are going to have to . . . adapt, make some choices, be creative, and compromise in this and every other case in which they are involved during this time without modern precedent.

WCR, Inc. v. W. Can. Plate Exchanger, Ltd., 2020 U.S. Dist. LEXIS 236820, at *7 (S.D. Ohio Dec. 16, 2020) (quoting *In re Broiler Chicken Antitrust Litig.*, 2020 U.S. Dist. LEXIS 111420, at *5 (N.D. Ill. June 25, 2020)).

¶ 65 Even if there is some implication of due process rights, there is no showing that the order risks this substantial right being lost without an immediate appeal. I note the majority's concern of some risk that a deponent might divulge confidential information without their attorney being in the same room. However, other courts have considered similar issues and have demonstrated that a party is not unduly prejudiced by not having counsel in the same room to defend a deposition:

> Plaintiffs argue that they should have the option to be in the same room with their individually named clients or any willing third-party witness while the deposition is taken. Even in those situations, Plaintiffs have made no showing of prejudice or hardship to counsel that cannot be overcome when participating remotely along with all other participants. While the Court appreciates the role of counsel in defending a witness during a deposition, counsel's role during a deposition is limited. Defense counsel can carefully listen to questions and make appropriate objections,

> and they can still do this remotely. The parties are encouraged to develop protocols to address any concerns with the process for making objections or instructing a witness not to answer. For example, other courts have addressed the issue of how to allow for a witness to pause before answering questions when being deposed remotely to allow for their attorney to consider whether to lodge any objections. Further, remote deposition protocol can provide for more frequent breaks if needed, and counsel can connect with their clients or witnesses in a private virtual "breakout room" or by a separate remote connection during those breaks.

H & T Fair Hills, Ltd. v. All. Pipeline L.P., 2020 U.S. Dist. LEXIS 167074, at *9-10 (D. Minn. Sept. 14, 2020) (internal citation omitted). In *In re Broiler*, the court described a process which could be followed to ensure that confidential information would not be accidentally divulged by a deponent:

> [T]o guard against a witness answering a question when the technology prevents the witness's counsel, who like the witness is participating in the deposition remotely and from a different location, from lodging an objection or instructing the witness not to answer the question, the parties might consider adopting a convention that would allow a witness to answer a question only after the lawyer defending the deposition says the witness can answer. A simple, "you may answer" would suffice. The Court is confident the parties can come up with other conventions that can make the taking and defending of remote deposition more palatable.

In re Broiler, 2020 U.S. Dist. LEXIS 111420, at *85 n.3.

¶ 66 Though not directly on point, the Federal Rules of Civil Procedure expressly allow a court to order that a deposition be taken by telephone. Fed. R. Civ. P. 30(b)(4). In a federal case from North Carolina, a court held that "[i]n civil cases, the better rule is that a request for a telephonic deposition should not be denied on the mere conclusory statement that it denies the opportunity for face-to-face confrontation." *Jahr v. IU Int'l Corp.*, 109 F.R.D. 429, 432 (M.D.N.C. 1986).

¶ 67 Reaching the merits of the appeal, for the reasons stated above, I do not believe that the trial court's order violated Defendant's due process rights. And while I might not have entered a similar order if I were the trial judge, I do not believe Defendant has adequately shown how the trial court abused its discretion in entering the order.

¶ 68 In conclusion, I simply do not see a substantial right, much less one that would have been forever lost without an immediate appeal, to justify essentially putting this case on hold for over a year and a half to resolve this discovery issue.

IN THE MATTER OF THE APPEALS OF

POP Capitol Towers, LP

P&L Coliseum Residential Developer, LLC

P&L Coliseum, LP

No. COA21-357

Filed 5 April 2022

1. Taxation—property valuation—appeal—notice of decision—mailing—third-party vendor

The notices of decision by a county board of equalization and review regarding three taxpayers' appeals of property valuations were properly mailed to the taxpayers in compliance with N.C.G.S. § 105-290(e) where the physical mailing was accomplished by a third-party vendor pursuant to a contract with the county assessor's office.

2. Taxation—property valuation—appeal—timeliness—emergency orders

Three taxpayers' deadlines to file their notices of appeal of property valuations were not tolled by the emergency Covid-19 orders issued by the Supreme Court because the Property Tax Commission is an administrative agency, not a trial court; further, the taxpayers' deadlines were not tolled by the emergency Covid-19 order issued by the Office of Administrative Hearings (OAH) because that order only extended filing deadlines for contested cases before the OAH.

Appeal by Taxpayers from orders of dismissal entered 28 January 2021 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 15 December 2021.

The Hillis Firm LLC, by Lindsey Walker Hillis, for Taxpayers-Appellants.

Ruff Bond Cobb Wade & Bethune, LLP, by Ronald L. Gibson and Robert S. Adden, Jr., for Appellee Mecklenburg County.

JACKSON, Judge.

¶ 1 POP Capitol Towers, LP ("POP"), P&L Coliseum Residential Developer, LLC ("P&L Developer"), and P&L Coliseum, LP ("P&L") (collectively "Taxpayers") argue that their notices of appeal to the Property Tax Commission (the "Commission") were timely because (1) the notices of decision were not properly mailed in compliance with N.C. Gen. Stat. § 105-290(e), and (2) emergency COVID-19 orders issued by our Supreme Court and the Office of Administrative Hearings ("OAH") extended the filing deadlines for their notices of appeal. After careful review, we reject Taxpayers' arguments and affirm the Commission's orders of dismissal.

I. Background

¶ 2 This case deals with three property tax appeals from the Mecklenburg County Board of Equalization and Review (the "Board") to the Commission. In 2019, Taxpayers each received property valuations from the Commission, which they disputed. Thereafter, Taxpayers appealed the valuations to the Board.

¶ 3 On 28 February 2020, a Notice of Decision by the Board, dated 2 March 2020, was mailed to each Taxpayer at their respective addresses. The notices of decision were mailed by South Data, a private company contracted by the Mecklenburg County Assessor's Office for mailing services. On 30 March 2020, Taxpayers mailed a Notice of Appeal and Application for Hearing for each property to the Commission, the Mecklenburg County Assessors' Office, and the Mecklenburg County's attorney. The notices of appeal were mailed through the United States Postal Service, but the envelopes containing the notices were not postmarked. The appeals were received and filed with the Commission on 6 April 2020.

¶ 4 On 8 April 2020, the Commission mailed an acknowledgment of the appeals to the Taxpayers, stating that the appeals were untimely and assigning the following case numbers: 20 PTC 239 for appellant POP, 20 PTC 240 for appellant P&L Developer, and 20 PTC 241 for appellant P&L. On 9 September 2020, Mecklenburg County (the "County") filed

and served a Motion to Dismiss the Taxpayers' appeals in each case. The motions to dismiss attached an affidavit of B. Mallard, Project Manager for South Data.

¶ 5 In her affidavit, Ms. Mallard stated that (1) part of her job was to oversee mailings from the County, (2) she personally reviewed the files for mailing, including the Board's notices of decision to the Taxpayers in these cases, and (3) the Board's notices of decision dated 2 March 2020 were mailed on 28 February 2020.

¶ 6 On 25 November 2020, Taxpayers filed responses in opposition to the County's motions to dismiss. Taxpayers asserted, *inter alia*, that (1) the Board failed to properly mail the notices in compliance with N.C. Gen. Stat. § 105-290(e), and (2) their appeals were timely filed under the emergency COVID-19 orders issued by the Supreme Court of North Carolina.

¶ 7 The motions were heard before the Commission on 9 December 2020. After receiving arguments from the parties' counsel, the Commission granted the County's motions to dismiss the appeals. On 28 January 2021, the Commission entered an Order of Dismissal for each appeal.

¶ 8 The Commission made the following findings of fact for each Taxpayer:

> 2. . . . the Board mailed notice of its decision to the Appellant by letter dated March 2, 2020. The Appellant contends that the Board did not actually mail notice of its decision to the Appellant, because the Board contracted with a third party vendor to provide mailing services in connection with its notice of decision. While we do not find this argument to be persuasive, we note that there is no dispute that the notice was actually received by the appellant, and we note further that the notice of appeal filed with the Commission is marked as signed by the Appellant's attorney on March 30, 2020. Accordingly, we find that the Board's notice of decision was mailed by letter dated March 2, 2020.
>
> 3. April 1, 2020 is thirty days after March 2, 2020.
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> 4. On April 6, 2020, the Property Tax Commission received a notice of appeal filed by the Appellant, appealing the Board's decision.

> 5. The Appellant's notice of appeal was submitted to the Property Tax Commission by United States mail, but the envelope containing the notice was not postmarked.

¶ 9 The Commission also made the following conclusions of law:

> 2. Because the Board mailed its notice of decision to the property owner by letter dated March 2, 2020, N.C. Gen. Stat. § 105-290(e) requires a notice of appeal from said decision to have been filed with the Commission by April 1, 2020.
>
> 3. . . . While orders issuing from the Supreme Court and from the Chief Justice clearly apply to the various divisions of the General Court of Justice, the Commission is an administrative agency, and not a part of the State's court system. Therefore, such orders are inapplicable to the deadlines created by the General Assembly for the administrative process of appeals before the Commission.
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> . . .
>
> 5. . . . Even if we were to assume that the appeal was mailed on March 30, 2020, the statute defines the date of filing as the earlier of the date actually received or the date postmarked by the United States Postal Service. Without a postmark, the date of mailing is irrelevant.
>
> 6. Because the notice of appeal was submitted by United States mail; was received in the office of the Commission on April 6, 2020; and did not bear a postmark stamped by the United States Postal Service, the appeal is considered filed on April 6, 2020.
>
> . . .
>
> 8. Because the Appellant did not perfect the appeal from the Board within the time required by the statute, the Commission has no jurisdiction to hear the Appellant's appeal.

¶ 10 Taxpayers timely filed their notices of appeal to this Court in each case. Because the appeals are based on the same facts and issues of

law, the parties have agreed to consolidate the three appeals before this Court.

II. Analysis

A. Standard of Review

> We review decisions of the Commission pursuant to N.C.G.S. § 105-345.2. Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the Commission.

In re Greens of Pine Glen LP, 356 N.C. 642, 646-47, 576 S.E.2d 316, 319 (2003) (citations omitted). Here, the issues advanced by Taxpayers are questions of law and therefore receive *de novo* review by this Court.

B. "Time Limit for Appeals" to the Board under N.C. Gen. Stat. § 105-290(e)

¶ 11 North Carolina General Statute § 105-290(e) requires a notice of appeal to be filed with the Commission "within 30 days after the date the board mailed a notice of its decision to the property owner." N.C. Gen. Stat. § 105-290(e) (2021).

> A notice of appeal submitted to the Property Tax Commission by United States mail is considered to be filed on the date shown on the postmark stamped by the United States Postal Service. If an appeal submitted by United States mail is not postmarked or the postmark does not show the date of mailing, the appeal is considered to be filed on the date it is received in the office of the Commission. A property owner who files an appeal with the Commission has the burden of proving that the appeal is timely.

Id. § 105-290(g). Here, it is undisputed that the Taxpayers' notices of appeal were not postmarked by the United States Postal Service and were not delivered to the Commission until after the 30-day window had passed.

¶ 12 We previously dealt with this postmarking issue in *In re Appeal of Bass Income Fund*, where we held that "a notice of appeal submitted

to the Commission via the Postal Service, but which does not bear a postmark *stamped by the Service*, is considered filed only upon receipt by the Commission." 115 N.C. App. 703, 705, 446 S.E.2d 594, 596 (1994) (emphasis in original). This Court acknowledged that "it is our duty to apply legislation as written, whatever our opinion may be as to its efficacy or as to the hardship it may impose in individual cases." *Id.* at 706, 246 S.E.2d at 596. *See also 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.").

¶ 13 Here, it is undisputed that the Taxpayers received the Board's notices of decision, which were mailed by letter dated 2 March 2020. Therefore, § 105-290(e) requires that Taxpayers must have filed notice of appeal by 1 April 2020, which is 30 days after the notices of decision were mailed, for their appeals to be timely. Although the notices of appeal were apparently signed and mailed by Taxpayers on 30 March 2020, the Commission did not actually receive the Taxpayers' notices of appeal until 6 April 2020. Because the notices of appeal were "not postmarked or the postmark does not show the date of mailing, the appeal is considered to be filed on the date it is received in the office of the Commission[,]" N.C. Gen. Stat. § 105-290(g), which in this case is 6 April 2020, beyond the 30-day statutory window.

¶ 14 Taxpayers, however, advance two arguments[1] that their notices of appeals were timely: (1) the Board's notices of decision were not properly mailed in compliance with § 105-290(e); and (2) emergency COVID-19 orders issued by our Supreme Court and the OAH extended the filing deadlines for their notices of appeal. We carefully review and reject both arguments.

C. Mailing the Notices of Decision under § 105-290(e)

¶ 15 **[1]** Here, there is no dispute that the Taxpayers actually received the Board's notices of decision, and that the Board actually issued the

1. We note that Taxpayers also briefly argue that "there is no evidence the [Board] ever mailed the decision to the property owner[,]" and dispute the admission of Ms. Mallard's affidavit, which they claim does not meet the business records exception for hearsay. Putting aside any information from the affidavit, it is undisputed that the Taxpayers actually received the Board's notices of decision, which were dated 2 March 2020. Therefore, even assuming the affidavit was inadmissible, any error from the Commission here would be harmless given that the notices themselves, which are signed and acknowledged by Taxpayers' attorney in their notices of appeal on 30 March 2020, prove the decisions were issued and received.

notices of decision. The only dispute is over the delivery method of the notices, specifically the Taxpayers' argument that the Board is required to conduct its own mailings or specifically appoint mailing duties and then oversee the delivery of its notices.

¶ 16 As previously mentioned, N.C. Gen. Stat. § 105-290(e) provides that "notice of appeal from an order of . . . a board of equalization and review shall be filed with the Property Tax Commission within 30 days after the date the board mailed a notice of its decision to the property owner." Taxpayers argue that the Board's notices of decision were not mailed in compliance with this statute, because the Board allowed the Mecklenburg Assessor's Office to conduct its mailings, and the Assessor's Office hired South Data, a private third-party, to mail the notices. Taxpayers interpret § 105-290(e)'s language quite literally to mean that the Board, or presumably its members, must physically mail its notices of decision. We disagree and hold that the notices were mailed in accordance with the statute.

> When engaging in statutory interpretation, our Supreme Court has explained the primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. The foremost task in statutory interpretation is to determine legislative intent while giving the language of the statute its natural and ordinary meaning *unless the context requires otherwise*. Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.

Bryant v. Wake Forest Univ. Baptist Med. Ctr., 2022-NCCOA-89, ¶33 (citing *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004)) (emphasis added, internal marks omitted).

¶ 17 First, Taxpayers argue that we should strictly construe the language of the statute to mean that only the Board may mail the notices of decision because the language reads "the date *the board mailed* a notice of its decision." N.C. Gen. Stat. § 105-290(e) (2021). Taxpayers argue that the plain meaning of "the board mailed" is that the Board must do the physical mailing, and that we should attribute great weight to this precise wording, which could have otherwise read "the date the decision was mailed" or "the date the taxpayer was notified." Taxpayers, however, ignore the context of the statutory language at issue.

¶ 18 While it is true, as in *Bass Income Fund*, that "it is our duty to apply legislation as written," it is also equally true that in statutory interpretation the "foremost task . . . is to determine legislative intent[.]" *Bryant*, 2022-NCCOA-89, ¶33. If we were to construe the language of § 105-290(e) to mean that only the Board or its members may physically mail notices, as the Taxpayers contend, we would be ignoring the purpose behind of § 105-290(e) in favor of a potentially nonsensical interpretation. The language at issue must be examined in its context. Section 105-290 is titled "Appeals to Property Tax Commission" and subsection 105-290(e) is titled "Time Limits for Appeals." Out of context, Taxpayers creatively argue that the language specifically requires the Board to mail the notices, but we do not believe our legislature intended to create such strict mailing procedures for the Board.

¶ 19 If our legislature intended for the Board to conduct its own mailings, as Taxpayers contend, this duty would have been specified under § 105-322(g) with the Board's other statutory duties. Subsection 105-322(g), which designates the "Powers and Duties" of the Board, mentions the following about mailings under subdivision 105-322(g)(2), "Duty to Hear Taxpayer Appeals":

> a. A request for a hearing under this subdivision (g)(2) shall be made in writing to or by personal appearance before the board prior to its adjournment. However, if the taxpayer requests review of a decision made by the board under the provisions of subdivision (g)(1), above, notice of which was mailed fewer than 15 days prior to the board's adjournment, the request for a hearing thereon may be made within 15 days after the *notice of the board's decision was mailed.*
>
> . . .
>
> d. On the basis of its decision after any hearing conducted under this subdivision (g)(2), the board shall adopt and have entered in its minutes an order reducing, increasing, or confirming the appraisal appealed or listing or removing from the tax lists the property whose omission or listing has been appealed. *The board shall notify the appellant by mail* as to the action taken on the taxpayer's appeal not later than 30 days after the board's adjournment.

Id. § 105-322(g)(2)(a), (d) (emphases added). The passive construction of "the board's decision was mailed" and complementary phrase "shall notify the appellant by mail" characteristically omit the subject who must do the mailing. The statute makes clear that the Board has the duty to *notify* the taxpayer and that such notification must be *mailed*, but the statute leaves flexible what procedure the Board must follow when conducting its mailings.

¶ 20 Moreover, Taxpayers' argument fails to consider the functionality of the Board from a practical standpoint. The Board is comprised of voluntary members. In a county such as Mecklenburg, one of the largest in the State, the Board likely issues thousands of notices to property owners every year. Surely our legislature did not intend when enacting § 105-290(e) that the entire Board, or even one of its voluntary members, must personally visit the United States Postal Service to drop off the thousands of notices of decision in order for those notices to be valid.

¶ 21 Second, Taxpayers argue in their brief that "nothing in N.C.G.S. § 105-322 grants the [Board] authority to delegate its duties to an off-site non-governmental third-party to mail its decision to the property owner[,]" and that "[h]ad the Legislature intended to allow the 'board' to outsource that [mailing] responsibility to a third-party entity, the statute would have provided such an option." However, Taxpayers later move away from this stance, conceding at oral argument that the Board *may* appoint third parties to conduct its mailings, but only if the Board still specifically oversees the mailings. Taxpayers then urge that the Board's delivery method here exceeded its statutory authority, because there is no record evidence that the Board specifically appointed the Assessor's Office or South Data to conduct its mailings and likewise no evidence exists that the Board oversaw the mailings in this case.

¶ 22 While the statute does not specify who must drop the Board's mail off at the Post Office, the statute neither expressly nor impliedly prohibits the Board, or the assessor, from employing third-parties to assist in delivering its mail. The statute *does*, however, specifically appoint the assessor as clerk to the Board. N.C. Gen. Stat. § 105-322(d) ("The assessor shall serve as clerk to the board of equalization and review[.]"). Additionally, in a provision about the assessor's powers and duties, the statute provides that "[the county assessor] shall perform the duties imposed upon him by law, and he shall have and exercise all powers reasonably necessary in the performance of his duties not inconsistent with the Constitution or the laws of this State." *Id.* § 105-296(a). We reject the argument that the Board needed to expressly appoint the assessor to conduct its mailings when the statute clearly designates the assessor as

the clerk to the Board. We also find no basis to hold that the Board must then supervise the assessor in mailing the notices in order for them to be valid.

¶ 23 Because the notices of decision were valid and the Taxpayers' appeals were not timely, the Commission correctly determined it did not have jurisdiction to hear the Taxpayers' appeals. *In re Appeal of La. Pac. Corp.*, 208 N.C. App. 457, 461-62, 703 S.E.2d 190, 193 (2010) (holding that if the taxpayer fails to perfect its appeal under the statute, the Commission is deprived of jurisdiction). We therefore affirm the Commission's decision to grant the County's motions to dismiss.

D. COVID-19 Emergency Orders

¶ 24 **[2]** Taxpayers further argue that the deadline to file their notices of appeal was tolled by the emergency COVID-19 orders issued by the North Carolina Supreme Court ("NCSC Orders"), or alternatively, the emergency COVID-19 order issued by the Office of Administrative Hearings ("OAH Order").

¶ 25 On 19 March 2020, former Chief Justice Cheri Beasley of our Supreme Court entered an emergency order stating,

> I order that all pleadings, motions, notices, and other documents and papers that were or are due to be filed in any county of this state on or after 16 March 2020 and before the close of business on 17 April 2020 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 17 April 2020.

On 27 March 2020, our Supreme Court imposed another order extending all "[d]eadlines imposed by the Rules of Appellate Procedure that fall between 27 March 2020 and 30 April 2020" for 60 days. On 13 April 2020, our Supreme Court extended the 19 March Order and clarified that the order applied to "documents and papers due to be filed and acts due to be done in the trial courts."

¶ 26 Taxpayers argue that the NCSC Orders tolled the deadline on their notices of appeal, because "[t]he Property Tax Commission is a trial court[.]" We disagree and hold that the Commission is an administrative agency, not a trial court.

¶ 27 Article IV of our Constitution allows the General Assembly to confer reasonably necessary judicial powers to administrative agencies but does not allow the establishment of courts outside of this Article. Article IV reads, in part, as follows:

> Section 1. Judicial power. The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.
>
> Section 2. General Court of Justice. The General Court of Justice shall constitute a unified judicial system for purposes of jurisdiction, operation, and administration, and shall consist of an Appellate Division, a Superior Court Division, and a District Court Division.
>
> Section 3. Judicial powers of administrative agencies. The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice.

N.C. Const. art. IV, §§ 1-3.

¶ 28 The conference of judicial power on an administrative agency is, therefore, not the establishment of a court, which our General Assembly is expressly not authorized to do outside of Article IV. For example, in *State ex rel. N.C. Utilities Comm'n v. Old Fort Finishing Plant*, our Supreme Court addressed whether it had jurisdiction to review decisions of the Utilities Commission on direct appeal. 264 N.C. 416, 417, 142 S.E.2d 8, 9 (1965). In doing so, the Court remarked that the Utilities Commission, "a creature of the General Assembly, is an administrative agency of the State with such powers and duties as are given to it by statute. These powers and duties are of a dual nature—supervisory or regulatory and judicial." *Id.* at 420, 142 S.E.2d at 11 (internal marks and citation omitted). The Court ultimately concluded that the General Assembly did not have authority under Article IV to allow direct appeals from "administrative agencies to the Supreme Court without prior appeal to and review by a lower court within the General Court of Justice." *Id.* at 422, 142 S.E.2d at 13. *But see* N.C. Gen. Stat. § 7A-29(b) (enacting

that certain appeals from the Utilities Commission now go directly to our Supreme Court, modified after the decision in *Old Fort Finishing Plant*). In doing so, the Court held that:

> [a]dministrative agencies referred to in Section 3 of Article IV *ex vi termini* are distinguished from courts. They are not constituent parts of the General Court of Justice. Section 1 of Article IV provides expressly that the General Assembly shall have no power to establish or authorize any courts other than as permitted by this Article.

Id., at 422, 142 S.E.2d at 12 (internal marks omitted).

¶ 29 Administrative agencies, even if quasi-judicial, are also not considered trial courts for purposes of limitations periods. *See Ocean Hill Joint Venture v. N.C. Dep't of Env't, Health & Nat. Res.*, 333 N.C. 318, 321, 426 S.E.2d 274, 276 (1993). In *Ocean Hill*, the Department of Natural Resources and Community Development (the "Department") sent a Notice of Violation to Ocean Hill for violations of the Sedimentation Pollution Control Act. *Id.* at 319, 426 S.E.2d at 275. After being assessed with a civil penalty, Ocean Hill filed a petition for a contested case hearing with the OAH. *Id.* at 319-20, 426 S.E.2d at 275. Our Supreme Court again relied on Article IV, Section 3 of our Constitution to hold that "the grant of limited judicial authority to an administrative agency does not transform the agency into a court for purposes of the statute of limitations." *Id.* at 321, 426 S.E.2d at 276. The Court concluded that an administrative assessment of a civil penalty by the Department was "not the institution of an action or proceeding in a court[,]" and therefore the limitations period under N.C. Gen. Stat. § 1-54 did not apply. *Id.* at 321, 324, 426 S.E.2d at 276, 278.

¶ 30 In further applying *Ocean Hill*, our Supreme Court has suggested that the Property Tax Commission is an administrative agency, not a trial court. *See In re Twin Cnty. Motorsports, Inc.*, 367 N.C. 613, 617, 766 S.E.2d 832, 835 (2014). In *Twin County*, the Court concluded that "an appearance by a nonattorney before an administrative hearing officer does not constitute the unauthorized practice of law[.]" *Id.* In doing so, the Court drew a parallel between appearing before an administrative hearing officer to appearing before the Property Tax Commission, remarking that its

> conclusion . . . is in line with recent legislative action. The North Carolina General Assembly has recently provided that, in contested cases before the Office of

> Administrative Hearings (OAH) and in appeals to the Property Tax Commission, a business entity may represent itself using a nonattorney representative. While not directly governing the matter *sub judice* because the legislation applies to contested cases before the OAH and appeals to the Property Tax Commission . . . , the passage of this legislation is consistent with our conclusion that a nonattorney's appearance before an administrative hearing officer does not constitute the unauthorized practice of law under N.C.G.S. § 84-4.

Id. (cleaned up).

¶ 31 In describing the appeals process for property tax assessments, we have previously explained:

> North Carolina law provides two avenues by which a taxpayer may seek relief from an unjust property tax assessment: *administrative* review followed by judicial review in the Court of Appeals, and direct *judicial* review in Superior or District court. Administrative review begins in the County Board of Equalization and Review. . . . Any taxpayer who wishes to except to an order of the County Board shall appeal to the State Property Tax Commission. In turn, a taxpayer who is unsatisfied with the decision of the Property Tax Commission shall appeal to the North Carolina Court of Appeals, and then to the North Carolina Supreme Court.

Johnston v. Gaston County, 71 N.C. App. 707, 709, 323 S.E.2d 381, 382 (1984) (emphases added) (citations omitted). *See also Brock v. N.C. Prop. Tax Comm'n*, 290 N.C. 731, 737, 228 S.E.2d 254, 258 (1976) ("As to the hearing before the county board of equalization and review: The *administrative decisions of the Property Tax Commission*, whether with respect to the schedule of values or the appraisal of property, are always subject to judicial review after administrative procedures have been exhausted." (emphasis added)).

¶ 32 Our legislature has also referred to the Commission as an administrative agency when outlining the appeals process from Commission decisions. *See* N.C. Gen. Stat. § 7A-29 (2021).

> § 7A-29. Appeals of right from certain administrative agencies.

> (a) From any final order or decision of . . . the Property Tax Commission under G.S. 105-290 and G.S. 105-342, . . . appeal as of right lies directly to the Court of Appeals.

Id. § 7A-29(a).

¶ 33 We hold that for purposes of the NCSC Orders, the Commission is not a trial court but an administrative agency vested with judicial powers consistent with Article IV, Section 3 of our Constitution. Therefore, because the Commission is a "creature of the General Assembly," the extensions granted by our Supreme Court for filings to "trial courts" do not apply to Taxpayers' filings to the Commission.

¶ 34 Taxpayers argue that, even if the Commission is an administrative agency, then the filing extensions issued by the Supreme Court would still apply, because they were expressly adopted in the OAH Order. We disagree.

¶ 35 On 27 May 2020, former Chief Administrative Law Judge Julian Mann III, ordered the following:

> On May 2nd, 2020, The Honorable Roy Cooper, Governor of the State of North Carolina, signed Senate Bill 704 into law . . . [which] authorizes the Chief Administrative Law Judge, by order, to extend the time or period of limitation for the filing of a petition for a *contested case*, whether established by N.C.G.S. § 150B-23(f) or by another statute, "[w]hen the Chief Justice of the North Carolina Supreme Court determines and declares that catastrophic conditions exist or have existed in one or more counties of the State and issues an order pursuant to G.S. 7A-39(b)."
>
> . . .
>
> In light of the May 21st, 2020 order issued by the Chief Justice of the North Carolina Supreme Court and by the authority granted to the Chief Administrative Law Judge under Session Law 2020-3, I now order that all petitions for a *contested case*, originating in any of North Carolina's 100 counties (or as may be otherwise authorized by law), that were or are due to be filed on or after March 19th, 2020, and before the close of business on July 31st, 2020, shall be deemed to be timely filed *if they are filed in the Office*

> *of Administrative Hearings* before the close of business on July 31st, 2020, notwithstanding the time or period of limitation established by N.C.G.S. § 150B-23(f) or by any other statute.

¶ 36 Because the OAH Order only extended filing deadlines for contested cases before the OAH, the order cannot be applied to extend the filing deadline for the Taxpayers' appeals in this case. *See* N.C. Gen. Stat. § 150B-23(f) (granting the Chief Administrative Law Judge authority to issue an emergency extension, such as the OAH Order, only for the filing of contested cases).

III. Conclusion

¶ 37 For the foregoing reasons, we affirm the Commission's dismissal of the Taxpayers' appeals because the notices of appeal were not timely filed, the Commission's mailing procedure did not violate § 105-290(e), and the statutory 30-day deadline for filing was not extended by the NCSC or OAH Orders.

AFFIRMED.

Judges DIETZ and COLLINS concur.

DEBORAH SINK MOSS AND CARLA SHUFORD,
ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS
v.
N.C. DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION, DEFENDANT

No. COA21-60

Filed 5 April 2022

1. Setoff and Recoupment—long-term state disability benefits—overpayment—duty of State to seek recoupment—breach of contract claim properly dismissed

In plaintiffs' breach of contract claims challenging a state agency's offset of transitional disability benefits (after the agency discovered the benefits had been overpaid for eleven years due its failure to sufficiently account for social security cost of living increases), the trial court properly granted the agency's motion to dismiss because, by law, the State had a duty to pursue recoupment of any

overpayment of disability benefits (N.C.G.S. § 135-9(b) and N.C.G.S. § 143-64.80), and therefore its actions were lawful.

2. Administrative Law—judicial review—setoff and recoupment of disability benefits—substantial evidence

In an action brought by two recipients of long-term state disability benefits challenging the reduction in their monthly benefits by the administering state agency, which sought to recoup overpayments that had occurred over an eleven-year period, the trial court properly affirmed the decisions of the administrative law judge (ALJ) regarding plaintiffs' lack of evidence to support their claims. The trial court properly applied the whole record standard of review and there was substantial evidence to support the ALJ's decisions regarding the financial records submitted by one plaintiff—which were not sufficient to show that the overpayments were miscalculated—and the application of the cost of living adjustments made by the Social Security Administration—which were awarded in certain years but not others—to determine the amount of the overpayments.

3. Appeal and Error—preservation of issues—collateral estoppel—not asserted in trial court

In an action brought by two recipients of long-term state disability benefits (plaintiffs) challenging the reduction in their monthly benefits by the administering state agency (defendant), where defendant raised the doctrine of collateral estoppel for the first time on appeal, its failure to first raise the affirmative defense in the trial court rendered the issue unpreserved for appellate review.

Appeal by Plaintiffs from orders entered 9 July 2020 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 6 October 2021.

Zaytoun Ballew & Taylor, PLLC, by John R. Taylor, Robert E. Zaytoun and Clare F. Kurdys, for Plaintiffs-Appellants.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Katherine A. Murphy, for Defendant-Appellee.

WOOD, Judge.

¶ 1 Deborah Sink Moss and Carla Shuford (collectively, "Plaintiffs") appeal from orders entered on July 9, 2020, 1) granting Defendant's motion to dismiss and 2) affirming the administrative law judge's final decisions.

On appeal, Plaintiffs allege the trial court erred by granting Defendant's motion to dismiss and denying their petition for judicial review. After a careful review of the record and applicable law, we affirm the orders of the trial court.

I. Factual and Procedural Background

¶ 2 When Plaintiff Shuford was 15 years old she was diagnosed with osteogenic sarcoma and a tumor in her left leg. As a result, her left leg was amputated. On March 8, 1982, Plaintiff Shuford began working in an administrative position at the University of North Carolina. While at the University of North Carolina, Plaintiff Shuford was hospitalized due to post-traumatic stress issues relating to the loss of her leg and her physical disabilities. On August 23, 1988, she applied for short-term disability and received approval shortly thereafter. On June 15, 1989, Plaintiff Shuford applied for long-term disability and was approved for long-term disability benefits retroactive to August 15, 1988.

¶ 3 On August 18, 1986, Plaintiff Moss worked as a teacher for the Wake County Public School Systems. Plaintiff Moss was given credit for 10 years of prior work experience. From November 1988 to December 1989, Plaintiff Moss was in three separate automobile accidents which resulted in injuries that caused her to experience pain while teaching. Subsequently, Plaintiff Moss was diagnosed with depression and stress from these car accidents. On April 17, 1990, she applied for short-term disability and was approved shortly thereafter. She then applied for long-term disability benefits on April 21, 1991 and was approved on June 11, 1991.

¶ 4 Each Plaintiff receives Transitional Disability Benefits from the North Carolina Department of State Treasurer, Retirement Systems Division ("Defendant"). Under the terms of North Carolina's Transitional Disability Benefits, disability payments are reduced by the gross amount of Social Security Disability benefits to which a person is entitled. As Social Security Disability benefits increase due to cost of living adjustments, the Plaintiffs' disability payments from Defendant are reduced accordingly.

¶ 5 In 2017, Defendant discovered a programming error which failed to account for cost of living increases to Plaintiffs' Social Security benefits. As a result, Defendant's payments of benefits to individuals within the transitional disability group had been overpaid since 2006. Following this discovery, Defendant calculated the amount Plaintiffs should have received and accordingly reduced Plaintiffs' monthly benefit payment amounts to offset the previously overpaid amount.

¶ 6 In 2017, Defendant informed Plaintiff Moss that she owed $13,235.00 in overpayments and informed Plaintiff Shuford that she owed $19,702.00 in overpayments. Defendant then reduced the amounts of Plaintiffs' monthly disability benefits in order to recoup the overpayments.

¶ 7 Plaintiffs Moss and Shuford each filed a petition with the Office of Administrative Hearings ("OAH") in December 2017, challenging the reduction in their disability payments. Due to similar facts and legal issues, Plaintiffs' cases were consolidated on January 2, 2018. The OAH held separate hearings for each Plaintiff.

¶ 8 On October 9, 2018, Plaintiff Moss's case was heard by the administrative law judge, and on October 9 and 15, 2018, Plaintiff Shuford's case was heard by the administrative law judge. At the hearing, Plaintiff Shuford offered her bank account statements and a spreadsheet as evidence of Defendant's miscalculation of her benefits. At the conclusion of each hearing, Defendant made a Rule 41(b) motion for involuntary dismissal after the evidence was presented for Plaintiff Moss and Plaintiff Shuford.

¶ 9 On December 17, 2018, the administrative law judge issued final decisions in favor of Defendant and dismissed Plaintiffs' cases with prejudice. Although Plaintiff Shuford had proffered her bank account statements at her hearing, the administrative law judge found they were "insufficient evidence to prove that her *gross* . . . [Social Security] Benefits differed from Respondent's accounting." The administrative law judge further held that disability benefit overpayments were State property, not Plaintiffs' personal property. The administrative law judge concluded Plaintiffs (1) offered insufficient evidence to prove that the overpayment calculations were incorrect; (2) knew Social Security disability payments were to be deducted from their payments under the Transitional Disability Benefits; and (3) failed to prove Defendant substantially prejudiced their rights.

¶ 10 On January 16, 2019, Plaintiffs filed petitions in Wake County Superior Court for judicial review of the OAH Decisions, asserting both errors of law and fact. Defendant filed a motion to dismiss. On July 9, 2020, the Superior Court entered an order granting Defendant's motion to dismiss and entered another order affirming the OAH Decisions. From entry of these two orders, Plaintiffs now appeal.

II. Discussion

¶ 11 Plaintiffs raise multiple issues on appeal; each will be addressed in turn.

A. Motion to Dismiss

¶ 12 **[1]** Plaintiffs first argue the trial court erred by granting Defendant's motion to dismiss because Plaintiffs had established valid claims for breach of contract. We disagree.

¶ 13 We begin our review by noting a motion to dismiss is reviewed *de novo*. *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 8 (2015); *Holton v. Holton*, 258 N.C. App. 408, 414, 813 S.E.2d 649, 654 (2018). Here, the Superior Court granted Defendant's motion to dismiss under both Rule 12(b)(1) and 12(b)(6).

1. 12(b)(6) Motion

¶ 14 Turning first to Rule 12(b)(6), a Rule 12(b)(6) motion to dismiss "tests the legal sufficiency of the complaint . . . ." *Isenhour v. Hutto*, 350 N.C. 601, 604, 517 S.E.2d 121, 124 (1999) (quoting *Forsyth v. Memorial Hosp. v. Armstrong World Indus.*, 336 N.C. 438, 442, 444 S.E.2d 423, 425 (1994)). "When reviewing the denial of a motion to dismiss pursuant to Rule 12(b)(6), the factual allegations in plaintiff's complaint are treated as true." *Id.* (citing *Cage v. Colonial Bldg. Co.*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994)).

¶ 15 A Rule 12(b)(6) motion reviews whether "as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory." *Forsyth Memorial Hosp.*, 336 N.C. at 442, 444 S.E.2d at 425-26 (citation omitted). *See Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991). "The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419, (2000). *See also Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 218, 367 S.E.2d 647, 649 (1988) ("A claim should be dismissed under Rule 12(b)(6) where it appears that the plaintiff is entitled to no relief under any statement of facts which could be proven.").

¶ 16 Turning to Plaintiff's argument that they had established valid claims for breach of contract, the elements for a breach of contract claim are the existence of a valid contract and a breach of the terms therein. *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 216, 768 S.E.2d 582, 590 (2015); *see Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000).

¶ 17 The relationship between State employees and the long-term disability system is contractual in nature. *See Wells v. Consolidated Judicial Retirement Sys.*, 136 N.C. App. 671, 673, 526 S.E.2d 486, 488 (2000). The long-term disability system is governed by Article 6 Chapter 135 of the North Carolina General Statutes. N.C. Gen. Stat. § 135-100(a) (2021). Chapter 135 was enacted in 1987 and became effective on January 1, 1988. An Act to Make Appropriations for Current Operations of State Departments, Institutions, and Agencies, and For Other Purposes Except For Aid to Certain Governmental and Nongovernmental Units, ch. 738, § 29(r), 1987 N.C. Session Laws 1354, 1392. The contractual right to long-term disability benefits vests after "five or more years of membership service." N.C. Gen. Stat. § 135-106(a) (1988). However, a transitional provision provides an opportunity for employees who were employed at the time of Chapter 135's enactment to receive disability benefits despite having less than five years of membership service:

> Any participant in service as of the date of ratification of this Article and who becomes disabled after one year of membership service will be eligible for all benefits provided under this Article notwithstanding the requirement of five years' membership service to receive the long-term benefit; provided, however, any beneficiary who receive[s] benefits as a result of this transition provision before completing five years of membership service shall receive lifetime benefits in lieu of service accruals under the Retirement System as otherwise provided in [N.C.] G[en]. S[tat]. [§] 135-4(y).

N.C. Gen. Stat. § 135-112(a) (1988).

¶ 18 Here, Plaintiffs were both employed as teachers for the State for at least one year, and thus, Plaintiffs qualified for long-term disability benefits. To the extent Plaintiffs and Defendant differ as to whether Plaintiffs were vested beneficiaries of the Teachers' & State Employees' Retirement System, or only in the transitional disability group per Section 135-112(a), we need not reach the merits of this argument. In the case *sub judice*, Plaintiffs only challenge Defendant's right to recoup disability benefits. Thus, whether Plaintiffs were vested beneficiaries or not, Plaintiffs were still eligible for, and indeed received, disability payments under Chapter 135. These disability payments, in turn, are governed by the statutory requirements within Chapter 135. *See Wells*, 136 N.C. App. at 673, 526 S.E.2d at 488.

¶ 19 Under N.C. Gen. Stat. § 135-106(b), the amount of long-term disability benefits received were supposed to be offset dollar-for-dollar by the Social Security Disability benefit for which Plaintiffs would otherwise be eligible. N.C. Gen. Stat. § 106(b) (1988). Additionally, each contract contained a recoupment provision pursuant to N.C. Gen. Stat § 135-9. When Chapter 135 became effective in 1988, Section 135-9(b) stated

> [n]otwithstanding any provisions to the contrary, *any overpayment of benefits to a member* in a state-administered retirement system or the former Disability Salary Continuation Plan or the Disability Income Plan of North Carolina *may be offset* against any retirement allowance, *return of contributions or any other right accruing under this Chapter* to the same person, the person's estate, or designated beneficiary.

N.C. Gen. Stat. § 135-9(b) (1988) (emphasis added). *See* N.C. Gen. Stat. § 143-64.80(a). At the time of Plaintiffs' hearings in 2018, our General Assembly had amended the language of Section 135-9(b) so that it read,

> [n]otwithstanding any provisions to the contrary, *any overpayment of benefits or erroneous payments to a member* in a State-administered retirement system or the former Disability Salary Continuation Plan or the Disability Income Plan of North Carolina, including any benefits paid to, or State Health Plan premiums or claims paid on behalf of, any member or beneficiary who is later determined to have been ineligible for those benefits or unentitled to those amounts, *may be offset against any retirement allowance*, *return of contributions or any other right accruing under this Chapter to the same person*, the person's estate, or designated beneficiary.

N.C. Gen. Stat. § 135-9(b) (2018) (emphasis added).

¶ 20 Moreover, the State has a duty under Section 143-64.80 to pursue the recoupment of any overpayment: "No State department, agency, or institution, or other State-funded entity may forgive repayment of an overpayment of State funds, but shall have a duty to pursue the repayment of State funds by all lawful means available, including the filing of a civil action in the General Court of Justice." N.C. Gen. Stat. § 143-64.80(b) (2018). The plain language of Section 135-9 in both 1988

and 2018 required the State to recoup any overpayments resulting from disability payments. In other words, the statutory terms of Plaintiff Moss and Plaintiff Shuford's right to receive disability payments included a recoupment clause which mandated Defendant to seek reimbursement from any overpayment.

¶ 21 Although we sympathize with the financial difficulties faced by Plaintiffs due to Defendant's error, Plaintiffs' statutory right to disability benefits also mandates the Defendant to seek recoupment of overpayments. *See* N.C. Gen. Stat. § 135-9(b) (2018). Plaintiffs' argument that Defendant's lawful action under the terms of Chapter 135 constitutes a breach of contract fails because Defendant had "a duty to pursue the repayment of State funds by all lawful means available." § 143-64.80(b). Therefore, we hold the trial court did not err by granting Defendant's motions to dismiss.

2. 12(b)(1) Motion

¶ 22 Plaintiffs next argue the trial court erred by granting Defendant's motion to dismiss under Rule 12(b)(1). A trial court grants a motion to dismiss pursuant to Rule 12(b)(1) when the court lacks jurisdiction over a subject matter. N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2021). A party, or the court on its own, may assert lack of jurisdiction. *Dale v. Lattimore*, 12 N.C. App. 348, 352, 183 S.E.2d 417, 419 (1971). "The filing of a motion to dismiss under Rule 12(b)(1) does not raise an issue of fact[,] [i]t challenges the jurisdiction of the court over the subject matter." *Journeys International, Inc. v. Corbett*, 53 N.C. App. 124, 125, 280 S.E.2d 5, 6 (1981). A Rule 12(b)(1) motion may not be viewed in the same manner as a Rule 12(b)(6) motion because under Rule 12(b)(1) "matters outside the pleadings[] . . . may be considered and weighed by the court in determining the existence of jurisdiction over the subject matter." *Tart v. Walker*, 38 N.C. App. 500, 502, 248 S.E.2d 736, 737 (1978).

¶ 23 Here, Plaintiffs specifically contend that Defendant waived the defense of sovereign immunity when it entered into a contract with Plaintiffs. *See Guthrie v. North Carolina State Ports Authority*, 307 N.C. 522, 535, 299 S.E.2d 618, 625 (1983) ("Sovereign immunity is a legal principle which states in its broadest terms that the sovereign will not be subject to any form of judicial action without its express consent."). However, because the trial court properly granted Defendant's motion to dismiss under 12(b)(6) we need not address Plaintiffs' argument regarding 12(b)(1).

B. Plaintiffs' Petition for Judicial Review

¶ 24 **[2]** Next, Plaintiffs contend the trial court erred by affirming the administrative law judge's decisions. "When the trial court exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 662, 599 S.E.2d 888, 896 (2004) (first citing *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002); and then citing *Avant v. Sandhills Ctr. For Mental Health, Development Disabilities & Substances Abuse Servs.*, 132 N.C. App. 542, 545, 513 S.E.2d 79, 82 (1999)).

¶ 25 Under N.C. Gen. Stat. § 150B-51, the reviewing court may affirm or remand a final decision. N.C. Gen. Stat. § 150B-51(b) (2021). The reviewing court 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) A "violation of constitutional provisions"; 2) an "excess of the statutory authority or jurisdiction of the agency or administrative judge"; 3) an "unlawful procedure"; or 4) "[a]ffected by other error of law . . . ." § 150B-51(b)(1)-(4). If a petitioner alleges any of the above has been violated, the reviewing court must apply a *de novo* standard of review. § 150B-51(c). However, if a reviewing court is determining whether the findings, inferences, conclusions, or decisions are "[u]nsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted" or "[a]rbitrary, capricious, or an abuse of discretion," a whole record standard of review is to be applied. § 150B-51(b)(5)-(6), (c).

¶ 26 When this Court reviews an appeal from a superior court which either affirmed or reversed an administrative agency's decision, we review for two factors: "(1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard." *Mayo v. N.C. State Univ.*, 168 N.C. App. 503, 507, 608 S.E.2d 116, 120 (2005) (citing *In re Appeal by McCrary*, 112 N.C. App. 161, 166, 435 S.E.2d 359, 363 (1993), *aff'd*, 360 N.C. 52, 619 S.E.2d 502 (2005).

1. Bank Account Statements

¶ 27 Plaintiffs initially allege the administrative law judge's decisions are not supported by competent evidence because they did not consider Plaintiff Shuford's financial records. Plaintiffs argue that the financial records provided by Plaintiff Shuford were conclusive to show the State's mathematical calculations used to withhold Plaintiffs' disability

statements were incorrect. Since Plaintiffs allege the decisions were not supported by substantial evidence, the trial court was required to apply a whole record standard of review. *See* § 150B-51(c). The trial court appropriately applied such standard, stating "[w]ith respect to assertions of fact-based errors, the Court has applied a whole record standard of review." Thus, we conclude the trial court did not err in its standard of review.

¶ 28 Next, we examine whether the trial court applied the whole record standard of review correctly. The whole record test "requires the examination of all competent evidence to determine if the administrative agency's decision is supported by substantial evidence." *Rector v. North Carolina Sheriffs' Educ. & Training Standards Com.*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 616 (1991) (citing *Henderson v. N.C. Dep't of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d, 887, 889 (1988)). Substantial evidence is relevant evidence "a reasonable mind might accept as adequate to support a conclusion." *Avant v. Sandhills Ctr. for Mental Health, Developmental Disabilities & Substance Abuse Servs.*, 132 N.C. App. 542, 546, 513 S.E.2d 79, 83 (1999) (quoting *Lackey v. N.C. Dep't of Human Resources, etc.*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982)). Notably, the whole record test is not a "tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979). Even if the record contains evidence contrary to an agency's findings, an appellate court may not substitute its judgment in lieu of the agency's judgment. *Avant*, 132 N.C. App. at 547, 513 S.E.2d at 83.

¶ 29 Applying the whole record standard of review, we consider the following evidence. Plaintiff Shuford offered her bank account statements and a spreadsheet into evidence. Plaintiff Shuford's spreadsheet showed the amount of social security payments deposited into her bank account, amount of disability payments deposited into her bank account, benefits paid by the state, social security offset amount calculated by the state, benefit amount the state should have paid, and social security offset amount the state should have paid from January 2006 until July 2017. Defendant also provided a spreadsheet detailing the amount it actually paid Plaintiff Shuford versus the amount it should have paid. The social security offset amount on Plaintiff Shuford's spreadsheet differed from the social security offset amount on the spreadsheet prepared by Defendant. For instance, Plaintiff Shuford's spreadsheet showed the social security offset amount for December 2006 was $1,056.00, while Defendant's spreadsheet showed Plaintiff Shuford's social security offset amount for the same date was $1,090.00.

¶ 30 These discrepancies are not due to a calculation error by Defendant, but rather are indicative of potential withholdings. Thomas Causey, a witness on behalf of Defendant, testified the social security offset amount illustrated on Plaintiff Shuford's spreadsheet statements does not consider potential money withheld by the Social Security Administration. Causey further testified that "Social Security has other deductions that they take out before . . . direct deposits are made for members. . . . So . . . the direct deposits, again, would not help us to know the amount that should be deducted." In other words, the amount of social security offset in Plaintiff Shuford's spreadsheet shows only the net amount of her social security benefits if money was withheld, not the gross amount of the benefits. The social security offset amount in Defendant's spreadsheet showed the gross amount of social security benefits received by Plaintiff Shuford prior to any withholdings. As a result, if the Social Security Administration was withholding money from the gross amount provided to an individual, this would be reflected in a lower amount being deposited into the individual's bank account. Nowhere within the record did Plaintiff Shuford offer evidence of the gross amount she received from the Social Security Administration, only proffering evidence as to the net amount. Therefore, the administrative law judge had substantial evidence from Defendant's spreadsheet to support its decisions.

¶ 31 Assuming *arguendo* Plaintiff Shuford's spreadsheet sufficed as contrary evidence for the purpose of calculating the overpayment amount, we are not permitted to substitute our judgment for that of the administrative law judge just because contrary evidence existed. *See id.*; *see also City of Rockingham v. N.C. Dep't of Env't & Natural Res.*, 224 N.C. App. 228, 239, 736 S.E.2d 764, 771 (2012) ("In an administrative proceeding, it is the prerogative and duty of that administrative body, once all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." (internal quotation marks omitted)). In light of the foregoing findings, we hold substantial evidence existed regarding the financial records to support the administrative law judge's decisions.

2. Cost of Living Adjustments

¶ 32 Plaintiffs also contend the administrative law judge erred by not considering Defendant's possible overpayments in the years when the Social Security Administration did not increase benefits due to a cost of living adjustments ("COLA"). Because Plaintiffs challenge whether findings of fact within the decisions were supported by substantial evidence, the trial court was required to apply a whole record standard of review.

See § 150B-51(c). The trial court appropriately applied such standard, stating "[w]ith respect to assertions of fact-based errors, the Court has applied a whole record standard of review." Therefore, we must analyze whether the trial court appropriately applied the whole record standard of review.

¶ 33 In this case, the administrative law judge made the following relevant findings of fact:

> 35. Because ORBIT had not been programmed to deduct the cost-of-living adjustments from the Transitional Benefit accounts, Petitioner Moss'[s] Transitional Disability Benefits had not been reduced by the Social Security cost-of-living adjustment increases which occurred in the years of 2006, 2007, 2008, 2011, 2012, 2013, 2014, and 2016.
>
> . . .
>
> 56. Subsequently, on June 16, 2017, Respondent notified Petitioner Shuford that Social Security cost-of-living adjustments had been given in 2006, 2007, 2008, 2011, 2012, 2013, 2014, and 2016, but that these cost-of-living adjustments had not been deducted from Shuford's Transitional Disability Benefits.

In 2009, 2010, and 2015, no COLA was awarded, and thus, the Social Security Administration did not increase its benefits. A careful review of Defendant's "should have paid" spreadsheets for each Plaintiff reveals Defendant did not increase the amounts of their social security benefits in the years when no COLA was granted. In the administrative law judge's findings, she omitted the years 2009, 2010, and 2015, the same years COLA was not awarded. Accordingly, we hold the administrative law judge considered Defendant's possible overpayments to Plaintiffs in the years COLA was not awarded and substantial evidence supported her findings.

3. Breach of Contract

¶ 34 Finally, Plaintiffs contend the trial court erred by denying their petition for judicial review because the administrative law judge did not consider their contractual rights to receive disability benefits. We disagree.

¶ 35 As explained above, Plaintiffs' rights to disability payments were subject to Chapter 135's statutory requirements. These requirements, in turn, contained a mandatory recoupment clause pursuant to N.C.

Gen. Stat. § 135-9(b). Thus, by accepting disability benefits, Plaintiffs agreed Defendant would recoup any overpayments of benefits to them. Furthermore, a careful review of the administrative law judge's decisions shows she properly considered the mandatory recoupment clause inherent to Plaintiffs' disability benefits. Therefore, substantial evidence existed to support the administrative law judge's conclusions Defendant acted within its statutory duty to recoup overpayments made to Plaintiffs, and Plaintiffs' argument is without merit.

C. Collateral Estoppel

¶ 36 **[3]** Although Defendant crafted a lengthy argument as to why Plaintiffs are barred from pursuing their claims in superior court under the doctrine of collateral estoppel, collateral estoppel is an affirmative defense under Rule 8 and thus must have been raised in the trial court in order to preserve this argument for appeal. N.C. Gen. Stat. § 1A-1, Rule 8(c) (2021); N.C. R. App. P. 10(a)(1). "Failure to plead an affirmative defense ordinarily results in waiver of the defense." *Ward v. Beaton*, 141 N.C. App. 44, 49, 539 S.E.2d 30, 34 (2000). Defendant raised the affirmative defense of collateral estoppel for the first time on appeal, and thus failed to preserve this issue for appeal. *See also In re D.R.S.*, 181 N.C. App. 136, 140, 638 S.E.2d 626, 628 (2007) (since "respondent raise[d] the defenses of collateral estoppel and *res judicata* for the first time on appeal, . . . [respondent] thus failed to properly preserve the issue[]").

III. Conclusion

¶ 37 For the foregoing reasons, the trial court did not err by granting Defendant's motion to dismiss. Additionally, the trial court did not err by affirming the OAH Decisions entered by the administrative law judge. Accordingly, the orders of the trial court are affirmed.

AFFIRMED.

Judges ZACHARY and CARPENTER concur.

PRESTON v. PRESTON

[282 N.C. App. 518, 2022-NCCOA-207]

PATRICK PRESTON, PLAINTIFF
v.
TOSHIKO PRESTON, DEFENDANT

No. COA21-204

Filed 5 April 2022

Appeal and Error—interlocutory orders—substantial right—attorney fees award—in conjunction with Rule 11 sanctions

Defendant wife's appeal from an order granting plaintiff husband's motion for sanctions pursuant to Civil Procedure Rule 11 and ordering defendant to pay $15,000 in attorney fees to plaintiff in their divorce case was dismissed where, although an interlocutory order requiring payment of a significant amount of money may be immediately appealed if it is shown to affect a substantial right, defendant failed to make that showing here. The disposal of the attorney fees issue did not fully dispose of any underlying substantive issue in the divorce case; rather, the award's purpose was to deter defendant's sanctionable conduct from continuing in the ongoing litigation. Furthermore, defendant's status as the dependent spouse had no bearing on whether the order affected a substantial right, and defendant made no arguments in her appellate brief showing how a substantial right had been affected.

Judge TYSON dissenting.

Appeal by defendant from order entered 2 September 2020 by Judge Karen D. McCallum in Mecklenburg County District Court. Heard in the Court of Appeals 26 January 2022.

Hamilton Stephens Steele & Martin, PLLC, by Kyle W. LeBlanc, for Plaintiff-Appellee.

Fleet Law, by Jennifer L. Fleet, for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Toshiko Preston ("Defendant") appeals from an order granting sanctions and attorneys' fees to Patrick Preston ("Plaintiff"). We dismiss Defendant's appeal as interlocutory.

I. Background

¶ 2 Plaintiff and Defendant were married on 25 July 1988. The facts leading to the imposition of sanctions against Defendant are as follows: Plaintiff filed a complaint for absolute divorce in October 2018. On 12 July 2019, Defendant filed her answer as well as motions to dismiss for lack of subject matter jurisdiction, improper venue, insufficiency of process, failure to state a claim, and a motion for sanctions. A hearing on these motions was held on 15 January 2020 ("the motions to dismiss hearing"). At the motions to dismiss hearing, the trial court indicated Defendant argued "profusely" that Plaintiff was not a citizen or resident of Mecklenburg County, that venue was improper in Charlotte, North Carolina and that North Carolina lacked jurisdiction to proceed with Plaintiff's complaint for absolute divorce. The trial court found Plaintiff was, in fact, a North Carolina resident, and jurisdiction was proper. Defendant appealed the trial court's decision, and those matters were resolved by this Court in the case of *Preston v. Preston*, 2021-NCCOA-670 (unpublished). In the appeal now before us, we review the imposition of sanctions against Defendant pursuant to N.C. Gen. Stat. § 1A-1, R. 11 (2021) ("Rule 11").

¶ 3 On 14 January 2020, one day before the motions to dismiss hearing, Defendant signed a verification for her complaint for post separation support, alimony, equitable distribution, and attorneys' fees. Contrary to the position she took at the motions to dismiss hearing, Defendant's complaint stated Plaintiff was a resident of North Carolina and admitted jurisdiction was proper. The complaint was file stamped on 15 January 2020, approximately one hour after the conclusion of the motions to dismiss hearing. In February 2020, Defendant also filed a motion to stay the divorce proceeding, which was denied. Plaintiff subsequently filed a motion for sanctions and attorneys' fees pursuant to Rule 11. The divorce had not been finalized at the time both parties' briefs were filed.

¶ 4 On 1 September 2020, the trial court signed a written order granting Plaintiff's request for sanctions against Defendant and ordering Defendant to pay Plaintiff $15,000.00 in attorneys' fees, to be remitted in monthly increments of $300.00 until paid in full. On 30 September 2020 Defendant filed a notice of appeal.

II. Jurisdiction

¶ 5 Defendant's appeal is interlocutory. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle

and determine the entire controversy." *Beasley v. Beasley*, 259 N.C. App. 735, 738, 816 S.E.2d 866, 870 (2018) (citation omitted). "[N]o appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right." *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978) (internal citations and quotation marks omitted). This Court has previously held: "Certain sanctions have been deemed immediately appealable because they affect a substantial right . . . [h]owever, an order to pay attorney's fees *as a sanction* does not affect a substantial right." *Long v. Joyner*, 155 N.C. App. 129, 134, 574 S.E.2d 171, 175, (2002) (emphasis added) (internal quotations and citations omitted). As we stated in *Long*, "[t]he order granting attorney fees is interlocutory, as it does not finally determine the action nor affect a substantial right which might be lost, prejudiced, or be less than adequately protected by exception to entry of the interlocutory order." *Id.* at 134, 574 S.E.2d at 175 (quoting *Cochran v. Cochran*, 93 N.C. App. 574, 577, 378 S.E.2d 580, 582 (1989)).

¶ 6 However, we have also held an order for a party to pay a "significant amount of money" may be immediately appealed if it can be shown by the appealing party to affect a substantial right. *See Estate of Redden ex rel. Morely v. Redden*, 179 N.C. App. 113, 116-17, 632 S.E.2d 794, 798 (2006) ("The Order appealed affects a substantial right of [the] Defendant . . . by ordering her to make immediate payment of a significant amount of money; therefore this Court has jurisdiction over the Defendant's appeal pursuant to N.C. Gen. Stat. § 1-277 and N.C. Gen. Stat. § 7A-27(d)." (citations omitted)), *remanded on other grounds*, 361 N.C. 352, 649 S.E.2d 638 (2007); N.C. Gen. Stat. § 7A-27(b). Of course, "[t]he burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) (citation omitted).

¶ 7 In *Beasley v. Beasley*, the plaintiff was ordered to pay $48,188.15 in attorneys' fees to his former wife. 259 N.C. App. at 742, 816 S.E.2d at 873. The trial court had not determined and resolved the parties' equitable distribution claims. *Id.* at 741, 816 S.E.2d at 872. In *Beasley*, the issue before this Court was "whether an order for attorney's fees, which completely disposes of that issue as it relates to other substantive claims, is immediately appealable . . . particularly where . . . it arguably affects a substantial right." *Id.* at 741, 816 S.E.2d at 872 (citations and internal quotation marks omitted). This Court held the plaintiff's interlocutory appeal was entitled to immediate review and reasoned:

> to delay plaintiff's appeal from the order regarding attorney's fees until a final determination on the merits of all the parties' remaining claims would jeopardize plaintiff's substantial right not only because it is "an order which completely disposes of one of several issues in a lawsuit . . . but also because it orders plaintiff to pay a not insignificant amount—$48,188.15—in attorney's fees.

Id. at 742, 816 S.E.2d at 872–73.

¶ 8 The distinction between *Beasley* and the case at bar is two-pronged and lies in the manner in which the award for attorneys' fees was requested. In *Beasley*, an award of attorneys' fees was requested pursuant to statutory authority, specifically N.C. Gen. Stat. § 50-13.6 (2017) ("Counsel fees in actions for custody and support of minor children") and N.C. Gen. Stat. § 50-16.4 (2017) ("Counsel fees in actions for alimony, post-separation support"). *Id.* at 740, 816 S.E.2d at 871. In the case at bar, Plaintiff does not request an award of attorneys' fees pursuant to North Carolina's alimony or child support statutes, but requests the award in conjunction with Rule 11, as part of a motion for sanctions against Defendant. *See* N.C. Gen. Stat. § 1A-1, R. 11.

¶ 9 As to the first distinction between *Beasley* and the case at bar, the grant of attorneys' fees in *Beasley* involved the final disposal of an underlying issue, while the grant of attorneys' fees in the case at bar stems from a Rule 11 motion for sanctions intended to address Defendant's conduct in the ongoing lawsuit. *Id.* at 741, 816 S.E.2d at 872. "[A]n order which completely disposes of one of several issues in a lawsuit affects a substantial right." *Case v. Case*, 73 N.C. App. 76, 78, 325 S.E.2d 661, 663 (1985) (citing *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976)). However, the sanctioning nature of the issue in the present case does not involve the disposal of an issue underlying the parties' original divorce litigation; rather, it presents an entirely new question. The trial court ordered Defendant to pay Plaintiff $15,000.00 in attorneys' fees, to be remitted in monthly increments of $300.00 until paid in full. The order of such a sanction, pursuant to Rule 11, was imposed to address and deter Defendant's conduct, which the trial court found to be significant in the ongoing action. The imposition of the Rule 11 sanctions was clearly intended to serve as a continuing deterrent, not as a signifier of the disposal of an issue underlying the parties' original divorce litigation. *See Case*, 73 N.C. App at 78, 325 S.E2d at 663.

¶ 10 Secondly, according to N.C. Gen. Stat. § 50-16.4 (2021), "the court may, upon application of such spouse, enter an order for reasonable counsel fees, to be paid and secured by the *supporting spouse* in the same manner as alimony." N.C. Gen. Stat § 50-16.4 (emphasis added). Based on the plain language of N.C. Gen. Stat. § 50-16.4, the legislature intended a *dependent* spouse should receive the award when a request for attorneys' fees was made pursuant to the statute.

¶ 11 There is a difference between the N.C. Gen. Stat. § 50-16.4 scenario and a request for attorneys' fees made pursuant to a Rule 11 motion for sanctions, as the purpose of an award for attorneys' fees in conjunction with a Rule 11 motion for sanctions is to prevent a party's injurious conduct, including harassment and causing unnecessary delay, from continuing during ongoing litigation. *See* N.C. Gen. Stat. § 1A-1, R. 11. Although Defendant admitted in her complaint for post separation support and alimony she is the "dependent spouse," and Plaintiff is the "supporting spouse" pursuant to N.C. Gen. Stat. § 50-16.1A (2), (5) (2021), and stated she does not have adequate resources to meet her reasonable needs, Plaintiff's request for attorneys' fees in conjunction with a Rule 11 motion is not limited by a qualifier suggesting the receiver of the award should be the dependent spouse. *Cf. Beasley*, 259 N.C. App. at 751, 816 S.E.2d at 877-78.

¶ 12 Where Plaintiff's request for attorneys' fees was made in conjunction with a Rule 11 motion for sanctions, whether the sanction involved an immediate payment of a significant amount of money is important to the determination of whether the sanction affects a substantial right. *See Estate of Redden ex rel. Morely* at 116-17, 632 S.E.2d at 798. However, no case law exists to support the contention Defendant's status as a dependent spouse affects whether Defendant has a substantial right to have this Court hear her interlocutory appeal. Defendant's bare assertion she is unable to pay does not suffice to confer jurisdiction on this Court. *See*, *e.g.*, *Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009) ("The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate why the order affects a substantial right."). Defendant provides no argument in her brief attempting to meet her burden of establishing that a substantial right will be affected unless she is allowed an immediate appeal from an interlocutory order. *See Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) (citation omitted) ("The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order."). "It is not the duty of this Court to construct arguments for or find support

for appellant's right to appeal from an interlocutory order[.]" *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). This Court therefore lacks jurisdiction to hear Defendant's appeal based on the contention the award of attorneys' fees affects a substantial right.

III. Conclusion

¶ 13 The trial court's award of Plaintiff's request for attorneys' fees in conjunction with a Rule 11 motion for sanctions against Defendant does not dispose of an underlying issue involved in the parties' divorce litigation and has not been shown by Defendant to affect a substantial right. This Court does not have jurisdiction to hear Defendant's appeal from an interlocutory order, and Defendant's appeal is therefore dismissed.

DISMISSED.

Judge ARROWOOD concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

¶ 14 Plaintiff's counsel's anticipation of a potential adverse outcome on the issue of jurisdiction and the parties' domicile and subsequent filing of claims in North Carolina does not support nor warrant Rule 11 sanctions. Plaintiff's substantial rights are affected by the issuance of attorney's fees as sanctions under Rule 11 to warrant an immediate review. I vote to address these substantial rights and to vacate the trial court's order. I respectfully dissent.

I. Background

¶ 15 Defendant signed a verification for her complaint for post-separation support, alimony, equitable distribution, and attorney fees on 14 January 2019. That complaint was not filed until 15 January 2020, after the jurisdictional hearing and ruling. Defendant's complaint stated Plaintiff was a resident of North Carolina, admitted jurisdiction was proper, and was filed one hour after the hearing concluded. Defendant filed a motion to stay the divorce proceeding in February 2020 which was denied. Plaintiff then filed his motion for Rule 11 sanctions and for attorney fees. The divorce had not been finalized at the time both parties' briefs were filed.

¶ 16 The trial court granted Plaintiff's request for sanctions against Defendant and ordered Defendant to pay Plaintiff $15,000.00 in attorney fees. Defendant appeals.

II. Jurisdiction

A. Interlocutory Appeal

¶ 17 "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Beasley v. Beasley*, 259 N.C. App. 735, 738, 816 S.E.2d 866, 870 (2018) (citation omitted). "[N]o appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978) (citations omitted).

> Admittedly the "substantial right" test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.

Id. at 208, 240 S.E.2d at 343.

B. Substantial Right

¶ 18 As the majority's opinion explains, in *Beasley*, the plaintiff was ordered to pay $48,188.15 in attorney fees to his former wife. *Beasley*, 259 N.C. App. at 742, 816 S.E.2d at 873. The trial court had not determined and resolved the couple's equitable distribution claims. *Id.* at 741, 816 S.E.2d at 872. On appeal, the issue before this Court was "whether an order for attorney's fees, which completely disposes of that issue as it relates to other substantive claims, is immediately appealable . . . particularly where . . . it arguably affects a substantial right." *Id.* (citations and internal quotation marks omitted).

¶ 19 This Court held the plaintiff's interlocutory appeal was entitled to immediate review and reasoned:

> to delay plaintiff's appeal from the order regarding attorney's fees until a final determination on the merits of all the parties' remaining claims would jeopardize plaintiff's substantial right not only because it is "an order which completely disposes of one of several issues in a lawsuit but also because it orders plaintiff

> to pay a not insignificant amount—$48,188.15—in attorney's fees[.]

Id. at 742, 816 S.E.2d at 872–73 (citation omitted).

C. Award of Attorney Fees

¶ 20 "[A] trial court's award of attorneys' fees must be supported by proper findings considering 'the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.' " *ACC Const., Inc. v. SunTrust Mortg., Inc.*, 239 N.C. App. 252, 271, 769 S.E.2d 200, 213 (2015) (citation omitted). The North Carolina State Bar has issued a conjunctive eight-factor rule concerning the reasonableness of attorney fees:

> (a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. The *factors to be considered* in determining whether a fee is clearly excessive include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

27 N.C. Admin. Code 2.1.05 (Supp. 2021) (emphasis supplied).

¶ 21 Here, Plaintiff's counsel's fee affidavit covers the time period from the inception of Plaintiff's divorce action in September 2018 up to and including Plaintiff's motion for sanctions in 2020. The affidavit highlights Plaintiff's counsel's time working for Plaintiff. The trial court did not

make these findings prior to award. The eight factors listed above to determine reasonable attorney fees are unaffected by the actions of the opposing party. *ACC Const., Inc.*, 239 N.C. App. at 271, 769 S.E.2d at 213. Defendant's substantial rights are affected to warrant immediate review.

D. Rule 11

¶ 22 Further, Rule 11 provides:

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties *the amount of the reasonable expenses incurred because of the filing of the pleading*, motion, or other paper, including a reasonable attorney's fee.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2021) (emphasis supplied). If sanctions are warranted in this case, a reasonable fee must be calculated from the filing of the sanctioned complaint on 15 January 2020 pursuant to Rule 11, not for Defendant's actions prior to the filing of the sanctioned complaint.

¶ 23 Defendant and Plaintiff each filed a myriad of complaints and motions throughout the preceding three years. Plaintiff argues Defendant's jurisdictional challenges unreasonably caused delays. The evidence, findings, and conclusions do not support this assertion. Plaintiff failed to provide the proper petition and the trial court findings do not support a conclusion holding Defendant financially responsible for nearly 30 months of legal fees prior to Defendant's purported sanctionable conduct. *See id.*

¶ 24 Defendant asserted in her complaint for post-separation support and alimony that she is the dependent spouse and asserts Plaintiff is the supporting spouse pursuant to N.C. Gen. Stat. § 50-16.1A(2),(5) (2021). Defendant stated she does not have adequate resources to meet her reasonable needs. The underlying divorce has not been finalized, which further complicates the issue of marital and non-marital property from which the $15,000 fee could be taken.

¶ 25 Considering the particular facts of this case, Defendant's substantial rights are affected by the trial court's order to pay a "not insignificant amount" before the final determination of the divorce judgment. *Beasley*,

259 N.C. App. at 742, 816 S.E.2d at 872-73. I vote to allow Defendant's interlocutory appeal under a substantial right.

III. Argument

A. Standard of Review

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A–1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence.
>
> . . . .
>
> [I]n reviewing the appropriateness of the particular sanction imposed, an "abuse of discretion" standard is proper[.]

Turner v. Duke Univ., 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

B. Imposition of Rule 11 Sanctions

¶ 26 Defendant argues the trial court erred in issuing Rule 11 sanctions against her. Plaintiff argues Defendant's signature and date on the verification *de facto* violates Rule 11 and requires sanctions as a matter of law. Rule 11 states in relevant part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that *to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument* for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (emphasis supplied).

¶ 27 When a party acts in "good faith and upon the advice of counsel" our Supreme Court has held that such conduct is objectively reasonable.

Bryson v. Sullivan, 330 N.C. 644, 662, 412 S.E.2d 327, 336 (1992). Counsel bears a duty to zealously advocate for her client. 27 N.C. Admin. Code 2.0.1(b) (2021).

¶ 28 Here, Defendant's attorney had prepared a summons, draft complaint, and verification, which Defendant signed on 14 January 2020, to be filed in the event of an adverse ruling by the trial court the next day. During the hearing, Defendant, a resident of the state of Maryland, had argued North Carolina did not have proper jurisdiction over the parties' divorce proceedings. The parties stipulate the trial court's determination that subject matter and personal jurisdiction were proper in North Carolina did not occur until 15 January 2020.

¶ 29 Defense counsel signed the summons and complaint and filed them approximately one hour after conclusion and ruling on the hearing on 15 January 2020. Plaintiff argues one hour after the hearing, Defendant acknowledged North Carolina courts have jurisdiction in her filed compliant for post-separation support, alimony, equitable distribution, and attorney fees. Defense counsel claimed she followed this protocol to preserve Defendant's answer to and claims on the merits of Plaintiff's complaint for divorce.

¶ 30 The trial court's Rule 11 findings of fact stated Defendant's actions warrant sanctions because she "was duly sworn and… acknowledged that the contents of the Complaint were true of her own personal knowledge." When the complaint and verification were filed, the trial court had already determined jurisdiction was proper in North Carolina. Defendant acknowledged North Carolina's jurisdiction as the court had ruled.

¶ 31 Defendant acted in good faith following the guidance of her counsel in signing the corresponding complaint and verification, which was filed only after the adverse ruling on jurisdiction. Defendant accepted the trial court's ruling after the hearing and moved forward with her legal strategy to preserve her claims and defenses on the merits. Defendant is not required to agree with the trial court's determination before she signs and her counsel files a complaint.

¶ 32 It is not sanctionable for counsel to alternatively anticipate an adverse outcome and to plan accordingly. Defendant's acknowledgement of North Carolina jurisdiction only occurred after her attorney filed her complaint to protect her marital interests in North Carolina. Whether it was filed an hour, day, or week later after the court ruled is immaterial.

¶ 33 Even if sanctions were appropriate, the trial court made an error of law and abused its discretion by ordering Defendant to pay for the entirety of Plaintiff's attorney fees. Both parties filed a myriad of complaints and motions throughout the preceding. Plaintiff failed to show why Defendant should be financially responsible for more than two years of legal fees prior to Defendant's purported sanctionable conduct. *See* N.C. Gen. Stat. § 1A-1, Rule 11(a).

¶ 34 The majority's opinion acknowledges the implementation of Rule 11 sanctions is the basis to award attorney fees in this case. The imposition of Rule 11 sanctions against Defendant which resulted in ordering her to pay Defendant's attorney's fees from inception is unreasonable and invalid. Plaintiff's arguments are without merit.

IV. Conclusion

¶ 35 Defendant has asserted and shown a substantial right to merit immediate review. Defendant's counsel acted zealously and pre-emptively in preparing summons, a complaint, and a verification to be signed by an out-of-state party in anticipation of a potential adverse ruling on jurisdiction and domicile. Rule 11 is not violated by preparing drafts of pleadings in anticipation of an unfavorable ruling, which are not filed until after the court's decision. Defendant acted in good faith under advice of counsel. *See Bryson*, 330 N.C. at 662, 412 S.E.2d at 336.

¶ 36 Substantial attorney fees awarded as Rule 11 sanctions are immediately appealable and are not warranted under these facts. The award of Plaintiff's substantial attorney fees for other and non- jurisdictional matters against Defendant, a dependent spouse, is also unwarranted. I vote to vacate the sanctions order and remand to the trial court for further proceedings. I respectfully dissent.

ROSENTHAL FURS, INC. v. FINE

[282 N.C. App. 530, 2022-NCCOA-208]

ROSENTHAL FURS, INC., PLAINTIFF
v.
JONATHAN ANDREW FINE AND MARSHALL GRANT, PLLC., DEFENDANTS

No. COA21-403

Filed 5 April 2022

1. Appeal and Error—interlocutory order—substantial right—order disqualifying counsel

In a legal malpractice action, in which defendant-attorney sought to appear pro se and as counsel for his co-defendant (the law firm he worked for), the trial court's order granting plaintiffs' motion to disqualify counsel was immediately appealable because such orders, though interlocutory, affect a substantial right.

2. Attorneys—Rules of Professional Conduct—Rule 3.7—witness-advocate rule—pretrial proceedings

In an action for legal malpractice, constructive fraud, and negligent misrepresentation against a law firm and one of its attorneys, the trial court did not abuse its discretion by disqualifying the attorney from serving as the law firm's counsel under N.C. Rule of Professional Conduct 3.7 (prohibiting a lawyer from acting as an advocate at a trial in which that lawyer will likely be a necessary witness). Although the case had not gone to trial yet, and Rule 3.7 does not expressly prevent a witness-advocate from participating in pretrial proceedings, the court had discretion to disqualify the attorney where the pretrial proceedings in this case would have involved evidence (specifically, depositions of the attorney and the firm) that, if admitted at trial, would reveal the attorney's dual role.

3. Attorneys—Rules of Professional Conduct—Rule 3.7—witness-advocate rule—lawyer's right to appear pro se

In an action for legal malpractice, constructive fraud, and negligent misrepresentation against a law firm and one of its attorneys, the trial court did not abuse its discretion by disqualifying the attorney from appearing pro se under N.C. Rule of Professional Conduct 3.7 (prohibiting a lawyer from acting as an advocate at a trial in which that lawyer will likely be a necessary witness). Although Rule 3.7 did not automatically prohibit the attorney from representing himself, the court had other justifiable bases for disqualifying him, including concerns about the attorney's ability to remain objective in his tripartite role (as lawyer, litigant, and the case's key witness)

and the attorney's prior history of misconduct as found by the State Bar (which included making misleading statements to clients and a false statement to a tribunal).

Appeal by Defendants from Order entered 11 March 2021 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 11 January 2022.

Randolph M. James, P.C., by Randolph M. James, for plaintiff-appellee.

J. Andrew Fine, for defendants-appellants.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Jonathan A. Fine (Fine) and Marshall Grant, PLLC, (Marshall Grant) (collectively Defendants) appeal from Order entered in favor of Rosenthal Furs, Inc. (Plaintiff) on 11 March 2021 granting Plaintiff's Motion to Disqualify Fine as Counsel for Defendants. The Record before us reflects the following:

¶ 2 On 1 October 2020, Plaintiff filed a Complaint for legal malpractice, constructive fraud, and negligent misrepresentations against Defendants.[1] Plaintiff based these claims on Defendants' prior representation of Plaintiff in a dispute related to the enforcement of a renewal option provision in a commercial lease. During the prior representation, the North Carolina State Bar suspended Fine's law license and subsequently censured Fine for practicing law while his license was suspended. Defendants failed to inform Plaintiff about Fine's suspended license. The Complaint alleged this failure to disclose, in addition to Fine's failure to competently evaluate and prosecute Plaintiff's claims, constituted a breach of the applicable duties of care. Furthermore, Plaintiff alleged Marshall Grant breached its duties of applicable care by representing to Plaintiff that Fine was an experienced commercial litigator when he either "(a) lacked or (b) possessed but failed to apply, the requisite skill and/or knowledge in prosecuting Plaintiff's claims." Additionally, Plaintiff alleged Marshall Grant, through its members, represented

1. Plaintiff filed an Amended Complaint 11 December 2020 after Defendants filed a Joint Motion to Dismiss Complaint on 1 December 2020.

that the firm possessed the requisite authority to practice law in North Carolina, but in fact, they did not.

¶ 3 On 29 October 2020, Fine apparently filed a Notice of Limited Appearance of Counsel on behalf of Marshall Grant and filed a Joint Motion to Dismiss Amended Complaint on 8 February 2021 on behalf of both Defendants.[2]

¶ 4 On 4 March 2021, Plaintiff filed a Motion to Disqualify Fine as counsel for Defendants. In support of its Motion to Disqualify, Plaintiff contended North Carolina Rules of Professional Conduct 1.9 (Rule 1.9) and 3.7 (Rule 3.7) applied and disqualified Fine from appearing pro se and serving as attorney for Marshall Grant. Specifically, Plaintiff contended Fine should be disqualified under Rule 3.7 because "Fine is a material and necessary witness in the litigation as Defendant Fine's conduct, advice, filings, decisions, statements, acts, and omissions are the subject of this legal malpractice lawsuit." Furthermore, Plaintiff contended Fine should be disqualified from serving as attorney for Marshall Grant under Rule 1.9(a) because Fine's representation of Marshall Grant is materially adverse to the interest of Plaintiff, and Defendants had not requested or received Plaintiff's informed consent for Fine to represent Marshall Grant.

¶ 5 Although Defendants did not file a response to the Motion to Disqualify, Fine appeared at the hearing for the Motion on 9 March 2021 on behalf of Defendants. Plaintiff's attorney, Randy James, (James) appeared on Plaintiff's behalf. After briefly introducing the case, James argued the trial court should grant the Motion to Disqualify because:

> [Fine's] highly sensitive to these allegations and he's emotional about them as - - and that we've alleged that he's going to be a witness. He says he's gonna be a witness. He's testifying in his papers - - in his motions and that he can't be both. He can't do both in this case and on behalf of Marshall Grant.

In his response to James, Fine acknowledged that he may have "come across as angry with some of the filings," but argued his emotional response to the filings was not relevant, and thus, "something that we should [not] get into now based on this motion to disqualify." Despite this initial hesitancy to discuss his actions in the case, Fine continued to read the testimonial statements in his Motions in an effort to show the

2. The Notice of Limited Appearance of Counsel is not included in the Record.

trial court the "ludicrous" nature of Plaintiff's assertions. Finally, Fine acknowledged—based on an ethics opinion from the state bar—that ultimately "it's up to the [trial] court to decide" whether an attorney can operate as an advocate and witness under Rule 3.7, but argued he should be able to represent himself because he was "competent" or "able to show that [he] understood what was going on . . . ."

¶ 6 Ultimately, on 11 March 2021, the trial court granted Plaintiff's Motion to Disqualify Fine as Counsel for Defendants and entered an Order disqualifying Fine from further representation of the Defendants. The Order included the following relevant Findings of Fact:

> 6. [Defendant's] conduct in representing Plaintiff during the Shmalo Litigation gives rise to claims of legal malpractice, constructive fraud, and negligent misrepresentation against Fine and Marshall Grant in this action.
>
> 7. Plaintiff alleges, and the Court finds it is undisputed, that Defendant Fine's North Carolina State Bar license . . . was suspended from March 29, 2015 to June 20, 2017, during which time Fine appeared in Macon County Superior Court for Plaintiff in the Shmalo Litigation as well as prosecuting an interlocutory appeal to the North Carolina Court of Appeals as counsel for Plaintiff.
>
> . . . .
>
> 9. Although during oral argument Fine disclosed Marshall Grant had signed a conflict waiver with Fine related to a conflict of interest between Fine and Marshall Grant, no such document was provided to the Court for its review. Further such a conflict waiver would not address Rule 3.7 concerns of Fine as a witness and advocate.
>
> 10. No answer has been filed by either defendant; however, the Court is concerned with Fine accepting representation in the Shmalo Litigation when his North Carolina law license had been suspended with an order from the North Carolina State Bar to disclose the suspension to Fine's clients and to wind down his practice during the suspension. The Court is further concerned with Marshall Grant accepting

professional fees from Plaintiff alleged to be in excess of $55,000 for an associate attorney whose North Carolina law license had been suspended.

11. Because Marshall Grant has not filed an answer to the amended complaint, the Court does not know the position Marshall Grant will take on whether it knew Fine's law license had been suspended when Fine accepted representation . . . .

12. Regardless of whatever position Marshall Grant takes about its knowledge of Fine's law license, clearly Fine will be deposed, Marshall Grant's attorneys and/or former attorneys will be deposed and as this case progresses, whether Fine disclosed his law license suspension and the reasons therefore may well constitute a disputed issue for resolution by the Court and/or the fact finder.

. . . .

14. Fine further acknowledged during this hearing, he was angry about being sued by Plaintiff and therefore his filed motions may reflect his emotional feelings . . . .

. . . .

19. Defendant Fine did not file a response to Plaintiff's motion to disqualify him, but called Plaintiff's motion to disqualify him as counsel for himself and Marshall Grant "ludicrous" during the hearing.

20. Considering Fine's wrongful conduct as found by the North Carolina State Bar and his prior suspension from the practice of law in North Carolina during the time of his prior representation of Plaintiff and the amounts of money invoiced and paid by Plaintiff to Marshall Grant during some if not much time of Fine's suspension, and other issues surrounding the representation of Plaintiff by Fine and Marshall Grant, Fine and Marshall Grant attorneys/staff will be witnesses in this litigation, both by deposition and depositions *de benne* [sic] *esse* for Marshall Grant non-resident attorneys.

The Order also included the following relevant Conclusions of Law:

> 7. Defendant Fine has a disqualifying conflict of interest based upon his prior representation of Plaintiff while not being licensed to practice law; Defendant Fine engaged in the unauthorized practice of law in representing Plaintiff as adjudicated by the North Carolina State Bar.
>
> 8. Based on this disqualifying conflict of interest, Defendant Fine cannot continue representation pro se or of Defendant Marshall Grant.

¶ 7 On 19 March 2021 Defendants filed a Motion for Reconsideration of the Order Granting Plaintiff's Motion to Disqualify, which was denied by an Order entered 29 March 2021. Defendants filed Notice of Appeal on 8 April 2021.

Appellate Jurisdiction

¶ 8 **[1]** The trial court's Order Granting Plaintiff's Motion to Disqualify is an interlocutory order. "Whether an appeal is interlocutory presents a jurisdictional issue, and this Court has an obligation to address the issue *sua sponte*." *Harris & Hilton, P.A. v. Rassette*, 252 N.C. App. 280, 281, 798 S.E.2d 154, 156 (2017). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, an appeal is permitted "if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Harris & Hilton*, 252 N.C. App. at 282, 798 S.E.2d at 156. The North Carolina Supreme Court has previously held that orders disqualifying counsel affect a substantial right and are immediately appealable. *See Goldston*, 326 N.C. at 726, 392 S.E.2d at 736. Thus, Defendants' appeal from the Order disqualifying Fine is properly before this Court.

Issues

¶ 9 The issues on appeal are whether: (I) the trial court erred in disqualifying Fine from representing Marshall Grant; and (II) the trial court erred in disqualifying Fine from representing himself pro se.

Standard of Review

¶ 10 Our standard of review for disqualification of counsel is well established: "Decisions regarding whether to disqualify counsel are within the discretion of the trial judge and, absent an abuse of discretion, a trial

judge's ruling on a motion to disqualify will not be disturbed on appeal." *Harris & Hilton, P.A. v. Rassette*, 252 N.C. App. 280, 283, 798 S.E.2d 154, 157 (2017). "Under the abuse of discretion standard, we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Id.*

Analysis

I. Fine's Representation of Marshall Grant

¶ 11 **[2]** Defendants contend the trial court abused its discretion in disqualifying Fine from representing Marshall Grant arguing Rule 3.7 only disqualifies a lawyer as an advocate at trial if the lawyer is likely to be a necessary witness. Specifically, Defendants allege the case is not close to trial and it is premature to decide whether a disqualifying conflict will arise.[3]

¶ 12 Rule 3.7(a) provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

N.C. Rev. R. Prof. Conduct 3.7. The comments to Rule 3.7 explain:

> The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is

3. Defendants further contend the trial court abused its discretion in disqualifying Fine under Rule 1.9 of the Rules of Professional Conduct prohibiting a lawyer from representing a client materially adverse to a former client in the same or substantially related matter because "the instant malpractice matter and the previous matter are 'substantially related.' " However, Defendants did not make this argument before the trial court and, instead, relied on Fine's assertion Marshall Grant had signed a conflict waiver. Nevertheless, the trial court's Finding of Fact indicates this signed waiver was never presented to the trial court, and further found, even if the waiver had been presented, this did not resolve the Rule 3.7 issue. Moreover, it is not clear how any waiver executed by Marshall Grant would resolve any conflict between Fine and Plaintiff regarding Fine's representation of a party materially adverse to Plaintiff.

> expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Id. at cmt. 2.

¶ 13 In *Harris & Hilton*, our Court has previously recognized the power of the trial court to disqualify counsel from representing their own law firm where the lawyer was likely to be a necessary witness under Rule 3. There, the law firm's attorneys sought to represent their law firm in a suit against a third party while simultaneously serving as witnesses on their firm's behalf as to disputed issues of fact. *Harris & Hilton*, 252 N.C. App. at 284, 798 S.E.2d at 157. The defendants argued they should be permitted to serve as both trial counsel and as witnesses because it "is no different than allowing litigants to represent themselves pro se." *Id.* We disagreed, recognizing "an entity such as Harris & Hilton is treated differently under North Carolina law than a pro se litigant." *Id.* (citing *LexisNexis, Div. of Reed Elseiver, Inc. v. Travishan Corp.*, 155 N.C. App. 205, 209, 573 S.E.2d 547, 549 (2002) (holding that under North Carolina law, a corporation is not permitted to represent itself pro se)).

¶ 14 Here, while Defendants recognize the authority of the trial court to disqualify a law firm's attorney from representing their law firm, they argue the trial court disqualified Fine prematurely as the language of Rule 3.7 states "a lawyer shall not advocate *at a trial*" and does not expressly prevent an advocate from participating in pretrial proceedings. However, Defendants fail to acknowledge a crucial portion of an ethics opinion explaining the "at a trial" language. In a 2020 Ethics Opinion addressing Rule 3.7, the North Carolina State Bar Ethics Committee noted that while Rule 3.7's prohibition on a lawyer acting as both advocate and witness "does not automatically extend to a lawyer's representation of a client in pretrial proceedings," the court has discretion to disqualify a lawyer from pretrial proceedings "if the pretrial activities involve evidence that, if admitted at trial, would reveal the lawyer's dual role." 2020 Formal Ethics Opinion 3, no. 2, N.C. State Bar.

¶ 15 In this case, the trial court found Fine along with Marshall Grant would be deposed and be witnesses at trial as Plaintiff requires evidence about Fine's wrongful conduct, suspension from the practice of law during the representation of Plaintiff, and the amounts of money invoiced and paid by Plaintiff to Defendants during Fine's suspension. Thus, if admitted at trial, the evidence obtained during these depositions would reveal Fine's dual role as it may not be clear to the jury whether they

should take Fine's deposition statements as proof or as an analysis of the proof. *See* N.C. Rev. R. Prof. Conduct 3.7, cmt. 2. Therefore, the trial court did not abuse its discretion in disqualifying Fine from representing Marshall Grant under Rule 3.7 of the Rules of Professional Conduct.

II. Fine's Pro Se Appearance

¶ 16 **[3]** Defendants also contend the trial court "made a clear error of law and abused its discretion" by disqualifying Fine from representing himself. Defendants argue "Fine's right to represent himself is codified in North Carolina law[,]" and there "cannot be a disqualification based on a pro se attorney/defendant's 'dual role' because it is axiomatic that a pro se litigant will always play a dual role as advocate and witness." Thus, Defendants contend Rule 3.7 of the Rules of Professional Conduct's restrictions on lawyers also acting as witnesses has no application to a lawyer acting pro se.

¶ 17 As a general proposition, Defendants are correct that under N.C. Gen. Stat. § 1-11, "A party may appear either in person or by attorney in actions or proceedings in which he is interested." N.C. Gen. Stat. § 1-11 (2021). Indeed, this Court has acknowledged in broad terms: "It is true that litigants are permitted under North Carolina law to appear pro se — regardless of whether the litigant is an attorney or a layperson." *Harris & Hilton*, 252 N.C. App. at 284, 798 S.E.2d at 157. The North Carolina State Bar, in a Formal Ethics Opinion, has also recognized Rule 3.7 does not prohibit a lawyer from proceeding as a pro se litigant. Responding to the inquiry: "Is a lawyer who is a litigant and who is likely to be a necessary witness prohibited by Rule 3.7 from representing himself at the trial?", the Ethics Committee responded: "No. The underlying reason for the prohibition—confusion regarding the lawyer's role—does not apply when the lawyer is also a litigant." 2011 Formal Ethics Opinion 1, Opinion no. 3, N.C. State Bar. Nevertheless, the same Opinion notes:

> The Ethics Committee observes, however, that it is the sole prerogative of a court to determine advocate/witness issues when raised in a motion to disqualify. This ethics opinion merely holds that a lawyer/litigant is not required to find alternative counsel prior to a court's ruling on a motion to disqualify.

Id. Thus, as a general rule, a lawyer-litigant has a right to appear pro se and Rule 3.7 does not automatically operate to disqualify a lawyer-litigant from appearing pro se even when the lawyer-litigant is likely to be a necessary witness.

¶ 18 Indeed, courts in other jurisdictions addressing the issue and applying the same or similar American Bar Association Model Rule 3.7 tend to reach the same conclusion. *See, e.g.*, *Brooks v. S.C. Comm'n on Indigent Def.*, 419 S.C. 319, 332, 797 S.E.2d 402, 409 (2017) ("Rule 3.7 of the South Carolina Rules of Professional Conduct does not apply to a pro se attorney."); *Farrington v. L. Firm of Sessions, Fishman*, 687 So. 2d 997, 1000 (1997) ("Rule 3.7 does not apply to the situation where the lawyer is representing himself."); *Beckstead v. Deseret Roofing Co.*, 831 P.2d 130, 134 (Utah Ct. App. 1992) ("Courts interpreting the prohibition against acting as a lawyer and a witness in the same case have consistently concluded the rule does not apply when the lawyer is representing himself.").[4]

¶ 19 A lawyer's right to be self-represented even when the lawyer is likely to be a necessary witness notwithstanding, the question remains whether circumstances may arise permitting a court to disqualify a lawyer from appearing pro se in a particular case. North Carolina courts do not appear to have addressed this question.

¶ 20 At least one court has suggested, however, that while the witness-advocate rule codified in Rule 3.7 does not apply to lawyers appearing pro se, the pro se lawyer may still be subject to discipline or sanctions including disqualification for abusing the role of lawyer-litigant:

> Since defendants have elected to appear pro se, they must conduct themselves in their role as advocates under the same standards of conduct expected of all members of the legal profession in relation to the opposing party, the court and the public. If during the course of these proceedings, the combined role of lawyer and party is abused, the trial judge, in his discretion, may impose whatever sanctions are necessary to [e]nsure the orderly conduct of the proceedings including requiring defendants to procure independent counsel to conduct the adversarial proceedings.

Farrington, 96-1486, p. 5, 687 So.2d at 1001.[5]

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4. Additional helpful discussion including the underlying rationale for this general rule may be found in *In re Waldrop*, No. 15-14689-JDL, 2016 WL 6090849, at *3 (Bankr. W.D. Okla. Oct. 18, 2016).

5. The *Farrington* Court provided an interesting example. It cited the Connecticut Court of Appeals for the general proposition an attorney should not be disqualified from proceeding pro se. *Presnick v. Esposito*, 8 Conn. App. 364, 366, 513 A.2d 165, 166 (1986).

¶ 21 We believe this approach is also consistent with North Carolina law. Certainly, the State Bar Formal Ethics Opinion on the question suggests there may well be circumstances necessitating disqualification of a lawyer-litigant during the course of proceedings in an individual case. 2011 Formal Ethics Opinion 1, Opinion no. 3, N.C. State Bar. Moreover, North Carolina courts retain inherent disciplinary power to regulate attorneys appearing before the courts. *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 182, 695 S.E.2d 429, 436 (2010) (courts possesses inherent authority to discipline attorneys and this authority is not limited by the rules of the State Bar); *see also Swenson v. Thibault*, 39 N.C. App. 77, 109, 250 S.E.2d 279, 299 (1978) ("[I]t is clear that the court's inherent power is not limited or bound by the technical precepts contained in the Code of Professional Responsibility as administered by the Bar.").

> Inherent power is that which the court necessarily possesses irrespective of constitutional provisions. Such power may not be abridged by the legislature. Inherent power is essential to the existence of the court and the orderly and efficient exercise of the administration of justice. Through its inherent power the court has authority to do all things that are reasonably necessary for the proper administration of justice.

Beard v. N.C. State Bar, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987).

¶ 22 Here, while it is apparent that the trial court did rely on Rule 3.7 in part for the basis of disqualifying Fine from representing both himself and Marshall Grant, it is also clear this was not the sole basis for disqualifying Fine. In fact, the trial court's Findings reflect the trial court's concern was not merely that Fine may likely be a necessary witness, but rather that Fine would likely be *the key witness* with unique knowledge upon which both his and Marshall Grant's liability may hinge. Further, the trial court's Findings reflect concern about Fine's ability to operate and advocate objectively in this tripartite role of litigant, lawyer, and key witness as illustrated by Fine's behavior and demeanor in this case including Fine's own acknowledgment: "he was angry about being

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However, on appeal after remand, the Connecticut Court sanctioned the pro se lawyer for his unprofessional conduct during the litigation noting: "Although appearing pro se in this action and appeal, the defendant is still an attorney licensed by the Superior Court to practice before the courts of our state. As such, he is subject to the Rules of Professional Conduct adopted by the judges of the Superior Court in his relationship with the courts and public." *Esposito v. Presnick*, 15 Conn. App. 654, 667, 546 A.2d 899, 905–06 (1988).

sued by Plaintiff and therefore his filed motions may reflect his emotional feelings . . . ."

¶ 23 Moreover, the trial court's Findings also demonstrate the trial court's additional concern about the interwoven relationships at the heart of this case including the attorney-client relationship between Fine and Plaintiff, Fine's relationship with Marshall Grant, and Marshall Grant's role in collecting substantial fees from Plaintiff for legal work while Fine was unlicensed. Finally, undergirding all of these concerns was the trial court's recognition of Fine's history of wrongful conduct as found by the North Carolina State Bar including: making "misleading statements [to clients] regarding the services Fine could provide"; making "a false statement to a tribunal by holding out in case filings as an actively licensed attorney in North Carolina despite being suspend at the time"; and charging or collecting "an illegal or excessive fee in violation of Rule 1.5(a)." Indeed, the allegations against Fine in this case include allegations of the same or similar wrongful conduct in his representation of Plaintiff.

¶ 24 Given the litany of concerns reflected in the trial court's Order, we cannot conclude the trial court's exercise of its inherent authority to control proceedings—including control of the lawyers appearing before it—was arbitrary or unsupported by reason. Thus, the trial court did not abuse its discretion in disqualifying Fine from appearing as an attorney for himself or Marshall Grant on the facts of this case. Therefore, the trial court did not err in entering its Order disqualifying Fine from appearing pro se and from representing Marshall Grant in this litigation. Consequently, we affirm the trial court's Order disqualifying Fine.

Conclusion

¶ 25 Accordingly, for the foregoing reasons, we affirm the trial court's Order.

AFFIRMED.

Judges ARROWOOD and CARPENTER concur.

CECIL JOHN RUSSELL, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. COA21-482

Filed 5 April 2022

Public Officers and Employees—dismissal—grievance form—timeliness—rational basis for finding

In a contested case involving the dismissal of a disabled corrections officer (petitioner), the administrative law judge (ALJ) had a rational basis for the implied finding that petitioner had timely filed his grievance form, where petitioner testified that he had timely mailed the form and a Department of Public Safety employee testified that the form was late but admitted that, due to COVID-19 restrictions, many employees were working remotely and the mail was not being checked every day. Petitioner therefore exhausted his administrative remedies and the ALJ had subject matter jurisdiction over the case.

Judge TYSON dissenting.

Appeal by Respondent from order entered on 23 December 2020 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 23 February 2022.

Jennifer J. Knox for Petitioner-Appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Adrina G. Bass, for Defendant-Appellant.

JACKSON, Judge.

¶ 1 The North Carolina Department of Public Safety ("Respondent") appeals from a final decision in a contested case in the Office of Administrative Hearings ("OAH"). We affirm the order of the administrative law judge ("ALJ").

I. Background

¶ 2 On 12 November 2018, Cecil John Russell ("Petitioner") was employed as a corrections officer at Central Prison in Raleigh, North

Carolina, when he suffered a work-related injury. As a result of the injury, Petitioner was placed on a leave of absence. During his leave of absence, Petitioner received medical benefits and disability compensation under North Carolina's Workers' Compensation Act.

¶ 3 On 5 July 2019, Petitioner was allowed to return to work in a light duty position. The next month, however, he suffered a reinjury during his recertification as a law enforcement officer. As a result of the reinjury, Petitioner was placed on another leave of absence, and began to receive workers' compensation benefits again.

¶ 4 On 17 January 2020, Petitioner requested job placement assistance from Respondent. Ms. R. Hinton, a human resources professional employed by Respondent, testified at the contested case hearing that when one of Respondent's employees is released from a physician's care after a work-related injury with permanent restrictions, an effort is made to locate a new position for the employee where the employee can work in a full duty capacity. Ms. Hinton described the job placement assistance process as follows: when an employee is released from a physician's care with permanent restrictions, meaning the employee cannot return to the employee's previous job at full duty, Respondent sends the employee a letter confirming that the employee has reached maximum medical improvement but still has a disability, and includes a blank employment application with the letter. The employee then has 15 days to return the application, and after receiving the completed application, Respondent conducts two job searches for the employee. Respondent's recruitment section determines the possible positions for which the employee is qualified based on the contents of the application, and then human resources runs a report of vacant positions within a 50-mile radius of the employee. Respondent runs two of these reports once a week during two consecutive weeks. If no vacant position is located during these job searches, the employee is separated from employment due to unavailability.

¶ 5 The job searches performed for Petitioner were unsuccessful. On 12 February 2020, Respondent sent Petitioner a Pre-Separation Letter. The Pre-Separation Letter explained:

> when an employee is on workers' compensation leave of absence, and the employee is unable to return to all of the position's essential duties as set forth in the employee's job description or designated work schedule due to a medical condition or the vagueness of a medical prognosis, and the employee and the agency

> are unable to reach agreement on a return to work arrangement that meets both the needs of the agency and the employee's medical condition, a separation may occur on the earliest of the following dates:
>
> (i) after the employee has reached maximum medical improvement for the work-related injury for which the employee is on workers' compensation leave of absence and the agency is unable to accommodate the employee's permanent work restrictions related to such injury; or
>
> (ii) 12 months after the date of the employee's work-related injury.

The Pre-Separation Letter noted that Petitioner was informed on 28 January 2020 that "there were no suitable vacant positions available given [his] medical restrictions and qualifications[,]" and advised as follows:

> Should you remain unavailable, prior to a recommendation for your separation, you will be given the opportunity to meet with me or propose in writing alternative methods of accommodation to avoid this separation. If you would like to meet, you should contact me at [redacted] by February 27, 2020. If you would like to submit your proposal in writing, it should be received at this office by February 27, 2020.
>
> If you remain unavailable after February 27, 2020, I will recommend your separation from employment under the provision of Separation Due to Unavailability[.] Such a separation is an involuntary separation and not considered disciplinary action.

¶ 6 After receiving the letter, Petitioner contacted his supervisor and requested the meeting offered in the letter. Petitioner's supervisor told him the meeting would be pointless if he could not return to full duty work by the 27 February 2020 deadline. Petitioner stated that he wanted to propose an alternative method of accommodation, but needed assistance doing so. Instead of receiving any assistance or the opportunity to meet with his supervisor, Petitioner was told taking either step would be futile.

¶ 7 On 3 March 2020, Respondent sent Petitioner a Letter of Separation informing him that he was being separated from his employment due

to unavailability. The Letter of Separation described Petitioner's appeal rights as follows:

> If you are a "career State employee" (as defined in N.C.G.S. § 126-1.1) and wish to appeal this decision, you must do so in writing within fifteen (15) calendar days. The appeal must be submitted by using the Step 1 Grievance Filing Form HR 555. The appeal must be mailed to the Grievance Intake Coordinator, Department of Public Safety, 512 N. Salisbury Street, 4201 Mail Service Center, Raleigh, NC 27699-4201. As an alternative to mail, the appeal may be mailed to [redacted e-mail address], or hand delivered to the State Capitol Police, 417 N. Salisbury Street, Raleigh, NC 27603, between the hours of 8:00 a.m. and 5:00 p.m.

Petitioner received the Letter of Separation on 9 March 2020, so the deadline for submission of his Step 1 Grievance Form was 24 March 2020.

¶ 8 On 20 March 2020, Petitioner completed a Step 1 Grievance Form to internally appeal Respondent's decision to separate him from his employment. He testified that the Grievance Form was mailed to Respondent's Raleigh office from his home in Fayetteville that day and that he personally observed his wife stamp the envelope and place it in the mailbox. During this timeframe, many employees of Respondent were working remotely because of the COVID-19 pandemic, and the mail was not being checked daily.

¶ 9 On 7 April 2020, Petitioner submitted a photograph of the Grievance Form he completed on 20 March 2020 to Respondent's Grievance Intake Coordinator by e-mail. The next day, the Grievance Intake Coordinator informed him that she was unable to print the Grievance Form using the photograph Petitioner sent. A date stamp on Petitioner's Grievance Form in the record on appeal suggests that it was received by Respondent on 8 April 2020. On 9 April 2020, Petitioner e-mailed another copy of the Grievance Form to Respondent's Grievance Intake Coordinator, who confirmed that this second copy was legible and had been received.

¶ 10 In a 16 April 2020 letter, Respondent informed Petitioner that it considered the grievance untimely. Respondent took the position that Petitioner had failed to meet the 24 March 2020 deadline because Respondent did not receive the grievance until 7 April 2020—the date Petitioner first attempted to provide Respondent with a copy by e-mail—despite the 8 April 2020 date stamp in the record on appeal and Respondent's 9 April 2020 confirmation of receipt by e-mail.

¶ 11 On 26 May 2020, Petitioner initiated a contested case in OAH, alleging that he had been discharged without just cause and without sufficient action to place him in a different position. On 25 June 2020, Respondent made a motion to dismiss, arguing that OAH lacked subject matter jurisdiction because Petitioner had failed to first exhaust his administrative remedies by timely filing a Step 1 Grievance Form. On 2 July 2020, Petitioner filed a response to the motion to dismiss. On 3 August 2020, the ALJ denied Respondent's prehearing motion to dismiss. On 7 August 2020, Petitioner filed a prehearing statement. On 11 August 2020, Respondent filed a prehearing statement.

¶ 12 The matter came on for hearing on 8 October 2020. Respondent renewed its motion to dismiss at the beginning of the hearing, which the ALJ denied. Petitioner's supervisor, who had signed both the 12 February 2020 Pre-Separation Letter and 3 March 2020 Separation Letter, did not testify. Respondent's Grievance Intake Coordinator essentially testified that she first received a copy of Petitioner's grievance on 7 April 2020 and that the original copy of Petitioner's grievance had never been received. On cross-examination, the Grievance Intake Coordinator admitted that she could not remember which days of the week she was in the office during the March to April 2020 timeframe, but stated that she was most likely in the office at least three days a week.

¶ 13 In an order entered on 23 December 2020, the ALJ reversed Respondent's decision to separate Petitioner from his employment and ordered that he be retroactively reinstated to the same or similar position he previously held and receive back pay, benefits, and attorney's fees. The ALJ also denied Respondent's renewed motion to dismiss based on "the effects COVID-19 has had on the operation of our State government offices[.]"

¶ 14 Respondent entered timely notice of appeal on 21 January 2021 and entered a corrected notice of appeal the following day.

II. Analysis

¶ 15 Respondent argues the ALJ erred in denying Respondent's motions to dismiss for lack of subject matter jurisdiction because Petitioner failed to first exhaust his administrative remedies before filing the contested case in OAH. The ALJ made no express finding regarding the timeliness of the filing of Petitioner's Step 1 Grievance Form but denied both of Respondent's motions to dismiss and concluded she had subject matter jurisdiction over the case. Based on these rulings, the ALJ necessarily found Petitioner's Step 1 Grievance was timely filed, despite not doing so expressly. We hold that there is a rational basis in the evidence to support this finding and affirm the order of the ALJ.

A. Standard of Review

¶ 16 "Chapter 150B, the Administrative Procedure Act, specifically governs the scope and standard of this Court's review of an administrative agency's final decision." *Harris v. N.C. Dep't of Pub. Safety*, 252 N.C. App. 94, 98, 798 S.E.2d 127, 132, *aff'd*, 370 N.C. 386, 808 S.E.2d 142 (2017). Chapter 150B provides:

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2021). "The standard of review is dictated by the substantive nature of each assignment of error." *Harris*, 252 N.C. App. at 99, 798 S.E.2d at 132 (citing N.C. Gen. Stat. § 150B-51(c)). "[Q]uestions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *Id.* (citation omitted).

¶ 17 "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.' " *Amanini v. N.C. Dep't of Hum. Res.*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994) (citation omitted). "As distinguished from the 'any competent evidence' test and a *de novo* review, the 'whole record' test gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Bennett v. Hertford Cnty. Bd. of Educ.*, 69 N.C. App. 615, 618, 317 S.E.2d 912, 915 (1984) (internal marks and citation omitted). "[T]he manner of our review is [not] governed

merely by the label an appellant places upon an assignment of error; rather, we first determine the actual nature of the contended error, then proceed with an application of the proper scope of review." *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118.

B. The ALJ's Decision Has a Rational Basis in the Evidence

1. Separation Due to Unavailability

¶ 18 Codified in Chapter 126 of our General Statutes, the North Carolina Human Resources Act governs personnel actions against state employees. *Hunt v. N.C. Dep't of Pub. Safety*, 260 N.C. App. 40, 44, 817 S.E.2d 257, 260-61 (2018). Generally speaking, "[n]o career State employee . . . shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35(a) (2021). State employees enjoy "a property interest [in] continued employment created by N.C. Gen. Stat. § 126-35 and protected by the Due Process Clause of the United States Constitution." *Emp. Sec. Comm'n v. Peace*, 128 N.C. App. 1, 10-11, 493 S.E.2d 466, 472 (1997) (citations omitted). However, on a non-disciplinary basis, state employees can be involuntarily separated from their employment if they are unable to perform their duties because they are unavailable to work under a provision of the North Carolina Administrative Code providing for "Separation Due to Unavailability." *See* 25 N.C. Admin. Code 1C.1007 (2021).

¶ 19 When an employee has been on a leave of absence because of a work-related injury, 25 N.C. Admin. Code 1C.007(a)(3) provides in relevant part that the employee may be separated from the employee's employment due to unavailability when

> the employee is unable to return to all of the position's essential duties as set forth in the employee's job description or designated work schedule due to a medical condition or the vagueness of a medical prognosis, and the employee and the agency are unable to reach agreement on a return to work arrangement that meets both the needs of the agency and the employee's medical condition[.]

Id. 1C.1007(a)(3). In such a situation,

> a separation may occur on the earliest of the following dates:
>
> > (A) after the employee has reached maximum medical improvement for the work related injury

> for which the employee is on workers' compensation leave of absence and the agency is unable to accommodate the employee's permanent work restrictions related to such injury; or
>
> (B) 12 months after the date of the employee's work related injury.

Id.

¶ 20 Subsections (b) and (c) of subchapter 1C, section .1007 delineate the process the employing agency must follow:

> (b) The employing agency shall send the employee written notice of the proposed separation in a Pre Separation Letter. The letter shall include the employing agency's planned date of separation, the efforts undertaken to avoid separation, and why the efforts were unsuccessful. This letter shall be sent to the employee at least 15 calendar days prior to the employing agency's planned date of separation. This letter shall include a deadline for the employee to respond in writing no less than five calendar days prior to the employing agency's planned date of separation.
>
> (c) If the agency and employee are unable to agree on terms of continued employment or the employee does not respond to the Pre Separation letter, the employing agency shall send the employee written notice in a Letter of Separation. The letter shall be sent no earlier than 20 calendar days after the Pre Separation letter is sent to the employee. The Letter of Separation shall state the actual date of separation, specific reasons for the separation and set forth the employee's right of appeal. . . .

Id. 1C.1007(b), (c).

¶ 21 North Carolina General Statute § 126-34.01 provides that a state employee "having a grievance arising out of or due to the employee's employment shall first discuss the problem or grievance with the employee's supervisor, . . . [and] [t]hen . . . shall follow the grievance procedure approved by the State Human Resources Commission." N.C. Gen. Stat. § 126-34.01 (2021). Importantly, separation due to unavailability "may be grieved or appealed." 25 N.C. Admin. Code 1C.007(c) (2021).

"The burden of proof on the agency in the event of a grievance . . . shall be to prove that the employee was unavailable, that efforts were undertaken to avoid separation, and why the efforts were unsuccessful." *Id.* After an appeal of an involuntary separation due to unavailability through the grievance process, "the final agency decision shall set forth the specific acts or omissions that are the basis of the employee's dismissal." *Id.* 1J.0613(h).

¶ 22 "Once a final agency decision is issued, a . . . State employee may appeal an adverse employment action as a contested case pursuant to the method provided in N.C. Gen. Stat. § 126-34.02[.]" *Harris*, 252 N.C. App. at 98, 798 S.E.2d at 131. Under N.C. Gen. Stat. § 126-34.02(b), there are six grounds for initiating a contested case in OAH, the third of which includes "appeal[ing] an involuntary nondisciplinary separation due to an employee's unavailability[.]" N.C. Gen. Stat. § 126-34.02(b)(3) (2021). In such a case, "the agency shall only have the burden to prove that the employee was unavailable." *Id.* If the agency fails to meet this burden, the ALJ presiding over the case may (1) reinstate the employee to the employee's previous position; (2) "[o]rder the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied"; or (3) "[d]irect . . . payment for any loss of salary which has resulted from the improper action of the appointing authority." *Id.* § 126-34.02(a). ALJs are "free to substitute their judgment for that of the agency[,]" *Harris*, 252 N.C. App. at 102, 798 S.E.2d at 134, and thus "have been given many of the powers and duties generally regarded as necessary to the independent function of our courts of justice[,]" *Ford v. Dep't of Env't, Health & Nat. Res.*, 107 N.C. App. 192, 197, 419 S.E.2d 204, 207 (1992). Either party can appeal to our Court from the ALJ's decision. *Harris*, 252 N.C. App. at 96, 798 S.E.2d at 130-31.

2. Subject Matter Jurisdiction

¶ 23 "The right to appeal to an administrative agency is granted by statute, and compliance with statutory provisions is necessary to sustain the appeal." *Lewis v. N. Carolina Dep't of Hum. Res.*, 92 N.C. App. 737, 739, 375 S.E.2d 712, 714 (1989). The failure to use the agency grievance process before initiating a contested case in OAH deprives OAH of subject matter jurisdiction over the case. *Nailing v. Univ. of N.C.*, 117 N.C. App. 318, 324, 451 S.E.2d 351, 355 (1994).

> Subject matter jurisdiction is jurisdiction over the nature of the case and the type of relief sought. Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented

> by the action before it. A court's lack of subject matter jurisdiction is not waivable and can be raised at any time, including on appeal.

Banks v. Hunter, 251 N.C. App. 528, 531, 796 S.E.2d 361, 365 (2017) (cleaned up).

¶ 24 The sole disputed evidentiary issue at the contested case hearing in this matter was whether Petitioner's 20 March 2020 Grievance Form was timely filed. Petitioner testified that his wife mailed the form the same day he completed it and that he personally observed her stamp the envelope and put it in the mailbox. Petitioner was mailing the Grievance Form from Fayetteville to Raleigh. Respondent's Grievance Intake Coordinator testified that this original copy of the form was never received by Respondent; instead, a legible electronic copy of the form was not received until 9 April 2020—16 days after the 24 March 2020 deadline. The Grievance Intake Coordinator admitted, however, that many of Respondent's employees were working remotely in March and April of 2020 because of the COVID-19 pandemic and that the mail was not being checked daily. The ALJ made no express finding regarding the timeliness of the filing of the Grievance Form but she denied Respondent's renewed motion to dismiss for lack of subject matter jurisdiction based on "the effects COVID-19 . . . on the operation of our State government offices[.]" This ruling implies that the ALJ credited Petitioner's testimony, and implicitly found that the Grievance Form was timely filed. The ALJ's conclusion of law that she had subject matter jurisdiction over the case likewise necessitates that the ALJ found the Grievance Form was timely filed, despite not doing so expressly.

¶ 25 We hold that there is a rational basis in the evidence for the finding that the Grievance Form was timely filed. Under the whole record test, the reviewing court "must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (citation omitted). "Substantial evidence" means "[r]elevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8c) (2021).

> In a contested case under the APA, as in a legal proceeding initiated in District or Superior Court, there is but one fact-finding hearing of record when witness demeanor may be directly observed. It is also

> well established that in an administrative proceeding, it is the prerogative and duty of the ALJ, once all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the ALJ to determine, and the ALJ may accept or reject in whole or part the testimony of any witness. Our review, therefore, must be undertaken with a high degree of deference as to the credibility of witnesses and the probative value of particular testimony. As our Supreme Court has explained, the ALJ who conducts a contested case hearing possesses those institutional advantages that make it appropriate for a reviewing court to defer to his or her findings of fact.

Brewington v. N.C. Dep't of Pub. Safety, 254 N.C. App. 1, 13, 802 S.E.2d 115, 124-25 (2017) (cleaned up).

¶ 26 On 24 March 2020, when the Grievance Form was due, North Carolina Governor Roy Cooper had declared a state of emergency in response to the COVID-19 pandemic. *See* Exec. Order No. 116 (2020). Respondent had allowed telecommuting for non-essential personnel, suspended staff training, limited external movement by offenders to reduce potential COVID-19 spread, and suspended visitation and volunteering at all prisons. Director and Chief Judge Julian Mann of OAH had encouraged all OAH employees to telecommute, and as of 18 March 2020, only "[a] very small number of managerial employees, as safety permits, ha[d] elected to be physically present in OAH, mostly on a staggered basis[.]" As Respondent's Grievance Intake Coordinator admitted on cross-examination, many of Respondent's employees were working remotely in March and April of 2020 because of the COVID-19 pandemic. Mail was not being checked daily.

¶ 27 Against this backdrop, in denying Respondent's motions to dismiss for lack of subject matter jurisdiction, the ALJ chose to credit Petitioner's testimony that his wife mailed the Step 1 Grievance Form on 20 March 2020 and that the Grievance Form was timely filed even though Respondent's Grievance Intake Coordinator testified that she did not receive an electronic copy until 7 April 2020. Giving appropriate deference to the ALJ, who was present in this case for the only "fact-finding hearing

of record when witness demeanor [could] be directly observed[,]" *id.* at 13, 802 S.E.2d at 124, and specifically, the ALJ's credibility determination with respect to Petitioner's testimony, we hold that the finding implicit in the ALJ's rulings denying Respondents' motions to dismiss for lack of subject matter jurisdiction—that the Grievance Form was timely filed—has a rational basis in the evidence under the whole record test. To hold otherwise would effectively require us to re-weigh the evidence before the ALJ and substitute our own credibility determination for that of the ALJ, which we cannot do as a reviewing court under the whole record test. *See Carroll*, 358 N.C. at 660, 599 S.E.2d at 895.[1]

III. Conclusion

¶ 28 We affirm the decision of the ALJ because the ALJ chose to credit Petitioner's testimony regarding the filing of his Step 1 Grievance Form. Since Petitioner first exhausted his administrative remedies before filing a contested case in OAH, the ALJ had subject matter jurisdiction over this contested case.

AFFIRMED.

Judge CARPENTER concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

¶ 29 The decision of the ALJ is properly reversed and remanded with instructions to dismiss Petitioner's case for lack of subject matter jurisdiction. I respectfully dissent.

I. Factual and Procedural Background

¶ 30 Petitioner's employment with the Department of Public Safety ("DPS") was terminated as of 3 March 2020 via a separation letter he received on 9 March 2020. If Petitioner wished to invoke a grievance review process, a "Step 1 Grievance Mediation Form" ("Step 1 Form") was required to be filed before the fifteenth calendar day after receipt of the letter or 24 March 2020. The Step 1 Form states: "[t]o file a grievance,

1. Respondent offers no argument that the ALJ's determinations regarding Respondent's failure to comply with state personnel policy on separation due to unavailability was error, and any such error is therefore deemed abandoned. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

you must submit this form within 15 calendar days of the event (or knowledge of the event) *that you are grieving*; otherwise, your grievance cannot be accepted." (emphasis supplied). The 3 March 2020 separation letter stated that the Step 1 Grievance Form "*must be received* by the Grievance Intake Coordinator on or before the fifteenth (15th) calendar day after receiving this letter" to be considered timely. (emphasis supplied).

¶ 31 Petitioner alleged he mailed the letter on 20 March 2020, but it was not marked as received by the Grievance Intake Coordinator until 8 April 2020, and only then after Petitioner had emailed a copy of the form. The purported *mailed* Step 1 Form was *never received* by the DPS Grievance Intake Coordinator.

¶ 32 Petitioner's emailed Step 1 Form was marked "as received" on 9 April 2020 and was deemed to be untimely. Petitioner's appeal was administratively dismissed. Petitioner filed a Petition for a Contested Case Hearing in the Office of Administrative Hearings ("OAH"). DPS moved for dismissal, arguing Petitioner had failed to timely invoke and exhaust his administrative remedies by completing the internal grievance process and receiving a final agency decision, and asserted OAH lacked subject matter jurisdiction to review the case. The ALJ denied the motion.

¶ 33 As is correctly stated by the majority's opinion: "The ALJ made no express finding regarding the timeliness of the filing of the Grievance Form, but denied Respondent's renewed motion to dismiss for lack of subject matter jurisdiction based on 'the effects COVID-19 . . . on the operation of our State government offices[.]' " DPS appeals.

II. Issues

¶ 34 Respondent asserts two issues on appeal: (1) whether former Chief Justice Beasley's order extending the time and periods of limitation due to COVID-19 applies to the internal grievance process under Office of State Human Resources (OSHR); and, (2) whether the ALJ erred in denying Respondent's Motion to Dismiss for lack of subject matter jurisdiction.

III. Analysis

A. Chief Justice's Order

¶ 35 Chief Justice Beasley's order titled "Extension of Time and Periods of Limitation Pursuant to N.C.G.S. § 7A-39(b)(1)" provides:

> all pleadings, motions, notices, and other documents and papers that were or are due to be filed in any

> county of this state on or after 16 March 2020 and before the close of business on 1 June 2020 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 1 June 2020.
>
> all other acts that were or are due to be done in any county of this state on or after 16 March 2020 and before the close of business on 1 June 2020 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 1 June 2020.

¶ 36 On 18 March 2020, Chief Judge Mann of the OAH also extended the filing deadlines based upon COVID-19.

¶ 37 The extension of time for filing asserted under N.C. Gen. Stat. § 7A-39 is expressly applicable only to those pleadings and documents filed with the courts within the Judicial Branch and to those matters and actions attendant thereto within the Judicial Branch. The statute grants the Chief Justice the authority to cancel court sessions and extend the time of filing for documents, motions, and papers in cases before the courts. N.C. Gen. Stat. § 7A-39 (2021).

¶ 38 It does not extend the time of filing for Executive Branch internal agency grievance processes. Chief Justice Beasley's 13 March 2020 order did not extend Petitioner's duty to timely file his Step 1 Form to invoke the jurisdiction of DPS' administrative review process. *See id.*

¶ 39 The Chief Justice's authority to extend the time for Judicial Branch filings under N.C. Gen. Stat. § 7A-39 and Chief Judge Mann's extension of filing in the OAH did not to extend every internal Executive Branch agency filing deadline. Petitioner's argument is without merit.

B. Lack of Subject Matter Jurisdiction

¶ 40 To properly initiate a contested case before the OAH, a state employee must first invoke and exhaust his agency's internal administrative remedies. The state employee must *complete* the internal grievance process, receive a final agency decision, and receive final review and approval of that decision by OSHR to invoke and exhaust his administrative remedies, prior to appealing to OAH. N.C. Gen. Stat. § 126-34.01 (2021).

¶ 41 In order to invoke jurisdiction to pursue the grievance process, the state employee carries the burden under the statute to show he timely filed a Step 1 Form within 15 days of the event (or knowledge of the

event) for which the employee is grieving. If the employee fails to initiate the grievance process within the required 15 days, jurisdiction is not involved, the internal grievance process is hated, and the grievance is administratively dismissed, the internal grievance process is halted, with no further action by the agency or OSHR.

¶ 42 Petitioner's assertion that he or his wife timely mailed the Step 1 Form does not carry his jurisdictional burden. The employee must timely invoke and exhaust his agency's internal administrative remedies prior to petitioning for a contested case hearing before OAH. Petitioner incorrectly argues this jurisdictional prerequisite puts the employee in a "Catch-22" situation, asserting he is unable to exhaust his administrative remedies *and* unable to appeal the agency decision. He admittedly received notice his of separation by letter and chose to purportedly invoke internal agency jurisdiction by a means, which left no objective certificate or proof of timely filing. Petitioner's assertion has no merit.

¶ 43 Petitioner further argues this Court's decision in *Erickson* requires this Court to affirm the ALJ's denial of DPS' motion to dismiss. *Erickson v. N.C. Dep't of Public Safety*, 264 N.C. App 700, 826 S.E.2d 821 (2019). In *Erickson*, DPS alleged Erickson had missed his deadline to continue his appeal from Step 1 to Step 2 in the internal grievance process. *Id.* at 701, 826 S.E.2d at 823. The Step 2 Form stated it had to be *filed* within 5 calendar days, but also that if it was not *received* within that timeframe, it would not be accepted. *Id.* at 707, 826 S.E.2d at 826. This Court determined the language in the form was conflicting and ambiguous and construed it against the drafting party. *Id.* This Court ultimately held Erickson's petition for a contested case hearing was proper despite not having timely exhausted his administrative remedies. *Id.*

¶ 44 *Erickson* is easily distinguishable from the facts before us. Erickson's mailed Step 2 Form *was received* one day late, whereas here, the mailed initiation of process Step 1 Form was *never received*. The issue before the Court in that case was whether, given the ambiguity of the form's instructions, Erickson had substantially complied with the form when viewed in the light most favorable to him. *Id.* at 706, 826 S.E.2d at 826. The agency's jurisdiction had already been timely invoked. *See id.*

¶ 45 Here, Petitioner's form was not received until 15 days after the deadline, and only then after Petitioner emailed the admittedly untimely form. He failed to comply with and invoke DPS' internal grievance process. Petitioner's failure deprived OAH of jurisdiction to hear the contested case. N.C. Gen. Stat. § 126-34.01.

IV. Conclusion

¶ 46 Statutes of limitations and repose limit and cut off the ability of a claimant, even with a meritorious claim, to timely assert rights. These statutes can be jurisdictional where the burden to show compliance therewith rests upon the claimant. Compliance is not satisfied by the bald assertions of timely filing by the party with the burden, where the record is devoid of any objective compliance. A claimant, even with a valid ticket, who arrives at the station late sees the train has already left. Those who timely arrived and boarded the train get to travel. Those who did not will be left on the station's platform, even if entitled to board and the train is just pulling away.

¶ 47 No objective evidence shows Petitioner carried his burden to timely invoke DPS' internal and jurisdictional grievance process. The extensions of times in the Judicial Branch and the OAH has no impact on an Executive Agency's internal jurisdictional procedures.

¶ 48 The employee must timely invoke and exhaust his agency's internal administrative remedies prior to petitioning for a contested case hearing before OAH. *Id*. This he failed to do. Neither the ALJ nor COVID can excuse a jurisdictional defect.

¶ 49 DPS' jurisdictional review train left the station on schedule. Petitioner was not on board. I vote to reverse the ALJ and remand to dismiss for lack of OAH jurisdiction. I respectfully dissent.

SCHROEDER v. CITY OF WILMINGTON

[282 N.C. App. 558, 2022-NCCOA-210]

DAVID SCHROEDER AND PEGGY SCHROEDER, PLAINTIFFS
v.
CITY OF WILMINGTON AND CITY OF WILMINGTON BOARD OF ADJUSTMENT, DEFENDANTS

No. COA21-192

Filed 5 April 2022

Cities and Towns—ordinance—registration requirement for short-term rentals—preempted by statute—statutory interpretation

In a declaratory judgment action challenging a city's zoning ordinance, which placed restrictions on short-term rentals and required short-term rental property operators to register their properties, the trial court properly concluded that the ordinance was preempted by N.C.G.S. § 160A-424(c)—prohibiting cities from requiring rental property owners and managers to obtain "any permit or permission . . . to lease or rent . . . or to register rental property with the city"—and its amended recodification at N.C.G.S. § 160D-1207(c), which added "under Article 11 or Article 12 of this Chapter" after "any permit or permission." The recodification's reference to Articles 11 and 12 (governing building and housing codes rather than zoning) applied exclusively to permits and permissions to lease or rent, and therefore it did not alter the original statute's unambiguous prohibition against the registration requirement. That said, the portion of the trial court's judgment striking provisions of the ordinance that did not violate the statute and were severable was reversed and remanded.

Appeal and cross-appeal from a judgment and stay entered 15 October 2020 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 17 November 2021.

Nelson Mullins Riley & Scarborough, LLP, by John E. Branch, III, and Andrew D. Brown, and Institute for Justice, by Ari Bargil and Adam Griffin, for Plaintiffs-Appellees/Cross-Appellants.

Poyner Spruill LLP, by N. Cosmo Zinkow and Robert E. Hagemann, and Deputy City Attorney Meredith T. Everhart, for Defendant-Appellant/Cross-Appellee City of Wilmington.

INMAN, Judge.

¶ 1 The North Carolina Constitution establishes the State as sovereign, and local governments may exercise only those powers that our General Assembly "deem[s] advisable" through legislative enactment. N.C. Const. art. VII, § 1. When a legal question arises regarding the scope of a local government's authority, it is the judiciary's duty to interpret the enabling law and apply it in accordance with the General Assembly's intent. *Occaneechi Band of Saponi Nation v. N.C. Comm'n of Indian Affairs*, 145 N.C. App. 649, 653, 551 S.E.2d 535, 538 (2001). And when a local government enacts an ordinance asserting powers that exceed those granted by the General Assembly, we are compelled to invalidate the unauthorized action. *King v. Town of Chapel Hill*, 367 N.C. 400, 411, 758 S.E.2d 364, 373 (2014).

¶ 2 David and Peggy Schroeder ("Plaintiffs") dispute the authority of the City of Wilmington ("Wilmington") to enact a zoning ordinance restricting short-term rentals through a registration and lottery process. Plaintiffs presented several state law and constitutional law rationales to the trial court. The trial court dismissed Plaintiffs' constitutional challenges but agreed that the zoning ordinance was entirely invalid based on a statute and its amended recodification precluding local governments from "requir[ing] any owner or manager of rental property . . . to register rental property with the local government." N.C. Gen. Stat. § 160A-424(c) (2017), *recodified as amended at* N.C. Gen. Stat. § 160D-1207(c) (2021).

¶ 3 The trial court stayed its judgment, and both parties appeal. Wilmington challenges the judgment and Plaintiffs challenge the dismissal of their constitutional claims and the entry of a stay.[1]

¶ 4 After careful review, we affirm the trial court's judgment that the registration and lottery provisions of Wilmington's ordinance are invalid under Section 160D-1207(c) of our General Statutes. But we reverse the portion of the judgment striking provisions of the Wilmington ordinance that are not prohibited by statute and are severable from the invalid provisions. Because our holding renders moot Plaintiffs' constitutional challenges to the ordinance, we do not reach Plaintiffs' cross-appeal.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 5 The record below and our General Statutes disclose the following:

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1. Plaintiffs moved this Court to dissolve the stay by separate motion, and we denied that motion by order entered 20 April 2021. Because Plaintiffs concede that we have already decided this issue against them and they advance their arguments strictly for preservation purposes, we do not revisit that issue in this opinion.

A. The General Assembly Restricts Permitting, Permission, and Registration Requirements for Residential Rentals

¶ 6 In 2011, the General Assembly enacted a statute prohibiting cities from penalizing or restraining the rental of residential real property absent "reasonable cause." 2011 N.C. Sess. Laws 1034, 1034, ch. 281. That statute, Section 160A-424(c),[2] prohibited cities from "requir[ing] any owner or manager of rental property to obtain any permit or permission from the city to lease or rent." N.C. Gen. Stat. § 160A-424(c) (2011). The statute provided an exception allowing cities to "levy a fee for residential rental property *registration* under subsection (c)" if the rental units in question had a sufficient number of local ordinance violations or were hotspots for criminality. *Id.* § 160A-424(d) (emphasis added). Subsection (d) further allowed cities "that charge[d] registration fees for all residential rental properties as of June 1, 2011" to continue to do so according to a specific fee schedule. *Id.*

¶ 7 As the land development statutes were codified at the time Section 160A-424(c) was originally enacted, municipal land development regulatory powers were found in Article 19, "Planning and Regulation of Development," of Chapter 160A, "Cities and Towns." County land development regulatory powers were located in Article 18, "Planning and Regulation of Development," in Chapter 153A, "Counties." Thus, the statutes authorizing local governments to regulate land uses were codified in two separate chapters, depending on the body politic. Section 160A-424(c), as a statute governing municipalities, was located in Part 5, "Building Inspection," of Article 19 in Chapter 160A. Organizationally, this placed Section 160A-424(c) apart from our municipal zoning laws, which were located in Part 3, "Zoning," of Article 19 in Chapter 160A.

¶ 8 In 2017, the General Assembly added language to Section 160A-424(c) to bar cities from "requir[ing] any owner or manager of rental property to obtain any permit or permission . . . to lease or rent . . . *or to register rental property with the city*." N.C. Gen. Stat. § 160A-424(c) (2017) (emphasis added). The statute continued the exceptions for properties that repeatedly violated building codes or were sites of substantial criminal activity. *Id.* The amended statute repealed the subsection that allowed the uniform rental registration programs predating June 2011 to continue, ending the authorization of those programs. *Id.* § 160A-424(d).

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2. Our General Statutes are organized by subject matter into chapters, which may be further subdivided into subchapters, articles, parts, or subparts. A "Section" is the text of the law itself, and sections are placed within the chapters and their various subdivisions.

B. Wilmington Regulates Short-Term Rentals Through Registration

¶ 9 Against this statutory backdrop, Wilmington sought to protect its neighborhoods and housing market from the impact of widespread short-term rentals. Wilmington's City Council identified concerns including "undue commercialization and disruption to the primary and overarching purpose of a neighborhood being first and foremost a residential community, where people actually live," and the possibility that "inordinate reductions in the supply of housing available for standard rentals for the citizens of Wilmington could have a destabilizing effect on housing affordability." These concerns led Wilmington to enact a zoning ordinance (the "Ordinance") in January 2019 regulating short-term rentals within city limits in an effort to balance their negative effects against the benefits of a "properly regulated" short-term rental market—including "assisting property owners to keep properties in good repair, which, in turn, stabilizes home ownership, maintains property values, and strengthens the economy of the City."

¶ 10 The Ordinance restricted short-term rentals to specific zoning districts, required at least 400 feet of separation between short-term rentals, and capped the total percentage of short-term rentals at two percent of residential parcels within Wilmington's 1945 Corporate Limits and two percent of residential parcels outside the same. To implement the separation and cap requirements, the Ordinance required short-term rental operators to register their properties. Initial registrations were to be doled out in conformity with the separation and cap requirements by lottery. Registrations would terminate if not renewed annually, upon transfer of the subject property, or for violations of law, and registrations filed after the initial lottery would be received and processed on a first-come, first-served basis. Existing short-term rental operators who failed to obtain a registration by lottery were required to cease short-term rentals by the end of a one-year amortization period. Other sections of the Ordinance imposed health, safety, and similar requirements, such as requiring short-term rental operators to conspicuously post the dates for garbage collection and the non-emergency telephone number for the Wilmington Police Department.

C. Plaintiffs' Challenge

¶ 11 Plaintiffs own a townhome in the Lions Gate community of Wilmington, which they used as a short-term rental without any reported problems prior to the enactment of the Ordinance. After the Ordinance was passed, Plaintiffs registered their property but lost in the initial

lottery, as another property within 400 feet of their townhouse drew a lower lottery number. Plaintiffs appealed to the Wilmington Board of Adjustment, which upheld Wilmington's denial of registration.

¶ 12 With no other administrative avenues available to them, Plaintiffs filed a declaratory judgment action in October 2019 to challenge the validity of the Ordinance, alleging it violated Section 160A-424(c)'s prohibition against ordinances "that would require any owner or manager of rental property to obtain any permit or permission from the city to lease or rent residential real property or to register rental property with the city."[3]

D. The General Assembly Reorganizes and Recodifies Local Land Use Regulatory Statutes

¶ 13 In July 2019, shortly before Plaintiffs filed suit, the General Assembly amended and recodified statutes concerning local government regulation of short-term rentals, including Section 160A-424(c). On 1 July 2019, the General Assembly enacted Session Law 2019-73 to explicitly place vacation rentals under the ambit of Section 160A-424. 2019 N.C. Sess. Laws 300, 300, ch. 73, § 1. Ten days later, the General Assembly amended and recodified Section 160A-424 as part of a session law captioned, "An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State." 2019 N.C. Sess. Laws 424, 424, ch. 111 (hereinafter "the Act"). Part II of the Act—which contains the recodification of Section 160A-424—is titled "Provisions to Reorganize, Consolidate, Modernize, and Clarify Statutes Regarding Local Planning and Development Regulation." *Id.* at 439, ch. 111.

¶ 14 Part II of the Act at issue in this case provides:

> . . . The intent of the General Assembly by enactment of Part II of this act is to collect and organize existing statutes regarding local planning and development into a single Chapter of the General Statutes and to consolidate the statutes affecting cities and counties.
>
> . . . The intent of the General Assembly by enactment of Part II of this act is to neither eliminate, diminish,

3. Plaintiffs also brought several facial and as-applied challenges to the Ordinance under the North Carolina Constitution and have cross-appealed the later dismissal of those claims to this Court. Because we hold that the allegedly unconstitutional portions of the Ordinance are preempted on statutory grounds, we dismiss as moot Plaintiffs' cross-appeal arguing the unconstitutionality of the Ordinance. *Chavez v. McFadden*, 374 N.C. 458, 467, 843 S.E.2d 139, 147 (2020).

> enlarge, nor expand the authority of local governments to exact land, construction, or money as part of the development approval process or otherwise materially alter the scope of local authority to regulate development . . . .

Id. at 439, ch. 111, §§ 2.1.(e)–(f). Part II relocated the previously scattered patchwork of planning and development statutes into a single new chapter, Chapter 160D. *Id.* at 439, ch. 111, § 2.4. The Act also expressly provides that "Part II of this act clarifies and restates the intent of existing law and applies to ordinances adopted before, on, and after the effective date." *Id.* at 547, ch. 111, § 3.2. As an express clarifying amendment of declared retroactive effect, the Act's recodification retroactively applied to Wilmington's Ordinance.

¶ 15 The new Chapter 160D is organized into 14 Articles. Chapter 160D maintains the structural separation between zoning and building code inspection that existed in the previous codification of our land regulation statutes. Zoning is now found in Article 7, "Zoning Regulation," N.C. Gen. Stat. §§ 160D-701, *et seq.*; building code enforcement in Article 11, "Building Code Enforcement," *id.* §§ 160D-1101, *et seq.*; and minimum housing standards in Article 12, "Minimum Housing Codes." *Id.* §§ 160D-1201, *et seq.* The Act recodified Section 160A-424 as Section 160D-1207, placing it among the minimum housing standard statutes in Article 12.[4] *Id.* §§ 160D-1201, *et seq.*

¶ 16 The General Assembly also modified the language regarding the prohibitions against permitting, permissions, and registrations applicable to residential rentals. The new statute, with additions marked in bold and deletions struck through, now reads:

> In no event may a ~~city~~ **local government** do any of the following: (i) adopt or enforce any ordinance that would require any owner or manager of rental property to obtain any permit or permission **under Article 11 or Article 12 of this Chapter** from the ~~city~~ **local government** to lease or rent residential real property or to register rental property with the ~~city~~ **local government**.

4. The sections in Chapter 160D are generally numbered sequentially according to their placement in the Chapter. The amended statutory language at issue here is found in the seventh section of Article 12 in Chapter 160D, hence Section 160D-1207.

Compare N.C. Gen. Stat. § 160A-424(c) (2017), *with* N.C. Gen. Stat. § 160D-1207(c) (2021).

E. The Trial Court Concludes the Ordinance Is Preempted by Statute

¶ 17 Wilmington moved to dismiss Plaintiffs' complaint. The trial court dismissed Plaintiffs' constitutional claims by order entered 11 March 2020. Wilmington then filed its answer and moved for summary judgment in its favor, while Plaintiffs moved to amend their complaint to explicitly address, among other things, the changes to and recodification of Section 160A-424(c) as Section 160D-1207(c). The trial court denied this motion by order entered on 3 September 2020, and on 15 September 2020, the trial court granted summary judgment to Plaintiffs, declaring the entirety of the Ordinance void based on the conclusion that Section 160A-424(c) and its revised codification at Section 160D-1207(c) unambiguously prohibited Wilmington's short-term rental registration scheme.

¶ 18 Wilmington moved for a stay of the trial court's judgment shortly after entry. The trial court granted that motion as to all parties except Plaintiffs who, by statute, enjoyed a stay of the Ordinance's enforcement against them during litigation. The trial court's ruling on summary judgment and the entry of the stay were then consolidated into a final judgment entered 15 October 2020, and both parties filed timely notices of appeal.

II. ANALYSIS

¶ 19 This appeal requires us to resolve three competing interpretations and applications of Sections 160A-424(c) and its successor statute 160D-1207(c): by the trial court, by Plaintiffs, and by Wilmington. Section 160A-424(c) prohibited Wilmington from enacting an ordinance that required a short-term rental operator "to obtain any permit or permission from the city to lease or rent . . . or to register rental property with the city." N.C. Gen. Stat. § 160A-424(c). When it recodified the statute as Section 160D-1207(c), the legislature added nine words that have spawned the differing interpretations before us, prohibiting Wilmington from requiring short-term rental operators "to obtain any permit or permission **under Article 11 or Article 12 of this Chapter** . . . to lease or rent . . . or to register rental property." N.C. Gen. Stat. § 160D-1207 (emphasis added).[5]

5. Section 160D-1207 includes several specific exceptions that are not at issue in this case, so we do not address them.

¶ 20 The trial court concluded that Section 160D-1207(c) prohibits Wilmington from requiring: (1) permits and permissions to rent under Articles 11 and 12; and (2) all registrations of rental property. Plaintiffs construe the new language to prohibit (1) all permits to lease or rent; (2) permissions to rent under Articles 11 and 12; and (3) all registrations of rental property as a condition to rent. Wilmington advocates a third reading, contending the added cross-reference to Articles 11 and 12 modifies the scope of "permits," "permissions," *and* registrations, so that local governments are authorized to use their zoning powers—found in Article 7—to implement registration schemes on short-term rentals.

¶ 21 After reviewing the language of the statutes, we hold that Wilmington's registration requirements for rentals, and those provisions of the ordinance inseparable from them, are prohibited by state statute and therefore invalid, and we affirm the trial court's judgment in this respect. However, because several of the Ordinance's provisions are severable from the invalid registration provisions, we reverse the trial court's judgment in part and remand for entry of a judgment that invalidates the registration requirement and those provisions inseverable from it, but leaves the severable sections, described below, intact.

A. Standard of Review

¶ 22 We review the trial court's entry of summary judgment *de novo*. *JVC Enters., LLC v. City of Concord*, 376 N.C. 782, 2021-NCSC-14, ¶8. Summary judgment is proper when there are no genuine issues of material fact and judgment in favor of a party is appropriate as a matter of law. *Id.* The same *de novo* standard applies to questions of statutory interpretation. *Id.*

B. Section 160A-424(c) Unambiguously Prohibited Wilmington's Registration Ordinance

¶ 23 When the Ordinance was first enacted, Section 160A-424(c) generally precluded cities from "requir[ing] any owner or manager of rental property . . . to obtain any permit or permission . . . to lease or rent residential real property or to register rental property with the city." N.C. Gen. Stat. § 160A-424(c) (2017). Thus, the statute prohibited two categories of regulation: (1) permits or permissions to lease or rent; and (2) registrations of rental property. The statutory language is in no way ambiguous, so it must be afforded its plain effect without reference to canons of statutory interpretation. *See, e.g., Jeffries v. Cnty. of Harnett*, 259 N.C. App. 473, 488, 817 S.E.2d 36, 48 (2018) ("[W]hen the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning."

(citation and quotation marks omitted)). The Ordinance is prohibited by the statute's straightforward language to the extent it requires Plaintiffs "to register rental property with the city." N.C. Gen. Stat. § 160A-424(c).

¶ 24 Wilmington asserts that Section 160A-424(c) was only intended to limit registration requirements in the context of building code inspections—not zoning—by pointing out that it was included in a part of our General Statutes that, per its title, related to municipal building inspections. But, because Section 160A-424(c) is unambiguous, our analysis begins and ends with the plain meaning of the text, and we need not consult its placement in a building inspection statute to discern the legislature's intent. *Appeal of Forsyth County*, 285 N.C. 64, 71, 203 S.E.2d 51, 55 (1974) ("The law is clear that captions of a statute cannot control when the text is clear." (citation omitted)); *First Bank v. S&R Grandview, L.L.C.*, 232 N.C. App. 544, 551, 755 S.E.2d 393, 397 (2014) (noting that "the placement of a statute within an act is less probative of legislative intent than the plain language of the statute itself" and holding the placement of a plain and unambiguous statute had no bearing on the interpretation of its plain language). *But see Ray v. N.C. Dept. of Transp.*, 366 N.C. 1, 8, 727 S.E.2d 675, 681 (2012) (observing that "even when the language of a statute is plain, the title of an act should be considered in ascertaining the intent of the legislature" where there was no question as to the plain meaning of a statutory amendment but only whether the amendment was intended to apply retroactively or prospectively) (citation and quotation marks omitted)).

C. Recodification as Section 160D-1207(c) Did Not Alter the Restriction Against Registrations

¶ 25 Our review of Section 160D-1207(c), in context with the rest of Chapter 160D and together with Section 160A-424(c)'s prior unambiguous language, leads us to hold that the registration provisions of the Ordinance are invalid. We hold that Section 160D-1207(c) continues to impose a disjunctive list of two prohibitions, restricting local governments from:

> requir[ing] any owner or manager of rental property [1] to obtain any permit or permission under Article 11 or Article 12 of this Chapter from the local government to lease or rent residential real property or [2] to register rental property with the local government. . . .

N.C. Gen. Stat. § 160D-1207(c). The Ordinance's registration provisions thus remain preempted by statute.

¶ 26 This reading of Section 160D-1207(c) avoids any violence to the statutory language and structure. It also continues to treat "permit or permission . . . to lease or rent" as a single category of prohibited regulatory action separate from "registrations"—just as was demanded by the unambiguous language of its predecessor statute, Section 160A-424(c).

¶ 27 Treating "permit or permission" of a like kind and as a single categorical phrase also accords with the construction of Chapter 160D itself. Article 11's statutes explicitly refer to "permits" and other approval mechanisms. Except for the prohibition against permits at issue here, Article 12's statutes do not expressly refer to "permits," but they do contemplate other forms of governmental approvals, *i.e.*, permissions. *Compare* N.C. Gen. Stat. §§ 160D-1101, *et seq*. (providing for building code enforcement powers through the issuance of building permits and other forms of written approvals for work), *with* N.C. Gen. Stat. §§ 160D-1201, *et seq*. (allowing for adoption and enforcement of minimum housing code ordinances without specifically referencing permitting).[6] Thus, applying the statutory cross-reference to both "permit or permission" and treating them together results in a general prohibition against requiring government approval to lease or rent, however required under Articles 11 or 12, that aligns with the structure of those Articles. *See*, *e.g.*, *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) ("[W]e are guided by the structure of the statute and certain canons of statutory construction." (citations omitted)).

¶ 28 We acknowledge that this reading appears, in some sense, to conflict with the provisions of Chapter 160D's enabling session law that express an intention to clarify, rather than change, the law. But every interpretation before this Court results in some substantive alteration, as each imposes some restriction where the prior unambiguous language of Section 160A-424(c) contained none.[7] In this circumstance, we must

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6. For example, Section 160D-1112 in Article 11 provides that post-permit changes to construction are only allowed if they "are clearly permissible under the State Building Code" or are made pursuant to "specific written approval of the proposed changes . . . [by] the inspection department." N.C. Gen. Stat. § 160D-1112 (2021). Article 12, meanwhile, allows a local administrative tribunal to close dwellings unfit for human habitation by order—rather than permit—until repairs are completed and habitation may resume. N.C. Gen. Stat. § 160D-1203(3)(a) (2021).

7. Ironically, the "clarifying" changes in Section 160D-1207 have now rendered the statute ambiguous. *See Winkler v. N.C. State Bd. of Plumbing, Heating & Fire Sprinkler Contractors*, 374 N.C. 726, 730, 843 S.E.2d 206, 211 (2020) (holding a statute was ambiguous where "the provision at issue is equally *unsusceptible* of each proposed interpretation").

attempt to construe the provisions of Chapter 160D's enabling session law together, and "harmonize such statutes, if possible, and give effect to each." *Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 371, 90 S.E.2d 898, 904 (1956).

¶ 29 Our reading of Section 160D-1207(c) seeks to harmonize the clarifying intent of the legislature with the imposition of a new limitation on local government authority to the extent possible. It aligns with and continues the clear original legislative intent, previously expressed in Section 160A-424(c), to provide two disjunctive restrictions: (1) prohibiting permits and permissions to lease or rent (now clarified as permits or permissions pursuant to Articles 11 or 12), and (2) prohibiting registrations of rental properties. In other words, Section 160A-424(c) unambiguously restricted permits or permissions to the same and equal extent, and our reading of Section 160D-1207(c) continues to treat them identically. Similarly, Section 160A-424(c) treated the restriction against permits and permissions separately from the prohibition against registrations, and our interpretation of Section 160D-1207(c) maintains this division, as we do not apply the statutory cross-reference to Articles 11 and 12 inserted into the clause restricting permits and permissions as applying to registrations. As discussed below, neither interpretation of Section 160D-1207(c) suggested by the parties allows for this same symmetry when compared to the original, unambiguous language contained in Section 160A-424(c).

¶ 30 In sum, we hold that the General Assembly enacted Section 160D-1207(c) to clarify that the restriction against permits or permissions to lease or rent originally found in Section 160A-424(c) applied only to the government approvals now found in Articles 11 and 12. The language added in Section 160D-1207(c) does not suggest that the legislature intended to modify the structure of the previous unambiguous statute precluding registrations generally, nor does it suggest treating "permission[s] . . . to lease or rent" as a separate category of prohibition from "permit[s] . . . to lease or rent." We agree with the trial court's interpretation of Section 160D-1207(c) as prohibiting local governments from requiring a short-term rental owner to obtain a permit to rent under Articles 11 or 12, a permission to rent under the same Articles, or to register the property as a rental with the government.[8] The provisions

8. We do not interpret Sections 160A-424(c) or 160D-1207(c) as exempting rental properties from all zoning or permitting requirements; as Plaintiffs conceded at oral argument, even their reading would not preclude Wilmington from zoning or requiring Plaintiffs to obtain a building permit to construct an addition to their property. Our reading does not prohibit these actions either and only limits "permit[s] . . . *under Article 11 or Article 12* . . . *to lease or rent*." N.C. Gen. Stat. § 160D-1207(c) (emphasis added).

of Wilmington's Ordinance requiring such a registration—as well as any provisions that are inseverable from that initial registration requirement—are preempted by Section 160D-1207(c) and its unambiguous predecessor Section 160A-424(c).[9]

D. The Parties' Preferred Interpretations Fail

¶ 31 In adopting the trial court's interpretation of Section 160D-1207(c), we reject the competing interpretations proposed by the parties.

¶ 32 Plaintiffs' proposed interpretation of the statute would rework the language and punctuation of the statute in the following manner, reflected in bold, to provide that local governments are prohibited from:

> requir[ing] any owner or manager of rental property**[:] [1]** to obtain any permit **[from the local government to lease or rent residential real property;]** or **[2] [to obtain]** permission under Article 11 or Article 12 of this Chapter from the local government to lease or rent residential real property**[;]** or **[3]** to register rental property with the local government **[to lease or rent residential real property]**. . . .

N.C. Gen. Stat. § 160D-1207(c).

¶ 33 Plaintiffs' proffered interpretation—which they contend is the only unambiguous reading—requires a substantial revision of the statutory language; truly unambiguous statutes require no modification to be given their plain effect. *See In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978) ("When the language of a statute is clear and unambiguous, . . . the courts must give the statute its plain and definite meaning, and

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9. Wilmington asserts that our interpretation would allow it to replace "register" with "permit" in the Ordinance and reenact it under Article 7 without violating Section 160D-1207(c). But such a hypothetical ordinance is not before us today and would be open to legal challenges asserting that the statute's language should be applied to reach any "permit" that is, in all practical effect, a registration otherwise barred by the statute. *Cf. Mazda Motors of America, Inc. v. Southwestern Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (" '[W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.' " (quoting *State v. Barksdale*, 181 N.C. 621, 625 107 S.E. 505, 507 (1921))). Because Wilmington's hypothetical ordinance is not before us, we decline to resolve whether such an ordinance would be preempted by Section 160D-1207(c). *See Chavez*, 374 N.C. at 467, 843 S.E.2d at 147 (noting our appellate courts do not " 'determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions.' " (citation omitted)).

are without power to interpolate, or superimpose, provisions and limitations not contained therein."); *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (noting that, in applying an unambiguous statute, "it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used"). And Plaintiffs offer no rule of grammar or construction that would allow us to transpose the modifier "to lease or rent" to the later restriction on registrations. Plaintiffs acknowledge that the prohibition on registration "follows in a completely separate clause" from "permit[s] or permission[s] . . . to lease or rent."

¶ 34 Plaintiffs argue that "it is impossible to conceive of a permitting scheme that did not also in some sense require registration. . . . [A] bar on registrations would sweep up practically any permitting scheme." But if this is true, Plaintiffs' reading of the statute would render its provisions redundant: the legislature would not need to prohibit permits to lease or rent and registrations to lease or rent separately if a ban on the latter encompassed the former. *See State v. Morgan*, 372 N.C. 609, 614, 831 S.E.2d 254, 258 (2019) ("We are further guided in our decision by the canon of statutory construction that a statute may not be interpreted in a manner which would render any of its words superfluous." (citation and quotation marks omitted)).[10] And, because this interpretation presumes the legislature intended to create *three* categories of restrictions—(1) permits, (2) permissions under Articles 11 or 12, and (3) registrations—when the unambiguous language of Section 160A-424(c) only imposed *two*—(1) permits or permissions, and (2) registrations—we decline to adopt it as the "clarified" meaning of Section 160A-424(c).

¶ 35 We also disagree with Wilmington's argument that the statutory cross-references added to Section 160D-1207(c) limit the general prohibition against registrations originally found in Section 160A-424(c). Under that reading, Section 160D-1207(c) prohibits local governments from:

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10. Our reading of the statute does not result in this redundancy. By prohibiting "permit[s] or permission[s] under Article 11 or Article 12 of this Chapter . . . to lease or rent" together, the General Assembly identified what permits it intended to curtail in Section 160D-1207(c). The registration prohibition is then read in context not to encompass all permits, but instead to prohibit any ordinance that requires the landowner to register as a residential rental with the government under any article and however imposed. *See City of Asheville v. Frost*, 370 N.C. 590, 592, 811 S.E.2d 560, 562 (2018) ("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."). *Cf. Jeffries*, 259 N.C. App. at 493, 817 S.E.2d at 50 ("The interpretative canon of *noscitur a sociis* instructs that 'associated words explain and limit each other' and an ambiguous or vague term 'may be made clear and specific by considering the company in which it is found, and the meaning of the terms which are associated with it.' " (citation omitted)).

> requir[ing] . . . any permit or permission under Article 11 or Article 12 . . . from the local government[:] [1] to lease or rent residential real property or[;] [2] to register rental property with the local government.

Thus, Wilmington asserts that Sections 160A-424(c) and 160D-1207(c) prohibit, among other things, "permission[s]. . . to register" under Articles 11 and 12. But Wilmington's able counsel conceded in oral argument that no statute in Article 11 or 12—or anywhere else in the General Statutes—references a "permission to register" scheme.

¶ 36 Counsel for Wilmington offered a singular example of a "permission to register" regime, contending a city could restrict short-term rentals to certain zoning districts and then require short-term rental operators to register. In such a circumstance, only those in the proper zoning district would have "permission to register" as a short-term rental.[11] But this example—the only one put forward by Wilmington—is self-defeating: if "permission to register" only arises through the exercise of a local government's Article 7 zoning powers, there would be no need for the General Assembly to prohibit "permission to register" under Articles 11 and 12. We will not read the statute as prohibiting something that does not appear to exist. Such a reading runs counter to the mandate that "a statute must be construed, if possible, to give meaning and effect to all of its provisions." *HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990). *See also Estate of Jacobs v. State*, 242 N.C. App. 396, 402, 775 S.E.2d 873, 877 (2015) (declining to adopt an interpretation rendering a statute's provisions "superfluous or nonsensical").

E. The Trial Court Erred in Invalidating the Entire Ordinance

¶ 37 Though we hold that the trial court correctly concluded that the Ordinance is invalid to the extent that it is preempted by Section 160D-1207(c), we disagree that the entirety of the Ordinance fails as a result.

¶ 38 Section 14 of the Ordinance states, "if any . . . portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed severable and

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11. Even this example does not align with the statute when its words are given their common and ordinary meaning, as a zoning ordinance allowing for certain uses in a district would not put any positive burden on the landowner "to *obtain* . . . permission" to engage in those uses.

such holding shall not affect the validity of the remaining portions thereof." We will give effect to this clause to preserve any provisions that are "not so interrelated or mutually dependent" on the invalid registration requirements that their enforcement "could not be done without reference to the offending part." *Fulton Corp. v. Faulkner*, 345 N.C. 419, 422, 481 S.E.2d 8, 9 (1997). Non-offending sections of the Ordinance that are "complete in [themselves] and capable of enforcement" will remain in effect. *Id*. Stated differently, "[w]e will sever a provision of an otherwise valid ordinance when the enacting body would have passed the ordinance absent the offending portion." *King*, 367 N.C. at 410, 758 S.E.2d at 372 (citation omitted).

¶ 39 Several provisions of the Ordinance are so intertwined with the invalid registration requirement that they are likewise preempted by Section 160D-1207(c), namely: (1) the cap and distance requirements and their predicate registration provisions, *i.e.*, the entirety of Secs. 18-331.2 and 18-331.4;[12] (2) the proof of shared parking or parking space rental and the submission of all shared parking agreements to the city attorney for approval prior to registration, as found in Sec. 18-331.5; (3) the registration termination provisions, *i.e*, the entirety of Secs. 18-331.8-.9 and .13; (4) the requirement that a registration number be posted in a short-term rental, as found in Sec. 18-331.14(d); (5) Sec. 18-331.7's limited application to "registered" uses only; and (6) the amortization of short-term rentals without a registration, *i.e.*, the entirety of Sec. 18-331.17.

¶ 40 The remainder of the Ordinance does not require registration to be enforceable and gives effect to Wilmington's intent in enacting the Ordinance. For example, the requirement that each short-term rental operator provide one off-street parking space per bedroom does not require registration to be effective or enforceable; a customer may rent a short-term rental assuming compliance with this provision and inform Wilmington of a violation should parking prove inadequate. Similarly, the prohibition against cooking in bedrooms or the requirement that operators conspicuously post the non-emergency telephone number for the Wilmington Police Department are not grounded in any registry.

¶ 41 We hold that the following provisions of the ordinance are *not* preempted by Section 160D-1207(c) and remain in effect: (1) the restriction of whole-house lodging to certain zoning districts, *i.e.*, the entirety of Sec. 18-331.1; (2) the requirement that there be at least one off-street

12. To avoid possible confusion, our citations refer to Section 18-331 of Chapter 18, Article 6 of Wilmington's Land Development Code, as amended by the Ordinance and set forth in the record on appeal.

parking space per bedroom, whether on-site or off-site through shared parking or parking space rental agreements, *i.e.*, the remaining portions of Sec. 18-331.5 not held preempted above; (3) the prohibition against variances by the board of adjustment in Sec. 18-331.6; (4) requirements that short-term operators comply with all applicable laws, disallow events and large gatherings, maintain adequate insurance, keep adequate records, ensure refuse is appropriately stored and collected, refrain from preparing and serving food, and prohibit cooking in individual bedrooms *i.e.*, the entirety of Secs. 18-331.10-.12. and .15-.16;[13] (5) the requirement that certain information unrelated to registration be posted in the rental, *i.e.*, Secs. 18-331.14(a)-(c) and (e); and (6) any provisions of the Ordinance not otherwise held preempted above.

III. CONCLUSION

¶ 42 For the foregoing reasons, we hold that the trial court correctly interpreted Sections 160A-424(c) and 160D-1207(c) in concluding that the short-term rental registration regime enacted by Wilmington was preempted by those statutes. We also hold, however, that portions of the Ordinance, as identified above, are severable from the invalid registration provisions and remain operative. We therefore affirm the trial court's judgment in part, reverse the portion of the judgment declaring the entirety of the Ordinance invalid, and remand for entry of a judgment consistent with our holdings. Plaintiffs' cross-appeal is dismissed as moot.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED; CROSS-APPEAL DISMISSED.

Judges ZACHARY and CARPENTER concur.

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13. Several of these provisions refer to "property owners registering a whole-house lodging" or "[r]egistrants," but it is clear from their context that they are intended to apply uniformly to all short-term rentals. Because "it is apparent that the legislative body, had it known of the invalidity of the [registration] portion, would have enacted the remainder alone," *Jackson v. Guilford Cnty. Bd. of Adjust.*, 275 N.C. 155, 168, 166 S.E.2d 78, 87 (1969), we hold these provisions remain valid despite the use of the words "registering" and "registrants."

STATE v. ACKER

[282 N.C. App. 574, 2022-NCCOA-211]

STATE OF NORTH CAROLINA
v.
JEFFERY RAY ACKER

No. COA21-512

Filed 5 April 2022

Homicide—jury instructions—self-defense and manslaughter—plain error analysis

In a trial resulting in defendant's conviction for second-degree murder, the trial court did not commit plain error by declining to instruct the jury on self-defense and manslaughter where defendant testified that he was fearful when the female victim became angry—and believed she may have been holding a gun—but he did not testify that she threatened to harm him; to the contrary, he made numerous statements before trial that he killed the victim because she had threatened to turn off his power and evict him or because she was saying rude things about his family. Further, a statement by the judge outside of the jury's presence regarding defendant's request for a manslaughter instruction had no probable impact on the jury's determination. Finally, there was no prejudice where the evidence of defendant's guilt was overwhelming.

Appeal by defendant from judgments entered 30 March 2021 by Judge John E. Nobles, Jr., in Craven County Superior Court. Heard in the Court of Appeals 22 February 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Michael T. Wood, for the State.

Michael E. Casterline for defendant-appellant.

ARROWOOD, Judge.

¶ 1 Jeffery Ray Acker ("defendant") appeals from judgments entered upon his convictions for second-degree murder, robbery with a dangerous weapon, and felony larceny. Defendant contends the trial court committed plain error by failing to instruct the jury on self-defense and manslaughter. For the following reasons, we hold the trial court did not commit plain error in defendant's trial.

I. Background

¶ 2 On 11 February 2019, a Craven County grand jury indicted defendant for first-degree murder and felony larceny of a motor vehicle. On 3 August 2020, defendant was indicted for robbery with a dangerous weapon.

¶ 3 The matter came on for trial on 22 March 2021 in Craven County Superior Court, Judge Nobles presiding. The evidence adduced at trial tended to show as follows.

¶ 4 In August 2018, defendant resided in a singlewide mobile home with his parents (collectively, "the Ackers") in Vanceboro, North Carolina. The singlewide belonged to Carolyn Patterson ("Patterson"), who lived in a doublewide mobile home on the same property. The Ackers assisted Patterson with lawn maintenance and other household chores, in part because Patterson had fibromyalgia and an ankle condition that required her to wear a protective boot. Patterson had a long relationship with the Ackers and had known defendant for his entire life.

¶ 5 Defendant's two nephews also lived on the property; Tyler[1] lived in the singlewide with the Ackers, and Brian lived in the doublewide with Patterson. Patterson's cousin, Heather Warren ("Warren"), testified that Patterson had raised Brian since he was an infant and she thought of him as her own son. Brian's father had legal custody pursuant to a 2014 consent order but allowed Patterson to raise Brian; Patterson did not have any legal custody of Brian. Brian's mother, Prescilla Tripp ("Tripp") testified that the Department of Social Services ("DSS") became involved with the family in August 2018; Tripp stated that a conclusion had not been reached, but that DSS was "going to remove [Brian] from [Patterson's] home." Tripp also testified that she established visitation with Brian "[e]very other weekend[,]" which was set by a schedule "handwritten" by Patterson.

¶ 6 On 23 August 2018, Brian was staying with Tripp, several days after his scheduled return to Patterson. On the afternoon of 23 August, Tripp took Brian, Tyler, and several other family members to Brian's school for orientation. Patterson also came to the school for the orientation event and got into a confrontation with Tripp over completing Brian's emergency contact paperwork.

¶ 7 After the school orientation concluded, Tripp took Brian back to the Acker's singlewide. Tripp testified that defendant was at the singlewide,

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1. The juveniles are referred to by pseudonyms to protect their identity in accordance with Rule 42(b) of the North Carolina Rules of Appellate Procedure.

had been drinking, and smelled of "strong alcohol." Tripp described defendant as a "functioning alcoholic"; defendant later testified that he also considered himself to be a functioning alcoholic.

¶ 8 Shortly before Tripp left the property, Patterson walked over to the singlewide, forcefully knocked on the window, and "said something." Tripp then returned to her home with Brian.

¶ 9 Defendant testified that at some point after Tripp left, Patterson called him over to her doublewide. Defendant stated that he went over to Patterson's trailer and observed Patterson pacing between two bedrooms in the trailer and swearing loudly. Defendant testified that he saw a black object in Patterson's hand, "[w]hich appeared to be a gun[,]" making defendant think that Patterson was "going to kill herself." At that point, defendant walked away from Patterson's doublewide and sat on a porch swing at the singlewide.

¶ 10 After sitting on the porch swing for a while, defendant heard Patterson call out to him again. Defendant testified that he slowly walked the long way around to Patterson's doublewide to have a clear view of her and saw that "there was nothing in her hand." Defendant saw that Patterson was in the computer room of her doublewide, and although defendant "felt awkward[,]" he went inside to "see what she wanted to say." Defendant testified that he commonly played a "peacemaker" role with Patterson.

¶ 11 In the computer room, Patterson asked defendant what he knew about the situation with Brian. Defendant testified that he told Patterson "DSS is going to take [Brian] from [her]." Defendant stated that "everything in the room changed[,]" Patterson began cursing and "throwing her hands" around, and at one point when Patterson turned, defendant "saw the same black object that [he] thought was a gun[.]" Defendant testified that he reached down and grabbed a baseball bat, and "must have swung it once and dropped it immediately." Defendant stated that he blacked out at that point and could not remember anything until the next day. Defendant was later asked, "[y]ou didn't mean to kill her; is that right[,]" to which defendant responded, "I would never kill anybody."

¶ 12 Ethel Acker ("Ms. Acker"), defendant's mother, testified that on the evening of 23 August, defendant was "out there in the yard" for some time, but eventually came inside, ate supper, and went to sleep. Ms. Acker testified that on the morning of 24 August, defendant woke her up and told her that Patterson had left early that morning and that Patterson's car was not there.

¶ 13 Jaron Whealton ("Whealton") testified that on 24 August 2018, he was working at a Mini Mart in Oriental, North Carolina. Whealton testified that defendant came into the store at around 11 a.m. and bought a fish sandwich; Whealton later saw defendant sitting outside in a van, eating the sandwich. On the evening of 24 August, Whealton again encountered defendant, this time at a waterfront bar near a marina in Oriental. When Whealton engaged defendant in conversation, defendant stated that he had killed a woman with a baseball bat. Whealton also testified that defendant did not make any statements indicating that Patterson had a weapon or that defendant feared for his life during the incident.

¶ 14 Defendant made similar statements to other people nearby. Elizabeth DeWitt ("Ms. DeWitt") testified that she and her husband, Robert ("Mr. DeWitt") encountered defendant at the waterfront; defendant sat next to Mr. DeWitt and said, "You can't get arrested in this town." When Mr. DeWitt asked defendant why, defendant responded that "he had killed a lady and he couldn't get arrested." Ms. DeWitt noted that defendant "seemed intoxicated" and had a blood stain on the front of his shirt. When asked if defendant had told Mr. DeWitt or Ms. DeWitt why he killed Patterson, Ms. DeWitt replied that defendant said Patterson "was talking shit about his family and the kids."

¶ 15 At around 8:15 p.m., defendant made a 911 call from the bar. Defendant told the operator that "something had happened the night before[,]" and that "he woke up that morning and realized what he had done[.]" When officers arrived at the waterfront, they encountered defendant, who was swaying and slurring his words. Defendant told police multiple times that he had killed Patterson, but did not know why. Pamlico County Sherriff's Office Investigator Tyquan Thompson ("Investigator Thompson") testified that defendant attempted to resist being detained, including trying to kick Investigator Thompson in the face while being placed in the patrol car.

¶ 16 Defendant was subsequently transported to the Pamlico County jail, where he waived his rights and was interrogated. Defendant, who "had a lot of blood on his shirt[ ] and his pants[,]" again told police that he killed Patterson with a baseball bat. Defendant "repeated over and over" that he hit Patterson in the head with a bat, first saying that he hit her "a couple of times," and later "three or four times[,]" with his statements seeming to "change as his mood went and the longer" he was in custody. At one point, defendant mentioned "that he thought he did [Patterson] a favor" by hitting her from behind "because it probably would hurt less." Defendant also told police that Patterson threatened to cut off the power to the Acker's singlewide and evict them from the property.

¶ 17 When police went to Patterson's home that evening, they found her body on the floor of the computer room. Patterson's body was covered in a white sheet, and a baseball bat was found lying under her body. State Bureau of Investigation Crime Scene Investigator Laura Kensington ("Kensington") testified that blood and brain matter were on the floor, and that cast-off blood splatter patterns on the walls and ceiling indicated that the baseball bat had been moving around in several directions. Kensington also testified that there were no defensive injuries on Patterson's hands or arms. No weapons other than the bat were recovered from Patterson's doublewide.

¶ 18 Onslow County Medical Examiner Dr. Anuradha Arcot ("Dr. Arcot") conducted an autopsy on Patterson. Dr. Arcot testified that Patterson had multiple skull fractures on the right side and back of her head, and the cause of death was determined to be a head injury. Dr. Arcot testified that Patterson's skull suffered severe fractures; although there were "way too many [skull fractures] to count," it appeared to Dr. Arcot that Patterson had been struck at least three times.

¶ 19 Patterson's van was found abandoned on a road outside of Oriental. Defendant's EBT card was found in the van when it was processed, and the keys to the van were in defendant's pocket when he was taken into custody.

¶ 20 On 4 February 2021, defendant's trial counsel filed a pre-trial notice of self-defense pursuant to N.C. Gen. Stat. § 15A-905(c). At trial, defendant's attorney submitted a written request for jury instructions, including requests for self-defense and manslaughter instructions. At the charge conference, defendant's trial counsel made the following request:

> We would also, for the record, Your Honor, that based on the evidence [defendant] testified to, that he was in fear of bodily harm, Your Honor, by the victim. And that he acted accordingly, Your Honor, for self-defense, Your Honor. Therefore, giving rise to the instruction of manslaughter.

After hearing from the prosecutor, the trial court made the following statement in ruling against the requested instruction:

> I don't see evidence to support a manslaughter instruction in this case. Seems like articulation of the situation here is the -- in no way indicated to me that it was anything other than a fantasy. The statement of being afraid was anything other than a fantasy.

¶ 21 The prosecutor requested that the trial court not instruct the jury on intoxication, while defendant's trial counsel argued that defendant's testimony supported the instruction. The trial court concluded that there was sufficient evidence to warrant an instruction on voluntary intoxication, as well as second-degree murder. The trial court then asked defendant's trial counsel the following:

> THE COURT: All right, Mr. Brown, for purposes of the record, you're in agreement with the jury instructions? Each instruction is what you requested also with the exception of your objection to lying in wait?
>
> MR. BROWN: That is correct, Your Honor.

¶ 22 The jury was not instructed on the charge of manslaughter or on self-defense. Defendant's trial counsel did not object to the jury instructions as issued; when the trial court asked for "any additions or requests or deletions" with respect to the jury charge, defendant's trial counsel responded, "No, Your Honor."

¶ 23 On 30 March 2021, the jury found defendant guilty of second-degree murder, felony larceny of a motor vehicle, and felony robbery with a dangerous weapon. Defendant pleaded to an aggravating factor for sentencing, specifically a probation revocation within the previous ten years. The trial court made a finding for this aggravating factor and found no mitigating factors. Defendant was sentenced to consecutive aggravated sentences of 365 to 438 months for second-degree murder and 97 to 129 months for robbery with a dangerous weapon. Judgment was arrested on the felony larceny conviction.

¶ 24 Defendant gave oral notice of appeal in open court.

II. Discussion

¶ 25 Defendant contends the trial court plainly erred in failing to give requested jury instructions on self-defense and manslaughter. Defendant alternatively argues that the issue may be reviewable under a *de novo* standard and that defendant sufficiently presented a *prima facie* case for self-defense.

A. Standard of Review

¶ 26 Under the North Carolina Rules of Appellate Procedure,

> A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the

> jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(a)(2).

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action 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).

¶ 27 In his principal brief, defendant acknowledges that his trial counsel failed to object to the jury charge after the instructions were given. In his reply brief and at oral argument, however, defendant argued that the issue may be reviewable under a *de novo* standard because "[i]t is not necessary for a defendant to repeat his objection to the instruction after the trial court denies the proposed instruction." In support of this argument, defendant cites *State v. Smith*, 311 N.C. 287, 290, 316 S.E.2d 73, 75 (1984) ("Defendant is not required by . . . the North Carolina Rules of Appellate Procedure . . . to repeat his objection to the jury instructions, after the fact, in order to properly preserve his exception for appellate review."). In *Smith*, our Supreme Court concluded that the defendant's objection was preserved where "defense counsel submitted a written request for particular instructions prior to the jury arguments, which the court denied." *Id.*

¶ 28 Our review of the transcript and record reveal that *Smith* is distinguishable from this case. Here, defendant's trial counsel submitted a written request for self-defense and manslaughter instructions and subsequently argued the issue during the charge conference. After the trial court denied defendant's request, the trial court asked if defendant's trial counsel was in agreement with the jury instructions; defendant's trial counsel responded, "That is correct, Your Honor." After the jury instructions were given, the trial court again asked if defendant had "any additions or requests or deletions" with respect to the jury charge; defendant's trial counsel responded "No, Your Honor." Defendant's trial counsel was given two opportunities to make distinct

objections to jury instructions, and instead expressed agreement with the given instructions. Although *Smith* may stand for the principle that one objection, with no further action addressing the matter, is sufficient to preserve an exception for appellate review, the exception was not sufficiently preserved in this case.

¶ 29 Because defendant failed to preserve the issue for appellate review, we review for plain error. Defendant's alternative arguments that he made a *prima facie* case for self-defense are overruled.

B. Jury Instructions

¶ 30 Under the plain error standard, "a defendant must demonstrate that a fundamental error occurred at trial[,]" which requires a showing that defendant was prejudiced and that the error "had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted).

¶ 31 "The trial judge must, without special request, charge the law applicable to the substantive features of the case arising on the evidence and apply the law to the essential facts of the case." *State v. Covington*, 317 N.C. 127, 131, 343 S.E.2d 524, 527 (1986) (citation and quotation marks omitted). "[D]efenses raised by the evidence constitute substantial features requiring an instruction." *State v. Jones*, 300 N.C. 363, 366, 266 S.E.2d 586, 587 (1980) (citation omitted).

1. Self-Defense

¶ 32 In North Carolina, we recognize two types of self-defense: perfect and imperfect. *State v. Revels*, 195 N.C. App. 546, 550, 673 S.E.2d 677, 681 (2009). The elements for perfect self-defense are as follows:

> (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 that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

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

State v. Lyons, 340 N.C. 646, 661, 459 S.E.2d 770, 778 (1995) (quoting *State v. McAvoy*, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992)).

¶ 33 Imperfect self-defense is established where the first two elements are satisfied, "but the defendant, without murderous intent, either was the aggressor in bringing on the affray or used excessive force." *Revels*, 195 N.C. App. at 551, 673 S.E.2d at 681 (citation and quotation marks omitted). A defendant acting in imperfect self-defense is "guilty of at least voluntary manslaughter . . . ." *State v. Larry*, 345 N.C. 497, 519, 481 S.E.2d 907, 919 (1997) (quoting *Lyons*, 340 N.C. at 661, 459 S.E.2d at 778).

¶ 34 "Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) (citations omitted). "However, if there is no evidence from which the jury reasonably could find that defendant in fact believed that it was necessary to kill his adversary to protect himself from death or great bodily harm, then the defendant is not entitled to have the jury instructed on self-defense." *State v. Webster*, 324 N.C. 385, 391, 378 S.E.2d 748, 752 (1989) (citation omitted). "In determining whether there was any evidence of self[-] defense presented, the evidence must be interpreted in the light most favorable to the defendant." *State v. Gappins*, 320 N.C. 64, 71, 357 S.E.2d 654, 659 (1987) (citations omitted).

¶ 35 Accordingly, to establish that the trial court plainly erred in failing to instruct the jury on self-defense, defendant was required to first establish that "it appeared to defendant and he believed it to be necessary to kill [Patterson] in order to save himself from death or great bodily harm[.]" *See Lyons*, 340 N.C. at 661, 459 S.E.2d at 778 (citation omitted). Defendant argues that his testimony at trial established that he had a reasonable ground for his belief that killing Patterson was necessary. We disagree.

¶ 36 Defendant testified that Patterson was angry and "throwing her hands" around, but did not testify that Patterson threatened to harm him. Instead, when the prosecutor asked whether defendant "didn't mean to kill" Patterson, defendant responded that he "would never kill anybody."

Defendant testified that on the night he killed Patterson, he saw a black object in her hand at two points: first when Patterson called him over but did not speak to him, and second when he was in the computer room with Patterson. Additionally, although defendant testified at trial that he thought Patterson may have been holding a gun, no guns were found at the scene.

¶ 37 Furthermore, defendant made numerous statements to witnesses and law enforcement officers prior to and in the course of being detained, and at no point did defendant state that Patterson may have had a gun or that he killed Patterson in self-defense. Instead, defendant stated that he killed Patterson because she threatened to cut off the power to the Acker's singlewide and evict them from the property, or because she "was talking shit about his family and the kids."

¶ 38 Even taking this testimony in the light most favorable to defendant, defendant has failed to establish that he believed it was reasonably necessary to kill Patterson to save himself from death or great bodily harm. Although defendant testified that he was "fearful" when Patterson became angry in her computer room, he also testified that he "would never kill anybody." And although defendant's testimony at trial focused on his fearfulness in Patterson's computer room, none of defendant's statements made prior to trial suggested that defendant was acting in self-defense. Based on defendant's own testimony, it does not appear that defendant had a reasonable ground to believe that killing Patterson was necessary to protect himself.

¶ 39 Accordingly, we hold that defendant failed to establish the first element of self-defense. Because defendant has failed to establish the first element, it is unnecessary to address the remaining elements.

2. Trial Court's Statements Regarding Defendant's Testimony

¶ 40 Defendant contends the trial court improperly substituted its own assessment of defendant's credibility by characterizing defendant's testimony as "a fantasy" at the charge conference. We disagree. Judge Nobles made this statement following defendant's request for a manslaughter instruction at the charge conference, immediately after stating that he did not "see evidence to support a manslaughter instruction in this case." The trial court's statement was made outside the presence of the jury, and was simply expressing the trial court's reasoning in denying defendant's request. This statement did not invade the province of the jury and did not have a probable impact on the jury's determination.

3. Prejudice

¶ 41 Assuming defendant had satisfied the first two elements for imperfect self-defense, defendant was also required to show that the failure to instruct the jury on self-defense or manslaughter constituted prejudice and "had a probable impact on the jury's finding that the defendant was guilty." *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

¶ 42 Even interpreting the evidence in a light most favorable to defendant, we conclude that the evidence overwhelmingly supports the jury instructions as given. As previously discussed, while defendant testified at trial that he was fearful and thought Patterson may have been holding a gun, defendant made numerous statements prior to trial indicating that he killed Patterson not out of fear, but for other reasons. Furthermore, Patterson did not verbally threaten or physically attack defendant, and the only weapon found at the scene was the bat defendant used to kill Patterson.

¶ 43 Based on the evidence presented to the jury, defendant has failed to show that the trial court's failure to instruct the jury on self-defense or manslaughter constituted prejudice. The evidence of defendant's guilt, most of it from statements he freely and voluntarily made, is overwhelming. Accordingly, we hold that the trial court did not plainly err in declining to instruct the jury on self-defense and manslaughter.

III. Conclusion

¶ 44 For the foregoing reasons, we hold that the trial court did not plainly err and that defendant received a fair trial.

NO ERROR.

Judges INMAN and JACKSON concur.

STATE v. BENNETT

[282 N.C. App. 585, 2022-NCCOA-212]

STATE OF NORTH CAROLINA
v.
CORY DION BENNETT, DEFENDANT

No. COA17-1027-2

Filed 5 April 2022

1. Appeal and Error—preservation of issues—Batson analysis—second step—no waiver

In an appeal from the trial court's order overruling a criminal defendant's *Batson* claim on grounds that the prosecutor met his burden at the second step of the *Batson* analysis and defendant failed to meet his burden at *Batson*'s third step, defendant did not implicitly waive appellate review of his arguments relating to *Batson*'s second step. Although the hearing transcript shows that the parties' discussions of steps two and three were not neatly divided, the transcript showed that defendant began raising an argument relating to the second step, the trial court cut him off and said it was accepting the prosecutor's representation on the matter, and defendant proceeded to address the third step.

2. Jury—selection—Batson analysis—race-neutral reasons—burden of showing purposeful discrimination

At the remand hearing on an African-American criminal defendant's *Batson* claim, which defendant raised after the prosecutor used peremptory strikes on two African-American prospective jurors but passed on a third juror who was white, the trial court did not clearly err in overruling defendant's *Batson* objections where it properly evaluated steps two and three of the *Batson* analysis. At the second step, the prosecutor articulated race-neutral reasons for striking the two jurors—one for being the only juror with a prior felony conviction, which the juror did not disclose, and the other for her business's connection to a drug investigation and for her confusing answers to a key question on voir dire—and was not required to substantiate those reasons with record evidence. At the third step, the trial court properly concluded that defendant failed to prove purposeful discrimination after considering factors such as comparative juror analyses, the case's lack of susceptibility to racial discrimination, historical evidence of discriminatory strikes by prosecutors in the county where defendant stood trial, and the prosecution's acceptance of five other African-American jurors at trial.

STATE v. BENNETT

[282 N.C. App. 585, 2022-NCCOA-212]

Appeal by defendant from order entered 9 February 2021 by Judge John E. Nobles, Jr. in Superior Court, Sampson County. Heard in the Court of Appeals 27 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for defendant.

STROUD, Chief Judge.

¶ 1 Defendant Cory Dion Bennett appeals from a trial court order overruling his objections, under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), to the prosecution's peremptory strikes of two African-American jurors, R.S. and V.B.[1] In a previous appeal, *State v. Bennett*, 374 N.C. 579, 843 S.E.2d 222 (2020) [hereinafter "*Bennett II*"], our Supreme Court found Defendant had presented the "necessary prima facie case of discrimination" required at the first step of *Batson*'s three step inquiry. *Id.*, 374 N.C. at 581, 843 S.E.2d at 224. Defendant's current appeal arises from the remand hearing on *Batson*'s second and third steps. *Id.* Because the trial court properly accepted the prosecutor's race neutral reasons for striking the jurors, we reject Defendant's argument the trial court clearly erred on *Batson*'s second step. Further, after evaluating all the relevant circumstances advanced by Defendant, we hold the trial court did not clearly err in determining Defendant had not met his burden of proving purposeful discrimination at *Batson*'s third step. Therefore, we affirm the trial court's order overruling Defendant's *Batson* objections.

I. Background

¶ 2 We rely on our Supreme Court's opinion in *Bennett II* to summarize the background of this case and Defendant's initial appeal. Across two grand juries in 2016, Defendant was charged with five counts of "possessing a precursor chemical with the intent to manufacture methamphetamine," one count of manufacturing methamphetamine, one count each of trafficking in methamphetamine by manufacture and by possession, and one count of possession of a firearm by a felon. *Bennett II*, 374 N.C. at 581, 843 S.E.2d at 224–25. The charges came on for a jury trial in March 2017. *Id.*, 374 N.C. at 581, 843 S.E.2d at 225.

1. We use the juror's initials throughout to protect their identity because they were struck in part due to allegations of and convictions for criminal activity.

¶ 3 *Bennett II* then summarized the history of three jurors, R.S., V.B., and R.C., because Defendant made a *Batson* objection after the prosecutor struck in succession R.S. and V.B., who are African American, but passed on R.C., who is not. *See* 374 N.C. at 586, 843 S.E.2d at 227–28 (summarizing *Batson* objection). The *Bennett II* Court listed the following about R.S.:

> In response to the prosecutor's inquiry concerning whether any prospective juror had "ever been the victim of a crime," [R.S.] responded that he had been the victim of a breaking or entering that had occurred approximately two years earlier; that, while law enforcement officers had investigated the incident, no one had ever been charged with the commission of the crime; and that [R.S.] believed that the investigating officers had handled the incident in a satisfactory manner. In addition, [R.S.] informed the prosecutor that, while he recognized one of the other prospective jurors, who worked at a local bank, his connection with this other prospective juror would not affect his ability to decide the case fairly and impartially in the event that he was selected to serve as a member of the jury.
>
> [R.S.] responded to prosecutorial inquiries concerning whether anything would make it difficult for him to be a fair and impartial juror and whether there was anything going on in his life that would make it difficult for him to serve on the jury in the negative. Similarly, [R.S.] denied having any religious, moral, or ethical concerns that would prevent him from voting to return a guilty verdict.

374 N.C. at 581–82, 843 S.E.2d at 225 (alterations to preserve juror confidentiality). The prosecutor exercised a peremptory challenge to strike R.S. after he finished questioning all the venire members initially seated in the jury box. *Id.*, 374 N.C. at 582, 843 S.E.2d at 225.

¶ 4 V.B., who is also African American, then replaced R.S., and our Supreme Court described her as follows:

> [V.B.] responded to the trial court's initial questions by stating that she was not aware of any reason that she would be unable to be fair to either the State or defendant. [V.B.] . . . owned a beauty salon . . . [near]

the courthouse.[2] After stating that she did not know anyone involved in the prosecution or defense of the case or any of the other prospective jurors, [V.B.] told the prosecutor that she had never been the victim of crime, a defendant or witness in a case, or a juror. In addition, [V.B.] stated that she did not have any strong feelings, either favorable or unfavorable, concerning the law enforcement profession; that she had not heard anything about the charges against defendant before arriving for jury selection; and that she would be able to be impartial to both sides. Similarly, [V.B.] expressed no reservations concerning the fact that possession of a firearm by a felon is unlawful and said that she was not confused by the distinction between the concepts of actual and constructive possession.

[V.B.] stated that she would be able to listen to and fairly consider the testimony of a witness who had entered into a plea agreement with the State, that she did not know any of the other prospective jurors who were seated in the jury box with her, and that she understood that legal dramas on television were not realistic. To [V.B.]'s knowledge, neither she, a member of her family, nor a close friend had ever had a negative experience with a member of the law enforcement profession or a member of the District Attorney's staff or had ever been charged with committing an offense other than speeding.

In response to further prosecutorial questioning, [V.B.] stated that she understood that defendant was presumed to be innocent; that he possessed the rights to a trial by jury, to call witnesses to testify in his own behalf, and to refuse to testify; and that any refusal on his part to testify in his own behalf could not be held against him. Moreover, [V.B.] stated that she understood the difference between direct and circumstantial evidence, that she understood that the State was required to establish defendant's guilt beyond

2. We have removed the precise location of the beauty salon to protect V.B.'s identity. However, as we discuss later on, the existence of the salon near the courthouse is relevant because the prosecutor used it to explain his reasons for striking V.B.

a reasonable doubt, and that she would be required as a member of the jury to assess the credibility of the witnesses.

[V.B.] assured the prosecutor that she could listen to all of the evidence, keep an open mind, and follow the law in accordance with the trial court's instructions; agreed with the prosecutor's comment that "the law is not always what we think it is or what we would like it to be"; and acknowledged that, in the event that she was selected to serve as a juror in this case, she would be required to follow the law and apply the law set out in the trial court's instructions to the facts. At that point, the following colloquy occurred between the prosecutor and [V.B.]:

> MR. THIGPEN: Do you think you could reach a verdict based only on hearing the evidence from the witness stand, or do you feel like in order to reach a verdict or to make a decision you would have to actually watch the alleged event happen?
>
> [V.B.]: Yeah.
>
> MR. THIGPEN: Okay. You looked confused. Some people—I have had jurors before that have said, "I can't make a decision until I see it happen."
>
> [V.B.]: Uh-huh.
>
> MR. THIGPEN: Okay. Do you feel like you could base your decision on just what the witnesses say, or do you feel like you have to watch it happen?
>
> [V.B.]: Kind of on both.
>
> MR. THIGPEN: What do you mean?
>
> [V.B.]: Sometimes, I guess, it's better to not have hearsay.
>
> MR. THIGPEN: Well, if you watched it happen, you would be a witness; right?
>
> [V.B.]: Right.
>
> MR. THIGPEN: And if you were a witness, you can't be a juror. Does that make sense?

> [V.B.]: Yes.
>
> MR. THIGPEN: So the only thing we have is witness testimony.
>
> [V.B.]: Okay.
>
> MR. THIGPEN: So do you feel like you could make a decision based only on hearing the testimony of the witnesses or before you could make that decision would you actually want to watch it happen?
>
> [V.B.]: Yeah.
>
> MR. THIGPEN: Okay. What you said was, "Yeah."
>
> [V.B.]: Yeah, I could make that decision through—
>
> MR. THIGPEN: Based on the testimony?
>
> [V.B.]: Uh-huh.
>
> After reiterating that nothing would make it difficult for her to be fair and impartial to either side and that nothing was going on in her life outside of the courtroom that would render jury service unduly burdensome, [V.B.] stated that she did not have any religious, moral, or ethical concerns about voting for a guilty verdict in the event that the State satisfied its burden of proof.

Id., 374 N.C. at 582–84, 843 S.E.2d at 225–26 (alterations to preserve juror confidentiality). The prosecutor then also peremptorily challenged V.B. *Id.*, 374 N.C. at 584, 843 S.E.2d at 226.

¶ 5 Juror R.C., who is not African American, then replaced V.B., and the Supreme Court described her as follows:

> In responding to the trial court's initial questions, [R.C.] stated that there was no reason that she could not be fair to either the State or defendant. . . . . In response to prosecutorial questions, [R.C.] said that she did not know the prosecutor, defendant, or defendant's attorney. [R.C.] denied having ever been the victim of a crime, a defendant, or a witness in a case. However, [R.C.] had served as a member of a criminal jury in Sampson County about thirty years earlier. According to [R.C.], the jury upon which she served

had deliberated on the case, she had not served as the foreperson of the jury, and nothing about that experience would impact her ability to serve on the present jury.

[R.C.] denied having strong feelings, either favorable or unfavorable, about the law enforcement profession and indicated that she had not read, heard, or seen anything about the charges against defendant before arriving in court for jury service. In addition, [R.C.] denied having any reservations about the fact that felons are prohibited from possessing firearms and expressed no confusion about the difference between actual and constructive possession. During a colloquy with the prosecutor, [R.C.] gave the following answers:

> MR. THIGPEN: Okay. Now, [R.C.], a witness may testify on behalf of the State as a result of a plea agreement with the State in exchange for [a] sentence concession. Based on that fact and that fact alone, would you not be able to consider that person's testimony along with all other evidence that you would hear in the case?
>
> [R.C.]: Yes, sir. No, sir.
>
> MR. THIGPEN: Do you understand my question?
>
> [R.C.]: Say it again.
>
> MR. THIGPEN: A witness may testify under a plea agreement in exchange for a sentence concession.
>
> [R.C.]: Okay.
>
> MR. THIGPEN: Now if that person were to testify, are you just going to go, [t]his person's made a deal; I don't care what they are going to say, or would you listen to it and consider it just like anybody else?
>
> [R.C.]: I would listen to their testimony and consider it.

[R.C.] did not know any of the other prospective jurors and understood that legal dramas were not based upon reality.

[R.C.] told the prosecutor that neither she, a member of her family, nor a close friend had ever had an unpleasant experience with a law enforcement officer or a member of the District Attorney's staff. [R.C.] acknowledged that certain drug charges involving her brother had been resolved, stated that she felt that the law enforcement officers involved in that situation had treated her brother fairly, and said that nothing about that experience would affect her ability to be a fair and impartial juror. [R.C.] understood that defendant was presumed to be innocent until proven guilty beyond a reasonable doubt; that he possessed the right to trial by jury, to call witnesses in his own behalf, and to refuse to testify; and that any decision that he might make to refrain from testifying in his own behalf could not be held against him.

[R.C.] told the prosecutor that she understood the difference between direct and circumstantial evidence and that, as a member of the jury, she would be required to assess the credibility of the witnesses. [R.C.] expressed confidence in her ability to listen to all of the evidence, keep an open mind, and follow the law in accordance with the trial court's instructions. [R.C.] agreed with the prosecutor that "the law is not always what we think the law is or what you think it should be" and that, as a juror, she would be required to use common sense, follow the law, and apply the law to the facts. In addition, [R.C.] stated that she "would not have to see the event happen"; that she could reach a verdict based upon the testimony of witnesses; and that she did not know of anything that would make it difficult for her to be fair and impartial to both the State and defendant.

When the prosecutor inquired whether there was anything occurring in her life outside of the courtroom that would make jury service difficult, [R.C.] mentioned her work-related obligations and stated that she was supposed to take her daughter-in-law to a doctor's appointment. On the other hand, [R.C.] agreed that the other prospective jurors probably had similar employment-related concerns and acknowledged

> that her daughter-in-law could use some other means to get to her appointment. Finally, [R.C.] stated that she did not have any religious, moral, or ethical concerns that would prevent her from voting to return a guilty verdict.

Id., 374 N.C. at 584–86, 843 S.E.2d at 226–27 (alterations to preserve juror confidentiality). The prosecutor then accepted R.C. as a juror. *Id.*, 374 N.C. at 586, 843 S.E.2d at 227.

¶ 6 After the prosecutor accepted R.C., Defendant made a *Batson* motion on the grounds that R.S. and V.B. were both Black and had both been excused. *Id.*, 374 N.C. at 586, 843 S.E.2d at 227–28. Defendant's attorney argued: "there was no overwhelming evidence, there was nothing about any prior criminal convictions, any feelings about—towards or against law enforcement, there's no basis, other than the fact that those two jurors happen to be of African[ ]American de[s]cent [and] they were excused." *Id.*, 374 N.C. at 586–87, 843 S.E.2d at 228 (alterations in original). The prosecutor argued Defendant had not passed *Batson*'s first step because he had not made a prima facie showing of discrimination simply by indicating both struck jurors were Black. *Id.*, 374 N.C. at 587, 843 S.E.2d at 228. After noting the prosecutor had already accepted three African-American jurors before striking R.S. and V.B., the trial court denied Defendant's *Batson* motion because Defendant had not made a prima facie showing. *Id.*

¶ 7 After the jury convicted Defendant of all charges, except the possession of a firearm by a felon, and the trial court sentenced him, Defendant appealed to this Court arguing he had made a prima facie showing under *Batson*.[3] *Id.*, 374 N.C. at 587–88, 843 S.E.2d at 228–29. This Court held Defendant failed to make a prima facie case. *Id.*, 374 N.C. at 588, 843 S.E.2d at 229. The Supreme Court granted discretionary review. *Id.*, 374 N.C. at 590, 843 S.E.2d at 230.

¶ 8 On review, the Supreme Court reversed this Court and concluded Defendant presented a prima facie case of discrimination. *Id.*, 374 N.C.

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3. During Defendant's initial appeal, the State questioned whether the record contained sufficient information about the jurors' races to have preserved the *Batson* issue for review. *See id.*, 374 N.C. at 588–90. 843 S.E.2d at 229–30 (explaining the State raised the issue and recounting how this Court addressed the issue). The Supreme Court upheld this Court's ruling "that the record contains sufficient information to permit us to review the merits of [D]efendant's *Batson* claim." *Id.*, 374 N.C. at 594, 843 S.E.2d at 233. As part of the order on appeal here, the State and Defendant ultimately agreed to the race of each prospective juror, so we do not need to revisit the issue.

at 581, 843 S.E.2d at 224. First, the court noted the numerical disparity in acceptance rates of African American versus white prospective jurors. *Id.*, 374 N.C. at 599, 843 S.E.2d at 235. It then highlighted "the absence of any significant dissimilarity between the answers given by" R.S., V.B., and R.C. or "any apparent indication arising from the face of the record that either" R.S. or V.B. "would not have been satisfactory jurors from a prosecutorial point of view . . . ." *Id.*, 374 N.C. at 599, 843 S.E.2d at 235–36. Finally, the Supreme Court rejected the State's argument that the prosecutor's acceptance of three African-American jurors before and of a further two after striking R.S. and V.B. negated the prima facie case of discrimination. *Id.*, 374 N.C. at 600–01, 843 S.E.2d at 236–37.

¶ 9 Based on that ruling, the Supreme Court remanded the case to this Court for further remand to the trial court "for a hearing to be held for the purpose of completing the second and third steps" of the *Batson* analysis. *Id.*, 374 N.C. at 602–03, 843 S.E.2d at 238. As the Supreme Court had previously summarized, step two obligated the prosecutor to present a "race-neutral explanation for the challenge," and step three required the trial court to determine "whether the defendant has met the burden of proving purposeful discrimination." *Id.*, 374 N.C. at 592, 843 S.E.2d at 231 (quoting *State v. Waring*, 364 N.C. 443, 474–75, 701 S.E.2d 615, 636 (2010)).

¶ 10 The trial court held the required remand hearing on 4 November 2020. At the remand hearing, the prosecutor addressed step two by offering race neutral reasons for striking R.S. and V.B. He explained he struck R.S. for failing to disclose a criminal record:

> So as it relates to, first, Perspective [sic] Juror Number 10, [R.S.], Judge, based upon the information that I had, [R.S.] had an undisclosed criminal record that included a conviction for common law robbery and possession with intent to sell an unauthorized recording device from Pitt County and a probation violation. I made a note of his record. When he was called into the box, and if it -- and it was important to me because of the prior felony conviction. He's the only juror of which I made that note and he's the only juror that I noted had a prior felony conviction.
>
> I asked the panel twice, including [R.S.], while he was in the panel about a criminal history. I asked, first, if anyone had ever been a defendant in a case before, and I explained what that meant. Secondly, I asked if a juror, a member of their family, or a close

> friend had been charged or convicted of anything other than speeding. [R.S.] did not answer.

¶ 11 The prosecutor then offered two reasons to justify his strike of V.B., an answer to a question exhibiting confusion and concerns her business was linked to a drug investigation:

> As it relates to [V.B.], Judge, she appeared to have some difficulty with what I call the "watch-it-happen question." And that's a question that came out of an older sexual assault case that two of my colleagues tried several years ago. The jury hung 11 to 1, actually it was tried in another county. The holdout juror in that case said he could not make a decision unless he saw it happen. So after that trial, we started working into our jury selection, a question about whether or not a juror could make a decision based only upon hearing testimony.
>
> I noted that [V.B.] looked confused by the question. She said she could base her decision on "kind of both" or "kind of on both." I tried to clarify that by asking her what she meant and she replied, "Sometimes I guess it's better not to have hearsay."
>
> Well, Judge, that told me that she preferred maybe video evidence or something other than just live testimony. I knew that there would not be any video testimony. Officers in this case don't have or did not wear body cameras and did not have in-car. I tried to clarify that question again and her answer was, "Yeah." I asked the question again and her she [sic] responded, "Uh-huh." So, at that point, I'm beginning to get concerned that she's telling me what she thinks I want to hear, and I'm questioning does she understand what I'm asking. She is the only juror that gave those responses and had that apparent difficulty with that question.
>
> Also, as it relates to [V.B.], Deputy Gore was seated with me at counsel table. She's here today, seated further away due to concerns with the virus, but she was seated with me at counsel table, and that's been my practice during jury selection, for my career, to have the charging officer sit with me. Deputy Gore has been a drug officer since 2008. At

> the end of my questions, I asked for a moment and conferred with Deputy Gore. Deputy Gore expressed concerns to me about [V.B.]'s business regarding a prior drug investigation . . . .
>
> I asked [V.B.], specifically, about her business to determine which beauty salon she referred to. . . . . So I asked her to clarify that. I then asked for a moment to confer with Deputy Gore again. Deputy Gore indicated that she believed that [V.B.]'s salon had been part of the . . . investigation, which I was aware of and knew was a multiagency drug investigation.
>
> I was familiar with [the target of the drug investigation] and I recalled seeing him outside the beauty salon and the barbershop. The beauty salon she identified is actually, I believe that's . . . [near] the courthouse. . . . .
>
> . . . . I was concerned that [V.B.], in addition to the issues with the -- what I call the watch-it-happen question, that she could be fair if her business was part of a drug investigation. So those would be my reasons for my two challenges.

¶ 12 After receiving that information, Defendant's counsel took a few minutes to confer. The trial court then offered them a recess if they wanted it, but they responded "I don't think that's necessary. I appreciate it. I think we're good."

¶ 13 As an initial matter related to the strike of R.S., Defendant argued the record did not include evidence of his prior conviction, but the trial court told him to either present evidence to the contrary or move on:

> [MR. ROZEAR (one of Defendant's attorneys)]: . . . . And I first note that we don't have anything in the record in front of us showing the existence of this conviction, so I'm not sure that –
>
> THE COURT: Are you saying that Mr. Thigpen is not correct when he said he had that criminal record?
>
> MR. ROZEAR: I – I – I don't know. I have no --
>
> THE COURT: The Court's accepting that as the gospel. I don't think he would have said that if that wasn't the case. I can't imagine -- now if it isn't the case, obviously, we've got a problem.
>
> MR. ROZEAR: Right.

> THE COURT: But I don't think I would make that accusation unless you've got some basis for it.
>
> MR. ROZEAR: Fair enough, Your Honor.

¶ 14 At the remainder of the remand hearing, Defendant presented numerous reasons the trial court should find the prosecutor's explanations were pretextual at *Batson*'s third step. He first argued the strike rate evidenced discrimination. Specifically, defense counsel noted the prosecutor had a strike rate of 40% for Black jurors and 0% for non-Black jurors in the case. As part of that argument, Defendant contended the trial court should not find a lack of discrimination simply because the prosecutor accepted some Black jurors. While the prosecutor accepted three Black jurors before R.S. and V.B. and accepted two more after, Defendant proposed that because the prosecutor struck R.S. and V.B. from the same seat in succession, this demonstrated "they didn't want a [B]lack juror in" that seat. In response, the prosecutor asked the trial court to assess his credibility to determine he was not passing on other Black jurors to cover his strikes of R.S. and V.B.

¶ 15 Defendant then argued the prosecutor's explanation for striking R.S., based on his undisclosed criminal record, was pretext because the prosecutor never asked R.S. about it. The prosecutor responded by explaining his usual process for jury selection; he had an assistant run criminal history checks on all the potential jurors and then made "a cheat sheet" with all the information to quickly assess it during jury selection. Further, the prosecutor did not want to embarrass R.S. by bringing up his criminal conviction during the voir dire.

¶ 16 Defendant made a similar argument that the prosecutor did not question V.B. about her business's connection to the drug investigation. The prosecutor responded he did not want to embarrass V.B. or reveal law enforcement's methods of undercover investigation.

¶ 17 Further, Defendant challenged the prosecutor's explanation he struck V.B. for her difficulty with the "watch-it-happen question." First, Defendant asserted in *Bennett II* our Supreme Court said "there was nothing in the record that showed a difference between the jurors." Defendant also contended a comparison with R.C. based on difficulty with a question would show R.C., who is not Black, and V.B., who is Black, were similarly situated. The prosecutor responded to the comparison that the difference between the questions R.C. and V.B. demonstrated confusion about was critical. R.C.'s answer was "not as big an issue" to him because he "expect[ed] people to be skeptical of confidential informants, of cooperating codefendants" and was not planning on

calling the witness who would be testifying pursuant to the plea agreement. By contrast, the question he asked to V.B. was critical because he was concerned "she regarded testimony as hearsay" and his whole case was "going to be witness testimony."

¶ 18 After that comparison, Defendant argued the trial court should consider the susceptibility of the case to racial bias on the basis Defendant is Black and was charged with a drug offense. To support that argument, Defendant presented statistics showing Black people were disproportionately arrested and sentenced for drug crimes. Defendant also presented as exhibits various reports supporting their data. The prosecutor responded the case was not susceptible to racial discrimination because this was a drug case without victims so there could not be a cross-racial crime.

¶ 19 Finally, Defendant argued historical evidence showed Sampson County prosecutors disproportionately struck qualified Black jurors. To support that argument, Defendant entered as exhibits two studies with data on juror strike rates by race that showed qualified Black jurors were struck disproportionately to qualified non-Black jurors. The prosecutor responded the main study was not reliable because it: (1) did not include the experiences of prosecutors; (2) relied on law students and recent graduates to collect data; and (3) was gathered off a cold trial transcript. The prosecutor further argued it was wrong to impute to him another prosecutor's alleged use of a peremptory strike based on race.

¶ 20 At the end of the hearing, the trial court requested both sides present proposed orders. Both sides also agreed an order could be entered out of county and out of session.

¶ 21 On 9 February 2021, the trial court entered an order overruling Defendant's *Batson* objections as to both R.S. and V.B. After recounting the history of the case, the order first listed the agreed-upon races of each prospective juror. The trial court then recounted how our Supreme Court had already determined Defendant met his burden on *Batson*'s first step and how the case was remanded for a hearing on the remaining two steps. As to *Batson*'s second step, the trial court found the prosecutor "met his burden of production and provided race-neutral reasons for his use of peremptory challenges to both" R.S. and V.B.

¶ 22 On *Batson*'s third step, the order explained the trial court weighed the totality of the circumstances surrounding the strikes and found the prosecutor's "proffered reasons were the actual reasons for the peremptory challenges" and his challenges of R.S. and V.B. were not made "on the basis of race." To support that conclusion the trial court first found

the case was not susceptible to racial discrimination because there were no cross-racial identifications by witnesses nor cross-racial victims; as a corollary the trial court found Defendant is African American, there are no victims, and there was no record of the race of key witnesses. On the same factor, in relation to Defendant's evidence of racial disparities in drug arrests and sentencing, the trial court found: "These facts, if true, would not give a prosecutor motivation to keep members of a particular race off the jury."

¶ 23 The trial court further determined the prosecutor did not engage in disparate questioning or investigation. It also did not credit side-by-side comparisons. The order then recounted how the prosecutor accepted three African-American jurors before the *Batson* challenge and a further two after it, thereby "negat[ing] an inference of racial discrimination or motivation." The trial court further discounted the statistical evidence of racially disproportionate strikes in Sampson County because: (1) the prosecutor in this case was not involved with the cases examined in the studies; (2) the studies did not take into account prosecutors' viewpoints; (3) the study used recent law graduates to collect data; and (4) the studies were conducted using "cold trial transcripts." With regard to the strike of R.S., the order finally specifically recounted how the prosecutor checked all potential jurors' criminal records and did not ask R.S. about the conviction to avoid embarrassing him. Based on those findings, the order overruled both of Defendant's *Batson* objections.

¶ 24 Defendant appealed directly to the Supreme Court of North Carolina, and it remanded to this Court "with instructions to examine the order that was entered by the trial court on remand on 9 February 2021 and to conduct any further review of that order that it deems appropriate . . . ."

II. Analysis

¶ 25 "The use of peremptory challenges for racially discriminatory reasons violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."[4] *State v. Locklear*, 349 N.C. 118, 136, 505 S.E.2d 277, 287 (1998) (citing *Batson*, 476 U.S. 79, 106 S. Ct. 1712). When a court must determine whether a prosecutor violated *Batson*

4. While Article I, Section 26 of the North Carolina Constitution also bars racially discriminatory peremptory strikes, *Locklear*, 349 N.C. at 136, 505 S.E.2d at 287, Defendant argues based on the United States Constitution alone. Even if Defendant were arguing under the North Carolina Constitution, our analysis under Article I, Section 26 would be identical. *See Waring*, 364 N.C. at 474, 701 S.E.2d at 635 ("Our review of race-based or gender-based discrimination during petit jury selection has been the same under both the Fourteenth Amendment to the United States Constitution and Article 1, Section 26 of the North Carolina Constitution.").

by exercising a peremptory challenge based on race, it employs a three-step inquiry:

> First, the party raising the claim must make a prima facie showing of intentional discrimination under the totality of the relevant facts in the case. Second, if a prima facie case is established, the burden shifts to the State to present a race-neutral explanation for the challenge. Finally, the trial court must then determine whether the defendant has met the burden of proving purposeful discrimination.

Bennett II, 374 N.C. at 592, 843 S.E.2d at 231 (quoting *Waring*, 364 N.C. at 474–75, 701 S.E.2d at 636).

¶ 26 Here, our Supreme Court, in *Bennett II*, already determined Defendant established "the necessary prima facie case of discrimination" under *Batson* step one. 374 N.C. App. at 581, 843 S.E.2d at 224. Defendant presents challenges to the trial court's analysis under *Batson* steps two and three. We explain the standard of review before turning to Defendant's arguments under steps two and three.

A. Standard of Review

¶ 27 When reviewing a trial court's *Batson* analysis, "a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous." *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1207 (2008); *State v. Clegg*, 2022-NCSC-11, ¶50 (quoting same language from *Snyder*). "Such 'clear error' is deemed to exist when, on the entire evidence[,] the Court is left with the definite and firm conviction that a mistake has been committed." *Clegg*, ¶ 37 (quoting *Bennett II*, 374 N.C. at 592, 843 S.E.2d at 231) (alteration in original). This deferential standard reflects that "[a] trial court's rulings regarding race-neutrality and purposeful discrimination are largely based on evaluations of credibility . . . ." *State v. King*, 353 N.C. 457, 469–70, 546 S.E.2d 575, 586–87 (2001). As our courts have recognized before, trial courts are "in the best position to assess the prosecutor's credibility . . . ." *State v. Cummings*, 346 N.C. 291, 309, 488 S.E.2d 550, 561 (1997); *see also Hernandez v. New York*, 500 U.S. 352, 365, 111 S. Ct. 1859, 1869 (1991) (explaining "evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province" (quotations and citation omitted)).

¶ 28 Under the clearly erroneous standard, "[t]he trial court's findings will be upheld on appeal unless the 'reviewing court on the entire

evidence [would be] left with the definite and firm conviction that a mistake ha[d] been committed.' " *State v. Chapman*, 359 N.C. 328, 339, 611 S.E.2d 794, 806 (2005) (quoting *Hernandez*, 500 U.S. at 369, 111 S. Ct. at 1871) (alterations in original). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *King*, 353 N.C. at 470, 546 S.E.2d at 587 (quotations and citations omitted); *see also Hernandez*, 500 U.S. at 369, 111 S. Ct. at 1871 (including identical language). This deference, however, "does not by definition preclude relief." *Bennett II*, 374 N.C. at 592, 843 S.E.2d at 231 (quoting *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 240, 125 S. Ct. 2317, 2325 (2005)). Applying the clearly erroneous standard of review, we now turn to Defendant's contentions.

B. *Batson* Step Two

¶ 29 Defendant first argues, under *Batson*'s second step, the trial court clearly erred in concluding "that the prosecutor had offered race-neutral explanations for the strikes of two jurors . . . ." Specifically, Defendant contends "the record must support a purported justification for a strike . . . ." Defendant then claims two of the prosecutor's justifications for striking jurors R.S. and V.B.—namely R.S.'s undisclosed criminal record and a connection between V.B.'s business and a drug investigation—were not supported by the record. Before reaching the merits of Defendant's argument, we respond to the State's contention Defendant failed to preserve his step two arguments.

1. Preservation

¶ 30 **[1]** The State first asserts Defendant did not preserve this argument because he "did not challenge the race-neutral character of the prosecutor's reasons or argue that the reasons did not otherwise satisfy step two of *Batson*." (Underline changed to italics.) Instead, the State contends Defendant's arguments went to step three and whether the reasoning was pretextual.

¶ 31 Under Rule of Appellate Procedure 10(a)(1), a party must present and "obtain a ruling" on an objection, motion, or other request to a trial court to preserve it for appellate review. N.C. R. App. P. 10(a)(1). Our courts have also "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" an appellate court. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quotations and citations omitted). To properly preserve an issue for appellate review, therefore, a defendant must (1) raise the issue below and (2) argue the same theory below.

¶ 32 Our review of the remand hearing transcript reveals it was not neatly divided into steps two and three, and we would not necessarily expect it to be once the prosecutor proffered some reason for his strikes. Still, Defendant's attorneys brought up the lack of evidence in the record for R.S.'s conviction before being cut off by the trial court and told the trial court was accepting the prosecutor's representation given Defendant lacked evidence to the contrary:

> [MR. ROZEAR (one of Defendant's attorney's)]: . . . . *And I first note that we don't have anything in the record in front of us showing the existence of this conviction*, so I'm not sure that –
>
> THE COURT: Are you saying that Mr. Thigpen is not correct when he said he had that criminal record?
>
> MR. ROZEAR: I – I – I don't know. I have no –
>
> THE COURT: The Court's accepting that as the gospel. I don't think he would have said that if that wasn't the case. I can't imagine – now if it isn't the case, obviously, we've got a problem.
>
> MR. ROZEAR: Right.
>
> THE COURT: But I don't think I would make that accusation unless you've got some basis for it.
>
> MR. ROZEAR: Fair enough, Your Honor.

(Emphasis added.) While the trial court's intervention prevented Defendant's attorney from finishing his argument, Defendant's counsel started arguing the lack of evidence in the record was a problem. Given Defendant's attempt to argue under the lack-of-evidence theory and the trial court's subsequent intervention, we are not comfortable concluding Defendant failed to preserve his *Batson* step two argument.[5]

¶ 33 The State also argues Defendant's argument on appeal "actually contradicts his argument in the trial court." Specifically, the State contends Defendant "implicitly recognized the [prosecutor's] explanation's race-neutral character" by recognizing that R.S.'s failure to disclose his criminal record could have amounted to a challenge for cause. The State cites *Hernandez* in support of its argument that a reason offered by the prosecutor is race neutral if it "corresponds to a valid for-cause challenge." 500 U.S. at 362–63, 111 S. Ct. 1868.

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5. Our lack of definite determination of the preservation issue ultimately does not alter our conclusion on the step two issue because we reject Defendant's arguments on the merits.

¶ 34 Again we reject the State's argument. In the portion of the transcript to which the State cites, Defendant's attorney is arguing under *Batson* step three as seen by his focus on whether the undisclosed conviction was the real issue or was merely pretextual: "*So if this were really the issue*, Mr. Thigpen probably could have had [R.S.] excused for cause by investigating this area further, and not had to use a peremptory in this case." (Emphasis added.) Notably, this statement also occurred after the trial court had made its above statements about accepting the prosecutor's proffered explanation "as the gospel." As we explained above, the trial court's comments came after it interrupted arguments from Defendant's counsel under step two, so the Defendant's attorneys were merely continuing with the *Batson* inquiry after the trial court's adverse ruling. Given that sequence of events, we do not accept the State's argument that Defendant implicitly waived his step two argument. Since we do not credit either of the State's preservation arguments, we proceed to evaluate Defendant's *Batson* step two arguments on the merits.

2. Merits

¶ 35 **[2]** Under *Batson*'s second step, once a defendant has made a prima facie showing of intentional discrimination, "the analysis proceeds to . . . where the State is required to provide race-neutral reasons for its use of a peremptory challenge." *State v. Hobbs*, 374 N.C. 345, 352, 841 S.E.2d 492, 499 (2020) (citing *Flowers v. Mississippi*, __ U.S. __, 139 S. Ct. 2228, 2243 (2019)). As our Supreme Court recently summarized:

> The State's explanation must be clear and reasonably specific, but does not have to rise to the level of justifying a challenge for cause. *See* [*State v.*] *Bonnett*, 348 N.C. [417,] 433, 502 S.E.2d [563,] 574 [1998]; *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 151 (1990). Moreover, " 'unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' " *Bonnett*, 348 N.C. at 433, 502 S.E.2d at 574–75 (quoting *Hernandez*, 500 U.S. at 360, 111 S. Ct. at 1866, 114 L. Ed. 2d at 406); *see also Purkett v. Elem*, 514 U.S. 765, 768-69, 115 S. Ct. 1769, 1771–72, 131 L. Ed. 2d 834, 839-40 (1995); *State v. Barnes*, 345 N.C. 184, 209-10, 481 S.E.2d 44, 57, *cert. denied*, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997), *and cert. denied*, 523 U.S. 1024, 118 S. Ct. 1309, 140 L. Ed. 2d 473 (1998). In addition, the second prong provides

> the defendant an opportunity for surrebuttal to show the State's explanations for the challenge are merely pretextual. *See State v. Gaines*, 345 N.C. 647, 668, 483 S.E.2d 396, 408, *cert. denied*, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997); *State v. Robinson*, 330 N.C. 1, 16, 409 S.E.2d 288, 296 (1991).
>
> [*State v.*] *Golphin*, 352 N.C. [364,] 426, 533 S.E.2d [168,] 211 [2000]. Therefore, at *Batson*'s second step, the State offers explanations for the strike which must, on their face, be race-neutral. If they are, then the court proceeds to the third step.

Id., 374 N.C. at 352–53, 841 S.E.2d at 499.

¶ 36 Expanding upon that summary, the requirement that the State's explanation must be clear and reasonably specific means the prosecutor must do more than "merely deny[] that he had a discriminatory motive" or "merely affirm[] his good faith." *Purkett*, 514 U.S. at 769, 115 S. Ct. at 1771. "Furthermore, if not racially motivated, the prosecutor may exercise peremptory challenges on the basis of legitimate hunches and past experience." *State v. Lyons*, 343 N.C. 1, 13, 468 S.E.2d 204, 209 (1996). Notably, the reason does not have to be "a reason that makes sense, but a reason that does not deny equal protection." *Purkett*, 514 U.S. at 769, 115 S. Ct. at 1771; *see also id.*, 514 U.S. at 767–68, 115 S. Ct. at 1771 ("The second step of this process does not demand an explanation that is persuasive, or even plausible."); *Clegg*, ¶ 47 (citing the same *Purkett* quote about an explanation not needing to be persuasive or even plausible); *Lyons*, 343 N.C. at 13, 468 S.E.2d at 209 ("The prosecutor is not required to provide an explanation that is persuasive, or even plausible."). This concept is what *Hobbs* means by its statement that the reason will be race-neutral unless discriminatory intent is inherent. 374 N.C. at 352, 841 S.E.2d at 499.

¶ 37 Further, while *Hobbs*'s summary includes a defendant's opportunity for a surrebuttal within step two, that simply sets up step three where the trial court must decide whether the defendant met his burden of showing intentional discrimination. *See Clegg*, ¶ 63 n.4 (explaining after the prosecutor offers race-neutral reasoning at step two, the defendant can submit evidence to show the prosecutor's reasoning is pretext and the prosecutor can offer surrebuttal before the trial court makes its "ultimate ruling under step three"). At step three the trial court "consider[s] the prosecutor's race-neutral explanations in light of all

of the relevant facts and circumstances, and in light of the arguments of the parties," *Hobbs*, 374 N.C. at 353, 841 S.E.2d at 499 (quoting *Flowers*, 139 S. Ct. at 2243), so for consistency defendants must have given that information prior to step three. Notably, the opportunity for surrebuttal does not change the otherwise low bar prosecutors have at the second step to give a race neutral explanation.

¶ 38 The United States Supreme Court recognized that low bar when it said the *Batson* inquiry proceeds to step three "even if the State produces only a frivolous or utterly nonsensical justification for its strike." *Johnson v. California*, 545 U.S. 162, 171, 125 S. Ct. 2410, 2417 (2005). The history of *Batson* in our state also demonstrates this low bar. Our courts have only once upheld a *Batson* objection to a prosecutor's striking of a juror of color at step two of the inquiry. *See State v. Robinson*, 375 N.C. 173, 178 & n.4 846 S.E.2d 711, 716 & n.4 (2020) [hereinafter "*Robinson III*"] (stating the Supreme Court of North Carolina has never held a prosecutor intentionally discriminated against a juror of color before mentioning a case where this Court found a *Batson* violation because of the prosecutor's lack of explanation); *see also Clegg*, ¶ 112 (Earls, J., Concurring) (updating history of *Batson* challenges in the state to note *Clegg* was the first case where our courts have ever found a substantive *Batson* violation at step three).[6] In that case, the prosecutor offered no explanation at all for striking some of the jurors. *State v. Wright*, 189 N.C. App. 346, 352–54, 658 S.E.2d 60, 64–65 (2008). As our Supreme Court recently emphasized, the inquiry at step two "is limited only to whether the prosecutor offered reasons that are race-neutral, not whether those reasons withstand any further scrutiny; *that scrutiny is reserved for step three*." *Clegg*, ¶ 62 (emphasis added).

¶ 39 Defendant's *Batson* step two argument fails because it misunderstands the low level of the bar a prosecutor must clear at that step. The second step does not require evidence in the record to support the prosecutor's articulated reason; a prosecutor must merely articulate a reason, *see Wright*, 189 N.C. App. at 352–54, 658 S.E.2d at 64–65 (finding error when prosecutor failed to articulate any reason for striking some

6. We acknowledge Defendant cited this history of *Batson* in our state to argue in favor of its step two argument. As explained below, our precedents do not allow us to strengthen step two regardless of Defendant's admonition in his reply brief that this Court and our Supreme Court can do the work of strengthening *Batson*. As an intermediate appellate court, we are ultimately bound by higher precedents. *E.g.*, *State v. Jones*, 253 N.C. App. 789, 796, 802 S.E.2d 518, 523 (2017). In addition, our Supreme Court has very recently reiterated the three-step analysis, including the low bar of step two, in *State v. Clegg*. *Id.*, ¶ 62.

jurors), and one that does not inherently reveal discriminatory intent. *Hobbs*, 374 N.C. at 352, 841 S.E.2d at 499. Given the explanation can be "frivolous or utterly nonsensical," *Johnson*, 545 U.S. at 171, 125 S. Ct. at 2417, a potentially legitimate explanation for which the prosecutor lacked evidence could also pass step two. *See Lyons*, 343 N.C. at 13, 468 S.E.2d at 209 (explaining prosecutors pass step two if their reason was based on "legitimate hunches and past experience").

¶ 40 Our Supreme Court's precedent further supports our determination a prosecutor does not need record evidence to pass *Batson*'s second step. In *State v. King*, our Supreme Court rejected the defendant's argument "there is no evidence in the record to support the prosecutor's belief . . . ." 353 N.C. at 471, 546 S.E.2d at 587–88. In that case, the prosecutor said he struck a Black juror because he had information of an investigation into the juror's father that forced the father to resign from the police department. *Id.*, 353 N.C. at 470–71, 546 S.E.2d at 587. The Supreme Court emphasized the issue at step two is the "facial validity" of the prosecutor's stated reason. *Id.*, 353 N.C. at 471, 546 S.E.2d at 587–88 (citing *Hernandez*, 500 U.S. at 360, 111 S. Ct. 1859). In *King*, the Supreme Court ultimately did not find a *Batson* violation, so the prosecutor's reason must have passed step two. *Id.*, 353 N.C. at 472, 546 S.E.2d at 588.

¶ 41 Here, we follow *King* and reject Defendant's argument that the trial court erred at *Batson*'s second step because there was no evidence in the record to support the prosecutor's strikes of R.S. for his undisclosed criminal record and of V.B. for her business's connection to a drug investigation. Neither of those challenged explanations[7] is inherently discriminatory because they do not rely on the jurors' race or race-based discriminatory stereotypes. *See Hobbs*, 374 N.C. at 352–53, 841 S.E.2d at 499 (explaining a reason will be deemed race-neutral if not inherently discriminatory). Beyond this inquiry, any "scrutiny is reserved for step three." *Clegg*, ¶ 62. Therefore, the trial court did not clearly err at step two in concluding the prosecutor articulated race-neutral reasons for his strikes of R.S. and V.B.

¶ 42 While Defendant cites an Arizona Court of Appeals case, *State v. Ross*, 483 P.3d 251 (2021), in support of his position, we reject that potentially persuasive precedent in the face of *King*'s binding precedent. We also note the Arizona case involved a prosecutor's strike based on the potential juror's conduct in the courtroom, *Ross*, 483 P.3d at 258–59,

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7. The prosecutor also argued V.B. was confused by one of his questions. Defendant did not challenge that justification at step two.

¶¶ 28, 31, which was not the reasoning for the strikes here. As the United States Supreme Court has recognized, the trial court has a greater need to collect evidence when a prosecutor proffers he struck a juror based on the juror's demeanor. *See Snyder*, 552 U.S. at 477, 479, 128 S. Ct. at 1208–09 (stating, "In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's firsthand observations of even greater importance," before noting the trial judge made no findings of fact as to the juror's demeanor); *see also Clegg*, ¶ 47 (citing *Snyder*'s discussion of demeanor and emphasizing the need for the trial court to accept evidence of demeanor).[8] Notably, *Snyder*'s discussion of supporting a prosecutor's strike came from its explanation of *Batson*'s third step. 552 U.S. at 477, 128 S. Ct. at 1208.

¶ 43 As *Snyder* illustrates, Defendant fails because he argues courts assess evidence supporting the prosecutor's reasoning at step two rather than step three. Instead, under controlling precedent, a court errs "by combining *Batson*'s second and third steps into one, requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive." *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771. To say a trial judge "*must terminate* the inquiry at step two when the race-neutral reason" is not minimally persuasive "violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Id.* (emphasis in original). Here, Defendant's argument threatens to do just that, so we conclude the trial court did not clearly err at step two. But we will consider the alleged lack of record evidence to support the prosecutor's strikes under step three, to which we turn next.

C. *Batson* Step Three

¶ 44 At *Batson*'s final step the "trial court must . . . determine whether the defendant has met the burden of proving purposeful discrimination." *Bennett II*, 374 N.C. at 592, 843 S.E.2d at 231; *see also Clegg*, ¶ 63 ("[I]n step three, the court carefully weighs all of the reasoning from both sides to ultimately decide whether it was more likely than not that the challenge was improperly motivated." (cleaned up)). To do that, trial courts employ an open-ended list of factors. *See Flowers*, 139 S. Ct. at 2243 (listing factors with the final one being "other relevant circumstances that

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8. *Clegg*'s citation to *Snyder*'s discussion of demeanor-based reasoning comes in the same paragraph it discussed *Batson*'s second step, *Clegg*, ¶ 47, but *Clegg* ultimately found even the demeanor-based reasoning passed step two, further emphasizing the step's low bar. *Clegg*, ¶ 62.

bear upon the issue of racial discrimination"); *see also Clegg*, ¶ 48 (noting a court can consult "all of the circumstances that bear upon the issue of racial animosity" (quoting *Snyder*, 552 U.S. at 478, 128 S. Ct. at 1208)). Defendant's overarching argument is that the trial court clearly erred when it concluded "the State's strikes were not substantially motivated by race . . . ." Defendant then includes numerous sub-arguments based on specific factors. We first review the overarching law on the third step as well as the relevant factors, and then we evaluate each of Defendant's arguments.

¶ 45 "At the third step of the analysis, the defendant bears the burden of showing purposeful discrimination." *Hobbs*, 374 N.C. at 353, 841 S.E.2d at 499. As our Supreme Court recently explained:

> "The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties." *Flowers*, 139 S. Ct. at 2243. At the third step, the trial court "must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Id.* at 2244. "The ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent.' " *Id.* (quoting *Foster v. Chatman*, [578] U.S. [488], 136 S. Ct. 1737, 1754, 195 L.Ed.2d 1 (2016)).

Id.; *see also Clegg*, ¶ 85 (including the substantial part language from *Flowers* and then explaining the United States Supreme Court has also articulated the burden as "whether it was more likely than not that the challenge was improperly motivated" (quoting *Johnson*, 545 U.S. at 170, 125 S. Ct. at 2417)).

¶ 46 To support the trial court's evaluation of all the relevant facts and circumstances, a defendant can "rely on 'a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race.' " *Hobbs*, 374 N.C. at 356, 841 S.E.2d at 501 (quoting *Flowers*, 139 S. Ct. at 2243). Relying on *Flowers*, our Supreme Court in *Hobbs* listed the following factors:

> • statistical evidence about the prosecutor's use of peremptory strikes against [B]lack prospective jurors as compared to white prospective jurors in the case;

> • evidence of a prosecutor's disparate questioning and investigation of [B]lack and white prospective jurors in the case;
>
> • side-by-side comparisons of [B]lack prospective jurors who were struck and white prospective jurors who were not struck in the case;
>
> • a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
>
> • relevant history of the State's peremptory strikes in past cases; or
>
> • other relevant circumstances that bear upon the issue of racial discrimination.

Id. (citing *Flowers*, 139 S. Ct. at 2243). As the last factor indicates, that list from *Flowers* is not exclusive, and courts are permitted to consider any relevant circumstances. *Id.* Thus, in the past our courts have also considered "the susceptibility of the particular case to racial discrimination." *Porter*, 326 N.C. at 498, 391 S.E.2d at 150 (quotations and citations omitted).

¶ 47 Defendant argues numerous of those factors support his position that "[t]he trial court's conclusion that the State's strikes were not substantially motivated by race was clear error." We address each factor in turn.

1. Trial Court's Ability to Conduct a Proper Comparative Juror Analysis

¶ 48 Defendant first argues the trial court "could not conduct a proper comparative juror analysis as to the prosecutor's unsupported justifications." Specifically, Defendant argues the trial court did not have the information it needed to compare R.S.'s criminal records, the connection of V.B.'s business to a drug investigation, and what the prosecutor knew about those characteristics in jurors. These arguments resemble the one Defendant made above at step two, but this factor should be analyzed at *Batson*'s third step instead. Further, Defendant asserts the "prosecutor's failure to conduct any investigation into those matters on the record either during voir dire or at the hearing is itself indicative of pretext." We briefly explain the law of comparative juror analysis before addressing each of those arguments in turn.

¶ 49 In *Miller-El II*, the United States Supreme Court recognized comparing struck venire members of color to white people allowed to serve was "more powerful" than "bare statistics" of strike rates alone. 545 U.S.

at 241, 125 S. Ct. at 2325. "If a prosecutor's proffered reason for striking a [B]lack panelist applies just as well to an otherwise-similar non[B]lack [person] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id.* The similar white jurors need not be identical. *Flowers*, 139 S. Ct. at 2249. In *Miller-El II*, for example, strong similarities between the struck Black venire members and the non-Black jurors were sufficient to conclude a comparative juror analysis supported a finding that race was significant in determining who was challenged. 545 U.S. at 247, 252, 125 S. Ct. at 2329, 2332.

¶ 50 We first address Defendant's argument that the trial court did not have the information it needed to compare R.S.'s criminal record to other potential jurors. We reject Defendant's argument because we disagree with what he asserts the record must include. Defendant faults the trial court for not asking the prosecutor to provide criminal history reports or his "cheat sheet" on potential jurors' criminal histories, but the trial court was not required to do so. A key feature of the *Batson* inquiry is the trial court's evaluation of the prosecutor's credibility. *See Hernandez*, 500 U.S. at 365, 111 S. Ct. at 1869 (explaining deference to trial court because the *Batson* inquiry "largely will turn on evaluation of credibility" (quotations and citation omitted)). Here, the trial court was inherently evaluating the prosecutor's credibility when it accepted his representations as to running criminal history checks on all jurors and learning of R.S.'s criminal record. Therefore, the trial court had the proper record before it even without the actual documents the prosecutor used.

¶ 51 Defendant emphasizes, in making the lack of record argument, the trial court's comment at the remand hearing that it was accepting the prosecutor's statement regarding R.S.'s criminal history "as the gospel." While the trial court's language was hyperbole, the context surrounding that statement reveals the trial court did not foreclose the possibility the prosecutor was wrong. Rather, after Defendant's attorney brought up the lack of evidence in the record of R.S.'s criminal history, the trial court asked about whether Defendant had evidence that criminal history representation was wrong:

> [MR. ROZEAR (one of Defendant's attorney's)]: . . . . And I first note that we don't have anything in the record in front of us showing the existence of this conviction, so I'm not sure that –
>
> THE COURT: Are you saying that Mr. Thigpen is not correct when he said he had that criminal record?

> MR. ROZEAR: I -- I -- I don't know. I have no --
>
> THE COURT: The Court's accepting that as the gospel. I don't think he would have said that if that wasn't the case. I can't imagine -- now if it isn't the case, obviously, we've got a problem.
>
> MR. ROZEAR: Right.
>
> THE COURT: But I don't think I would make that accusation unless you've got some basis for it.
>
> MR. ROZEAR: Fair enough, Your Honor.

This exchange came after the trial court offered Defendant's counsel time for a recess to do their own research into the information on criminal history, but Defendant's counsel declined after conferring briefly. Defendant's counsel had the same access to criminal records of the jurors as the State, and if Defendant's counsel believed the State misrepresented this information, he was free to check to confirm it. Thus, the trial court was open to evidence the prosecutor was wrong about R.S.'s criminal history, but Defendant simply did not present any evidence after having declined the trial court's offer to give him time to independently research criminal histories of prospective jurors. The trial court was not required to do any more. *See State v. Smith*, 352 N.C. 531, 540–41, 532 S.E.2d 773, 780–81 (2000) (rejecting defendant's appeal on *Batson* issue when the prosecutor's reasoning was based on a potential juror's unrevealed criminal record and defendant, when given the chance, had not sought criminal record information to support its argument that reasoning was pretextual). Defendant has not carried the burden to show purposeful discrimination at this step. *Bennett II*, 374 N.C. at 592, 843 S.E.2d at 231.

¶ 52 Defendant makes a similar argument about the lack of ability to compare between jurors with respect to the prosecutor's reason for striking V.B., specifically the alleged connection between V.B.'s business and a drug investigation. We reject that argument again because all the reasons we laid out above apply equally here. First, the trial court accepted the prosecutor's statement as credible. Second, Defendant failed to present any evidence to the contrary. While we acknowledge Defendant could not undertake the same investigation as the prosecution in regard to a criminal investigation that did not even result in charges against V.B., this Court has accepted a similar explanation in the past. *See King*, 353 N.C. at 470–72, 546 S.E.2d at 587–88 (finding no *Batson* violation when the prosecutor said he struck a Black juror because he had information of an investigation into the juror's father that forced the father to resign from the police department). Even without that precedent, the

connection to the drug investigation is but one reason the prosecutor gave for striking V.B., and the comparative juror analysis is but one factor given "[t]he trial court must consider the prosecutor's race-neutral explanations in light of *all* of the relevant facts and circumstances." *Hobbs*, 374 N.C. at 353, 841 S.E.2d at 499 (quoting *Flowers*, 139 S. Ct. at 2243) (emphasis added). And as a practical matter, a requirement that the prosecutor present evidence regarding a drug investigation as part of the *Batson* hearing—even where the Defendant has not argued any reason to disbelieve the prosecution's representations about the investigation – could lead to a series of mini-trials regarding each challenged juror and risk identifying confidential informants. *See State v. Jackson*, 322 N.C. 251, 258, 368 S.E.2d 838, 842 (warning against creating a "trial within a trial" when conducting the *Batson* examination).

¶ 53 In his third argument, Defendant contends the trial court lacked information about what the prosecutor knew about other jurors' criminal records and potential connections to police investigations. As to the criminal records of other jurors, Defendant's argument does not comport with the record. The prosecutor told the trial court he had an assistant run the criminal records of everyone on the jury list for him. And as a practical matter, the prosecutor would need to know about the past criminal records of all potential jurors, as a white juror who failed to answer this question truthfully would be of the same concern to the prosecution as a Black juror.

¶ 54 As to the investigation, the prosecutor received that information from the deputy sitting with him at counsel's table. The State argues the prosecutor could not "query" the deputy for "a comprehensive check on all the prospective jurors," so any lack of information as to other jurors' connections to investigations "would not reflect a choice to ignore that characteristic." Given the comparative juror analysis is but one factor and the prosecutor offered a separate explanation for striking V.B. before bringing up the investigation, we cannot say the trial court clearly erred based on this alone.

¶ 55 In his final argument under the heading about the trial court's inability to conduct a comparative juror analysis, Defendant argues "the prosecutor's failure to conduct any investigation into those matters on the record either during voir dire or at the hearing is itself evidence of pretext." Defendant later expands on this argument by highlighting *Flowers* found "the failure to inquire is itself evidence of pretext." (Citing *Flowers*, 139 S. Ct. at 2249.) Defendant then argues his counsel presented the prosecutor an opportunity during voir dire to clarify his reasoning but the prosecutor only argued Defendant's showing was insufficient to make a prima facie case.

¶ 56 Defendant correctly states the law. Disparate investigation and a failure to meaningfully voir dire a potential juror on a subject used later to justify a strike could be evidence an explanation is pretextual. *Flowers*, 139 S. Ct. at 2248–49. Still, "disparate questioning or investigation alone does not constitute a *Batson* violation." *Id.* at 2248; *see also Clegg*, ¶ 94 (relying on *Flowers* to explain disparate questioning and investigation can inform the trial court's *Batson* evaluation but does not alone constitute a *Batson* violation). We have already addressed the allegations of disparate investigation above when we discussed what evidence the prosecutor had about other jurors' criminal records and connections to criminal investigations.

¶ 57 As to the failure to ask the jurors about the topics during voir dire, the prosecutor offered explanations at the remand hearing. That differentiates this case from *Clegg* where our Supreme Court recently relied on disparate questioning to find a *Batson* violation by in part noting the prosecutor asked additional questions of a Black juror "without explanation." *Id.*, ¶¶ 93–95. Here, the prosecutor explained he did not want to embarrass V.B. or reveal the methods of an undercover investigation. As to R.S.'s criminal record, the prosecutor explained he did not want to embarrass R.S. and had seen other prosecutors striking jurors for undisclosed criminal records without questioning them. Among those explanations, the desire to avoid revealing police undercover investigations appears reasonable. The other explanations are race-neutral. We agree with Defendant, however, much of the embarrassment of the venire members could have been mitigated by conducting voir dire on the subjects outside of the presence of the other potential jurors. But again, conducting separate voir dire of potential jurors is a time-consuming process. If the prosecutor had decided to challenge for cause instead of using a preemptory challenge, perhaps he would have requested a separate voir dire to inquire into the undisclosed criminal record. Instead, he chose to use a preemptory challenge, avoiding the need for more time-consuming and potentially embarrassing questioning of the juror. A factfinder's choice between "two permissible views of the evidence . . . cannot be clearly erroneous." *King*, 353 N.C. at 470, 546 S.E.2d at 587. As a result, we cannot find clear error here where the trial court accepted plausibly race-neutral explanations for Defendant's failure to quetion R.S. and V.B. about the subjects the prosecutor later used to justify the strikes.

¶ 58 We also reject Defendant's argument the prosecutor had to create a record justifying his strikes at the initial *Batson* hearing. Defendant points us to a part of the initial trial transcript where his attorney indicated there was nothing in the State's voir dire about prior criminal

convictions or other bases for the two jurors being excused. Notably, this line was the first sentence after Defendant's attorney made a *Batson* motion. As such, it was appropriate for the prosecutor to respond by arguing Defendant had not made out a prima facie case. The inquiry was still at step one where Defendant had the burden to make out a prima facie case, which comes before the prosecutor would have a burden to offer any explanation let alone defend it against charges of pretext. *See Bennett II*, 374 N.C. at 592, 843 S.E.2d at 231 (laying out the three *Batson* steps). Thus, this was not the appropriate stage for the prosecutor to present an explanation or evidence regarding reasons for striking the jurors. If we were to accept Defendant's argument, as a practical matter, the State would have to demonstrate cause for every strike of a Black juror instead of using peremptory strikes, but that is not the law.

¶ 59 Reviewing all of Defendant's arguments on the trial court's ability to conduct a proper comparative juror analysis, we cannot conclude the trial court clearly erred.

2. Comparative Juror Analysis

¶ 60 After arguing the trial court could not have conducted a proper comparative juror analysis, Defendant includes his own comparative juror analyses for the challenges based on both R.S.'s criminal record and V.B.'s confusion when answering a question. Defendant argues the analysis of other jurors' criminal records reveals "there is reason to be skeptical of the trial court's findings." Similarly, Defendant contends the prosecutor's confusion reasoning for V.B. "does not withstand scrutiny." We address each argument in turn.

¶ 61 First, Defendant asks us to take judicial notice of numerous traffic violations of venire members to support his argument the trial court was wrong to find R.S. was the only potential juror who had personal interaction with the criminal justice system, even traffic violations. Assuming *arguendo* the jurors' traffic violations as compiled by Defendant are accurate, we are not persuaded they demonstrate the trial court clearly erred in finding the State's strikes were not substantially motivated by race. The trial court's findings on jurors' personal interaction with the criminal justice system mention interactions "even related to traffic violations":

> Prospective Juror [R.S.] was the only juror that ADA Thigpen noted who had a felony or misdemeanor conviction, and indeed was the only prospective juror ADA Thigpen noted as having any personal

> interaction with the criminal justice system, even related to traffic violations.

But, the prosecutor's initial explanation focused on *felony* convictions:

> So as it relates to, first, Perspective Juror Number 10, [R.S.], Judge, based upon the information that I had, [R.S.] had an undisclosed criminal record that included a conviction for common law robbery and possession with intent to sell an unauthorized recording device . . . and a probation violation. I made a note of his record. When he was called into the box, and if it – and *it was important to me because of the prior felony conviction*. He's the only juror of which I made that note and he's *the only juror that I noted had a prior felony conviction*.

(Emphasis added.) Thus, the trial court's Finding of Fact overstated what the prosecutor had said at the hearing. Given that *Batson*'s second step, which sets up the third step here, focuses on the prosecutor's explanation, *Hobbs*, 374 N.C. at 352–53, 841 S.E.2d at 499, we will take his actual explanation as controlling rather than the court's overstated summary.[9]

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9. Defendant argues the prosecutor drafted the order signed by the trial court and thus we should attribute that overstatement of the prosecutor's reasons to him and find it "reeks of afterthought." (Citing *Miller-El II*, 545 U.S. at 246, 125 S. Ct. at 2328.) While both parties were to present proposed orders to the trial court, we do not have before us the proposed orders for comparison to the final order. As such, we are not willing to assign responsibility for this overstatement to the prosecutor specifically or the State more generally. And regardless of which draft the trial court used—if either—the trial judge is ultimately responsible for the order. *See In re A.B.*, 239 N.C. App. 157, 167, 768 S.E.2d 573, 579 (2015) ("[T]he order is the responsibility of the trial court, no matter who physically prepares the draft of the order.").

We also note this explanation does not reek of afterthought because the prosecutor made clear he was not concerned about traffic violations during the original jury selection process. The prosecutor specifically excluded speeding tickets from his questions about jurors' past convictions. The trial court also noted in its Findings of Fact the prosecutor excluded traffic tickets when asking jurors about their past interactions with the criminal justice system: "Prospective Juror [R.S.] was the only juror who did not answer the questions truthfully because he did not disclose his prior criminal record, despite being part of the full jury panel that was asked if any member had been a defendant in a case before (T. p. 34) and asked if any juror themselves, a member of their family, or a close friend had ever been charged or convicted of anything other than a speeding ticket (T. p. 45)." Therefore, rather than reeking of afterthought, the inclusion of traffic violations appears to be a misstatement by the trial court; the prosecutor from the beginning did not care about them.

¶ 62 Taking the explanation given by the prosecutor at the remand hearing's step two portion, the comparative juror analysis compiled by Defendant does not persuade us. With the exception of a driving while impaired charge, all of the interactions listed by Defendant are minor traffic infractions of speeding, registration issues, and a seatbelt violation. As for the DWI, the State presents evidence that the prospective juror was acquitted on the charge, and we accept that evidence and argument *arguendo* as well since we did the same with Defendant's evidence. Thus, as the prosecutor represented, R.S. was the only juror with a prior felony conviction, so there are no substantially similar non-Black jurors with whom to conduct a comparison. *See Miller-El II*, 545 U.S. at 247, 125 S. Ct. at 2329 (setting out the substantially similar standard for conducting a comparative juror analysis). The trial court did not clearly err by finding there were no substantially similar non-Black jurors based upon the prior felony conviction.

¶ 63 Turning to the comparative juror analysis of V.B.'s answers to voir dire questions, Defendant begins by arguing our Supreme Court already conducted a comparative juror analysis and "held there was an 'absence of any significant dissimilarity between the answers given' " by another juror and V.B. (Citing *Bennett II*, 374 N.C. at 599, 843 S.E.2d at 235–36.) While the Supreme Court found an "absence of any significant dissimilarity between the answers given" by R.S., V.B., and the third juror, it only used that to conclude Defendant had made out a "prima facie case of purposeful discrimination." *Bennett II*, 374 N.C. at 599, 843 S.E.2d at 235–36. The prima facie first step of a *Batson* analysis, however, is fundamentally different from the third step the trial court had to address and we now confront. As our Supreme Court explained in a case that came out a month before *Bennett II*, the burden on the defendant at step one "is one of production, not of persuasion. That is, a defendant need only provide evidence supporting an inference discrimination has occurred." *Hobbs*, 374 N.C. at 351, 841 S.E.2d at 498. In *Bennett II*, the Supreme Court further explained "the existence of such a permissible inference" is not "the same thing as an ultimate conclusion that impermissible discrimination has, in fact, taken place." 374 N.C. at 598, 843 S.E.2d at 235 (citing *Johnson*, 545 U.S. at 171, 125 S. Ct. at 2417–18). "As a result, a court should not attempt to determine whether a prosecutor has actually engaged in impermissible purposeful discrimination at the first step of the *Batson* inquiry." *Id.*, 374 N.C. at 599, 843 S.E.2d at 235. Given these admonitions, we reject Defendant's argument that the Supreme Court's analysis of the similarity between V.B. and other jurors at step one should control our analysis here at step three.

¶ 64 Conducting our own comparative juror analysis, the prosecutor explained he struck V.B. because "she appeared to have some difficulty with what I call the 'watch-it-happen question,' " which is "a question about whether or not a juror could make a decision based only upon hearing testimony." The prosecutor explained he started asking that question after hearing about an 11 to 1 hung jury in a colleague's case in another county because the holdout juror in that case "said he could not make a decision unless he saw it happen." The prosecutor went on to explain:

> I noted that [V.B.] looked confused by the question. She said she could base her decision on "kind of both" or "kind of on both." I tried to clarify that by asking her what she meant and she replied, "Sometimes I guess it's better not to have hearsay."
>
> Well, Judge, that told me that she preferred maybe video evidence or something other than just live testimony. I knew that there would not be any video testimony. Officers in this case don't have or did not wear body cameras and did not have in-car. I tried to clarify that question again and her answer was, "Yeah." I asked the question again and her [sic] she responded, "Uh-huh." So, at that point, I'm beginning to get concerned that she's telling me what she thinks I want to hear, and I'm questioning does she understand what I'm asking. She is the only juror that gave those responses and had that apparent difficulty with that question."

The question before us is whether the prosecutor's proffered reason above "applies just as well to an otherwise-similar" non-Black juror. *Miller-El II*, 545 U.S. at 241, 125 S. Ct. at 2325.

¶ 65 Defendant first argues we should not accept this explanation because it was based on demeanor and such explanations should be viewed with greater scrutiny. Reading the whole explanation given by the prosecutor, we do not agree that his reasoning for striking V.B. was based on demeanor. While the prosecutor noted V.B. looked confused, he then spent two paragraphs discussing how her answers exhibited what he believed was confusion and otherwise concerned him. While the case Defendant cites does not provide any explanation of what it means by demeanor-based strikes because its analysis does not turn on jurors struck for those reasons, *see Harris v. Hardy*, 680 F.3d 942, 965 (7th Cir. 2012) (explaining those strikes are troubling but consideration

of them was unnecessary because the defendant carried his burden elsewhere), plain meaning alone demonstrates the prosecutor's reasoning was not demeanor-based. Further, in *Clegg*, our Supreme Court recently found a *Batson* violation based in part on its rejection of the prosecutor's demeanor-based reasoning. *Id.*, ¶¶ 77–78 (demeanor analysis), ¶ 100 (ultimately concluding there was a *Batson* violation). There, the prosecutor's reasoning was based on demeanor when he mentioned the potential juror's "body language and lack of eye contact." *Id.*, ¶ 77. Here, the prosecutor did not primarily focus on V.B.'s demeanor. Rather, the prosecutor's explanation was based on V.B.'s answers in the record; he noted the appearance of confusion only as an introduction to his reasoning, which was based upon actual responses, not V.B.'s demeanor.

¶ 66 Turning to a comparison based on V.B.'s answers, Defendant argues V.B. was similar to a "non-Black" juror, R.C. Defendant argues R.C. exhibited similar behavior, which the prosecutor characterized as confusion with V.B.'s answers, when the prosecutor asked R.C. a question about whether she would not be able to consider the testimony of a witness testifying pursuant to a plea agreement. Rather than challenge Defendant's representation of R.C.'s answers, the State responds the difference in the questions to which each potential juror responded meant they were not substantially similar and thus could not be compared.

¶ 67 As our Supreme Court noted in *Bennett II*, the relevant colloquy between V.B. and the prosecutor, Mr. Thigpen, occurred as follows:

> MR. THIGPEN: Do you think you could reach a verdict based only on hearing the evidence from the witness stand, or do you feel like in order to reach a verdict or to make a decision you would have to actually watch the alleged event happen?
>
> [V.B.]: Yeah.
>
> MR. THIGPEN: Okay. You looked confused. Some people—I have had jurors before that have said, "I can't make a decision until I see it happen."
>
> [V.B.]: Uh-huh.
>
> MR. THIGPEN: Okay. Do you feel like you could base your decision on just what the witnesses say, or do you feel like you have to watch it happen?
>
> [V.B.]: Kind of on both.
>
> MR. THIGPEN: What do you mean?
>
> [V.B.]: Sometimes, I guess, it's better to not have hearsay.

> MR. THIGPEN: Well, if you watched it happen, you would be a witness; right?
>
> [V.B.]: Right.
>
> MR. THIGPEN: And if you were a witness, you can't be a juror. Does that make sense?
>
> [V.B.]: Yes.
>
> MR. THIGPEN: So the only thing we have is witness testimony.
>
> [V.B.]: Okay.
>
> MR. THIGPEN: So do you feel like you could make a decision based only on hearing the testimony of the witnesses or before you could make that decision would you actually want to watch it happen?
>
> [V.B.]: Yeah.
>
> MR. THIGPEN: Okay. What you said was, "Yeah."
>
> [V.B.]: Yeah, I could make that decision through—
>
> MR. THIGPEN: Based on the testimony?
>
> [V.B.]: Uh-huh.

374 N.C. at 583–84, 843 S.E.2d at 226.

¶ 68 The relevant exchange between the prosecutor and R.C. occurred as follows:

> MR. THIGPEN: Okay. Now, [R.C.], a witness may testify on behalf of the State as a result of a plea agreement with the State in exchange for [a] sentence concession. Based on that fact and that fact alone, would you not be able to consider that person's testimony along with all other evidence that you would hear in the case?
>
> [R.C.]: Yes, sir. No, sir.
>
> MR. THIGPEN: Do you understand my question?
>
> [R.C.]: Say it again.
>
> MR. THIGPEN: A witness may testify under a plea agreement in exchange for a sentence concession.
>
> [R.C.]: Okay.
>
> MR. THIGPEN: Now if that person were to testify, are you just going to go, [t]his person's made a deal; I don't care what they are going to say, or would you listen to it and consider it just like anybody else?

> [R.C.]: I would listen to their testimony and consider it.

Id., 374 N.C. at 585, 843 S.E.2d at 227 (all alterations other than removing juror name in original). Arguably, R.C.'s answer of "Yes, sir. No, sir." resembles V.B.'s answer of "Kind of on both" in that each one equivocates and requires further explanation. But it is also true that the question to R.C. was confusing since it was phrased in the negative: "would you *not* be able to consider . . . ." *Id.* Thus, to give an affirmative answer would require a negative response, essentially, "No, sir, I would not *not* be able to consider . . . ." After answering, "Yes, sir," it appears R.C. realized the question was phrased with a "not" so she changed the answer to "No, sir."

¶ 69 Whether R.C's answer demonstrated confusion based on a question phrased in the negative or equivocation, we agree with the State the trial court did not clearly err in finding the confusing answers were not substantially similar because of the questions to which each responded. The prosecutor explained at the remand hearing that R.C.'s answer was "not as big an issue" to him because he "expect[ed] people to be skeptical of confidential informants, of cooperating codefendants" and was not planning on calling the witness who would be testifying pursuant to the plea agreement. By contrast, the prosecutor explained the question he asked to V.B. was critical because he was concerned "she regarded testimony as hearsay" and his whole case was "going to be witness testimony." The prosecutor went on to explain he knew about a prior case that had a jury hang 11 to 1 on not having video to watch it happen. This rationale built on the prosecutor's initial explanation that he struck V.B. because she said she preferred video evidence but he knew "there would not be any video testimony." As a result, the question on which V.B. gave confusing answers was far more material to the prosecution's case than the question to which R.C. gave confusing answers.

¶ 70 The trial court gave a similar explanation for why it did not credit the comparison between R.C. and V.B.:

> Any similarity between prospective Jurors [V.B.] and [R.C.] on the basis of momentary confusion does not support an inference of discriminatory intent. Prospective Juror [V.B.] was confused on an issue that touched almost every piece of evidence in the State's case but Juror [R.C.]'s confusion was on an issue not even at play in the State's case.

Based on our review of the confusing answers of V.B. and R.C., we conclude the trial court did not clearly err in determining they were not substantially similar, as would be required to support a *Batson* violation.

3. Susceptibility of Case to Racial Discrimination

¶ 71 After finishing with his two arguments related to the comparative juror analysis factor, Defendant contends the trial court clearly erred in determining "this case was not susceptible to racial discrimination . . . ." To support that argument, Defendant provides law review articles and reports from nonprofit organizations, which according to Defendant show "[c]riminal cases are susceptible to racial bias at all stages" and that drug cases are particularly susceptible "given pervasive cultural stereotypes and disparities in law enforcement related to drugs." Defendant then argues the trial court erred because it focused on the race of witnesses, the anticipated evidence, and the lack of victims rather than "the effect of bias and racial stereotypes on *jurors*." (Emphasis in original.) Defendant further faults the trial court for saying evidence of disparate arrest and imprisonment rates for drug crimes would be applicable to every case with an African-American defendant.

¶ 72 At *Batson*'s third step, "the judge should consider the susceptibility of the particular case to racial discrimination." *Porter*, 326 N.C. at 498, 391 S.E.2d at 150. "The race of the defendant, the victims, and the key witnesses bears upon this determination." *Id.*, 326 N.C. at 498, 391 S.E.2d at 150–51. Specifically, our courts have focused on whether the case crosses racial lines among those key figures. *Contrast id.*, 326 N.C. at 500, 391 S.E.2d at 152 (finding no error in trial court's third step analysis based in part on the fact that the victim, both of the defendant's counsel, and the defendant were all Native American) *and State v. Fair*, 354 N.C. 131, 142, 557 S.E.2d 500, 511 (2001) (finding the jury selection process was "less likely to be susceptible to racial discrimination" when the defendant, victim, and half of the State's witnesses were African-American) *with Golphin*, 352 N.C. at 432, 533 S.E.2d at 214 (explaining "this case may be one susceptible to racial discrimination because defendants are African-Americans and the victims were Caucasian").

¶ 73 Defendant contends he presented significant evidence about "pervasive cultural stereotypes and disparities in law enforcement related to drugs" as part of his argument that this case was susceptible to racial discrimination because Defendant is Black and faced prosecution for a drug offense. In particular, Defendant presented law review articles, academic journal articles, and a study by the ACLU regarding disparate arrest and sentencing rates for Black people for drug crimes. Even if we

assume the conclusions of the authors of these articles and the study are correct, that type of evidence is not what our Supreme Court meant in *Porter* when it listed "the susceptibility of the particular case to racial discrimination" as a relevant third step factor. *Porter*, 326 N.C. at 498, 391 S.E.2d at 150. Rather, as seen in *Porter* and subsequent cases expanding on the factor, a case is particularly susceptible to racial discrimination if the identities of the defendant, victims, and witnesses cross racial lines. *See id.*, 326 N.C. at 500, 391 S.E.2d at 152; *Fair*, 354 N.C. at 142, 557 S.E.2d at 511; *Golphin*, 352 N.C. at 432, 533 S.E.2d at 214 (all focusing on racial identity of those key players and whether it is the same or different across those groups).

¶ 74 Here, the trial court found Defendant is African-American, there were no victims, and "[t]here is no record of the race of key witnesses." The trial court also found there was no evidence of "any potential racial motivations on the part of any witness." Based upon these Findings, the trial court determined the case was not susceptible to racial discrimination and emphasized that there were no cross racial issues. The trial court did not err in that analysis; it did exactly what our caselaw required it to do. Where there is no evidence of any racial motivations or discrimination in the particular case under review, our precedent does not allow us to account in some sort of general philosophical way for "the effect of bias and racial stereotypes on *jurors*" as Defendant wants us to consider. If Defendant wants to argue the precedent should change or be expanded upon, that argument is more properly directed at our Supreme Court. *E.g.*, *Jones*, 253 N.C. App. at 796, 802 S.E.2d at 523 ("[T]his Court has no authority to reverse existing Supreme Court precedent." (quotations and citation omitted)).

¶ 75 The trial court also found:

> the defendant argued that the case was susceptible to racial discrimination because of (1) disparate arrest rates for marijuana possession and 'in general' and (2) disparate rates of imprisonment after conviction. These facts, if true, would not give a prosecutor motivation to keep members of a particular race off the jury. The facts the defendant cited, if true, are applicable to every case with an African-American defendant, thus making this case not 'particularly susceptible' to racial discrimination.

(Citations omitted.) Defendant argues that the trial court appeared to hold "that, because all Black people may face racial discrimination

within the criminal justice system, no individual Black person can argue that such discrimination could affect their specific case." We do not read the trial court's finding so broadly. The trial court was correct that Defendant's argument, as stated, would in fact mean that every case with a Black defendant would be considered as "particularly susceptible" to racial discrimination for purposes of a *Batson* analysis, but that is not the law. Even if we accept as true Defendant's evidence which indicates Black people have a disparate arrest rate and rate of imprisonment after conviction for marijuana possession and "in general," this does not mean that a particular case is "susceptible to racial discrimination" for purposes of the *Batson* analysis.[10] While our precedent does not allow us to consider such disparate impact evidence for the susceptibility analysis, this type of evidence could be relevant to a trial court's consideration of a defendant's *Batson* argument, depending upon the particular features of the case under consideration, including the crime charged, the races of the defendant, victims, and witnesses, and other unique facts of a particular case. *See Batson*, 476 U.S. at 97–98, 106 S. Ct. at 1723 ("The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.").[11] The trial court properly conducted the analysis required by our precedent and did not clearly err in finding this case was not susceptible to racial discrimination.

4. History of Racial Discrimination in Jury Selection in Sampson County

¶ 76 Defendant's fourth argument asserts the trial court clearly erred in disregarding "the history of discriminatory strikes by the State . . . ." Defendant first recounts how he presented a Michigan State University ("MSU") study to the trial court that found, across three capital cases between 1990 and 2010, prosecutors in Sampson County struck 73.9% of qualified Black venire members but struck only 19.4% of qualified non-Black venire members.[12] Defendant later notes he told the trial

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10. Defendant's charges were related to methamphetamine, not marijuana. *See Bennett II*, 374 N.C. at 581, 843 S.E.2d at 224–25 (summarizing charges); *id.*, 374 N.C. at 587–88, 843 S.E.2d at 228–29 (noting convictions on methamphetamine charges).

11. Just before that quote, *Batson* also explains the Equal Protection Clause "forbids the States to strike [B]lack veniremen on the assumption that they will be biased in a particular case simply because the defendant is [B]lack." 476 U.S. at 97, 106 S. Ct. at 1723.

12. The authors of the MSU study are two associate professors at the Michigan State University College of Law. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The*

court the results of the MSU study have been replicated by a Wake Forest University study. Defendant then takes issue with each of the four reasons the trial court gave for discounting the study. According to Defendant, the trial court was wrong to discount the MSU study: (1) on the basis that recent law school graduates collected the data because the United States Supreme Court has cited data with that collection method; (2) on the basis prosecutors "were not consulted in conjunction with the study" because our Supreme Court has "repeatedly cited, discussed, and relied upon" the MSU study "when describing the history of discrimination in jury selection in various counties in our State"; (3) on the basis the MSU study was conducted on cold trial transcripts because "[e]very single *Batson* decision from the Supreme Court has been decided on a cold record"; and (4) on the basis the prosecutor in this case was not involved in the MSU study cases because *Batson*-line precedents do not require historical evidence to directly show the specific prosecutor has a history of discrimination.

¶ 77 As a preliminary matter, we agree with Defendant's summary of the trial court's reasoning for determining "the MSU study's conclusions are of limited, if any[,] usefulness . . . ." We also agree the trial court's first three reasons, as listed in the numbering above, do not support discounting the MSU study. For any study, the trial court should evaluate the purpose of the study and its methodology and reliability, but just the fact that law students provided assistance does not make it reliable or unreliable, without more information. Defendant notes that Justice Breyer's concurrence in *Miller-El II* cites at least one study where law students provided research assistance. *See Miller-El II*, 545 U.S. at 268, 125 S. Ct. at 2341 (Breyer, J. Concurring) (citing Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 52–53, 73, n.197 (2001)); Baldus et al., *The Use of Peremptory Challenges*, *supra*, at 3 n.a1 (listing law students who provided research assistance). While

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Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials, 97 Iowa L. Rev. 1531, 1531 n.aa1 (2012). They "examined jury selection in at least one proceeding for each inmate who resided on North Carolina's death row as of July 1, 2010, for a total of 173 proceedings." *Id.* at 1542–43. According to Defendant, three of these capital cases were from Sampson County, but the article cited does not identify the counties where the proceedings occurred. The article does include a footnote regarding a "list of current death row inmates" available at the website of the North Carolina Department of Public Safety and that list identifies the county where each was convicted. *Id.* at 1533 n.6. Obviously the inmates listed on the website have changed since publication of the article in 2012, but we will assume for purposes of this opinion that Defendant's representation of three cases as of July 2010 from Sampson County is correct.

Justice Breyer used the evidence to show discriminatory use of peremptory challenges remains a problem in general rather than in a specific case as Defendant argues for here, *Miller-El II*, 545 U.S. at 268, 125 S. Ct. at 2341, his citation at least indicates support for analysis based on law student data collection. Also, in general law students appear capable of collecting data under the supervision of researchers.

¶ 78 Turning to the trial court's second criticism of the lack of prosecutorial opinions in the study, we again agree with Defendant that reason does not necessarily undermine the study. Again, the trial court must consider the methodology of each study and the purpose for which the information is presented. The results of a study may be more trustworthy if the methodology is sound and it draws information from more sources, but it is not necessarily of *no* value based on the lack of prosecutorial opinions. In addition, as Defendant notes, our Supreme Court has favorably cited the MSU study multiple times, albeit all in the context of Racial Justice Act claims rather than *Batson*. *Robinson III*, 375 N.C. at 179–80, 846 S.E.2d at 717; *State v. Augustine*, 375 N.C. 376, 378, 847 S.E.2d 729, 730 (2020); *State v. Burke*, 374 N.C. 617, 619, 843 S.E.2d 246, 248 (2020). At the very least, those cites suggest the study's methodology for collecting disparate jury strike percentages was acceptable. *See Robinson III*, 375 N.C. at 179–80, 846 S.E.2d at 717 (recounting disparate jury strike evidence). To the extent the trial judge's issue with the MSU study was based on his concerns that it read racial animus from racial disparities without consulting prosecutors who could have countered such analytical paths, we address that below with our discussion of the trial court's final criticism.

¶ 79 We also agree with Defendant's argument that the trial court's third reason, the conducting of the study on a cold record, does not justify discounting it. As Defendant points out, all *Batson* precedents—and indeed our entire appellate court system in this state and in this country—rely on reviewing the cold record. While a review of the cold record may not be the same as a trial court's perspective, the standard of review takes this factor into account. For example, here, the clear error standard of review recognizes the trial court's superior ability to evaluate credibility in comparison to a cold record alone. *See King*, 353 N.C. at 469–70, 546 S.E.2d at 586–87 (explaining the clear error standard of review reflects that rulings on race neutrality turn on evaluations of credibility); *Cummings*, 346 N.C. at 309, 488 S.E.2d at 561 (explaining trial courts are in the best position to make those credibility evaluations). In addition, a court can consider the reliability and completeness of the information provided from the cold record in each study. For example, the MSU

study notes the data sources and methods of collection of information regarding the jurors and voir dire for the cases included in the study. Grosso & O'Brien, *A Stubborn Legacy*, *supra*, at 1542–48. Since the MSU study included *only* capital murder trials, *id.* at 1533, the records may have been more complete and detailed than would be expected for non-capital and lower-level felony trials.[13] Thus, the fact that a study is based upon review of the "cold record" of the cases does not necessarily undermine its value.

¶ 80 Finally, the trial court discounted the MSU study because it did not show racial disparity in juror strikes in past cases involving the prosecutor in this case. Defendant contends the trial court was wrong to discount the MSU study on this basis because historical evidence does not require "direct evidence that a particular prosecutor was involved in past discrimination." To support this position, Defendant relies on the United States Supreme Court's decision in *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 123 S. Ct. 1029 (2003), and our Supreme Court's decision in *Hobbs*.

¶ 81 Defendant's reliance on *Miller-El I* and on *Hobbs* is misplaced because the portions he cites come from the cases' evaluation of *Batson*'s first step. *See Miller-El I*, 537 U.S. at 346–47, 123 S. Ct. at 1044–45 (stating, "Finally, *in our threshold examination*, we accord some weight to petitioner's historical evidence of racial discrimination by the District Attorney's Office" before discussing the evidence to which Defendant points (emphasis added)); *Hobbs*, 374 N.C. at 350–51, 841 S.E.2d at 497–98 (describing how the prima facie step works before then indicating "a court must consider historical evidence of discrimination"). As we have explained more fully above, a defendant's burden at *Batson*'s first step is fundamentally different from his burden at *Batson*'s third step. "At the stage of presenting a prima facie case, the defendant is not required to persuade the court conclusively that discrimination has occurred." *Hobbs*, 374 N.C. at 351, 841 S.E.2d at 498. At the third step, defendants are required to persuade the court conclusively that discrimination has occurred. *See Bennett II*, 374 N.C. at 592, 843 S.E.2d at 231 (summarizing *Batson*'s third step as "the trial court must then determine *whether the defendant has met the burden of proving purposeful discrimination*" (emphasis added)). Given this difference between

13. Even if jury selection information may be more complete for capital murder trials, the study does not address whether jury selection statistics from capital murder trials are necessarily comparable to lower level felony trials such as Defendant's trial on charges of possession and distribution of methamphetamine precursors and trafficking in methamphetamine.

the first and third steps in the *Batson* analysis, we cannot find that *Miller-El I* and *Hobbs* support Defendant's argument about the relevance of data that Sampson County prosecutors other than the one here struck Black venire members at a disproportionate rate.

¶ 82 However, in the time since the trial court made its ruling and the parties finished their supplemental briefing, our Supreme Court has clarified statistical evidence "regarding the disproportionate use of peremptory strikes against Black potential jurors" should be considered.[14] *Clegg*, ¶ 81. *Clegg* endorsed statistics of disparate strike rates in noncapital cases. *See Clegg*, ¶ 69 (describing the data), ¶ 81 (accepting the data.) Notably, our Supreme Court in *Clegg* relied on preliminary results from the same Wake Forest study Defendant cites. *See id.*, ¶ 68 (explaining the trial court noted evidence about non-capital cases from Pollitt & Warren, 94 N.C. L. Rev. at 1964); Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. Rev. 1957, 1964 n.44 (2016) (citing "preliminary findings from a study of jury selection in all non-capital North Carolina felony trials from 2011-2012" conducted by Wake Forest University School of Law professors showing a 16% strike rate of non-white potential jurors and an 8% strike rate of white potential jurors); Ronald F. Wright, Kami Chavis, & Gregory S. Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. Ill. L. Rev. 1407, 1419–20 (Wake Forest professors' final study cited by Defendant including study of juror strikes in all North Carolina felony trials in 2011).

¶ 83 Based on *Clegg*—which was decided after the trial court's consideration of this case—the trial court did not identify a proper basis for

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14. The trial court's error here is particularly understandable given Defendant did not identify a case where evidence of racial disparity alone supported a finding of purposeful discrimination at *Batson*'s third step. Further, the history of *Batson*, as a Fourteenth Amendment Equal Protection Clause case line, *Batson*, 476 U.S. at 89, 106 S. Ct. at 1719 ("[T]he State's privilege to strike individual jurors through peremptory challenges[] is subject to the commands of the Equal Protection Clause."), has focused on racially discriminatory purpose rather than racially disproportionate impact alone. *See Washington v. Davis*, 426 U.S. 229, 239–40, 96 S. Ct. 2040, 2047–48 (1976) (explaining in the equal protection context in general, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose," such that a violation does not arise from a state action "*solely* because it has a racially disproportionate impact" (emphasis added)). *Batson* itself explained while evidence of racial disparity may provide "[c]ircumstantial evidence of invidious intent," such disparity is not alone enough absent (near) total exclusive of African Americans from jury venires. 476 U.S. at 93, 106 S. Ct. at 1721. Against this pre-*Clegg* backdrop, the trial court could understandably have discounted the racial disparity evidence in the MSU study.

failing to take into account Defendant's data showing racially disparate strike rates in Sampson County, regardless of whether the same prosecutor in this case was involved in the studied cases. Yet we note that a trial court could weigh the usefulness of statistical information based upon the timing of the study and any relevant changes in the policies or procedures of the prosecutor's office in a particular county, even if the data does not identify the particular prosecutor involved in a case. For example, the MSU study began about 25 years and concluded about 5 years before the jury selection in this case. *See* Grosso & O'Brien, *A Stubborn Legacy*, *supra*, at 1557 n.101 (noting first trial court to review the study summarized it as looking at jury selection practices in capital cases in this state between 1990 and 2010). The record does not indicate if the practices or policies of the District Attorney's office in Sampson County were the same during the years covered by the study and 2017, when Defendant was tried. Our Supreme Court has noted these policies could be quite important. In *Clegg* the Supreme Court noted that in *Miller-El II*, there was evidence of " 'a specific policy [in the prosecutor's office] of systematically excluding [B]lack[] [people] from juries' evidenced by a training manual that 'outlined the reasoning for excluding minorities from jury service.' " *Clegg*, ¶ 31 (quoting *Miller-El II*, 545 U.S. at 263–64, 125 S. Ct. at 2338–39) (alterations in original). The Wake Forest study was more recent than the MSU study but was still based upon information collected at least six years before Defendant's trial. *See* Wright, Chavis, & Parks, *The Jury Sunshine Project*, *supra*, at 1419 (explaining the project examined all felony trials for which the authors could find adequate information in the state in 2011). But even weighing the data in Defendant's favor, we cannot find the trial court clearly erred, as we would be required to find to reverse the trial court. *See Chapman*, 359 N.C. at 339, 611 S.E.2d at 806 (explaining standard of review in *Batson* cases is clear error). Side-by-side comparisons of the potential jurors are more powerful than "bare statistics," *Miller-El II*, 545 U.S. at 241, 125 S. Ct. at 2325, and those comparisons here support the prosecutor. Further, we have already concluded the lack of susceptibility of this case to racial discrimination favors the prosecutor's reasoning as well. Given those two factors, as well as the final factor we discuss below, the trial court did not clearly err in its ultimate determination that Defendant has failed to show purposeful discrimination as required at *Batson*'s third step.

5. Weight Given to Black Jurors Accepted by the State

¶ 84 Defendant finally argues the trial court "gave improper weight to the Black jurors accepted by the State." Specifically, Defendant alleges

the trial court erred in finding the prosecutor's acceptance of three African-American jurors before the initial *Batson* hearing and two after the hearing tended to negate an inference of racial discrimination. Defendant also noted *Bennett II* rejected the evidence of the prosecutor's acceptance of other Black jurors "when *all of* the peremptory strikes he did use were against Black jurors." (Emphasis in original; citing *Bennett II*, 374 N.C. at 600–01, 843 S.E.2d at 237.) Lastly, Defendant highlights the "racially-motivated strike of even a single juror is a *Batson* violation, regardless of how many jurors of the same race the prosecutor accepted."

¶ 85 First, as with Defendant's other arguments based on *Bennett II*, we note our Supreme Court was focused on the first step of the *Batson* inquiry, whether Defendant showed a prima facie case: "[W]e do not find the State's argument that defendant failed to show the existence of the required *prima facie case* of discrimination based upon the fact that the prosecutor accepted three of the five African American prospective jurors that were tendered to him for questioning to be persuasive." *Bennett II*, 374 N.C. at 600–01, 843 S.E.2d at 237 (emphasis added). As we have repeatedly explained above, the first step differs significantly from the third step. *See Hobbs*, 374 N.C. at 351, 841 S.E.2d at 498 (explaining the prima facie case does not require showing purposeful discrimination).

¶ 86 That being said, the reasoning of our Supreme Court in *Bennett II* relied on *Flowers* and *Miller-El II*, both of which are *Batson* step three cases. *See Bennett II*, 374 N.C. at 600–01, 843 S.E.2d at 236–37 (citing *Flowers*, which in turn cited *Miller-El II* for the idea that the United States Supreme Court was skeptical of the prosecution's decision to accept one Black juror because it could be done to obscure an otherwise consistent pattern of opposition to seating Black jurors); *Flowers*, 139 S. Ct. at 2244 ("The question for this Court is whether the Mississippi trial court clearly erred in concluding that the State was not motivated in substantial part by discriminatory intent when exercising peremptory strikes at Flowers' sixth trial." (citation and quotations omitted)); *Miller-El II*, 545 U.S. at 241, 125 S. Ct. at 2325 (explaining at the start of its analysis that it was looking at "evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step"). And we also acknowledge *Batson*'s central premise that "[i]n the eyes of the Constitution, one racially discriminatory peremptory strike is one too many." *See Flowers*, 139 S. Ct. at 2241 (summarizing *Batson* as stressing that point).

¶ 87 Still, the trial court did not clearly err by giving weight to the Black jurors accepted by the prosecution because the situation here is different

from the situations warned of in *Miller-El II* and *Flowers*. In *Miller-El II*, the Supreme Court emphasized the "late-stage" nature of the decision in contrast to behavior earlier in the jury empanelment process. 545 U.S. at 250, 125 S. Ct. at 2330. Here, by contrast, the prosecution accepted three Black jurors before striking R.S. and V.B. and accepted two more after.

¶ 88 Turning to *Flowers*, the Supreme Court there emphasized the prosecution could not hide behind the fact that it accepted one Black juror at Flowers's *sixth* trial given "[t]he overall record of this case," especially the prosecution having struck all Black jurors at four previous trials of Flowers. 139 S. Ct. at 2246. Here, as we have explained throughout the rest of this opinion, the overall record does not present a clear picture of intentional discrimination as in *Flowers*. We further note that while only one Black juror was accepted in *Flowers*, 139 S. Ct. at 2246, the prosecution here accepted five. Ultimately, the jury included 5 Black and 7 white jurors. Notably, this final breakdown includes a higher percentage of Black jurors than the relative population of Black people within Sampson County at the time,[15] which reinforces the conclusion

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15. The final jury was 41.67% Black. According to United States Census Bureau County Population Demographics Data from 1 July 2016—the closest available data before Defendant's March 2017 trial, *Bennett II*, 374 N.C. at 581, 843 S.E.2d at 225—non-Hispanic Black and multiracial people represented 27.15% of Sampson County's population. *See County Population by Characteristics: 2010-2019*, United States Census Bureau (Oct. 8, 2021), https://www.census.gov/data/tables/time-series/demo/popest/2010s-counties-detail.html (including "Annual County Resident Population Estimates by Age, Sex, Race, and Hispanic Origin" data as well as a "File Layout" guide to understand the datasets).

We also make two quick notes on our methodology. First, we rely on United States Census Bureau data because the record did not include data on the population statistics of Sampson County. However, the record includes the Wake Forest Study discussed above, and that study used "census information about the population and racial breakdown of each county" in its analysis. Wright, Chavis, & Parks, *The Jury Sunshine Project*, *supra*, at 1422. Since Defendant relied on a study using similar underlying data, we rely on the same here to address his arguments.

Second, we explain how we calculated the percentages. After downloading all the North Carolina data from the Census Bureau, we isolated the data from Sampson County for Year "9" since that is the year that corresponds to data from 1 July 2016 according to the "File Layout" guide. We then calculated a total population of 63,225 by summing the "TOT_POP" columns across all age groups. To get the population of non-Hispanic Black and multiracial people, we summed the four columns for non-Hispanic Black males (NHBA_MALE), non-Hispanic Black females (NHBA_FEMALE), non-Hispanic multiracial males (NHTOM_MALE), and non-Hispanic multiracial females (NHTOM_FEMALE), which resulted in a total of 17,165 non-Hispanic Black or multiracial people in Sampson County at the time. Finally, we divided the non-Hispanic Black or multiracial population by the total population to determine non-Hispanic Black or multiracial people represented 27.15% of the population of Sampson County as of 1 July 2016.

the prosecutor did not intentionally discriminate based on jurors' race. Given these differences from *Flowers* and from *Miller-El II*, the trial court did not clearly err in weighing the prosecution's acceptance of five other Black jurors.

III. Conclusion

¶ 89 Having reviewed the entire record, the trial court did not clearly err in overruling Defendant's *Batson* objections as to either R.S. or V.B. We conclude the trial court properly conducted the *Batson* step two inquiry and find no clear error in its determination the prosecution proffered race neutral reasons. We also find no clear error in the trial court's step three evaluation of whether the Defendant met his burden of proving purposeful discrimination based on the following relevant factors: comparative juror analyses; susceptibility of the case to racial discrimination; historical evidence of discriminatory strikes by the Sampson County prosecutor's office; and weight given to the prosecution's acceptance of other Black jurors before and after R.S. and V.B. Therefore, we affirm.

AFFIRMED.

Judges WOOD and JACKSON concur.

STATE OF NORTH CAROLINA
v.
JAIME SUZANNE BOWEN, Defendant

No. COA21-43

Filed 5 April 2022

1. Appeal and Error—preservation of issues—criminal case—constitutional argument—covered by general motion to dismiss for insufficiency of evidence

In a trial for extortion, defendant was not required to state a specific ground for her motion to dismiss for lack of sufficient evidence in order to preserve for appeal a constitutional argument (that the First Amendment required a narrow interpretation of N.C.G.S. § 14-118.4, the criminal statute at issue) because a motion to dismiss preserves all arguments related to insufficiency of the evidence.

2. Constitutional Law—First Amendment—extortion—criminal speech not protected—true threat analysis inapplicable

Defendant's conviction for extortion pursuant to N.C.G.S. § 14-118.4—based on defendant's promise not to publish a tell-all if the victim paid for defendant to sign a confidentiality agreement, years after defendant and the victim met through an online match-making exchange and then conducted an extra-marital sexual relationship—was based on ample evidence and did not violate the First Amendment because the statute was narrowly tailored to prohibit extortionate speech, and since such speech constitutes criminal conduct, it was not constitutionally protected speech to which a "true threat" analysis must be applied.

Appeal by Defendant from judgment entered 24 September 2019 by Judge George Cooper Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 October 2021.

Attorney General Joshua H. Stein, by Associate Attorney General Brian M. Miller, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Jaime Suzanne Bowen ("Defendant") appeals from a judgment entered following her conviction of extortion. On appeal, Defendant argues the First Amendment to the United States Constitution requires the word "threat" in N.C. Gen. Stat. § 14-118.4 to be construed in accordance with the term "true threat"; and as such, the evidence was insufficient to show she committed a true threat. After a careful review of the record and applicable law, we affirm the judgment of the trial court.

I. Factual and Procedural Background

¶ 2 In 2011, Steven Nason ("Nason") visited Seeking Arrangement,[1] an online dating service where a "sugar daddy," seeks to meet a "sugar

1. Seeking, originally called Seeking Arrangement, is a website where " 'sugar daddies' and 'sugar mommas' could meet 'sugar babies' by honestly sharing expectations for a relationship upfront. . . . Seeking is about identifying what drives us and how we can live our best lives with someone by our side." SEEKING, https://www.seeking.com/about-us (last visited March 25, 2022).

baby." At the time, Nason was married and had children. According to Nason, he accessed Seeking Arrangement because he believed his current marriage was difficult and he was "seeking . . . [another] relationship and . . . was willing to help someone financially."

¶ 3 Nason met Defendant, who was twenty-eight years of age, through the website. The parties began a sexual relationship that lasted a couple of months, during which time Nason provided Defendant with financial compensation. Thereafter, Nason divorced his wife in 2013 and re-married in 2016.

¶ 4 On December 9, 2016, Nason received a LinkedIn message from Defendant, stating to let her know if he "would ever want [sic] grab lunch []or dinner . . . ." When Nason did not respond to Defendant's initial message, Defendant sent two more messages to him over LinkedIn, and after acquiring his e-mail address, also e-mailed him. After the parties exchanged a few e-mails, Defendant informed Nason she was writing a book about her experience on Seeking Arrangement titled "The Sugar Lie." According to Defendant, the book was a "memoir of . . . [her] experience on Seeking Arrangement[]." Nason was included in Defendant's book because the two "pursued a paid, sexual, relationship from meeting on the site . . . ." Defendant explained she reached out to Nason, because there was "somebody interested in publishing" "The Sugar Lie," and she "needed to reach out to everybody that . . . [she] had written about . . . ." After receiving this e-mail, Nason retained an attorney to review and assist him with the situation.

¶ 5 When Nason did not respond to the e-mail, Defendant sent two certified letters to his home address. Therein, Defendant again alerted Nason about her book and stated she "had to send a certified letter to your ex-wife, as statements you made in regard to her in your marriage are to be included." In response, Defendant sent a letter to Nason asking, in relevant part, "[w]hat alternatives are available?"

¶ 6 Seventeen days later, Nason received an e-mail from Defendant's new e-mail address, Thesugarlie@gmail.com. Defendant explained to Nason she had "reached out to your ex-wife twice" and because Defendant's ex-wife had not responded, "the only person . . . [the ex-wife] will be able to come after for defamation . . . is you." Regarding possible alternatives, Defendant stated that other gentlemen had asked her "to consider working out a confidentiality agreement . . . [and she was] open to discussing that." Defendant clarified that "all the other men who have asked me to consider a confidentiality agreement have made financial offers" ranging from $100,000.00 to $500,000.00.

¶ 7 Thereafter, Defendant began to e-mail Nason more frequently. Defendant pressured Nason to send his "offer" for a confidentiality agreement by a certain deadline because she would soon decide "who's offer, if any, I will be accepting." When Nason failed to provide Defendant with an offer, Defendant e-mailed him stating that he would not receive a confidentiality agreement, and she would be "contacting the Dr. Phil show to see about getting on to promote . . . [her] book around the time it's coming out. . . . [and] [t]here may be a chance they might reach out to you to appear on the show or make a comment."

¶ 8 Notwithstanding Nason missing her initial deadline, Defendant continued to send messages to him through e-mail and LinkedIn in her effort to persuade him to make a monetary offer in exchange for a confidentiality agreement. After multiple messages without a response, Defendant e-mailed Nason on February 7, 2017, saying she would contact his current wife "for a statement since . . . [Nason is] going to have to tell her about the book and being on [s]eeking [a]rrangement[] . . . [and] since other women you met on there will probably come forward once the book is out."

¶ 9 That same day, Nason met with Detective Matthew Grimsley with the Charlotte Mecklenburg Police Department. Nason provided Detective Grimsley with copies of the e-mails exchanged with Defendant, and Detective Grimsley initiated an investigation of Defendant. Thereafter, Nason coordinated every communication between himself and Defendant with Detective Grimsley.

¶ 10 Meanwhile, Defendant continued to demand Nason make her an "offer" and pay for a confidentiality agreement. Acting under Detective Grimsley's direction, Nason sent a message to Defendant with an offer of $250,000.00. Defendant accepted Nason's offer and sent a confidentiality agreement to him. On February 9, 2017, Nason asked Defendant to meet him in a public place to deliver the money. Detective Grimsley intended to arrest Defendant at the meeting. However, Defendant refused to meet in person, demanding instead that the funds be sent to her by wire transfer. At no point did Nason wire any money to Defendant.

¶ 11 On February 16, 2017, Detective Grimsley arrested Defendant at her apartment in Charlotte, North Carolina. After Defendant's arrest, the magistrate issued a search warrant, and Detective Grimsley, accompanied by other officers, returned to Defendant's apartment to conduct a search. The officers' search resulted in the seizure of confidentiality agreements between Defendant and multiple other men; however, the officers did not find any evidence of Defendant having written a book

or being in contact with a publisher or Dr. Phil. On September 18, 2017, Defendant was indicted for extortion.

¶ 12 At trial, Defendant twice moved to dismiss the charges, but both motions were denied. On September 24, 2019, the jury found Defendant guilty of extortion pursuant to N.C. Gen. Stat. § 14-118.4. That same day, the trial court sentenced Defendant to 16 to 29 months in confinement, suspended the sentence, and placed Defendant on 24 months of supervised probation. Defendant gave oral notice of appeal in open court.

II. Discussion

A. Defendant's Constitutional Argument Was Preserved

¶ 13 **[1]** At the outset, we address the State's contention that Defendant's argument on appeal was not preserved. Appellate Rule 10(a)(3) provides, "[i]n a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue [later] presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial." N.C. R. App. P. 10(a)(3). A properly made motion to dismiss for insufficiency of the evidence under Appellate Rule 10(a)(3) "preserves *all* insufficiency of the evidence issues for appellate review . . . ." *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020) (emphasis added). Although Rule 10(a)(3) requires a defendant to make a motion, the defendant is not required to "assert a specific ground for a motion to dismiss for insufficiency of the evidence." *Id.* at 245-46, 839 S.E.2d at 788 (citation omitted).

¶ 14 Here, the State argues since Defendant did not raise a constitutional argument in her motions to dismiss at the trial court, her argument is not preserved for appeal. We disagree. Defendant was not required to state a specific ground for her motion to dismiss as a properly made motion to dismiss preserves all arguments based on insufficiency of the evidence. *Id.* Moreover, Defendant does not raise an entirely new issue on appeal, but rather argues the insufficiency of the evidence to support a conviction for extortion under her proposed Constitutional interpretation of N.C. Gen. Stat. § 14-118.4. We hold Defendant's motion to dismiss preserved for appellate review all issues surrounding sufficiency of the evidence, including the Constitutional argument Defendant now raises before this Court.

B. North Carolina's Extortion Statute and The First Amendment

¶ 15 **[2]** On appeal, Defendant argues the trial court erred by denying her motion to dismiss because under the First Amendment, N.C. Gen. Stat. § 14-118.4 must be construed to apply only to true threats. We disagree.

¶ 16 In support of her sole argument on appeal, Defendant relies heavily upon *State v. Taylor* where this court held the First Amendment requires a "true threat" reading to be applied to every anti-threat statute. *State v. Taylor*, 270 N.C. App. 514, 849 S.E.2d 776 (2020), *rev'd*, 379 N.C. 589, 2021-NCSC-164. Therefore, we first determine whether the United States Constitution requires us to construe the North Carolina extortion statute's "threat" language as a "true threat" before reaching the merits of Defendant's sufficiency of the evidence argument.

¶ 17 On appeal, constitutional challenges and alleged violations are reviewed *de novo*. *State v. Shackelford*, 264 N.C. App. 542, 551, 825 S.E.2d 689, 695 (2019). When an issue concerning the First Amendment arises, an appellate court must " 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499, 104 S. Ct. 1949, 1958, 80 L. Ed. 2d 502, 515 (1984). *E.g.*, *State v. Taylor*, 379 N.C. 589, 2021-NCSC-164 ¶ 44.

¶ 18 Any state statute that criminalizes speech "must be interpreted with the commands of the First Amendment clearly in mind." *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 1401, 22 L. Ed. 2d 664, 667. The importance of the First Amendment is paramount within our State, and the trial court must construe any statute that criminalizes speech in accordance with the First Amendment, even if the statute does not explicitly require it. *See also State ex rel. North Carolina Milk Com. v. National Food Stores, Inc.*, 270 N.C. 323, 331, 154 S.E.2d 548, 554-55 (1967); *State v. Strickland*, 27 N.C. App. 40, 43, 217 S.E.2d 758, 760 (1975). The State bears "the burden of proving the speech it seeks to prohibit is unprotected." *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 620, 123 S. Ct. 1829, 1841, 155 L. Ed. 2d 793, 810 n.9 (2003). Requiring the State, not the defendant, to prove whether disputed speech is unprotected speech ensures equity in court proceedings. *See Speiser v. Randall*, 357 U.S. 513, 526, 78 S. Ct. 1332, 1342, 2 L. Ed. 2d 1460, 1473 (1958) ("The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens.").

¶ 19 Recent cases from both our appellate courts and the federal courts identify an emerging trend in the law holding that the First Amendment requires all statutes governing threats be construed as a "true threat." *Watts*, 394 U.S. at 707, 89 S. Ct. at 1401, 22 L. Ed. 2d at 667; *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011). *Cf. Taylor*, at ¶ 17-19. *Watts v. United States* is among the first cases to act as the catalyst for

the "true threat" analysis requirement under the First Amendment. In *Watts*, the defendant was convicted for knowingly and willfully threatening the President of the United States after he stated at a political rally

> [t]hey always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.

Watts, 394 U.S. at 706, 89 S. Ct. at 1401, 22 L. Ed. 2d at 666. The U.S. Supreme Court overturned the conviction reasoning "[t]he language of the political arena . . . is often vituperative, abusive, and inexact. . . . Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners," the defendant's speech could not be construed as a true threat. *Id.* at 708, 89 S. Ct. at 1401-02, 22 L. Ed. 2d. at 667. The holding in *Watts* established that the First Amendment "requires the [g]overnment to prove a true threat" exists when prosecuting under a statute that criminalizes a pure form of speech. *Id.* at 708, 89 S. Ct. at 1401, 22 L. Ed. 2d at 667 (internal quotation marks omitted).

¶ 20 A "true threat" is an "objectively threatening statement communicated by a party which possess the subjective intent to threaten a listener or identifiable group." *State v. Taylor*, 379 N.C. 589, 2021-NCSC-164, ¶ 34. *See Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 1548, 155 L. Ed. 2d 535, 552 (2003). The speaker of the true threat need not intend "to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* at 360, 123 S. Ct. at 1548, 155 L. Ed. 2d at 552 (cleaned up) (citation omitted).

¶ 21 Our Supreme Court applied the holding in *Watts* to a North Carolina anti-threat statute for the first time in *State v. Taylor*. In *Taylor*, the defendant posted comments on Facebook against court officers, referencing that one officer would be the "first to go[,]" and another officer could incur "death to her as well." *Taylor*, at ¶ 2, 7. Ultimately, defendant was convicted under N.C. Gen. Stat. § 14-16.7(a) for knowingly and willfully making a threat to kill an officer of the court. *Id.* at ¶ 12-13. Defendant appealed, and, in reversing the trial court, this Court determined his conviction violated the true threat exception to the First Amendment. *Id.* at ¶ 3.

¶ 22 Subsequently, our Supreme Court affirmed the true threat exception to the First Amendment, noting "[i]f defendant's Facebook posts

contained any true threats, then it is indisputable that he could be criminally punished . . . [but if the] posts did not contain any true threats, then his expression is shielded by the First Amendment." *Id.* at ¶ 18. Our Supreme Court further stated "in defining and applying the true threats exception, a statute criminalizing speech must be interpreted with the commands of the First Amendment clearly in mind." *Id.* at ¶ 24 (internal quotation marks omitted) (quotation omitted). Ultimately, our Supreme Court held that the "Free Speech Clause of the First Amendment to the United States Constitution protect[s] defendant from being convicted solely for publishing the messages contained in his Facebook posts[.]" *Id.* at ¶ 4.

¶ 23 Here, Defendant urges this court to hold that the First Amendment of the United States Constitution requires we apply the "true threat" requirement to the terms within N.C. Gen. Stat. § 14-118.4 which sets forth the crime of Extortion. Whether N.C. Gen. Stat. § 14-118.4 falls under the "true threat" requirement of the First Amendment is a case of first impression. We decline to extend the "true threat" requirement to N.C. Gen. Stat. § 14-118.4 and hold the First Amendment does not require a threat under the terms of N.C. Gen. Stat. § 14-118.4 be a "true threat" to fall outside the protections of the First Amendment.

¶ 24 Generally, the First Amendment "prevents government from proscribing speech, . . . or even expressive conduct, . . . because of disapproval of the ideas expressed." *R. A. V. v. St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 2542, 120 L. Ed. 2d 305, 317 (1992). Our society, however, permits content-based restrictions on speech that is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*, 505 U.S. at 383, 112 S. Ct. at 2543, 120 L. Ed. 2d at 317 (quotation omitted). Categories of speech that may be restricted are those forms of speech intended and likely to "incite imminent lawless action, . . . obscenity, . . . defamation, . . . speech integral to criminal conduct, . . . so-called 'fighting words,' . . . child pornography, . . . fraud, . . . true threats, . . . and speech presenting some grave and imminent threat the government has the power to prevent . . . ." *United States v. Alvarez*, 567 U.S. 709, 717, 132 S. Ct. 2537, 2544, 183 L. Ed. 2d 574, 587 (2012). Although the "true threat" requirement under the First Amendment has been applied to speech surrounding political hyperbole, Courts have hesitated to apply the "true threat" requirement to extortion. *See also United States v. Quinn*, 514 F.2d 1250, 1268 (1975).

¶ 25 In the case before us, Defendant was convicted of extortion under Section 14-118.4. Extortion, though verbal, is a crime in and of itself.

United States v. Marchetti, 466 F.2d 1309, 1314, (4th Cir. 1972). Like robbery or murder, extortion "refers to criminal conduct that has a commonly understood meaning providing ample notice of the conduct falling within its ambit, limiting the potential for abuse in enforcement, and ensuring that protected First Amendment speech is not within its reach." *United States v. Coss*, 677 F.3d 278, 289 (6th Cir. 2012). Extortion is speech that is integral to criminal conduct, notwithstanding the content of the speech. It therefore falls within the category of unprotected speech, and necessarily may be restricted. *See also Alvarez*, 567 U.S. at 717, 132 S. Ct. at 2544, 183 L. Ed. 2d at 5887; *Seals v. McBee*, 898 F.3d 587, 597 (2017) (noting "extortion" is "unprotected speech"). As the Fifth Circuit colorfully expressed in *Quinn*, "[i]t may categorically be stated that extortionate speech has no more constitutional protection than that uttered by a robber while ordering his victim to hand over the money, which is no protection at all." *United States v. Quinn*, 514 F.2d 1250, 1268 (5th Cir. 1975). In *United States v. Kirsch*, the court found that true threat jury instructions should not be read in conjunction with extortion statutes, explaining "the extortion statutes at issue in this case already contain sufficient intent requirements. There is thus no need to further separate innocent conduct from wrongful conduct." *United States v. Kirsch*, 151 F. Supp. 3d 311, 318 (W.D.N.Y. 2015).

¶ 26 We agree with the reasoning of the federal courts and hold that extortionate speech as prohibited by N.C. Gen. Stat. § 14-118.4 is not constitutionally protected speech. Thus, a "true threat" application and analysis to Section 14-118.4 is unmerited.

¶ 27 Notwithstanding our holding, a statute prohibiting extortionate speech may itself be unconstitutional. Other courts in the federal circuit have addressed the validity of extortion statutes under the First Amendment. The Sixth Circuit in *Coss* held an extortion statute did not violate the First Amendment when the statute was sufficiently "cabined by its own wrongful threat and intent to extort requirements to survive constitutional muster." *United States v. Coss*, 677 F.3d 278, 290 (6th Cir. 2012). In *United States v. Hutson*, the Ninth Circuit held a statute was valid under the First Amendment

> [b]ecause the statute in the present case is limited to extortionate threats, it does not regulate speech relating to social or political conflict, where threats to engage in behavior that may be unlawful may nevertheless be part of the marketplace of ideas. . . . The 'intent to extort' requirement of section 876 guarantees that the statute reaches only extortionate speech,

> which is undoubtedly within the government's power to prohibit.

843 F.2d 1232, 1235 (9th Cir. 1988).

¶ 28 As in *Coss* and *Hutson*, Section 14-118.4 contains the necessary intent and act requirements to pass constitutional muster. N.C. Gen. Stat. § 14-118.4 states: "Any person who threatens or communicates a threat or threats to another with the intention thereby wrongfully to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion and such person shall be punished as a Class F felon." N.C. Gen. Stat. § 14-118.4 (2021). Per the plain language of Section 14-118.4, the "intent" component of the section lies in the requirement that the perpetrator must "communicate a threat or threats" while possessing the requisite intent to "wrongfully . . . obtain anything of value or any acquittance, advantage, or immunity . . . ." *Id.* The "act" component, in turn, rests in Section 14-118.4's prohibition of the crime of extortion within our State and does not limit speech "relating to social or political conflict." *Hutson*, 843 F.2d at 1235. Consequently, we hold Section 14-118.4 withstands First Amendment scrutiny as it prohibits only extortionate speech.

¶ 29 In this case, extensive evidence was presented to support Defendant's conviction of extortion. Defendant sent Nason multiple e-mails and letters asserting that she was writing a book about their "sugar daddy" and "sugar baby" relationship. Defendant told Nason she sent certified letters to his ex-wife regarding statements he had made about her. When Nason did not immediately offer to "purchase" a confidentiality agreement, Defendant sent frequent e-mails demanding Nason submit a bid for a confidentiality agreement. Defendant threatened, absent a confidentiality agreement, Nason's ex-wife could come after him for defamation, he may be asked to appear on the Dr. Phil show about the book, and his current wife would receive letters from Defendant. Under these facts, there was ample evidence to support the jury's finding Defendant committed extortion under Section 14-118.4.

¶ 30 Finally, Defendant concludes her argument on appeal by alleging the evidence was insufficient to show she committed a "true threat." As discussed *supra*, because we hold the crime of extortion does not require a "true threat" under the First Amendment, we need not address this argument.

III. Conclusion

¶ 31 Following the U.S. Supreme Court and federal appellate opinions, we hold extortionate speech is criminal conduct in and of itself and,

as such, is not constitutionally protected speech. Therefore, the First Amendment does not require that the "true threat" analysis be applied to N.C. Gen. Stat. § 14-118.4. Although statutes prohibiting extortionate speech may, as a whole, be unconstitutional, Section 14-118.4 is narrowly tailored as to only restrict extortionate speech, and thus is valid under the First Amendment. The evidence in this case supported the jury's finding that Defendant committed extortion in violation of Section 14-118.4. Accordingly, we discern no error in the judgment of the trial court.

NO ERROR.

Judges ZACHARY and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
ROCHEIN FUQUAN JORDAN

No. COA21-469

Filed 5 April 2022

Search and Seizure—traffic stop—consent to search residence—ongoing narcotics investigation

There was no error in the trial court's denial of defendant's motion to suppress evidence of a firearm and drugs seized from the apartment he shared with his girlfriend based on consent given during a traffic stop of defendant and his girlfriend where the traffic stop was initiated based on a speeding infraction and extended based on the smell of marijuana coming from the vehicle, the officer made a five- to seven-minute phone call after discovering marijuana in the vehicle to inquire whether he should inform defendant and his girlfriend about the ongoing investigation of narcotics sales from their apartment, and the officer had not yet decided whether to arrest defendant for the marijuana found in the vehicle at the time he requested consent to search the apartment. Even assuming the mission of the stop was already completed, the officer was justified in extending the stop because he had reasonable suspicion—based on prior surveillance and a controlled drug purchase—that defendant and his girlfriend were selling narcotics from their apartment. Finally, the consent to search the apartment was freely and

voluntarily given where the officer stated that he believed the police had probable cause to apply for a search warrant.

Appeal by Defendant from Judgment entered 13 April 2021 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 25 January 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John A. Payne, for the State.

Benjamin J. Kull for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Defendant Rochein Fuquan Jordan (Defendant) appeals from a Judgment entered upon his guilty plea to Possession of a Firearm by a Felon and Possession of Cocaine, following the denial of his Motion to Suppress evidence obtained during a search of his residence. The Record before us—including evidence presented during the hearing on the Motion to Suppress—tends to reflect the following:

¶ 2 In July 2018, a confidential informant reported to the Greensboro Police Department Defendant was selling heroin and crack cocaine out of the apartment (Apartment) Defendant shared with his girlfriend, Harlena Whitworth (Whitworth). In early August 2018, the lead officer in the investigation, Officer Garrison, orchestrated a controlled drug buy at Defendant's Apartment. During the controlled buy, Officer Garrison observed the informant go into the Apartment and come back out. Afterwards, Officer Garrison followed the informant to a separate location, where the informant turned over the drugs—which Officer Garrison identified as heroin—and identified Defendant as the seller.

¶ 3 A few weeks after the controlled buy, on or about 20 August 2018, officers were surveilling the Apartment, when Defendant left the Apartment, riding in the front passenger seat of a white Lexus sedan driven by Whitworth. Officer Fisher of the Greensboro Police Department quickly caught up to the vehicle and followed it for approximately a quarter of a mile. While following the vehicle, Officer Fisher noticed the vehicle was traveling 47 miles-per-hour in a 35 mile-per-hour zone. Officer Fisher activated his blue lights and siren to initiate a traffic stop. As Officer Fisher pulled over the vehicle, he noticed Defendant reaching towards the center console, and upon approaching the vehicle, smelled a strong

odor of marijuana coming from the vehicle. Consequently, Officer Fisher requested Defendant and Whitworth exit the vehicle. Officer Fisher placed Defendant and Whitworth in handcuffs and took them to the rear of the vehicle so the second officer, Officer Childrey, could search the car. A search of the car revealed two partially burned blunts in the front passenger compartment ashtray and a small baggie of marijuana in the center console.

¶ 4 After Officer Childrey had searched the car, Officer Fisher called Officer Garrison to inquire into whether he should inform Defendant and Whitworth about the ongoing narcotics investigation. The call to Officer Garrison lasted five to seven minutes. Subsequently, Officer Fisher informed Whitworth and Defendant this was "not just a random traffic stop" and law enforcement officials were actually there to follow up on the informant's tip about the sales of heroin and crack cocaine from the Apartment, as well as the controlled buy. During the conversation, Whitworth and Defendant remained handcuffed, outside of their car. Officer Fisher explained:

> that [he] felt like [the police] had probable cause to apply for a search warrant. And . . . we could apply for a search warrant or we could search - - if [Whitworth] should be willing to provide consent, we could search her residence on consent.

After Whitworth learned of the scope of the investigation, she consented to the search of the Apartment.[1] The officers transported Defendant and Whitworth back to the Apartment where Whitworth signed a consent form. A search of the Apartment revealed, *inter alia*, a firearm found next to Defendant's driver's license and a quantity of cocaine.

¶ 5 On 3 September 2020, Defendant was indicted for Possession of a Firearm by a Felon and Felony Possession of Cocaine. Subsequently, on 27 February 2020, Defendant filed a Motion to Suppress the evidence obtained as a result of the search of the Apartment, alleging it was the product of an unreasonable search and seizure in violation of his federal and state constitutional rights. The trial court heard arguments on Defendant's Motion to Suppress the same day.

¶ 6 Defendant argued the search was unconstitutional because "[o]nce the traffic violation was addressed and once the search of the vehicle

1. Officer Fisher testified Whitworth consented to the search—not Defendant. However, Officer Fisher also testified Defendant cooperated with the search and neither Whitworth nor Defendant attempted to revoke the consent.

was completed, there was no other new probable cause or reasonable suspicion developed to detain [Defendant] or Ms. Whitworth any further beyond that." Thus, according to Defendant, once the purpose for the stop was complete, any action taken after the stop was illegal because it unlawfully extended the stop.

¶ 7 Following the hearing, the trial court denied Defendant's Motion to Suppress by Order entered on 23 March 2020. The trial court found, in relevant part:

> 8. The stop began as a traffic stop for speeding, but upon the officer's observation of the odor of marijuana when he approached the vehicle, probable cause to search the vehicle was developed, and officers were authorized to conduct a search of the passenger compartment of the vehicle. This search was undertaken a produced a small quantity of what law enforcement officers determined by training and experience to be marijuana.
>
> 9. Possession of marijuana is at least a Class 3 misdemeanor in North Carolina as of the date of this stop and entry of this Order, and law enforcement officers were authorized to take defendant into custody based upon the discovery of marijuana in an area of the vehicle over which defendant had both actual and constructive possession.
>
> 10. Law enforcement officers were further authorized to take defendant into custody based upon the evidence of defendant's possession with intent to sell or deliver heroin generated during the controlled purchase of that controlled substance from the defendant on or about August 2, 2018.
>
> 11. The stop, detention, and arrest of the defendant in the case at bar do not implicate those Fourth Amendment violations which were at issue in *Rodriguez*. Consequently, the holding in *Rodriguez* does not require this Court to exclude the evidence recovered as a result of the consent search of defendant's residence on August 20, 2018.

¶ 8 Subsequently, on 12 April 2021, Defendant pled guilty to the charges of Possession of a Firearm by a Felon and Possession of Cocaine,

reserving his right to appeal the denial of his Motion to Suppress.[2] The trial court consolidated the two charges into one Judgment and imposed a suspended sentence of 15 to 27 months. Defendant gave oral Notice of Appeal in open court.

Issues

¶ 9 The sole issue on appeal is whether the trial court erred in denying the Motion to Suppress on the basis the consent given to search the Apartment during the traffic stop of Defendant and Whitworth was voluntarily given during the course of a valid traffic stop.

Analysis

A. Standard of Review

¶ 10 "Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether [the trial court's] findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." *State v. Reynolds*, 161 N.C. App. 144, 146-47, 587 S.E.2d 456, 458 (2003) (citation and quotation marks omitted). The trial court's conclusions of law, however, are reviewed de novo. *See State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997) (citation omitted). "In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State[.]" *State v. Moore*, 152 N.C. App. 156, 159, 566 S.E.2d 713, 715 (2002) (citations omitted).

B. Duration of the Traffic Stop

¶ 11 Defendant concedes Officer Fisher had reasonable suspicion to initiate the traffic stop based on the speeding infraction, and based on the smell of marijuana, had reasonable suspicion to search the vehicle. However, Defendant argues, the consent to search the Apartment was invalid because the consent was given after Officer Fisher extended an otherwise-completed traffic stop in order to conduct an unrelated investigation into the sale of heroin and crack-cocaine.

¶ 12 "Upon timely motion, evidence must be suppressed if: (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina[.]" N.C. Gen. Stat. § 15A-974(a) (2021). The

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2. "Pursuant to N.C. Gen. Stat. § 15A-979(b), a defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty." *State v. Brown*, 142 N.C. App. 491, 492, 543 S.E.2d 192, 193 (2001) (citation and quotation marks omitted).

Fourth Amendment of the United States Constitution guarantees "[t]he right of the people to be secure . . . against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "A traffic stop is a seizure" within the meaning of the Fourth Amendment "even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)). "Thus, a traffic stop is subject to the reasonableness requirement of the Fourth Amendment." *State v. Reed*, 373 N.C. 498, 507, __ S.E.2d __ (2020).

¶ 13 We evaluate the reasonableness of a traffic stop by examining "(1) whether the traffic stop was lawful at its inception and (2) whether the continued stop was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Id.* (citation and quotation omitted). "[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop." *Rodriguez v. United States*, 575 U.S. 348, 354, 191 L. Ed. 2d 492, 498 (2015). Nevertheless, "during the course of a traffic stop [the police] may question a vehicle's occupants on topics unrelated to the traffic infraction . . . as long as the police do not extend an otherwise-completed traffic stop in order to conduct these unrelated investigations." *United States v. Bowman*, 884 F.3d 200, 210 (4th Cir. 2018). Moreover, the seizure may be extended if "reasonable suspicion of another crime arose before that mission was completed." *State v. Bullock*, 370 N.C. 256, 257, 805 S.E.2d 671, 673 (2017).

¶ 14 In this case, Defendant contends since the officers never took any further action regarding the speeding and marijuana possession, the original and secondary missions of the traffic stop "necessarily and abruptly ended" when Officer Fisher admitted that the officers "were actually there" to investigate a separate and completely unrelated matter. Our Supreme Court recently rejected a similar argument in the case of *State v. Johnson*. There, the officer initially stopped the defendant for a "fictitious tag" violation, and after conducting a criminal record's check that revealed defendant had been charged with multiple violent crimes and offenses, returned to the vehicle to search defendant's person and vehicle. *State v. Johnson*, 2021-NCSC-85, ¶ 2-5. The defendant argued since the officer did not ultimately issue a citation for the traffic violation, the officer had necessarily decided not to issue the citation at the time he searched Defendant, and thus, the searches were not in furtherance of the purpose of the traffic stop, but rather "independent investigative actions targeting other unarticulated suspicions of criminal activity." *Id.* at ¶ 22. Our Supreme Court noted the officer did not

testify that he had already made a determination to refrain from charging defendant for the traffic violation at the time of the record check and subsequent *Terry* frisk. *Id.* at ¶ 24. Thus, the Court concluded:

> The officer's declination to issue a citation to defendant for the traffic offense, with only defendant's speculation as to the timing of the officer's decision to refrain from charging defendant with the violation in the dearth of any evidence to support defendant's theory, does not equate to a conclusion that the officer unreasonably prolonged the traffic stop.

Id. Cf. State v. Bedient, 247 N.C. App. 314, 318, 786 S.E.2d 319, 323 (2016) ("[T]he original purpose, or mission, of the traffic stop—addressing defendant's failure to dim her high beam lights—had concluded [when the officer] gave defendant a verbal warning, deciding not to issue defendant a traffic ticket.").[3]

¶ 15 Similarly, here, at the time Officer Fisher asked for consent to search the Apartment, there is no evidence to suggest Officer Fisher had already made a determination to refrain from charging Defendant for the traffic violation or marijuana possession. Instead, the Record seems to indicate that at the time of Officer Fisher's request for consent to search the Apartment, the stop had not been "otherwise-completed" as he had not yet made a decision on whether to charge Defendant for the marijuana possession. Indeed, Officer Fisher had not yet issued a verbal warning or a citation for the offenses and testified at the time of the request for consent to search, Defendant was not yet free to go. Moreover, as the trial court found: "law enforcement were authorized to take defendant into custody based upon the discovery of marijuana in an area of the vehicle over which defendant had both actual and constructive control." Thus, although law enforcement did not ultimately charge Defendant with possession of marijuana, the evidence tends to show the officers had not yet decided whether to take Defendant into custody for the marijuana possession at the time the request for consent to search the Apartment was made.[4] Therefore, the request was made

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3. *See also State v. Duncan*, 272 N.C. App. 341, 354, 846 S.E.2d 315, 325 (2020) (concluding the officer's search of defendant's person was unrelated to the mission of the stop when the officer admitted that after an initial pat-down to ensure the defendant did not have any weapons, "he believed he felt marijuana in Defendant's jacket and that this was the purpose of the search").

4. Defendant makes no argument he was in custody at the time consent was given and, thus, subject to constitutional protections for a person in custody, e.g. *Miranda*

"during the course of a traffic stop," and the officer was permitted to ask the vehicle's occupants a question unrelated to the traffic infraction.

¶ 16 Furthermore, assuming the "missions of the stop" were completed at the time Officer Fisher asked for consent to search the Apartment, he was justified in extending the stop because he had reasonable suspicion to believe Defendant was engaged in the sale of controlled substances. "To prolong a detention beyond the scope of a routine traffic stop an officer must possess a justification for doing so other than the initial traffic violation that prompted the stop in the first place. *Reed*, 373 N.C. at 510 (citing *United States v. Branch*, 537 F.3d 328, 336 (4th Cir. 2008)). "This requires either the driver's consent or a reasonable suspicion that illegal activity is afoot." *Id.*

¶ 17 The reasonable suspicion standard is "a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 567 (2000)). In order to meet this standard, an officer simply must "reasonably . . . conclude in light of his experience that criminal activity may be afoot." *Bullock*, 370 N.C. at 258, 805 S.E.2d at 674 (quoting *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889 (1968)). The officer "must simply be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Johnson*, 370 N.C. at 34, 803 S.E.2d at 139 (2017) (citation and quotation omitted). "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." *Id.*

¶ 18 Here, the trial court made several Findings of Fact tending to show Officer Fisher had reasonable suspicion, based on specific and articulable facts, criminal activity was afoot including: the tip from the confidential reliable informant that Defendant was selling heroin and crack cocaine; the surveillance of the Apartment during which police witnessed many people visiting the house during a short time; and the confidential reliable informant's controlled purchase of heroin from the residence. Indeed, this Court has considered this combination of factors as sufficient to rise to the level of probable cause. *See*

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warnings, or that if he was in fact in custody for the marijuana possession this would have invalidated consent to search the Apartment. *But see State v. Cummings*, 188 N.C. App. 598, 603, 656 S.E.2d 329, 333 (2008) ("After Defendant invoked his right to counsel, interrogation ceased. Agents did not ask any further questions about the robbery or Mr. Graham's homicide. The agents asked only whether Defendant would give his consent for his vehicle to be searched, a question to which *Miranda* warnings do not apply.").

State v. Stokley, 184 N.C. App. 336, 340-41, 646 S.E.2d 640, 644 (2007) (probable cause existed where a confidential informant bought cocaine from defendant at defendant's house, the officer knew and trusted the CI, the CI made a controlled buy from defendant after meeting with the officer, and the officer witnessed several hand-to-hand transactions between defendant and visitors to his house). Therefore, since the officers could likely meet the higher standard for probable cause based on the results of the ongoing investigation, Officer Fisher could necessarily meet the "less demanding standard" of reasonable suspicion. Consequently, the officer was justified in extending the seizure to question Defendant about the sale of heroin and crack-cocaine even though it was unrelated to the traffic violation. Thus, the trial court did not err in denying the Motion to Suppress because the stop was not unlawfully extended.

C. Voluntary Consent

¶ 19 In the alternative, Defendant argues "the consent was necessarily invalid because it was the direct result of unconstitutional coercion." Specifically, Defendant contends the officer coerced Defendant and Whitworth by giving them an ultimatum under a claim of lawful authority.

¶ 20 "Evidence seized during a warrantless search is admissible if the State proves that the defendant freely and voluntarily, without coercion, duress, or fraud, consented to the search." *State v. Williams*, 314 N.C. 337, 344, 333 S.E.2d 708, 714 (1985). Whether consent to a search was given voluntarily is a question of fact determined from the totality of the circumstances. *State v. Brown*, 306 N.C. 151, 170, 293 S.E.2d 569, 582 (1982). In reviewing the circumstances in which consent is given, this Court must determine whether there is "evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place." *State v. Bartlett*, 260 N.C. App. 579, 584, 818 S.E.2d 710, 714-15 (2015) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 247, 36 L. Ed. 2d 854, 874 (1973)).

¶ 21 For example, in *State v. Bartlett*, this Court concluded the defendant voluntarily consented to a search after considering circumstantial factors such as: only one officer interacted with the defendant even though there were four officers present on the scene; the officer did not make threats, use harsh language, or raise his voice at any time during the encounter; and each of the officers' firearms remained holstered throughout the encounter. *Bartlett*, 260 N.C. App. at 584-85, 818 S.E.2d at 715. Moreover, "[a]t no point did Defendant testify that he was unaware of his ability to refuse [the officer's] request, or that he feared retribution had he elected to do so." *Id.* at 585, 818 S.E.2d at 715.

¶ 22 However, "a search cannot be justified as lawful on the basis of consent when consent is based upon a representation by the official conducting the search that he possesses a warrant." *State v. Kersh*, 12 N.C. App. 80, 83, 182 S.E.2d 608, 610 (1971) (citing *Bumper v. North Carolina*, 391 U.S. 543, 550, 20 L. Ed. 2d 797, 803 (1968) (holding consent involuntary when the officer announced, "I have a search warrant to search your house."). In that circumstance consent is not valid because "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search." *Bumper*, 391 U.S. 543, 550, 20 L. Ed. 2d 797, 803. Nevertheless, if the officers do not give a suspect a reason to believe they presently have a warrant, consent may be valid in the absence of coercion. *Kersh*, 12 N.C. App. at 83, 182 S.E.2d at 610.

¶ 23 Here, unlike in *Bumper*, Officer Fisher did not claim to presently have a search warrant or give Defendant and/or Whitworth a reason to believe they had no right to resist the search. Instead, the trial court found Officer Fisher told Defendant they "would seek to obtain" a search warrant or they could search "with consent, if defendant and/or female would consent to the search." Furthermore, Officer Fisher did not definitively represent to Defendant that police could obtain a search warrant based on the evidence they had, and instead couched the statement by saying "that [he] felt like [the police] had probable cause to *apply* for a search warrant." Thus, Officer Fisher merely gave Defendant his opinion of the evidence—not an ultimatum.

¶ 24 Moreover, the trial court did not find that Officer Fisher used threats, harsh language, or raised his voice at any time during the encounter or otherwise used inherently coercive tactics in obtaining the consent of Whitworth to search the Apartment. The evidence indicates that upon arriving at the Apartment, the officers removed the handcuffs from Defendant and Whitworth, informed them of their right to refuse the search, and requested Whitworth sign a consent form. Therefore, we conclude the trial court did not err in concluding Defendant and/or Whitworth freely and voluntarily consented to the search.

Conclusion

¶ 25 Consequently, for the foregoing reasons, we conclude the trial court did not err in denying Defendant's Motion to Suppress. Accordingly, we affirm the Judgment.

AFFIRMED.

Judges DIETZ and INMAN concur.

STATE v. JORDAN

[282 N.C. App. 651, 2022-NCCOA-215]

STATE OF NORTH CAROLINA
v.
RICHARD HENRY JORDAN, JR.

No. COA21-91

Filed 5 April 2022

1. Search and Seizure—warrantless entry—private residence of another—reasonable expectation of privacy

Where law enforcement effected a warrantless entry of a private residence in the course of investigating a stolen car and subsequently seized drugs and paraphernalia from a safe found in the house, defendant had a reasonable expectation of privacy to challenge the search. Although defendant was not an occupant of the residence, he was present when officers entered and there was evidence that he had some authority to decide who could be admitted to the residence and that he owned the safe or had control over it since he locked it with a key and put the key in his pocket. Therefore, in his prosecution for multiple drug-related offenses, defendant had standing to bring his motion to suppress.

2. Search and Seizure—warrantless entry—private residence of another—lack of exigent circumstances or lawful consent—no probable cause

In a drug prosecution arising from evidence seized from a private residence during the course of officers' investigation into a stolen vehicle, the trial court erred by denying defendant's motion to suppress where there was no evidence that exigent circumstances existed, as argued by the State, that justified the officers' warrantless entry of the residence to follow a suspect who could have destroyed evidence, or that the officers had obtained lawful consent to enter. Further, although the officers obtained a search warrant to search the house and a safe contained therein, the supporting affidavit did not establish probable cause because it related information that was tainted by the illegal entry.

Appeal by Defendant from judgments entered 28 January 2020 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 November 2021.

Patterson Harkavy LLP, by Christopher A. Brook, for Defendant-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State-Appellee.

COLLINS, Judge.

¶ 1 Defendant Richard Henry Jordan, Jr., appeals from judgments entered upon guilty verdicts of possession of a firearm by a felon, possession of drug paraphernalia, and trafficking in cocaine, and a plea of guilty to attaining habitual felon status. Defendant argues that the trial court erred by denying his motion to suppress evidence gathered by police officers following their warrantless entry into a private residence. We reverse the trial court's denial of Defendant's motion to suppress and remand the matter for further proceedings.

I. Background

¶ 2 On 21 November 2017, the Charlotte Mecklenburg Police Department received a report of a stolen Infiniti car. One of the car's co-owners told officers that he suspected his girlfriend had taken the car and gave the officers the location of a house where she might be found.

¶ 3 At around midnight, Officer Patrick White and Officer Williams[1] responded to the house in an unmarked police vehicle. The house contained a salon and a residence which were separated by sealed doors. White and Williams drove down a driveway on the right side of the house, passed a door, and reached a gravel parking lot in the rear. The officers saw at least four cars parked there, including the Infiniti which had been reported stolen. White and Williams positioned their car so they could watch the Infiniti.

¶ 4 Shortly after arriving, White observed a man who White would later identify as Marcel Thompson "come around from the side of the residence where the door was," walk "right up to the driver's side door of the" Infiniti, "and kind of square[] up on the door as if he was going to go inside of the vehicle." White observed Thompson look up at the patrol car, stand "there for a second and stare[] directly at [the patrol car], and then immediately turn[] away from the car and [begin] walking quickly back down towards the side of the residence." White radioed Officers Erik Tran-Thompson and Jonathan Brito, who were in a marked patrol car nearby, to move in and detain Thompson. White explained that he wanted to stop Thompson because he and Williams "believed

1. Officer Williams did not testify at the suppression hearing or at trial.

that [Thompson] was taking possession of the stolen motor vehicle at that time."

¶ 5 White and Williams pulled their patrol car into the driveway and saw Thompson standing at the door of the residence, appearing to "knock[] on the door hastily." When Williams opened the door of the patrol car, White heard Thompson "say either, 'it's the police' or 'police, police,' as he knocked on the door." Tran-Thompson and Brito entered the driveway and activated the blue lights of their patrol car while Thompson was still outside the residence. Brito also saw Thompson seeking to enter the residence, and Tran-Thompson heard Thompson yell, "It's the police!"

¶ 6 Williams, followed by Brito, approached Thompson while White and Tran-Thompson went to the parking lot to check the Infiniti. Defendant opened the door of the residence from inside; Thompson stepped inside but left the door open. Brito testified that Williams was speaking with Thompson while Thompson was in the open doorway. According to Brito, Williams said, "We need to talk to you. Come out here" immediately prior to entering the residence. Williams stepped into the residence and after 30 to 45 seconds indicated to Brito that the officers had enough to "lock it down." According to Brito, this meant that Williams believed the officers had probable cause to seek a search warrant. At that time, Brito saw Defendant "standing next to [a] safe[,] close the safe, lock it with a key, and put the key in his pocket."

¶ 7 Officer Scottie Carson and Officer Turner[2] arrived in the third patrol car on the scene. When Carson and Turner arrived, Williams was already inside the residence, "around the corner into the bedroom," and speaking with a woman; Tran-Thompson was at the doorway; and Brito was at the table. Carson saw the door to the residence was open and observed a table inside with a razor blade, white powdery residue, baggies, and a safe on top. Tran-Thompson later confirmed that these items were "visible from the doorway." Carson entered the residence "because [he] could see how many individuals that were not law enforcement officers [were] inside" and there was "what appeared to [him] to be narcotics and narcotics paraphernalia[.]" Upon entering the residence, Carson saw Thompson directly in front of the door, Defendant standing, and an older man seated.

¶ 8 Carson went further into the residence toward the bedroom and bathroom because his "immediate thought" upon entering "was to go into [the] back room and clear it." Carson testified that he saw a firearm

2. Officer Turner did not testify at the suppression hearing or at trial.

at the head of the bed and the officers "decided that [they] were definitely going to have to lock everything down." Carson elaborated that "[t]o lock everything down" meant to "get consent from the homeowner," prohibit those present from leaving, and refrain from touching or moving anything.

¶ 9 Brito testified that the officers did not determine who leased the residence until after the officers had entered the residence and "everybody was aware that [the officers] were locking it down." Body-worn camera footage shows the officers asked who lived in the residence after at least two officers had already entered. Tran-Thompson, Carson, and Brito each testified that the older man, Mr. Deitz, either leased or owned the residence.[3]

¶ 10 Carson and Tran-Thompson testified that Deitz gave the officers consent to search the residence. Brito's body-worn camera footage, portions of which were played at the suppression hearing, shows that Deitz did not answer when Williams initially asked for consent to search the residence. Instead, Deitz asserted that anything the officers might find belonged to a woman who was in the residence. When Williams again asked for consent to search the residence, Deitz stated that he was not giving the officers permission to search. Williams responded, "Well, in that case, . . . we're just gonna put everybody in handcuffs real quick, none of y'all are under arrest, you're just detained. And we're just gonna go ahead and get a search warrant, okay." Only then did Deitz interject, "Oh, well, you can search it then. You ain't got to handcuff nobody." On the witness stand, Carson explained that Deitz refused to give the officers consent to search the safe because it did not belong to him. The officers placed the four persons in the residence in handcuffs.

¶ 11 The officers asked Defendant whether he stayed or lived at the residence; Brito recalled that Defendant "pretty much said something to the line of, 'Well, I don't have anything to do with anything that's in here. I don't live here. This has nothing to do with me.' " Brito did not "see any clothing items or overnight bags that belonged" to Defendant but could not tell whether the other officers had "found clothing or suitcases that belonged" to Defendant.

¶ 12 Regarding the safe, Defendant told the officers that they "didn't have a warrant" and "didn't have a reason to search the safe." Defendant stated

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3. The record contains multiple spellings of the occupant's name. We use this spelling to maintain consistency. Additionally, because the record is unclear as to whether Deitz was the owner or lessee of the residence, we refer to him as the occupant of the residence.

that the safe did not belong to him, though Brito saw Defendant lock the safe and put the key in his pocket, and Carson later saw Defendant remove the key from his pocket. Later that night, the woman suspected of stealing the car told the officers that the safe belonged to Defendant.

¶ 13 When the officers could not get consent to search the safe from the four persons in the residence, they applied for and received a warrant to search the residence, including the safe. Upon executing the warrant, the officers seized cocaine, a pistol, and currency from inside the safe, and baggies, syringes, a digital scale, and a razor blade from beside the safe. Defendant was taken into custody and subsequently indicted for trafficking cocaine, possession of a firearm by a felon, possession of drug paraphernalia, and attaining habitual felon status.

¶ 14 Prior to trial, Defendant moved to suppress all evidence gathered by the officers on 22 November 2017 as a result of their entry into the residence. Following a hearing, the trial court denied Defendant's motion to suppress. Though the trial court directed the State to prepare a written order, the record reflects that the trial court never entered a written order denying Defendant's motion to suppress.

¶ 15 In announcing its ruling from the bench, the trial court stated as follows:[4]

> [I]n this particular case, you've got a car that was reported stolen. There was an idea of where the car may be. The police . . . drove behind the location of where the report indicated the car might be. There were four cars behind the building in question that looks like a residence but it was part residence, part commercial enterprise. They saw four cars. One of the cars met the description of the stolen car.
>
> While they were there, a short -- very short time, an individual came out to -- looked like they were going to get into the car. They had actually touched the car. And as the officer testified, it looked as if he was going to enter the car and then noticed police and even used -- said the word "police" as he came

4. Given the nature of the trial court's announced ruling from the bench, and without having entered a written order in this case, it is somewhat difficult to discern between the trial court's thoughts generally regarding the evidence and the findings of fact and conclusions of law it intended to make.

back to the door to the residential part of the structure, knocked on the door.

When the other marked cars -- the first car that he saw was not marked. And the other cars that came up with a marked car with marked uniformed officers, he entered the residence. The individual had a red hoodie and I think was Mr. Thompson, not the defendant. The door was left open. And Officer Williams approached the door, put his foot through the threshold, at least one foot, spoke to the individual. It was raining outside, asked the individual if he wanted to come outside to talk.

The officers felt like that there was at least a scintilla of evidence, some evidence that the Mr. Thompson had possessed the stolen automobile, however briefly. They at least wanted to detain Mr. Thompson and talk to him about his involvement with the stolen motor vehicle that he had just walked away from and actually kind of hurriedly ran or jogged away from when [he] saw the police officers.

The officer, because the indication was that the Mr. Thompson didn't want to go outside in the rain, the circumstances as described by the officers seemed to indicate that Mr. Thompson would rather have the officer come inside out of the rain to talk to him, which he did.

The other officers, for safety reasons, approached. And a very short time while they were talking . . . the other officer that came in, saw the -- testified that he saw what looked to be cocaine or crystal-and-powder type substance with a razor and baggies or something similar material that looked like somebody had been cutting drugs, I think it turned out to be heroin, which led to further discussion, a protective sweep.

At some point early on, the owner of the residence, an older gentleman who leased the residence or owned it, gave consent. There was no time -- early on -- but no time did the defendant indicate that he had any kind of expectation of privacy and interest in

the property where he had -- didn't want the officers to go, needed to get a warrant, that sort of thing.

The officers acted reasonably with a protective . . . sweep. . . . They were not doing any of this as a pretext. This house had not been previously -- this location had not been previously targeted. So there was no pretext indicated.

And, later, because there were -- after the obvious plain view drugs, looked to be drugs, were seen, a warrant or warrants were issued to -- with regard to . . . the safe that nobody claimed ownership of.

That's some of the evidence that was presented and as the Court recalls it . . . it's similar to United States versus Santana. Some connection similar there.

There is also an argument . . . that there's actually circumstances when the defendant was fleeing referring to State versus Rigara. . . . [B]ut more accurately, I think the officers had a reasonable justification to detain the Mr. Thompson and to have him stopped. He didn't stop. And there would have been a heightened concern of potential loss of evidence or something nefarious afoot. He was touching the stolen car and then escaped, was trying to make his escape or flight away from the police officer and into . . . the residence. And so there was certainly justification to detain and talk with the individual.

And being that the owner of the residence made no indication whatsoever that the officers could not come in out of the rain, especially with the door open. There was never a time that I noticed that the door was actually closed to the officers. There was no attempt to close it. And there is no other arguments that could be made from the State's case that the door was left open for their entry.

¶ 16 Defendant was tried before a jury, which returned guilty verdicts of trafficking of cocaine, possession of a firearm by a felon, and possession of drug paraphernalia. Defendant pled guilty to attaining habitual felon status. The trial court sentenced Defendant to consecutive terms of

124 to 161 and 101 to 134 months in prison.[5] Defendant gave notice of appeal in open court.

II. Discussion

¶ 17 Defendant argues that the trial court erred by denying his motion to suppress. Our review of a trial court's ruling on a motion to suppress is limited to "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citation omitted). Unchallenged findings are deemed supported by competent evidence and are binding on appeal. *Id.* at 168, 712 S.E.2d at 878. We review conclusions of law de novo. *Id.*

A. Challenged Findings of Fact

¶ 18 Defendant initially contends that portions of two of the trial court's findings of fact are unsupported by competent evidence. First, Defendant challenges the finding that Defendant "didn't want the officers to go, needed to get a warrant, that sort of thing" to the extent that it "suggests [Defendant] did not object to the warrantless entry." While this finding is unclear, it does not state that Defendant did not object to the warrantless entry. Defendant's challenge to this finding is without merit.

¶ 19 Next, Defendant challenges the trial court's finding that "the indication was that . . . Mr. Thompson didn't want to go outside in the rain" and "the circumstances as described by the officers seemed to indicate that Mr. Thompson would rather have the officer come inside out of the rain to talk to him, which he did." Defendant contends that this finding is not supported by competent evidence to "the extent [it] suggests Mr. Thompson consented to the officers' warrantless entry." Again, while this finding is unclear, it does not state that Thompson invited the officers in or otherwise consented to the warrantless entry. Defendant's challenge to this finding is also without merit.

B. Reasonable Expectation of Privacy

¶ 20 **[1]** Defendant argues that the trial court's findings of fact and conclusions of law do not support denial of the motion to suppress for lack of standing to challenge the search. The State argues, on the other hand, that the trial court did not err in denying Defendant's motion to suppress

5. The trial court also sentenced Defendant to 30 to 48 months in prison for another drug possession conviction in No. 18 CRS 206212, which Defendant has separately appealed to this Court.

because Defendant failed to show a reasonable expectation of privacy in the residence, and therefore was not entitled to challenge the search.

¶ 21 " 'Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.' " *Plumhoff v. Rickard*, 572 U.S. 765, 778 (2014) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). The "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection . . . has a legitimate expectation of privacy in the invaded place."[6] *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (citations omitted). A legitimate expectation of privacy requires "two components: (1) the person must have an actual expectation of privacy, and (2) the person's subjective expectation must be one that society deems to be reasonable." *State v. Wiley*, 355 N.C. 592, 602, 565 S.E.2d 22, 32 (2002) (citation omitted). The defendant has the burden of showing such an expectation of privacy. *State v. Mlo*, 335 N.C. 353, 377, 440 S.E.2d 98, 110 (1994); *State v. Barnes*, 158 N.C. App. 606, 612, 582 S.E.2d 313, 318 (2003).

¶ 22 It is "well established that a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it." *Byrd*, 138 S. Ct. at 1527 (citations omitted); *see also State v. Alford*, 298 N.C. 465, 471, 259 S.E.2d 242, 246 (1979) (same). A place need not be a person's home "for one to have a legitimate expectation of privacy there." *Minnesota v. Olson*, 495 U.S. 91, 96 (1990). An overnight guest has a reasonable expectation of privacy in a residence sufficient to claim the protection of the Fourth Amendment. *Id.* at 96-97. So too may certain social guests. *See*, *e.g.*, *United States v. Gray*, 491 F.3d 138, 153 (4th Cir. 2007) ("[W]e have recognized that persons other than overnight guests can have a legitimate expectation of privacy in the home of another," typically "in the context of social visitors with near-familial relationships"); *Bonner v. Anderson*, 81 F.3d 472, 475 (4th Cir. 1996) (frequent visitor with close relationship to homeowner, whose relative was raised in home, and who formerly lived nearby, had reasonable expectation of privacy in home). But a person's "legitimate presence on the premises of the place searched, standing

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6. Courts often denote this inquiry as whether a defendant has "standing" to press a Fourth Amendment claim. "The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search[.]" *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018). However, the Supreme Court has explained that this analysis "is not distinct from the merits" of a Fourth Amendment Claim but " 'is more properly subsumed under substantive Fourth Amendment doctrine.' " *Id.* (quoting *Rakas*, 439 U.S. at 139).

alone, is not enough to accord a reasonable expectation of privacy"; this would be "too broad a gauge for measurement of Fourth Amendment rights." *Byrd*, 138 S. Ct. at 1527 (quotation marks and citations omitted).

¶ 23 The evidence presented at the suppression hearing does not support a finding that Defendant lacked a reasonable expectation of privacy in the residence searched. Defendant was one of four persons present in the residence late at night. Officer Tran-Thompson testified that Defendant opened the door from inside the residence when Thompson knocked, indicating that Defendant had some authority over who would be admitted to the residence. The evidence further suggests that Defendant owned the safe and had permission to keep it in the residence. Taken together, this evidence demonstrates that Defendant had more than a mere "legitimate presence on the premises of the place searched[.]" *Byrd*, 138 S. Ct. at 1527.

¶ 24 The State emphasizes that Defendant did not own or lease the residence, but this does not conclusively determine that Defendant lacked a reasonable expectation of privacy in the premises. *Alford*, 298 N.C. at 471, 259 S.E.2d at 246. The State also argues that Defendant "disclaimed any possessory interest in the premises and in the safe in particular." It is well established that a "reasonable expectation of privacy in real property may be surrendered . . . if the property is permanently abandoned." *State v. McKinney*, 361 N.C. 53, 56, 637 S.E.2d 868, 871 (2006). But Defendant did not deny his connection with the residence and disclaim ownership of the safe until after the officers effected their warrantless entry into the residence and detained its occupants. "[W]hen an individual 'discards property as the product of some illegal police activity, he will not be held to have voluntarily abandoned the property or to have necessarily lost his reasonable expectation of privacy with respect to it[.]' " *State v. Holley*, 267 N.C. App. 333, 347, 833 S.E.2d 63, 75 (2019) (quoting *State v. Cromartie*, 55 N.C. App. 221, 225, 284 S.E.2d 728, 731 (1981)); *see also State v. Borders*, 236 N.C. App. 149, 165, 762 S.E.2d 490, 503 (2014) ("[P]roperty may not be abandoned if it is done as a direct result of a law enforcement officer's illegal search or seizure."); *United States v. Leshuk*, 65 F.3d 1105, 1111 (4th Cir. 1995) ("[A] person does not voluntarily abandon property when the abandonment results from police misconduct[.]"). Additionally, while Defendant denied ownership of the safe and asserted that he did not "have anything to do with anything" in the residence, Defendant nonetheless exercised the power to exclude others from the safe by locking it and putting the key in his pocket. *See State v. Casey*, 59 N.C. App. 99, 114, 296 S.E.2d 473, 482 (1982) (holding defendant did not relinquish expectation of privacy in plastic bags, despite denying ownership of them, because he maintained

the "right to exclude all others from the bags by virtue of his right of possession and control").

¶ 25 The record does not support a finding of fact that Defendant lacked a reasonable expectation of privacy in the residence. Accordingly, Defendant may challenge the search of the residence.

C. Warrantless Entry into the Residence

¶ 26 **[2]** "Upon timely motion, evidence must be suppressed if . . . [i]ts exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina[.]" N.C. Gen. Stat. § 15A-974(a)(1) (2020). The exclusionary rule "provides that evidence derived from an unconstitutional search or seizure is generally inadmissible in a criminal prosecution of the individual subjected to the constitutional violation." *McKinney*, 361 N.C. at 58, 637 S.E.2d at 872 (citations omitted).

¶ 27 The Fourth Amendment guards the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980) (quotation marks and citations omitted). But "because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). "[E]xceptions to the warrant requirement are few in number and carefully delineated." *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984) (quotation marks and citation omitted).

1. Exigent Circumstances

¶ 28 One "well-recognized exception" to the warrant requirement "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 563 U.S. 452, 460 (2011) (quotation marks, brackets, and citations omitted). The Supreme Court has identified several situations which may amount to exigent circumstances sufficient to justify a warrantless entry into a home, including the need "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury," *Brigham City*, 547 U.S. at 403 (citations omitted); the need to prevent the imminent destruction of evidence, *King*, 563 U.S. at 460; and the hot pursuit of a fleeing suspect, *Lange v. California*, 141 S. Ct. 2011, 2024 (2021); *United States v. Santana*, 427 U.S. 38, 42-43 (1976). Courts assess whether a warrantless

entry was justified by exigent circumstances based on the totality of the circumstances. *Lange*, 141 S. Ct. at 2018; *Riley v. California*, 573 U.S. 373, 402 (2014). "Whether a now or never situation actually exists—whether an officer has no time to secure a warrant—depends upon facts on the ground." *Lange*, 141 S. Ct. at 2018 (quotation marks and citations omitted).

¶ 29 The State argues that exigent circumstances justifying the officers' warrantless entry into the residence "existed in the potential destruction of evidence and Mr. Thompson's attempted flight." But, as Defendant argues, the trial court erred by concluding that only a reasonable suspicion to detain Thompson justified the warrantless entry into the residence in pursuit of Thompson. The trial court concluded that "there was certainly justification to detain and talk with" Thompson and the officers "had a reasonable justification to detain [Thompson] and to have him stopped." However, warrantless entry into a home in pursuit of a suspect is permissible only where the officers have probable cause. *See*, *e.g.*, *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (per curiam) ("[P]olice officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home."); *State v. Adams*, 250 N.C. App. 664, 670, 794 S.E.2d 357, 362 (2016) ("A warrantless arrest in the home may be reasonable where there is probable cause and exigent circumstances.").

¶ 30 "[P]robable cause is defined as those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *State v. Parisi*, 372 N.C. 639, 650, 831 S.E.2d 236, 244 (2019) (quotation marks and citation omitted). Whether probable cause existed depends on the totality of the circumstances. *Id.* Reasonable suspicion cannot be substituted for probable cause. *Alabama v. White*, 496 U.S. 325, 330 (1990); *State v. Johnson*, 378 N.C. 236, 2021-NCSC-85, ¶ 16.

¶ 31 Although the trial court did not conclude that the officers had probable cause to arrest Thompson, the State contends that the officers in fact had probable cause to arrest Thompson for felony possession of a stolen vehicle. This argument is unavailing because neither the trial court's findings nor the underlying record support such a conclusion. The trial court found only that Thompson "looked like [he was] going to get into" the stolen car, "was touching the stolen car,"[7] saw the patrol

7. Though Defendant does not challenge this finding on appeal, we note that there was no evidence that Thompson touched the stolen Infiniti.

car, "and then escaped, was trying to make his escape or flight away from the police officer and into the residence." The State presented no other evidence connecting Thompson to the car, nor any evidence suggesting that Thompson knew or had reason to believe the car was stolen. *See* N.C. Gen. Stat. § 20-106 (2017) (recodified at N.C. Gen. Stat. § 14-71.2) (providing that any person "who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken, and who is not an officer of the law engaged at the time in the performance of his duty as such officer shall be punished as a Class H felon").

¶ 32 The State contends that the officers were faced with the potential destruction of evidence in "either the car keys or the drug paraphernalia officers observed through the door." While the State presented evidence that the drug paraphernalia might be seen through the open front door, it did not present evidence that Williams was actually aware of its presence and concerned for its potential destruction in his brief time at the door prior to entering the residence. As to the car keys, the State has failed to offer a credible explanation of how this evidence would be readily destructible such that the officers' immediate entry was necessary. *See King*, 563 U.S. at 461 ("Destruction of evidence issues probably occur most frequently in drug cases because drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain."). The State contends that Thompson's ability to put the car keys down presented a risk of destroying the evidentiary link between Thompson's possession of the keys and the stolen Infiniti. The State suggested at argument that the officers' ability to enter the residence and conduct a search to prevent this from happening would be "beneficial" to a subsequent prosecution for possession of the stolen vehicle. The State's argument fails in part because in a prosecution for possession of a stolen vehicle, the State may proceed on a theory of constructive possession or recent possession, notwithstanding a lack of actual possession of a stolen vehicle or its keys. *See*, *e.g.*, *State v. McNair*, 253 N.C. App. 178, 187, 799 S.E.2d 631, 639 (2017) ("Under the theory of constructive possession, a person may be charged with possession of an item . . . when he has both the power and intent to control its disposition or use, even though he does not have actual possession." (quoting *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989)). More fundamentally, the State's theory of imminent destruction of evidence is not borne out by the facts of this case: Williams entered the residence just moments after arriving at the front door. Thompson had not slammed the door behind himself, to the contrary, he had left the door open and was talking to Williams immediately before Williams entered.

¶ 33 The totality of the circumstances in the present case does not reveal exigent circumstances sufficient to justify the officers' warrantless entry into the private residence.

2. Consent

¶ 34 Another "of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (citations omitted). The State acknowledges in its brief that the trial court did not find that Thompson consented to the officers' entry. Instead, the State argues that the trial court did not err in denying the motion to suppress because Deitz, the occupant of the residence, gave consent.

¶ 35 The record is clear, however, that the officers did not determine Deitz was the occupant of the residence, speak with him, or gain his consent to search the residence until after they had illegally entered the residence without a warrant. Accordingly, the subsequent consent to search can justify the denial of Defendant's motion to suppress only if the taint from the officers' initial warrantless entry had dissipated. Courts consider three factors in determining whether the taint from an illegal search has dissipated: (1) the time elapsed between the Fourth Amendment violation and the procurement of consent or confession; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).

¶ 36 Here, the officers entered a private residence, without a warrant or probable cause, within seconds of engaging Thompson at the door. Such "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed[.]" *United States v. United States Dist. Ct.*, 407 U.S. 297, 313 (1972). The record demonstrates that the officers secured Deitz's consent closely on the heels of their entry into residence and their decision to "lock it down," which Carson testified included prohibiting those present from leaving. According to Brito, Williams decided that the officers would lock down the residence just 30 to 45 seconds after entering. Carson testified that the officers placed the four individuals in handcuffs and informed them that they would be detained until the officers obtained a warrant. The record does not reflect any other intervening circumstances between the officers' entry into the residence and Deitz's acquiescence in the search which would attenuate the taint of the officers' illegal entry. Because the taint of the initial illegal entry had not dissipated, Deitz's consent to search cannot justify the officers' warrantless entry into and search of the residence.

3. Search Pursuant to Warrant

¶ 37 Lastly, the State argues that the trial court did not err in denying the motion to suppress because Defendant was charged based on items found in the safe, which was searched pursuant to a warrant. The State contends that the search of the safe pursuant to the warrant was not tainted by any illegal police conduct because the officers saw the drugs and drug paraphernalia inside the residence in plain view while they were still outside the doorway.

¶ 38 If information in an affidavit of probable cause that was "used to obtain a search warrant was procured through an unconstitutional [search], the warrant and the search conducted under it were illegal and the evidence obtained from them was fruit of the poisonous tree." *McKinney*, 361 N.C. at 59, 637 S.E.2d at 872-73 (quotation marks, brackets, ellipsis, and citation omitted). Evidence seized pursuant to a search warrant will not be excluded, however, if the facts in the affidavit independent of those gathered due to the unlawful police conduct gave rise to probable cause. *Id.* at 59, 637 S.E.2d at 873. In such a case, the challenged evidence is not a fruit of the unlawful police conduct, but the product of an untainted independent source. *See Segura v. United States*, 468 U.S. 796, 814 (1984) (declining to exclude evidence seized pursuant to a search warrant where "[n]one of the information on which the warrant was secured was derived from or related in any way to" the allegedly unlawful initial entry into an apartment).

¶ 39 Here, Tran-Thompson averred that there was probable cause to believe that certain evidence of heroin possession and possession of drug paraphernalia would be found both in the residence and on the persons of Defendant and Deitz. Tran-Thompson recounted the following facts and circumstances in support of this assertion: (1) Defendant locking the safe upon the officers' entry, (2) apparent drug paraphernalia on a table "in the main living area," (3) a metal tin on the bed containing a spoon with residue of white powder, (4) drugs and paraphernalia on Thompson's person, (5) a handgun behind the bed, and (6) syringes in a linen closet. Each of these observations was the fruit of the officers' unlawful warrantless entry into the residence. The trial court did not find—and the State did not present any evidence—that the officers made any of these observations prior to entering the residence. The State's evidence merely suggesting that it was possible to observe some drug paraphernalia through the open doorway, absent evidence that any of the officers indeed saw the items before entering, fails to demonstrate that this information was obtained independent of the officers' unlawful warrantless entry into the residence.

¶ 40 The remaining information in the affidavit untainted by the officers' warrantless entry concerned the report of the stolen car, the presence of the stolen car in the back parking lot, Thompson's approach to the stolen car, and Thompson's return to the residence. This information fails to establish probable cause to search the residence, Deitz, or Defendant for evidence of possession of heroin and drug paraphernalia.[8] *See State v. Frederick*, 259 N.C. App. 165, 170, 814 S.E.2d 855, 859 ("[A]n affidavit is sufficient to establish probable cause 'if it supplies reasonable cause to believe that the proposed search for evidence *probably* will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender.' " (quoting *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984))), *aff'd per curiam*, 371 N.C. 547, 819 S.E.2d 346 (2018).

¶ 41 Because the affidavit supporting the issuance of the search warrant, stripped of the facts obtained by the officers' unlawful entry into the residence, does not give rise to probable cause to search the residence for the evidence of drugs and drug paraphernalia described in the warrant, "the warrant and the search conducted under it were illegal and the evidence obtained from them was fruit of the poisonous tree." *McKinney*, 361 N.C. at 59, 637 S.E.2d at 872-73 (quotation marks and citations omitted).

III. Conclusion

¶ 42 Defendant did not lack a reasonable expectation of privacy in the residence. Exigent circumstances did not justify the officers' warrantless entry into the residence, and the taint of the initial warrantless entry is not removed from either the occupant's after-the-fact consent to search the residence or the subsequent warrant to search the residence and the safe. The trial court therefore erred by denying Defendant's motion to suppress evidence obtained as a result of the officers' entry into the residence.

REVERSED AND REMANDED.

Judges HAMPSON and CARPENTER concur.

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8. The search warrant in the present case provided only for the seizure of certain evidence of possession of drugs and drug paraphernalia. Because "[t]he scope of a search is generally defined by its expressed object," *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (citation omitted), we need not address whether the affidavit established probable cause to search the residence for evidence of any other offense.

STATE v. SHEFFIELD

[282 N.C. App. 667, 2022-NCCOA-216]

STATE OF NORTH CAROLINA
v.
GEORGE WILLIAM SHEFFIELD, DEFENDANT

No. COA19-282

Filed 5 April 2022

1. Evidence—sex offense with a child—photographs of condoms—relevance—grooming behavior

In a prosecution for first-degree sex offense with a child, there was no error in the admission of photographs showing condoms found in defendant's bedroom, which were relevant to corroborate the victim's testimony about items defendant showed him and to demonstrate defendant's planning and preparation to commit the crime; therefore, their admission did not violate Rules of Evidence 401 or 404(b).

2. Evidence—sex offense with a child—photograph of dildos—improper character evidence—plain error analysis

In a prosecution for first-degree sex offense with a child, the introduction of a photograph showing dildos found in defendant's bedroom violated Rules of Evidence 401 and 404(b), since the photo had no relevance to any fact related to defendant's guilt or innocence (where there was no evidence that defendant discussed or showed dildos to the victim) and should have been excluded as improper character evidence. However, there was no plain error where there was no probable impact on the jury given the evidence of defendant's guilt and the State's lack of emphasis on these particular items.

3. Satellite-Based Monitoring—lifetime monitoring—imposed automatically—based on crime defendant did not commit—mutual mistake

Where the trial court's imposition of automatic lifetime satellite-based monitoring (SBM) on defendant without an evidentiary hearing—after defendant was convicted of first-degree sex offense with a child—was erroneous, based on the mistaken belief by the State, defendant, and the court that defendant was guilty of a qualifying offense, the SBM order was vacated without prejudice to the State's ability to file another SBM application.

4. Discovery—criminal case—sealed documents—in camera review by appellate court—materiality

On appeal from defendant's conviction of first-degree sex offense with a child, the appellate court conducted an in camera review of sealed documents not previously released by the trial court and determined that the investigating officer's personnel file did not contain any documents that were favorable or material to defendant and were therefore properly withheld. Although social services and school records of the child victim contained some portions that were favorable to defendant, they did not undermine confidence in the outcome of the trial and therefore were not material; thus, the trial court did not err in withholding those materials as well.

Judge ARROWOOD concurring in result only.

Appeal by Defendant from judgment entered 23 April 2018 by Judge Joseph N. Crosswhite in Caldwell County Superior Court. Heard in the Court of Appeals 11 March 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.

MURPHY, Judge.

¶ 1 A trial court errs where it admits evidence that does not have any tendency to make any fact of consequence more or less likely. However, where that error does not have a probable impact on the jury's finding that a defendant was guilty, the error does not rise to plain error and does not entitle a defendant to relief. Here, the trial court's admission of relevant photographs of condoms was proper. Additionally, the trial court's improper admission of irrelevant photographs of dildos did not rise to plain error.

¶ 2 A satellite-based monitoring ("SBM") order requiring automatic lifetime SBM that is mistakenly based on a crime the defendant did not commit is entered in error. Where that order is entered due to the mutual mistake of the State, the defendant, and the trial court, the proper remedy is to vacate without prejudice to the filing of a subsequent SBM application. Here, the trial court erred by entering automatic lifetime SBM

based on the parties' and the trial court's mistaken belief that Defendant was guilty of a qualifying offense. As a result, we vacate the SBM order without prejudice to the State's ability to refile an SBM application.

¶ 3 When the State has sensitive documents that are alleged to be favorable and material to a defendant, the documents must be turned over to the defendant if, after an *in camera* review, the trial court finds the documents to be favorable and material. Where some of these documents are not turned over to the defendant, on appeal, we must review the documents to determine if the trial court erred by not providing any documents to the defendant that were both favorable *and* material. Here, after reviewing documents that the trial reviewed *in camera*, we conclude that there were favorable, but not material, documents that were not provided to Defendant. Defendant is not entitled a new trial.

BACKGROUND

¶ 4 Defendant George William Sheffield lived next to Peter's[1] mother's boyfriend. When Peter's mother would visit her boyfriend, she would bring her children, and they would often see Defendant. Defendant would let Peter's family use his washer and dryer, let the children mow his lawn, and would occasionally make meals for Peter's family. On 23 July 2015, when Peter was twelve years old, Peter mowed Defendant's lawn. After mowing the lawn, Peter showered at Defendant's home, and Defendant washed Peter's dirty clothes. Then, Peter's family all had dinner at Defendant's home. After dinner, Peter and his younger brother sat on the couch and watched television at Defendant's home while the rest of the family left the home.

¶ 5 While Peter was watching television, Defendant tapped him on the shoulder and took Peter to Defendant's computer where a pornography website was open. After showing Peter the website, Defendant "whipped out his penis and started messing with it" and began talking to Peter about the pornography, including "ask[ing] if [Peter] ever did this and [if Peter had] ever seen anything like this." Peter testified:

> [a]fter [Defendant] started messing with his penis, I started sliding over to get away and he pulled the chair closer and started messing with his penis even more and watching more of those videos, more of them.

1. Pseudonyms are used for all relevant persons throughout this opinion to protect the identity of the juvenile and for ease of reading.

> So I got tired of that and I tried to leave and that's when he grabbed me, let me get on my knees, and started sucking his penis.[2] And then I tried to move away. And then he started sucking my penis and that's when he pulled me into the bathroom.
>
> I was about to leave because my mother it was time for me to leave and go get ready for bed [sic]. And I went to go leave and that's when he pulled me into the bathroom before I left and grabbed the baby oil and tried to stick his penis in my butt.

At this point, Peter got up, left Defendant's home, and went to his mother's boyfriend's home where he almost immediately told his mother what Defendant had done.

¶ 6 Peter's mother took him to the Lenoir Police Department, where they met Officer Charles Barlow, and an ambulance took them to a nearby hospital where Peter's clothes were collected into evidence. Peter was then taken to another hospital to have a sexual assault examination and a forensic interview. During the forensic interview, Peter stated that there was a prior incident where Defendant showed Peter a glass duck that contained 10-20 square packets of an unfamiliar item, that Peter thought might contain a pill or gum, and that, prior to showing him these items, Defendant winked at Peter and told him not to tell the little kids. The State argued that these packets were condoms in its closing argument.

¶ 7 Although there was no evidence of physical injury, Carolyn Abbott, a forensic nurse examiner, testified that this was not unusual with the actions alleged. An employee from the North Carolina State Crime Laboratory testified that a sample of Peter's underwear had DNA on it, and, in response to the State asking for "the statistical odds in regard to [the DNA] belonging to someone other than [Peter] and [Defendant,]" the employee stated, "the chance of randomly selecting an unrelated individual who also could not be excluded from that multiple major that was obtained from the cutting of the underwear would be, approximately, in [the] North Carolina Caucasian population, 1 in 13.9 million[.]"[3]

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2. When asked "How did it come to be that you had his penis in your mouth?" Peter clarified that "[Defendant] pulled [him] to it." Peter also clarified that "[Defendant] sucked [his] penis" after Defendant had "pulled [Peter's] pants down."

3. The judgment indicates that Defendant's race is "W" indicating white, or Caucasian.

¶ 8 Additionally, the State admitted three photographs of a dresser drawer in Defendant's bedroom without objection; one of these photographs depicted a drawer containing a condom and two dildos, and the other two depicted a Ziploc bag of condoms, one of which showed a dildo in the background. There was no suggestion at trial that the dildos were involved in any way with what happened to Peter, and the State made no comments regarding the dildos aside from when the State initially admitted the photograph portraying them into evidence.

¶ 9 Furthermore, prior to trial, Defendant attempted to gain access to the personnel file of Officer Barlow, as well as the school and DSS files related to Peter. All of these documents were reviewed by the trial court *in camera*. The trial court released some of each type of these documents to Defendant and sealed the remaining documents.

¶ 10 Based on the events described above, the jury found Defendant guilty of first-degree sex offense with a child under N.C.G.S. § 14-27.4(a)(1),[4] and the trial court sentenced Defendant to 240 to 348 months. After sentencing Defendant, the trial court ordered Defendant to register as a sex offender for thirty years and to enroll in SBM for life upon his release from imprisonment. Underlying the imposition of lifetime SBM enrollment, the trial court found that Defendant had committed rape of a child under N.C.G.S. § 14-27.23 or sexual offense with a child under N.C.G.S. § 14-27.28.[5] The trial court also found that Defendant was convicted of an offense involving "the physical, mental, or sexual abuse of a minor." However, the trial court did not find Defendant to be a sexually violent predator, a recidivist, or to have been convicted of an aggravated offense. Defendant timely appeals.

ANALYSIS

¶ 11 On appeal, Defendant argues (A) "the trial court plainly erred in admitting irrelevant, color photos showing 'two dildos' and condoms taken in [Defendant's] bedroom when these items were unrelated to the alleged offense and found in a separate room[;]" (B) "the trial court erred in determining that [Defendant] qualified for mandatory lifetime [SBM] because his conviction under N.C.G.S. § 14-27.4(a)(1) did not require

4. N.C.G.S. § 14-27.4(a)(1) was recodified as N.C.G.S. § 14-27.29 effective 1 December 2015. As the date of the offense was 23 July 2015, we use the then-existing version of the statute, N.C.G.S. § 14-27.4(a)(1), which was effective from 1 October 1994 until 30 November 2015.

5. At the time of the offense, these statutes were codified as N.C.G.S. § 14-27.2A and N.C.G.S. § 14-27.4A, respectively.

lifetime monitoring[;]" and (C) "this Court should grant a new trial if, upon *in camera* review of the sealed records, it determines the information is favorable and material to [Defendant's] guilt or punishment."[6]

A. Admission of the Photographs of Condoms and Dildos

¶ 12 **[1]** Our Supreme Court has held:

> [T]he North Carolina plain error standard of review applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error. To have an alleged error reviewed under the plain error standard, the defendant must specifically and distinctly contend that the alleged error constitutes plain error. Furthermore, plain error review in North Carolina is normally limited to instructional and evidentiary error.

State v. Lawrence, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (marks and citations omitted).

> 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.

Id. at 518, 723 S.E.2d at 334 (marks and citations omitted).

¶ 13 Defendant argues that the trial court plainly erred in admitting State's Exhibits P-21, P-22, and P-23, which were pictures showing condoms and dildos found in Defendant's bedroom, because they were irrelevant to the alleged incident, constituted prohibited evidence under Rule 404(b), and had a probable impact on the jury. The State contends this evidence was properly admitted under our Rules of Evidence, but

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6. Defendant also argues "Defense Counsel failed to provide effective assistance of counsel during [Defendant's] SBM hearing when he failed to subject the prosecution's case to meaningful adversarial testing."zHowever, as discussed below, this issue is mooted by our resolution of his earlier SBM argument.

also argues Rule 404(b) does not apply because "the challenged exhibits were not evidence of 'other' acts" and "mere possession of items that are lawful to possess is not character evidence."

¶ 14 The State relies on *State v. Sessoms*, in which we have held "wielding a machete is not a character trait" and therefore "was not 'character evidence' pursuant to . . . Rule 404(b), but rather [a witness's] description of what he saw and his reason for calling for help[.]" *State v. Sessoms*, 226 N.C. App. 381, 385, 741 S.E.2d 449, 453 (2013). However, in *Sessoms*, we did not hold that possession of an item can never fall under Rule 404(b). *Id.* Indeed, we have consistently addressed the possession of items under Rule 404(b) in the exact context of the issue here—a defendant's possession of materials related to sex in a child sexual assault case. *See, e.g.*, *State v. Smith*, 152 N.C. App. 514, 523, 568 S.E.2d 289, 295, *disc. rev. denied, appeal dismissed*, 356 N.C. 623, 575 S.E.2d 757 (2002); *State v. Hinson*, 102 N.C. App. 29, 36, 401 S.E.2d 371, 375, *disc. rev. denied, appeal dismissed*, 329 N.C. 273, 407 S.E.2d 846 (1991); *State v. Bush*, 164 N.C. App. 254, 261, 595 S.E.2d 715, 719 (2004); *State v. Rael*, 321 N.C. 528, 534, 364 S.E.2d 125, 129 (1988); *State v. Brown*, 178 N.C. App. 189, 193, 631 S.E.2d 49, 52 (2006). We address this issue under Rule 401 and Rule 404(b).

¶ 15 " '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 (2021). "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 (2021).

> Evidence of other . . . acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (2021).

¶ 16 In *Smith*, we held:

> evidence of [the] defendant's possession of pornographic materials, without any evidence that [the]

> defendant had viewed the pornographic materials with the victim, or any evidence that [the] defendant had asked the victim to look at pornographic materials other than the victim's mere speculation, was not relevant to proving [the] defendant committed the alleged offenses in the instant case and should not have been admitted by the trial court.

Smith, 152 N.C. App. at 523, 568 S.E.2d at 295.

¶ 17 There, we relied on *State v. Doisey*, *Hinson*, and *State v. Maxwell*. *See State v. Doisey*, 138 N.C. App. 620, 626, 532 S.E.2d 240, 244, *disc. rev. denied*, 352 N.C. 678, 545 S.E.2d 434 (2000), *cert. denied*, 531 U.S. 1177, 148 L. Ed. 2d 1015 (2001); *Hinson*, 102 N.C. App. at 36, 401 S.E.2d at 375; *State v. Maxwell*, 96 N.C. App. 19, 24, 384 S.E.2d 553, 556 (1989), *disc. rev. denied*, 326 N.C. 53, 389 S.E.2d 83 (1990). In *Smith*, we described the holdings of each of these cases. *Smith*, 152 N.C. App. at 521-22, 568 S.E.2d at 294. We described *Doisey* as holding that "evidence that the defendant placed a camcorder in a bathroom used by children and taped the activities in the bathroom was not properly admitted to show 'design or scheme to take sexual advantage of children.' " *Id*. We described *Hinson* as holding that "evidence that the defendant possessed photographs depicting himself in women's clothing, dildos, lubricants, vibrators and two pornographic books, was not properly admitted to show 'proof of intent, preparation, plan, knowledge and absence of mistake,' in [a] sexual offense case involving seven-year-old victim." *Id*. at 522, 568 S.E.2d at 294. Finally, we described *Maxwell* as holding that "evidence that the defendant frequently appeared nude in front of his children and had fondled himself in presence of daughter was not properly admitted to show [the] 'defendant's plan or scheme to take advantage of his daughter.' " *Id*.

¶ 18 In *Bush*, we held that the admission of evidence showing the defendant had previously purchased and owned pornography was error because there was no evidence to suggest that the defendant had shown, or provided, the pornography to the victim. *Bush*, 164 N.C. App. at 261-62, 595 S.E.2d at 719-20.

> [T]he mere possession of photographic images, whether in still form or on a videotape, has been deemed inadmissible as the defendant's possession of such materials does not establish motive, intent, common scheme or plan; rather the possession of such materials is held only to show the defendant has

> the propensity to commit the offense for which he is charged and to be highly inflammatory.

Id. at 262, 595 S.E.2d at 720 (citing *Smith*, 152 N.C. App. at 521-22, 568 S.E.2d at 294, *Doisey*, 138 N.C. App. at 628, 532 S.E.2d at 246).

¶ 19 However, "our appellate courts have long recognized that lay testimony and other evidence can be admissible under Rule 404(b) to show that a defendant engaged in grooming-like behavior." *State v. Goins*, 244 N.C. App. 499, 516, 781 S.E.2d 45, 56 (2015). In *State v. Williams*, in response to an argument that evidence of the defendant taking the child victim to see an x-rated movie violated Rule 404(b), our Supreme Court upheld the admission of evidence because "the [victim's] presence at the film at [the] defendant's insistence, and his comments to her show his preparation and plan to engage in sexual intercourse with her and assist in that preparation and plan by making her aware of such sexual conduct and arousing her." *State v. Williams*, 318 N.C. 624, 632, 350 S.E.2d 353, 358 (1986).

¶ 20 In *Rael*, our Supreme Court, again in response to a challenge to evidence under 404(b), upheld the admission of evidence of pornographic magazines and video tapes because "the video tape and magazines and Detective Martin's testimony concerning them were relevant to corroborate the victim's testimony that the defendant had shown him such materials at the time the defendant committed the crimes for which he was on trial[,]" and thus as "relevant [evidence] to a fact or issue other than the character of the accused, Rule 404(b) did not require that they be excluded from the evidence at trial." *Rael*, 321 N.C. at 534, 364 S.E.2d at 129.

¶ 21 In *Brown*, in response to a challenge under Rule 404(b) to the admission of photographs of nude women, we upheld the admission of the photographs because

> [the] defendant showed [the victim] four photographs of nude adult women with whom she was acquainted prior to the first time [the] defendant engaged in a sexual act with her, and that [the] defendant told her that he was going to take similar pictures of her. [The victim] further testified that [the] defendant attempted to take pictures of her, but that [the] defendant was unable to get her grandmother's camera. The admission of the photographs into evidence served to corroborate [the victim's] testimony of [the] defendant's

> actions and provided evidence of a plan and preparation to engage in sexual activities with her.

Brown, 178 N.C. App. at 193, 631 S.E.2d at 52.

¶ 22 Here, the evidence falls under both aspects of our caselaw. In his forensic interview, which was played for the jury, Peter described an incident where Defendant showed him a square packet found inside a glass duck, winked at Peter, and told Peter there was gum inside of it. Peter didn't know if it was a pill, gum, or something else that "could make 'em get silly or something." Although Peter did not testify regarding this information, the introduction of the condoms found in Defendant's home, even though they were not in a glass duck, corroborated Peter's statement, as it showed Defendant owned condoms that matched the description of the items Peter claims Defendant showed him. This evidence was relevant to corroborate the potential grooming behavior, and was used for the purposes of showing planning and preparation by Defendant, as well as to corroborate Peter's testimony. The admission of the photographs of the condoms was not error under Rule 401 or Rule 404(b).

¶ 23 **[2]** However, the admission of State's Exhibit P-21, which is a photograph of the condoms with the dildos, was error under Rule 401 and Rule 404(b). There was no evidence presented that Defendant discussed, showed, or exposed Peter to a dildo. As a result, the dildos were entirely irrelevant to any fact of consequence related to Defendant's guilt or innocence. The State argues State's Exhibit P-21, the photograph depicting the dildos and condoms, showed the context of where the condoms were located in Defendant's home and that, after the evidence was introduced, the State never mentioned the dildos at any stage of the trial. The State provides no reason as to why the exact location of the condoms was significant when it was undisputed that they were found in Defendant's home, and we are unaware of such a reason. Additionally, there were other photographs showing the condoms found in the home without the dildos in the background, which would have equally corroborated Peter's statement regarding the square packets. Even if State's Exhibit P-21 was relevant, Rule 404(b) should have resulted in the exclusion of the photograph. While in *Bush*, *Smith*, and *Hinson* there was testimony given regarding the possession of the material related to sex, it makes no difference whether the evidence was admitted by testimony or by a photograph. Here, like in *Bush*, *Smith*, and *Hinson*, the jury was presented with evidence unrelated to the offenses alleged showing the possession of materials related to sex. This evidence had no relevant purpose, and instead, if used, could only be used by the jury as character evidence in contravention of Rule 404(b). The trial court erred in admitting this evidence.

¶ 24 However, this error does not rise to the level of plain error as it did not have a probable impact on the jury. Defendant argues the admitted photographs had a probable impact on the jury because they paint him as someone who had "prurient interests in sexual gratification and [as] a sexual deviant who would be more likely to engage in a sex act with a child." His basis for this argument is "[s]ex toys, such as dildos, are often seen as immoral or obscene" and they "allowed the State to imply that [Defendant] was bisexual or gay—even though the trial court explicitly barred the State from introducing evidence about [Defendant's] sexuality." Assuming, *arguendo*, that Defendant's contention about dildos is true, he cannot show plain error here.

¶ 25 Despite the trial court barring the State from introducing evidence regarding Defendant's sexuality, evidence implying Defendant is bisexual or gay was introduced without objection, and was not challenged on appeal:

> [DETECTIVE:] I told [Defendant] that there were some issues with pornography. I asked him if there was any pornography in the residence. He told me that there was not. He said he only researched pornography online. He said he looked them up on websites called SexTube and GayTube.
>
> [THE STATE:] And did he say anything else at that point?
>
> [DETECTIVE:] I asked what type of pornography that he watched and he told me bisexual.

As a result, we do not consider any potential prejudice from the implication Defendant is bisexual or gay, as the implication would have been before the jury regardless of any error.

¶ 26 However, this is not the end of our inquiry, as we must also consider Defendant's argument that the erroneous admission of a photograph with dildos in the background suggested Defendant was immoral and/or a sexual deviant more likely to sexually assault a child. In weighing the effect of this evidence, it is important to note that, aside from laying the foundation for the photographs and admitting the photograph into evidence, the only other reference made to the dildos was made by Defendant in closing arguments when he stated:

> You saw some pictures. I think the State is trying to convey that he's a deviant, but he's got condoms. He's a single man. He had two sex toys in a drawer. I don't

> know if you saw from the pictures, but there were a few pairs of women's underwear. Again, it looks bad, but it is not illegal. He is a single man. He admits to looking at porn on his computer. Again, that's not illegal.

Our Supreme Court has previously focused on the minimal emphasis of irrelevant evidence to conclude there was no prejudicial error. *See State v. Rose*, 335 N.C. 301, 322-23, 439 S.E.2d 518, 529-30 ("[The] [d]efendant has failed to show, however, that the admission of the Bibles into evidence was prejudicial. In fact, evidence of the presence of the Bibles in the victim's apartment was introduced through photographs of the apartment, including one that clearly depicted the Bibles on a bookshelf. [The] [d]efendant did not object to the introduction of these photographs. Furthermore, [the] defendant himself points out that after the Bibles were admitted they were only mentioned once again during the trial when the victim's sister testified that she had seen the Bibles in the victim's apartment. Thus, we conclude that the admission of the Bibles into evidence did not constitute error prejudicial to [the] defendant."), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 883 (1994), *and overruled on other grounds by State v. Buchanan*, 1353 N.C. 332, 543 S.E.2d 823 (2001).

¶ 27 The evidence properly introduced at trial and the evidence that is not the subject of this appeal is sufficiently strong that the improperly admitted evidence, in light of its minimal emphasis, did not have a probable impact on the jury. Peter reported the incident to his mother almost immediately after it happened. His mother immediately took him to the police and then two hospitals for the proper examinations and interviews to be performed. Peter testified regarding Defendant sexually assaulting him, which was corroborated by Peter's mother's testimony regarding what Peter had told her Defendant had done. A recording of the forensic interview was published to the jury, which also corroborated Peter's testimony regarding Defendant sexually assaulting him.[7] Multiple exhibits were entered into evidence that corroborated the incident, including: State's Exhibit P-26, photographs of the baby oil used; State's Exhibit P-39, Defendant's ripped shirt; and exhibits related to the State's DNA sample analysis. Additionally, there was testimony regarding the DNA found in Peter's underwear that showed there was a 1 in

7. We note that, while some details of these accounts differed, both of Peter's accounts of what happened were consistent in that they reflected "there was pornography involved; there was oral sex involved; there was an attempt at anal sex; and there was something about baby oil."

13.9 million chance of randomly selecting an unrelated Caucasian individual who could not be excluded from the DNA sample. Based on this evidence and the lack of an indication in the Record that the dildos were emphasized by the State, the error in admitting State's Exhibit P-21 does not rise plain error.

B. SBM Order

¶ 28 **[3]** Defendant argues, and the State concedes, that the trial court erred in determining that Defendant was subject to automatic lifetime SBM. However, the State contends that the SBM order should be remanded to the trial court to make an SBM determination, while Defendant contends that the SBM order should be reversed.

¶ 29 Although Defendant did not object at the trial court level, the trial court's error is still proper for our review pursuant to N.C.G.S. § 15A-1446(d)(18). N.C.G.S. § 15A-1446(d)(18) (2021) ("Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division. . . . The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law."). This approach is consistent with our prior holding in *State v. Dye*—that an error in an SBM proceeding that violated statutory mandates was preserved by N.C.G.S. § 15A-1446(d)(18), where "the trial court erred by ordering [the defendant] to enroll in the SBM program for a period of thirty years without sufficient findings of fact that [the] [d]efendant required the highest possible level of supervision and monitoring[.]" *State v. Dye*, 254 N.C. App. 161, 167-68, 802 S.E.2d 737, 741 (2017). As this issue is preserved for our review, we turn to the merits.

¶ 30 The SBM statute has two initial steps:

> (a) When an offender is convicted of a reportable conviction as defined by [N.C.G.S. §] 14-208.6(4), during the sentencing phase, the district attorney shall present to the court any evidence that (i) the offender has been classified as a sexually violent predator pursuant to [N.C.G.S. §] 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of [N.C.G.S. §] 14-27.23 or [N.C.G.S. §] 14-27.28, or (v) the offense involved the physical, mental, or sexual abuse of a minor. The district attorney shall have

> no discretion to withhold any evidence required to be submitted to the court pursuant to this subsection.
>
> . . . .
>
> (b) After receipt of the evidence from the parties, the court shall determine whether the offender's conviction places the offender in one of the categories described in [N.C.G.S. §] 14-208.40(a), and if so, shall make a finding of fact of that determination, specifying whether (i) the offender has been classified as a sexually violent predator pursuant to [N.C.G.S. §] 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of [N.C.G.S. §] 14-27.23 or [N.C.G.S. §] 14-27.28, or (v) the offense involved the physical, mental, or sexual abuse of a minor.

N.C.G.S. § 14-208.40A(a)-(b) (2018).[8] Here, after trial, Defendant, the State, and the trial court all incorrectly agreed that Defendant was convicted of a sexual offense with a child under N.C.G.S. § 14-27.28,[9] and therefore was subject to mandatory SBM for life. In reality, Defendant was convicted of what was codified as N.C.G.S. § 14-27.4(a)(1) at the time of the offense and had been recodified to N.C.G.S. § 14-27.29 by the time of trial. Defendant was ineligible for automatic lifetime SBM because the trial court found the other grounds for automatic lifetime SBM were not present. *See* N.C.G.S. § 14-208.40A(c) (2018) (listing the grounds for automatic lifetime SBM enrollment as being "a sexually violent predator, [being] a recidivist, having committed an aggravated offense, or [being] convicted of [N.C.G.S. §] 14-27.23 or [N.C.G.S. §] 14-27.28").

¶ 31 However, Defendant was eligible for the risk assessment track under N.C.G.S. § 14-208.40A(d) and (e):

> (d) If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that the offense is not an aggravated

8. We note that N.C.G.S. § 14-208.40A was amended with an effective date of 1 December 2021. *See* N.C.G.S. § 14-208.40A (2021); 2021 S.L. 138 § 18(d). However, the amendment is not relevant for our resolution of the issues presented in this appeal.

9. As discussed above, at the time of the offense, this statute was codified as N.C.G.S. § 14-27.4A.

> offense or a violation of [N.C.G.S. §] 14-27.23 [(rape of a child; adult offender)] or [N.C.G.S. §] 14-27.28 [(first degree sexual offense)] and the offender is not a recidivist, the court shall order that the Division of Adult Correction do a risk assessment of the offender. The Division of Adult Correction . . . shall have a minimum of 30 days, but not more than 60 days, to complete the risk assessment of the offender and report the results to the court.
>
> (e) Upon receipt of a risk assessment from the Division of Adult Correction . . . pursuant to subsection (d) of this section, the court shall determine whether, based on the Division of Adult Correction's risk assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court.

N.C.G.S. § 14-208.40A(d)-(e) (2018). Under this statute, Defendant was entitled to a risk assessment that would provide the basis for the level of SBM imposed.

¶ 32 Here, there was no evidentiary hearing, which would have been required either way under our caselaw,[10] and the parties and the trial court all improperly characterized Defendant's conviction. Due to the failure of all parties to accurately characterize the offense Defendant was found guilty of, resulting in improper SBM sentencing, we vacate the SBM order without prejudice to the State's ability to file a subsequent SBM application.

¶ 33 In *State v. Greene*, where the Defendant made a motion for involuntary dismissal under Rule 41(b) of our Rules of Civil Procedure, we held the State's concession that it failed to carry its burden to conduct

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10. *See Grady v. North Carolina*, 575 U.S. 306, 310-311, 191 L. Ed. 2d 459, 462-63 (2015) (citations omitted) ("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. The North Carolina courts did not examine whether the State's monitoring program is reasonable—when properly viewed as a search—and we will not do so in the first instance.").

a *Grady* hearing meant that it necessarily conceded that the trial court should have granted Defendant's motion to dismiss the SBM proceedings because "dismissal under Rule 41(b) is to be granted if the plaintiff has shown no right to relief[.]" *State v. Greene*, 255 N.C. App. 780, 783-84, 806 S.E.2d 343, 345 (2017) (citing *Jones v. Nationwide Mut. Ins. Co.*, 42 N.C. App. 43, 46-47, 255 S.E.2d 617, 619 (1979)). As a result, the proper remedy was to reverse because, at the trial court, "the [SBM] matter would have ended there." *Id.* at 784, 806 S.E.2d at 345.

¶ 34 *Greene* is not controlling because here there was no motion to dismiss under Rule 41(b), nor an objection made, and all parties were operating under an error of law. *Greene* distinguished the facts before it from *Harrell v. W.B. Lloyd Constr. Co.*, stating:

> In *Harrell*, [] remand was appropriate because "incompetent evidence ha[d] been erroneously considered by the trial judge in his ruling on the sufficiency of [the] plaintiff's evidence." The evidence was insufficient *in light of* the improperly considered evidence. Therefore, it was necessary to remand the case in order for the trial court to consider the matter anew absent the erroneously admitted evidence. In contrast, there has been no contention in this case that the State's evidence was improperly considered by the trial court.

Id. at 783, 806 S.E.2d at 345 (citations omitted) (quoting *Harrell v. W.B. Lloyd Constr. Co.*, 300 N.C. 353, 358, 266 S.E.2d 626, 630 (1980)). Here, like in *Harrell*, the trial court based its order on an error of law. As a result, like in *Harrell*, the appropriate remedy is to remand.

¶ 35 Furthermore, here we are guided by *State v. Bursell*, 258 N.C. App. 527, 533-34, 813 S.E.2d 463, 467-68 (2018) ("*Bursell I*"), *rev'd in part and aff'd in part by State v. Bursell*, 372 N.C. 196, 827 S.E.2d 302 (2019) ("*Bursell II*"). In *Bursell I*, we distinguished *Greene* and vacated the SBM order entered there without prejudice to the State's ability to file a subsequent SBM application. *Id.* at 533-34, 813 S.E.2d at 467-68. In *Bursell II*, our Supreme Court affirmed our decision "to vacate the trial court's SBM order without prejudice to the State's ability to file another application for SBM." *Bursell II*, 372 N.C. at 201, 827 S.E.2d at 306. Similarly, because *Greene* is distinct from the facts before us here, we may elect not to reverse the SBM order with prejudice to the State's ability to file a subsequent SBM application. Here, like in *Bursell I*, we vacate the SBM order subjecting Defendant to lifetime SBM without

prejudice to the State's ability to file a subsequent SBM application. *See Bursell I*, 258 N.C. App. at 534, 813 S.E.2d at 468; *Bursell II*, 372 N.C. at 201, 827 S.E.2d at 306. Additionally, Defendant's ineffective assistance of counsel claim on the basis of Defense Counsel's failure to object to the imposition of lifetime SBM for failure to conduct a *Grady* hearing is rendered moot, and we do not address it.

C. *In Camera* Review of Sealed Documents

¶ 36 **[4]** Defendant argues that we should review the sealed documents previously reviewed *in camera* by the trial court for any evidence that is "favorable and material to his guilt or punishment[,]" and further remand the case for a new trial if it is determined he was denied access to such information at the trial court level.

> A defendant who is charged with sexual abuse of a minor has a constitutional right to have the records of the child abuse agency that is charged with investigating cases of suspected child abuse, as they pertain to the prosecuting witness, turned over to the trial court for an *in camera* review to determine whether the records contain information favorable to the accused and material to guilt or punishment.

State v. McGill, 141 N.C. App. 98, 101, 539 S.E.2d 351, 355 (2000); *see also State v. Hardy*, 293 N.C. 105, 128, 235 S.E.2d 828, 842 (1977) ("[W]e hold that since realistically a defendant cannot know if a statement of a material State's witness covering the matters testified to at trial would be material and favorable to his defense, *Brady* and *Agurs* require the judge to, at a minimum, order an *in camera* inspection and make appropriate findings of fact. As an additional measure, if the judge, after the *in camera* examination, rules against the defendant on his motion, the judge should order the sealed statement placed in the record for appellate review."). Further,

> [i]f the trial court conducts an *in camera* inspection but denies the defendant's request for the evidence, the evidence should be sealed and placed in the record for appellate review. On appeal, this Court is required to examine the sealed records to determine if they contain information that is both favorable to the accused and material to either his guilt or punishment. If the sealed records contain evidence which is both favorable and material, [the]

> defendant is constitutionally entitled to disclosure of this evidence.

McGill, 141 N.C. App. at 101-02, 539 S.E.2d at 355 (marks and citations omitted).

> The duty to disclose encompasses impeachment evidence as well as exculpatory evidence. Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.
>
> A reasonable probability is a probability sufficient to undermine confidence in the outcome. Therefore, in determining whether the defendant's lack of access to particular evidence violated his right to due process, the focus should be on the effect of the nondisclosure on the outcome of the trial, not on the impact of the undisclosed evidence on the defendant's ability to prepare for trial.

State v. Lynn, 157 N.C. App. 217, 220, 578 S.E.2d 628, 631 (2003) (marks and citations omitted).

¶ 37 Here, following an *in camera* review of DSS and school records relating to Peter, the trial court found "certain documents to be discoverable" while others were deemed to be "duplicative of the documents released, not admissible, not relevant, or otherwise not subject to discovery[.]" Accordingly, the trial court sealed the documents. Further, after a separate *in camera* review was conducted of the personnel file of Officer Barlow, the trial court entered an order stating the trial court "conclude[d] that certain portions of [Officer Barlow's personnel records] should be released for use in connection with [Officer Barlow's] potential testimony in this case. The [c]ourt notes that other portions of these personnel records concerned an extra-marital affair which is not admissible for impeachment purposes under North Carolina law."

¶ 38 Pursuant to *McGill* and *Hardy*, Defendant is entitled to appellate-level *in camera* review of documents not released previously by the trial court.

¶ 39 Our *in camera* review of the documents here reveals the order of the trial court related to Officer Barlow did not restrict Defendant's access to evidence that was favorable or material. However, some portions of the DSS and school records that were not disclosed to Defendant were favorable to him. For Defendant to be entitled to a new trial where

withheld documents were favorable, we must also determine that the withheld documents were material. *See McGill*, 141 N.C. App. at 101-02, 539 S.E.2d at 355 (marks omitted) ("If the sealed records contain evidence which is both favorable and material, [the] defendant is constitutionally entitled to disclosure of this evidence.").

¶ 40 "Evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Lynn*, 157 N.C. App. at 220, 578 S.E.2d at 631 (quoting *State v. Holadia*, 149 N.C. App. 248, 256-57, 561 S.E.2d 514, 520-21, *disc. rev. denied*, 355 N.C. 497, 562 S.E.2d 432 (2002)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (marks omitted).

¶ 41 After a careful consideration of this case in its entirety, we hold that the withheld documents do not undermine our confidence in the outcome of Defendant's trial and the withheld documents were therefore not material. The trial court did not err in not turning over the withheld documents. In order to maintain the confidentiality of these documents, further analysis of this issue, including a discussion of those documents favorable to Defendant, are made in an order entered under seal. This order will remain under seal pending further consideration, if any, or release by our Supreme Court.

CONCLUSION

¶ 42 The trial court did not err in admitting photographs of condoms found inside Defendant's home. The trial court did, however, err in admitting photographs of dildos found in Defendant's home, but this error did not rise to the level of plain error. Additionally, we vacate the SBM order and remand without prejudice to the State's ability to file a subsequent SBM application. Finally, after a comprehensive review of the sealed documents from the trial court's *in camera* review, we conclude the trial court did not err as there was not any material evidence that was not provided to Defendant.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judge ZACHARY concurs.

Judge ARROWOOD concurs in result only.

TAC STAFFORD, LLC v. TOWN OF MOORESVILLE

[282 N.C. App. 686, 2022-NCCOA-217]

TAC STAFFORD, LLC, a North Carolina Limited Liability Company, Plaintiff
v.
TOWN OF MOORESVILLE, a North Carolina body politic and corporate, Defendant

No. COA21-229

Filed 5 April 2022

1. Cities and Towns—subdivision development—approvals conditioned on off-site improvements—no statutory authority

A town lacked authority under N.C.G.S. § 160A-372 to require plaintiff, the developer of a residential subdivision within the town, to make improvements to off-site public transportation locations as a condition for issuing development approvals for the subdivision, and therefore the trial court properly granted summary judgment to plaintiff on its claims for declaratory judgment and injunctive relief against the town. The unambiguous text of section 160A-372 only authorized the town to require the developer to "consider existing or planned streets when it plats streets or highways within its subdivision" or, alternatively, to require the developer to provide funds so that the town itself could construct roads outside of the subdivision.

2. Attorney Fees—action against a town—violation of law setting unambiguous limits on authority

After a trial court granted summary judgment in favor of plaintiff, the developer of a residential subdivision within a town, on its claims for declaratory judgment and injunctive relief against the town, which plaintiff filed after the town unlawfully conditioned its development approvals for the subdivision on the construction of certain off-site improvements, the trial court properly awarded attorney fees to plaintiff pursuant to N.C.G.S. § 6-21.7. The town clearly lacked authority under N.C.G.S. § 160A-372 (governing subdivision control ordinances) and the case law interpreting it to require plaintiff to complete the off-site improvements, and therefore the town "violated a statute or case law setting forth unambiguous limits on its authority."

3. Cities and Towns—subdivision development—approvals conditioned on off-site improvements—exaction of fees—extent

After a trial court granted summary judgment in favor of the developer of a town's residential subdivision (plaintiff) on its claims for declaratory judgment and injunctive relief against the town, which plaintiff filed after the town unlawfully conditioned its development approvals for the subdivision on the construction

of certain off-site improvements, the court properly denied in part plaintiff's motion for reimbursement of expenditures relating to the off-site improvements. Because plaintiff had paid some of those funds to entities other than the town, the town did not "exact" those funds, and therefore the town was not required under N.C.G.S. § 160A-363(e) to "return" what it never received. Nevertheless, the court's order partially denying plaintiff's motion was reversed and remanded where the record suggested that plaintiff may have paid a higher amount to the town than what the court determined it had.

4. Cities and Towns—subdivision development—approvals conditioned on off-site improvements—writ of mandamus—mootness of remaining issues

Where a trial court ruled in favor of plaintiff, the developer of a residential subdivision within a town, on its claims for declaratory judgment and injunctive relief against the town, which plaintiff filed after the town unlawfully conditioned its development approvals for the subdivision on the construction of certain off-site improvements, and where the court subsequently issued a writ of mandamus requiring the town to issue development approvals for the subdivision without requiring the unlawful condition, the court properly dismissed plaintiff's remaining claims against the town, with prejudice, where the writ of mandamus's issuance rendered those claims moot.

Appeal by defendant from orders entered 10 August 2020 and 23 February 2021 by Judge Martin B. McGee in Iredell County Superior Court. Cross-appeal by plaintiff from order entered 23 February 2021 by Judge Martin B. McGee in Iredell County Superior Court. Heard in the Court of Appeals 14 December 2021.

Scarbrough, Scarbrough & Trilling, PLLC, by Madeline J. Trilling and James E. Scarbrough, for plaintiff-appellee/cross-appellant.

Cranfill Sumner LLP, by Steven A. Bader and Patrick H. Flanagan, for defendant-appellant/cross-appellee.

ZACHARY, Judge.

¶ 1 Defendant Town of Mooresville ("the Town") appeals from the trial court's 10 August 2020 order granting Plaintiff TAC Stafford, LLC's

motion for summary judgment, denying the Town's motion for summary judgment, and issuing a writ of mandamus "requiring [the Town] to take all necessary steps to authorize the issuance of development approvals for the Stafford Subdivision without regard to construction of the [o]ff-[s]ite [i]mprovements[.]" The Town also appeals from the trial court's 23 February 2021 order granting in part Plaintiff's motion for reimbursement of fees and denying the Town's motion to stay. Lastly, Plaintiff cross-appeals from the trial court's 23 February 2021 order denying in part its motion for reimbursement of expenditures and recovery of attorneys' fees and costs.

¶ 2 After careful review, we affirm the 10 August 2020 order. As for the 23 February 2021 order, we affirm in part, reverse in part, and remand to the trial court.

Background

¶ 3 In 2014, Plaintiff purchased the Stafford Subdivision property (the "Subdivision"), which was zoned R-3 (Single Family Residential-3), allowing for development by right of three residential units per acre. Plaintiff submitted concept plans for the Subdivision to the Town, and on 21 January 2015, the Town informed Plaintiff via a series of emails first that the concept plans were approved, then that the approval was subject to the completion of a traffic impact analysis ("TIA") and the notation on the plan of "any required on-site and off-site improvements[.]"

¶ 4 Pursuant to a preexisting agreement, the Town selected Ramey Kemp & Associates, Inc. ("Ramey Kemp") to prepare the TIA, an expense for which Plaintiff was required to reimburse the Town. On 13 August 2015, Ramey Kemp completed and sealed the TIA. Still seeking the development approvals, Plaintiff entered into a Mitigation Measures Agreement ("MMA") with the Town on 4 November 2015. The MMA obligated Plaintiff to implement certain mitigation measures, including various improvements to off-site public transportation locations (the "off-site improvements") up to 2.3 miles away from the Subdivision, "as a condition of development." The MMA also conditioned the issuance of certificates of occupancy ("COs") for certain units of the Subdivision on completion of the off-site improvements.

¶ 5 Following minor changes to the Subdivision concept plan, on 6 March 2017, the parties executed an amended MMA. In its attempt to complete its obligations under the MMA, Plaintiff spent a total of $993,584.00. However, Plaintiff was ultimately unable to purchase rights-of-way from the owners of various properties necessary to complete the off-site improvements. Plaintiff requested that the Town condemn the properties,

pursuant to the Town's preexisting policy concerning the private acquisition of property to facilitate transportation mitigation measures, but the Town rejected Plaintiff's request during three meetings between December 2017 and October 2018 at which Plaintiff was not present. The Town then refused to issue the remaining COs for more than half of the Subdivision, on the ground that Plaintiff had breached the MMA by failing to complete the required off-site improvements.

¶ 6 On 30 January 2019, Plaintiff filed a complaint against the Town asserting multiple claims for declaratory and injunctive relief arising from its obligations to make the off-site improvements in accordance with the MMA, as well as claims for inverse condemnation, refund of illegally exacted fees, and breach of contract (if the MMA were found to be enforceable). Plaintiff argued, *inter alia*, that the Town lacked authority under N.C. Gen. Stat. § 160A-372 (2019)[1] to require the off-site improvements as part of a by-right approval process for the Subdivision. Plaintiff further petitioned the trial court to issue a writ of mandamus directing the Town to take all necessary steps to issue COs and any other required developmental approvals for the Subdivision, and moved for attorneys' fees and costs. The Town filed its answer, generally denying the allegations of Plaintiff's complaint, on 8 April 2019.

¶ 7 On 14 February 2020, the Town moved for summary judgment. Plaintiff filed its own motion for summary judgment on 18 February 2020. On 24 February 2020, the motions for summary judgment came on for hearing in Iredell County Superior Court. On 10 August 2020, the trial court entered its order granting Plaintiff's motion for summary judgment, denying the Town's motion for summary judgment, granting Plaintiff's petition for a writ of mandamus, and reserving for later determination the financial issues such as attorneys' fees, costs, and reimbursement of expenditures.

¶ 8 On 4 September 2020, the Town filed its notice of appeal. That same day, the Town filed a motion to stay or enjoin execution or enforcement of the order and writ of mandamus, pending its appeal. The Town's motion came on for hearing on 2 October 2020, at which hearing Plaintiff again raised the financial issues. The trial court requested

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1. "Effective 19 June 2020, the General Assembly consolidated the provisions governing planning and development regulations by local governments into a new Chapter 160D of the General Statutes." *85' & Sunny, LLC v. Currituck Cty.*, 279 N.C. App. 1, 2021-NCCOA-422, ¶ 18 n.3, *disc. review denied*, 379 N.C. 685, 865 S.E.2d 858 (2021). As the former Chapter 160A was in effect at all times relevant to this appeal, we address that Chapter in this opinion.

supplemental briefing on the financial issues, which both parties filed in November 2020.

¶ 9 On 23 February 2021, the trial court entered an order granting in part and denying in part Plaintiff's motion for reimbursement of expenditures, determining that the Town "should return $101,500.00 plus 6% interest per annum" to Plaintiff pursuant to N.C. Gen. Stat. § 160A-363(e); however, the court determined that the remaining expenditures were "paid to other entities – not the Town – in the course of the development of the property and as part of the MMA" and thus those funds were "not recoverable pursuant to G.S. 160A-363(e)[.]" The trial court also granted Plaintiff's motion for attorneys' fees and costs. The trial court then concluded that "[b]ecause mandamus is the proper remedy in this case, Plaintiff's remaining claims that were not resolved" by the 10 August 2020 order "are moot." Accordingly, the trial court dismissed the remaining claims with prejudice.

¶ 10 On 24 February 2021, the Town filed its notice of appeal from the 23 February 2021 order. Plaintiff filed its notice of appeal from the same order on 8 March 2021.

Summary Judgment

¶ 11 **[1]** On appeal from the trial court's 10 August 2020 order granting Plaintiff's motion for summary judgment and denying the Town's motion for summary judgment, the Town argues that the trial court erred by concluding that the Town did not have the authority to require off-site improvements as a condition for issuing development approvals for the Subdivision.

A. Standard of Review

¶ 12 We conduct de novo review of a trial court's grant of summary judgment "because the trial court rules only on questions of law." *Buckland v. Town of Haw River*, 141 N.C. App. 460, 462, 541 S.E.2d 497, 499 (2000) (citation omitted). "A trial court may grant a motion for summary judgment where there is no genuine issue of material fact and where the movant is entitled to judgment as a matter of law." *Id.*; N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021).

B. Analysis

¶ 13 In its order granting Plaintiff's motion for summary judgment, the trial court relied on this Court's opinion in *Buckland* to support its conclusion that § 160A-372 "does not permit the Town to require [Plaintiff] to make off-site changes, in the manner in which it seeks, as a condition

of the Town issuing development approvals." The Town argues that *Buckland* is both legally and factually inapposite, and therefore is not controlling authority in this case. We disagree.

¶ 14 In *Buckland*, the plaintiffs requested that the town approve a subdivision plat dividing their 7.6-acre property into 11 lots. 141 N.C. App. at 461, 541 S.E.2d at 499. The town approved the plaintiffs' subdivision plat "with the condition that [the] plaintiffs 'adhere to the subdivision regulations regarding the improvement of the public right-of-way and unopened portion of Fairview and Hollar Streets,' specifically instructing [the] plaintiffs that its 'subdivision ordinance requires paving and curb and gutter.' " *Id.* The plaintiffs filed a complaint seeking, *inter alia*, a writ of mandamus directing the town to approve their subdivision request without restrictions, but the trial court granted the town's motion for summary judgment. *Id.* at 461–62, 541 S.E.2d at 499.

¶ 15 On appeal, this Court reviewed N.C. Gen. Stat. § 160A-372, the enabling legislation for city and town ordinances, which "grant[ed] municipalities certain powers they may include in a subdivision control ordinance." *Id.* at 463, 541 S.E.2d at 500. As it existed both when this Court decided *Buckland* and when the trial court granted Plaintiff's motion for summary judgment in the present case, § 160A-372(a) provided:

> A subdivision control ordinance may provide for the orderly growth and development of the city; for the coordination of transportation networks and utilities within proposed subdivisions with existing or planned streets and highways and with other public facilities; for the dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision or, alternatively, for provision of funds to be used to acquire recreation areas serving residents of the development or subdivision or more than one subdivision or development within the immediate area, and rights-of-way or easements for street and utility purposes including the dedication of rights-of-way pursuant to G.S. 136-66.10 or G.S. 136-66.11; and for the distribution of population and traffic in a manner that will avoid congestion and overcrowding and will create conditions that substantially promote public health, safety, and the general welfare.

N.C. Gen. Stat. § 160A-372(a).

¶ 16 Interpreting § 160A-372(a), this Court determined that "a municipality's subdivision ordinance may require a developer to consider existing or planned streets when it plats streets or highways *within* its subdivision, but the statute does not empower municipalities to require a developer to build streets or highways *outside* its subdivision." *Buckland*, 141 N.C. App. at 463, 541 S.E.2d at 500 (first emphasis added) (citation omitted). Because the trial court had "implicitly f[ound] as a matter of law that [the town] could compel [the] plaintiffs to construct access roads," this Court concluded that the trial court erred in granting the town's motion for summary judgment. *Id.* at 465, 541 S.E.2d at 501. Accordingly, the *Buckland* Court reversed and remanded to the trial court for the entry of an order granting summary judgment in favor of the plaintiffs. *Id.* at 467, 541 S.E.2d at 502.

¶ 17 In the present case, the Town argues that *Buckland* only interpreted the first clause of § 160A-372(a)—which it denominates the "Within Provision"—and that it was authorized to require the off-site improvements pursuant to the final clause of § 160A-372(a), which it denominates the "Traffic Provision." The Town maintains that *Buckland* is therefore legally inapposite to the present case, in that the *Buckland* Court "only considered the scope of a town's authority to act under the Within Provision" but "did not consider whether [the town]'s ordinance was permissible under the Traffic Provision." However, the Town's argument is misguided. Ultimately, regardless of whether *Buckland* is viewed as interpreting the entirety of § 160A-372(a) or merely the Within Provision, the Town fails to identify any statutory authority permitting it to require off-site improvements as a condition of development approval or the issuance of COs under the circumstances presented.

¶ 18 The Town urges this Court to adopt a broad construction of § 160A-372. Specifically, the Town notes that its ordinance is consonant with § 160A-372's authorization that a town ordinance

> may provide that in lieu of required street construction, a developer may be required to provide funds that the city may use for the construction of roads to serve the occupants, residents, or invitees of the subdivision or development and these funds may be used for roads which serve more than one subdivision or development within the area.

N.C. Gen. Stat. § 160A-372(f). The Town argues that the "implication" of § 160A-372, "when viewed in the collective, is that a town can require a developer to account for increases in traffic attributable to

a proposed development. And, in providing a town tools to fulfill this objective, [§ 160A-372] does not preclude a town from requiring off-site road improvements."

¶ 19 However, we are only at liberty to adopt a broad construction of § 160A-372 if its language is ambiguous. "*If the enabling statute 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." *Quality Built Homes Inc. v. Town of Carthage*, 369 N.C. 15, 19, 789 S.E.2d 454, 457 (2016) (emphasis added) (citation and internal quotation marks omitted); *accord* N.C. Gen. Stat. § 160A-4. Section 160A-4's "broad construction mandate . . . is a rule of statutory construction rather than a general directive, and, as such, *is inoperative when the enabling statute is clear and unambiguous on its face*[.]" *Quality Built Homes*, 369 N.C. at 19, 789 S.E.2d at 457 (emphasis added) (citation and internal quotation marks omitted).

¶ 20 The Town does not identify any such ambiguity in the plain text of § 160A-372; instead, the Town merely identifies what it would prefer that the statute provide. Section 160A-372 clearly does not authorize the Town to condition approval of the Subdivision or to withhold the issuance of COs on the completion of off-site improvements.

¶ 21 The plain text of § 160A-372 makes clear that our General Assembly has only authorized the Town to "require a developer to consider existing or planned streets when it plats streets or highways *within* its subdivision[.]" *Buckland*, 141 N.C. App. at 463, 541 S.E.2d at 500 (emphasis added). Alternatively, the Town "may require a developer to *provide funds* to be used to construct roads *both within and outside of* a development. If the municipality selects this alternative, it undertakes to build these roads itself and [forgoes] the option of compelling the developer to build its own roads within the development." *Id.* at 464, 541 S.E.2d at 500–01 (emphases added) (citation omitted). But here, the Town pursued neither of these authorized courses of action, and thus lacked statutory authority to withhold development approvals for the Subdivision or condition such approvals on the completion of off-site improvements.

¶ 22 Lastly, the Town attempts to distinguish *Buckland* on its facts. While Plaintiff here sought approval of the development of the Subdivision with 467 lots on 209 acres, the developers in *Buckland* sought approval for only 11 lots on 7.6 acres. *Id.* at 461, 541 S.E.2d at 499. The Town also notes that *Buckland* makes no mention of a TIA or MMA, and asserts that

the Town of Haw River "provided no justification for its pre-condition" in that case. Accordingly, the Town argues that "[t]hese distinctions . . . warrant a different outcome" in this case.

¶ 23 Yet the Town makes no argument as to *why* these distinctions warrant a different outcome. Nothing in *Buckland* purports to limit its holding that § 160A-372 "does not empower municipalities to require a developer to build streets or highways *outside* its subdivision" to cases involving developments of a certain size. *Id.* at 463, 541 S.E.2d at 500. The plain language of both the statute and *Buckland* presents a clear rule, regardless of the scale of the development at issue.

¶ 24 The trial court did not err in granting Plaintiff's motion for summary judgment. Accordingly, the Town's argument is overruled, and the trial court's 10 August 2020 order is affirmed.

Attorneys' Fees

¶ 25 **[2]** On appeal from the trial court's 23 February 2021 order, the Town argues that the trial court erred by awarding attorneys' fees to Plaintiff. We disagree.

¶ 26 The trial court determined that "Plaintiff is entitled to recover reasonable attorneys' fees pursuant to G.S. 6-21.7." That statute provides, *inter alia*:

> In any action in which a city or county is a party, upon a finding by the court that the city or county violated a statute or case law setting forth unambiguous limits on its authority, the court shall award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action.

N.C. Gen. Stat. § 6-21.7.

¶ 27 "It is well established that the word 'shall' is generally imperative or mandatory when used in our statutes." *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cty.*, 368 N.C. 360, 365, 777 S.E.2d 733, 737 (2015) (citation and internal quotation marks omitted). Thus, § 6-21.7 provides for mandatory attorneys' fees through its use of the word "shall." When a trial court decides whether to award mandatory attorneys' fees, we review the trial court's decision de novo. *Willow Bend Homeowners Ass'n v. Robinson*, 192 N.C. App. 405, 418, 665 S.E.2d 570, 578 (2008).

¶ 28 The Town argues that the trial court erred in awarding attorneys' fees to Plaintiff pursuant to § 6-21.7 because the limitations on the Town's authority pursuant to § 160A-372 and *Buckland* are not "unambiguous."

For purposes of § 6-21.7, " 'unambiguous' means that the limits of authority are not reasonably susceptible to multiple constructions." N.C. Gen. Stat. § 6-21.7. In support of this argument, the Town again advances its claim, which we have already rejected, that *Buckland* does not control the outcome of this case because the Traffic Provision is a grant of authority that is legally distinct from the Within Provision.

¶ 29 As previously discussed, *Buckland* does not support the Town's claimed authority to act as it has in this case. Moreover, *Buckland*'s analysis is not ambiguous, and the Town's assertions to the contrary fail to persuade. Because the Town "violated a statute or case law setting forth unambiguous limits on its authority," *id.*, the trial court did not err in awarding attorneys' fees to Plaintiff. The Town's argument is overruled.

Recovery of Plaintiff's Expenditures

¶ 30 On cross-appeal from the trial court's 23 February 2021 order, Plaintiff argues that it is entitled to recover "*all* money expended in relation to the illegal [o]ff-[s]ite [i]mprovements that the Town unlawfully imposed[.]" Alternatively, Plaintiff argues that it is entitled to recover the same money as "compensatory damages based on the alternative claims" that Plaintiff raised in its verified complaint.

A. Standard of Review

¶ 31 In its 23 February 2021 order on the monetary issues remaining after entry of its 10 August 2020 order, the trial court granted in part and denied in part Plaintiff's motion for reimbursement of expenditures. Specifically, the trial court interpreted § 160A-363(e), which provided that "[i]f the city is found to have illegally exacted a tax, fee, or monetary contribution for development or a development permit not specifically authorized by law, the city shall return the tax, fee, or monetary contribution plus interest of six percent (6%) per annum." N.C. Gen. Stat. § 160A-363(e).

> Although the assessment of costs is generally within the discretion of the trial court, when the validity of an award of costs hinges upon the extent to which the trial court properly interpreted the applicable statutory provisions, the issue before the appellate court is one of statutory construction, which is subject to de novo review.

Justus v. Rosner, 371 N.C. 818, 829, 821 S.E.2d 765, 772 (2018) (citations and internal quotation marks omitted).

B. Exaction

¶ 32 **[3]** In its 23 February 2021 order, the trial court concluded that the Town "should return $101,500.00 plus 6% interest per annum to [Plaintiff] for reimbursement of fees paid to the Town" pursuant to N.C. Gen. Stat. § 160A-363(e). However, the trial court also determined that:

> The other funds paid by [Plaintiff] . . . were paid to other entities – not the Town – in the course of the development of the property and as part of the MMA. Plaintiff elected to pay these funds. The funds were not "exacted" by the Town. As a result, the funds are not a "tax, fee, or monetary contribution" under § 160A-363(e) that the Town can return.

¶ 33 On cross-appeal, Plaintiff asserts that it is undisputed that its total expenditures in pursuit of the off-site improvements were $993,854.00 and argues that the trial court erred in not awarding it the full amount of its undisputed expenditure. Plaintiff contends that to be entitled to relief under § 160A-363(e), "the Town must have (a) acted illegally in order to; (b) exact a tax, fee, or monetary contribution (c) as a condition to development or a development permit." (Emphasis omitted). Plaintiff notes that "[t]he first element has already been determined, and the third is undisputed." The issue is thus whether the trial court erred in determining the extent to which the Town "illegally exacted a tax, fee, or monetary contribution[.]" N.C. Gen. Stat. § 160A-363(e).

¶ 34 "An exaction is a condition of development permission that requires a public facility or improvement to be provided at the developer's expense." *Franklin Rd. Props. v. City of Raleigh*, 94 N.C. App. 731, 736, 381 S.E.2d 487, 490 (1989) (citation omitted). This Court has identified the categories into which exactions most commonly fall, including "requirements that land be dedicated for street rights-of-way, parks, or utility easements and the like" and "requirements that improvements be constructed or installed on land so dedicated[.]" *Id.* (citation omitted).

¶ 35 Here, Plaintiff argues that the Town

> unlawfully required Plaintiff, as a condition of development, to expend its own funds—*i.e.*, to contribute monetarily—to obtain required right-of-way and easements from third parties, design and construct off-site improvements which [Plaintiff] itself had no use for and which provide [Plaintiff] no benefit outside of attempting to comport with the Town's illegal

> and coercive demands to obtain required necessary development approvals.

(Emphasis omitted). Accordingly, Plaintiff argues that the full amount of $993,854.00 was an "exaction" that it is entitled to recover under § 160A-363(e).

¶ 36 However, this definition alone does not resolve the issue before us. The trial court determined that only $101,500.00 of Plaintiff's expenditures were paid directly to the Town, and as such, those were the only funds "exacted" *by the Town*. The Town notes in response to Plaintiff's cross-appeal that § 160A-363(e) uses the word "return" and argues that, because the Town did not receive the remaining $892,354.00 of Plaintiff's expenditures, it "cannot 'return' what it does not possess." Nevertheless, Plaintiff contends that "the applicability of N.C.G.S. § 160A-363(e) is not dependent upon the payee of the unlawfully exacted funds—it is irrelevant whether they were required to be paid directly to the Town of Mooresville." (Emphasis omitted).

¶ 37 Neither party cites any case that directly addresses this issue in interpreting § 160A-363(e). However, we agree with the Town's interpretation of the text of § 160A-363(e). Although the statute is silent as to whether the Town must be the recipient of the funds to be returned, the Town cannot "return" that which it has not received. Thus, we affirm the trial court's conclusion of law that funds paid to entities other than the Town were not "exacted" by the Town. Plaintiff's argument is overruled.

¶ 38 However, Plaintiff also argues that the trial court erred in finding that the total sum of funds paid directly to the Town was $101,500.00. Plaintiff claims that it "is also entitled to recover the $155,679.00 paid in relation to the traffic engineering performed by Ramey Kemp," because that amount was "actually paid directly to the Town[.]"

¶ 39 Our careful review of the record suggests that the trial court arrived at its total of $101,500.00 paid to the Town from an affidavit provided by Plaintiff in support of its motion for summary judgment. That affidavit also lists $155,679.00 as the amount paid to Ramey Kemp. However, Plaintiff directs us to an exhibit in the record, composed of a letter from a transportation engineer for the Town, directing that Plaintiff "issue a check to the Town of Mooresville (memo: Stafford TIA)," and assuring Plaintiff that "[o]nce I have received the payment in full for the study and the executed letter, I will issue notice to proceed for the consultant to begin work on the TIA." Plaintiff also cites the deposition of the Town's engineering director, in which he states that the Town "had a

policy in place that we -- the developer would -- so, basically the Town would pay for the services and the developer would reimburse that." The record thus suggests that Plaintiff may have paid more directly to the Town than the trial court determined.

¶ 40 As such, even though we affirm the trial court's conclusion of law concerning the meaning of an exaction pursuant to § 160A-363(e), we nevertheless must reverse the 23 February 2021 order as regards its specific conclusion on the amount of total expenditures that the Town "exacted" from Plaintiff. On remand, the trial court shall conduct additional proceedings to determine precisely how much Plaintiff paid directly to the Town, and thus how much Plaintiff is entitled to recover from the Town, with interest, pursuant to § 160A-363(e).

C. Mandamus

¶ 41 **[4]** Lastly, Plaintiff argues that the trial court erred in concluding that Plaintiff's remaining claims were rendered moot by the issuance of a writ of mandamus, and by dismissing those remaining claims with prejudice. While Plaintiff agrees that the court's writ of mandamus was "vital" to its ability to obtain prospective relief, Plaintiff maintains that mandamus "alone does not make [it] whole" and "simply does not afford [it] complete relief for the damages [it] incurred . . . as a direct result of the Town's unlawful conduct." We disagree.

¶ 42 The writ of mandamus is "a limited and extraordinary remedy to provide a swift enforcement of a party's already established legal rights." *Holroyd v. Montgomery Cty.*, 167 N.C. App. 539, 543, 606 S.E.2d 353, 356 (2004), *disc. review and cert. denied*, 359 N.C. 631, 613 S.E.2d 690 (2005). "The function of a writ of mandamus is to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established." *Id.* at 543, 606 S.E.2d at 356–57 (citation omitted). The trial court "may only issue a writ of mandamus in the absence of an alternative, legally adequate remedy." *Graham Cty. Bd. of Elections v. Graham Cty. Bd. of Comm'rs*, 212 N.C. App. 313, 322, 712 S.E.2d 372, 379 (2011) (citation omitted).

¶ 43 In the present case, with the exception of the motion for litigation costs and attorneys' fees pursuant to N.C. Gen. Stat. §§ 1-263 and 6-21.7, every claim Plaintiff raised in its complaint was resolved by the issuance of the writ of mandamus. Plaintiff sought declaratory judgments on several issues relating to the Town's lack of authority to withhold development approvals, which were resolved by mandamus. Plaintiff also raised constitutional arguments regarding substantive and procedural due process, which the trial court determined were unnecessary to address as

the "matter [wa]s resolved through statutory interpretation[.]" Lastly, Plaintiff raised several contractual claims, each of which aimed to relieve Plaintiff of its off-site improvement obligations under the MMA. Further, Plaintiff pleaded in its petition for a writ of mandamus that "[t]here is no alternative legally adequate remedy available to [Plaintiff] other than the issuance by this Court of a writ of *mandamus*, because State law and the Ordinances require lots within the Subdivision to have COs prior to occupancy of residences located thereon."

¶ 44 "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996) (citations and internal quotation marks omitted). Here, the trial court correctly determined that Plaintiff's claims, other than the motion for litigation costs and attorneys' fees, were rendered moot by the issuance of the writ of mandamus, in that each claim sought relief from the Town's requirement of off-site improvements as a condition of development approval. Because the issuance of the writ of mandamus provided the relief that Plaintiff sought, at that point, further determination of Plaintiff's remaining claims could not have any practical effect on the existing controversy. Thus, the trial court did not err in dismissing any remaining claims as moot, and Plaintiff's argument is overruled.

Conclusion

¶ 45 For the reasons stated herein, we affirm the trial court's 10 August 2020 summary judgment order in its entirety. The 23 February 2021 order is affirmed, in part, as to the award of attorneys' fees to Plaintiff and the dismissal of Plaintiff's remaining claims as moot; reversed, in part, as to the amount of Plaintiff's expenditures that it may recover from the Town pursuant to N.C. Gen. Stat. § 160A-363(e); and remanded to the trial court for further proceedings to determine the sum of Plaintiff's direct payments to the Town and to assess the amount of Plaintiff's recovery.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges WOOD and GRIFFIN concur.

SOC'Y FOR THE HIST. PRES. OF THE TWENTY-SIXTH N.C. TROOPS, INC. v. CITY OF ASHEVILLE

[282 N.C. App. 700, 2022-NCCOA-218]

THE SOCIETY FOR THE HISTORICAL PRESERVATION OF THE TWENTY-SIXTH NORTH CAROLINA TROOPS, INC., PLAINTIFF
v.
CITY OF ASHEVILLE, NORTH CAROLINA, AND BUNCOMBE COUNTY, NORTH CAROLINA, DEFENDANTS

No. COA21-429

Filed 5 April 2022

1. Jurisdiction—standing—legal injury—removal of historical monument—alleged breach of contract

In a dispute concerning a city's decision to remove a monument, the trial court's order dismissing plaintiff historical society's complaint for lack of standing was affirmed where plaintiff's claims for breach of contract, a temporary restraining order, a preliminary injunction, and a declaratory judgment did not sufficiently allege any legal injury. The "donation agreement" at issue contemplated the restoration of the monument, not its continued preservation, and plaintiff did not allege any ownership rights to the statute.

2. Contracts—breach of contract—failure to state a claim—contractual relationship complete—monument restoration

In a dispute concerning a city's decision to remove a monument, the trial court's order dismissing plaintiff historical society's complaint for failure to state a claim was affirmed where, although a valid contract did exist between plaintiff and defendant city for restoration of the monument, the restoration had been completed and the contractual relationship between the parties was complete. The restoration contract was limited in scope and duration and did not contemplate ongoing preservation of the monument or grant any ownership rights to plaintiff.

Appeal by plaintiff from order entered 30 April 2021 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 22 February 2022.

The Law Office of H. Edward Phillips, PLLC, by H. Edward Phillips, III, for plaintiff-appellant.

City of Asheville Attorney's Office, by Senior Assistant Attorney Eric P. Edgerton, for defendant-appellee City of Asheville.

No brief filed for defendant-appellee Buncombe County.

ARROWOOD, Judge.

¶ 1 The Society for the Historical Preservation of the Twenty-Sixth North Carolina Troops, Inc. ("plaintiff") appeals from the trial court's order dismissing plaintiff's complaint, which was brought against the City of Asheville ("defendant City") and Buncombe County ("defendant County") (collectively, "defendants") for breach of contract. Plaintiff contends the trial court erred as a matter of law in dismissing the complaint on the grounds that plaintiff had standing to bring the complaint, and that the complaint stated a claim upon which relief could be granted. For the following reasons, we affirm the trial court.

I. Background

¶ 2 On 23 March 2021, plaintiff filed a complaint in Buncombe County Superior Court claiming breach of contract. Plaintiff's complaint was filed in response to the announced decision to remove and deconstruct the Zebulon Baird Vance Monument ("Vance Monument") situated in Asheville, North Carolina. Plaintiff alleged that it undertook a project to restore and preserve the Vance Monument pursuant to a contract with defendant City made in 2015. Plaintiff alleged that, prior to contracting with defendant City, it raised approximately $138,447.38[1] to pay for the restoration and preservation of the Vance Monument.

¶ 3 The complaint additionally provided that "[plaintiff] never intended that the money its organization raised, that its members donated out-of-pocket as individuals, and the countless man hours expended for the better part of three years would be thrown asunder by elected officials representing the Defendants[,]" violating the terms of the contract "and likely in violation of state law."

¶ 4 Underlying the breach of contract claim, plaintiff sought a temporary restraining order, preliminary and permanent injunction, and declaratory judgment. Plaintiff alleged that, due to its fundraising efforts and contract with defendant City, "a removal of the Vance Monument will cause an injury that is unique to [plaintiff], which cannot be compensated through an award of monetary damages." Plaintiff further alleged that there was "no other adequate remedy at law" if defendants

1. A footnote in the complaint states that, of this total, the City of Asheville donated $22,608.38 and Buncombe County donated $7,500.00; plaintiff contributed $108,341.00.

permanently removed and destroyed the Vance Monument, and that there was "no recompense that can be given to [plaintiff] that will compensate them for their preservation efforts in 2015."

¶ 5 Attached as Exhibit B was the "Donation Agreement" between plaintiff and defendant City. Paragraph one, titled "Donation," provided the following:

> [Plaintiff] agrees to purchase and contract for the Restoration on the Vance Monument at Pack Square Park, in accordance with the terms and conditions set forth in this Agreement. Upon completion of [plaintiff]'s work of said Restoration in accordance with the terms and conditions set forth in this Agreement, the City agrees to accept said donation.

The Donation Agreement further provided that the "parties agree[d] that a reasonable estimate of the total value of the donation" was $115,000.00. The Donation Agreement also set forth several "General Conditions[,]" including that defendant City "reserves the right to reject any and all work and materials, which in the reasonable opinion of the City's Project Manager, do not meet the requirements of the approved site plan and specifications."

¶ 6 On 27 January 2021, plaintiff filed a "Petition to Preserve Historic Artifact" with the North Carolina Historical Commission. The Petition asserted plaintiff's claim that defendant City lacked authority under N.C. Gen. Stat. § 100-2.1 to remove the Vance Monument.

¶ 7 On 29 March 2021, defendant City filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted, also seeking an award of attorney fees alleging a lack of a justiciable issue. On 7 April 2021, defendant County filed an answer generally denying the allegations set out in plaintiff's complaint and seeking dismissal, also arguing that plaintiff lacked standing and that the complaint failed to state a claim upon which relief could be granted. On 9 April 2021, plaintiff filed a motion to stay the proceedings pending a decision by the North Carolina Supreme Court in the appeal of *United Daughters of the Confederacy v. City of Winston-Salem by and through Joines*, 275 N.C. App. 402, 853 S.E.2d 216 (2020).

¶ 8 The matter was heard in Buncombe County Superior Court on 12 April 2021, Judge Thornburg presiding. On 30 April 2021, the trial court entered an order denying plaintiff's motion to stay and granting

defendants' motions to dismiss for failure to state a claim upon which relief could be granted.

¶ 9 In the order, the trial court concluded that the obligations of any potential agreement between the parties had been fulfilled, and therefore plaintiff "failed to sufficiently allege a breach of contract claim." The trial court further concluded that plaintiff's claims were "not sufficiently apposite to those pending before the Supreme Court of North Carolina to warrant a delay in the proceedings[,]" and that plaintiff lacked standing to bring the remaining claims because plaintiff "and its individual members are not injuriously affected in their persons, property or constitutional rights in a manner to create an actual controversy and standing in this matter." Regarding defendant City's request for attorney's fees, the trial court found that there was not "a complete absence of a justiciable issue of either law or fact raised by" the pleadings and that an award of attorney's fees was not proper.

¶ 10 Plaintiff filed notice of appeal on 18 May 2021. On 23 August 2021, plaintiff filed a motion for stay of appellate proceedings pending a decision by the North Carolina Supreme Court in *United Daughters*. Plaintiff's motion was denied on 7 September 2021. Defendant City filed a motion to dismiss plaintiff's appeal on 8 September 2021. Defendant City's motion was denied on 21 September 2021.

II. Discussion

¶ 11 Plaintiff contends the trial court erred in dismissing plaintiff's complaint for lack of standing and failure to state a claim. Defendant contends that plaintiff's argument on appeal ignores this Court's decision in *United Daughters* and that dismissal with prejudice was proper.

A. Standard of Review

¶ 12 This Court reviews an order granting a motion to dismiss to determine "whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428 (2007) (citation omitted).

> Dismissal is proper "when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint

> discloses some fact that necessarily defeats the plaintiff's claim."

Id. at 512, 640 S.E.2d at 428-29 (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)). "On appeal of a 12(b)(6) motion to dismiss, 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." *Birtha v. Stonemor, N.C., LLC*, 220 N.C. App. 286, 291, 727 S.E.2d 1, 6 (2012) (citation omitted).

B. Standing

¶ 13 **[1]** Previously in North Carolina, a plaintiff was required to demonstrate three things to establish standing: 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) (citations omitted).

¶ 14 Recently, our Supreme Court held as a matter of first impression that the North Carolina Constitution does not include an injury-in-fact requirement for standing where a purely statutory or common law right is at issue. "When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, . . . the legal injury itself gives rise to standing." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 2021-NCSC-6, ¶ 82. "The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right, because 'every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law.' " *Id.* (quoting N.C. Const. art. I, § 18, cl. 2). The Court specified that the word "injury" means, "at a minimum, the infringement of a legal right; not necessarily 'injury in fact' or factual harm[.]" *Id.* ¶ 81.

¶ 15 Accordingly, to establish standing, a plaintiff must demonstrate the following: a legal injury; the traceability of the injury to a defendant's actions; and the probability that the injury can be redressed by a favorable decision. *See id.*

¶ 16 In pursuing a declaratory judgment with respect to the rights in a statue, a plaintiff is required to "show, at the very least, that it possessed some rights in the statue—a legally protected interest invaded by defendants' conduct." *United Daughters*, 275 N.C. App. at 407, 853 S.E.2d at 220.

¶ 17 In this case, plaintiff presents several arguments that it has "a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter[,]" and accordingly standing to sue. These arguments include plaintiff's contention that it has representational standing for its individual members as taxpayers, or alternatively that it "has succeeded to the interests of those who were responsible for designing, funding, and erecting" the Vance Monument. Plaintiff asserts that the underlying "actual controversy between the parties" is defendants' decision "to demolish and remove" the Vance Monument.

¶ 18 We first address plaintiff's standing argument with respect to the breach of contract claim. To satisfy the first element of standing, plaintiff was required to demonstrate that it suffered a legal injury, or the infringement of a legal right, by breach of contract.

¶ 19 As previously discussed, plaintiff's complaint alleged that defendant City breached the Donation Agreement by deciding to dismantle the Vance Monument. Plaintiff attached a copy of the Donation Agreement to its complaint. The Donation Agreement specifically provided that plaintiff would "donate" the restoration work to defendant City upon completion; the donation had an estimated value of $115,000.00. Notably, the Donation Agreement describes the work as the "Restoration" and does not contemplate ongoing preservation efforts.

¶ 20 The trial court's order provided the following:

> After considering the pleadings, the parties' submissions, the arguments of counsel, and the record, the Court concludes that, in the event that Plaintiff has properly alleged the existence of a valid contract, the obligations of any potential agreement have been fulfilled; therefore, Plaintiff has failed to sufficiently allege a breach of contract claim.

¶ 21 A close comparison of the Donation Agreement and plaintiff's complaint bring us to the conclusion that plaintiff has not sufficiently demonstrated or alleged a legal injury. The Donation Agreement, which both parties agreed to, and plaintiff now asserts enforcement of, contemplated a limited duration and scope of *restoring* the monument, with plaintiff's contributions to be *donated* upon completion. Contrary to the plain language of the Donation Agreement, plaintiff's complaint and argument on appeal introduce plaintiff's intent to *preserve* the monument. No portion of the Donation Agreement binds either party to engage in preservation efforts after the restoration work was completed.

¶ 22 Plaintiff's complaint would sufficiently allege a breach of contract claim if the contract bound the parties to engage in preservation efforts, or to maintain the Vance Monument in its current state for some defined period of time. Instead, the contract in this case was for the donation of restoration work, which was completed prior to defendant City's decision to remove the Vance Monument. Accordingly, as the trial court properly concluded, plaintiff's complaint did not sufficiently allege a breach of contract claim, and plaintiff has failed to satisfy the first element of standing to bring its breach of contract claim.

¶ 23 Although plaintiff's brief primarily focuses on defendant City and does not specifically address defendant County's motion to dismiss, plaintiff similarly does not have standing to bring a breach of contract claim against defendant County. Defendant County was not a party to the contract, and accordingly was unable to breach the contract. The trial court properly granted defendant County's motion to dismiss for failure to state a claim and lack of standing.

¶ 24 We turn next to plaintiff's claim for a temporary restraining order and preliminary injunction. As with the breach of contract claim, in order to establish standing, plaintiff is required to demonstrate a legal injury.

¶ 25 Plaintiff's remaining claims for relief repeatedly reference the Donation Agreement and plaintiff's fundraising efforts. Plaintiff's complaint also references the "Petition to Preserve Historic Artifact" which was "specifically requesting the aid of the Historical Commission to exercise its statutory authority under N.C. Gen. Stat. § 143B-62 and assist in providing aid to [plaintiff] in its continued preservation efforts to maintain the Vance Monument."

¶ 26 It is somewhat unclear what legal injury plaintiff asserts, in both the complaint and the present appeal, in seeking the TRO, preliminary injunction, and declaratory judgment. The portions of plaintiff's brief discussing N.C. Gen. Stat. § 100-2.1 include a non-sequitur discussion of chattels, the assertion that "this action squarely raises the question of the applicability of the Monuments Act[,]" and the assertion that plaintiff has "an abiding and cognizable legal interest in the Vance Monument because it is a legacy organization which was responsible for its restoration and its acceptance by [d]efendant City."

¶ 27 None of these arguments establish a legal injury suffered by plaintiff sufficient to establish standing. Although plaintiff has filed a Petition with the Historical Commission, the Petition taken together with defendant City's decision to remove the Vance Monument do not legally injure

plaintiff. The Petition is a matter for the Historical Commission to consider and is not before the trial court or this Court.

¶ 28 Regarding plaintiff's assertion that it has a legal interest as a legacy organization, this assertion was rejected in *United Daughters*, where "plaintiffs alleged no ownership rights to the statue[,]" and accordingly "failed to demonstrate or allege any legal interest in the statue." *United Daughters*, 275 N.C. App. at 408, 853 S.E.2d at 220. Similarly in this case, plaintiff has not alleged any ownership rights to the statue, and accordingly has failed to demonstrate any legal interest in the statue. Without the breach of contract claim, and with no ownership rights to the Vance Monument, plaintiff is unable to establish a legal injury, and is therefore unable to establish standing for its claims for a TRO, preliminary injunction, and declaratory judgment.

C. Failure to State a Claim

¶ 29 **[2]** Plaintiff next contends the trial court erred in dismissing plaintiff's complaint for failure to state a claim upon which relief could be granted. We disagree.

¶ 30 "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citation omitted). The "elements of a valid contract are offer, acceptance, consideration, and mutuality of assent to the contract's essential terms." *Se. Caissons, LLC v. Choate Const. Co.*, 247 N.C. App. 104, 110, 784 S.E.2d 650, 654 (2016) (citing *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980)). "Generally, a party seeking to enforce a contract has the burden of proving the essential elements of a valid contract." *Murray v. Deerfield Mobile Home Park, LLC*, 2021-NCCOA-213, ¶ 36 (citation and quotation marks omitted), *review dismissed*, 860 S.E.2d 921, and *review denied*, 861 S.E.2d 330 (2021).

¶ 31 In this case, plaintiff had the burden of proving that a valid contract existed between the parties and that defendants breached the terms of that contract. As previously discussed, the evidence presented was sufficient to establish that the contractual relationship between plaintiff and defendant City was complete. Nowhere in the Donation Agreement did defendant City grant any ownership rights in the Vance Monument to plaintiff; the Donation Agreement specifically contemplated a limited scope and duration. As defendant City aptly puts it, plaintiff's complaint seeks "to read into the Donation Agreement a fifth obligation with which the City would be required to comply: maintaining the Vance Monument

in place for all eternity." Although there was sufficient evidence that a contract existed, there was insufficient evidence that defendant City breached the contract. The trial court did not err in dismissing plaintiff's complaint for failure to state a claim.

III. Conclusion

¶ 32 For the foregoing reasons, we hold that plaintiff lacked standing to assert its claims, and that the trial court did not err in dismissing plaintiff's complaint for failure to state a claim.

AFFIRMED.

Chief Judge STROUD and Judge WOOD concur.

GWENDOLYN DIANETTE WALKER, Widow of ROBERT LEE WALKER, Deceased Employee, Plaintiff
v.
K&W CAFETERIAS, Employer, LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

No. COA21-335

Filed 5 April 2022

1. Workers' Compensation—lien—third-party wrongful death recovery—subrogation

The Industrial Commission did not err by imposing a workers' compensation lien against a wrongful death recovery, including any portion that would have been distributed to heirs who did not share in the worker's compensation award for decedent's death, since, as established in *In re Estate of Bullock*, 188 N.C. App. 518 (2008), the plain language of N.C.G.S. § 97-10.2(f) and (h) allows such a lien to be enforced against any person receiving payment from a third-party tortfeasor for the death of an employee. Further, nothing in the statute permits subrogating the rights of an employer to those of the beneficiaries of a workers' compensation award.

2. Workers' Compensation—lien—third-party wrongful death recovery—multiple UIM policies—subrogation

In an action involving a wrongful death settlement and a workers' compensation lien arising from a fatal car accident that occurred in South Carolina, the Industrial Commission erred by

determining that the proceeds recovered from the personal uninsured/underinsured motorist (UIM) policy held by decedent and his wife (plaintiff) in the South Carolina-based wrongful death action were exempt from subrogation under N.C.G.S. § 97-10.2. Although the Supreme Court held in *Walker v. K&W Cafeterias*, 375 N.C. 254 (2020), that South Carolina law applied to proceeds paid under defendant employer's commercial UIM policy (due to choice-of-law contract principles), and therefore those proceeds ($900,000) could not be used to satisfy defendants' workers' compensation lien, the same reasoning did not apply to the personal UIM policy. Therefore, the proceeds of that policy ($12,500) were subject to North Carolina law as the governing forum and to defendants' subrogation rights.

3. Workers' Compensation—lien—third-party wrongful death recovery—distribution of costs and attorneys' fees

In an action involving a wrongful death settlement and workers' compensation lien arising from a fatal car accident that occurred in South Carolina, the Court of Appeals modified the Industrial Commission's order disbursing proceeds from multiple policies to pay for costs and attorneys' fees. After determining that $12,500 from plaintiff's and decedent's personal uninsured/underinsured motorist (UIM) policy was subject to subrogation (contrary to the Industrial Commission's determination), the Court of Appeals ordered that one-third of that amount be disbursed to pay plaintiff's attorneys' fees and the remainder in satisfaction of defendants' (decedent's employer and the employer's insurer) subrogation lien. Disbursements of proceeds from defendant employer's commercial UIM policy ($900,000)—free and clear of defendants' subrogation interests—and the third-party tortfeasor's liability policy ($50,000)—split between costs, attorneys' fees, and satisfaction of defendants' subrogation lien—were left undisturbed.

Appeal by plaintiff, and cross-appeal by defendants, from amended opinion and award entered 15 April 2021 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 December 2021.

The Sumwalt Group, by Vernon Sumwalt and Christa Sumwalt, for plaintiff-appellant/cross-appellee.

Cranfill Sumner LLP, by Steven A. Bader and Roy G. Pettigrew, for defendants-appellees/cross-appellants.

ZACHARY, Judge.

¶ 1 Plaintiff Gwendolyn Dianette Walker appeals, and Defendants K&W Cafeterias and Liberty Mutual Insurance Company cross-appeal, from the Amended Opinion and Award of the Full North Carolina Industrial Commission (the "Commission") ordering that Plaintiff's counsel (1) disburse $900,000.00 in commercial uninsured/underinsured motorist ("UIM") proceeds and $12,500.00 in personal UIM proceeds free and clear of Defendants' subrogation lien pursuant to N.C. Gen. Stat. § 97-10.2 (2021), and (2) disburse $50,000.00 in liability insurance policy proceeds according to the following distribution:

- $5,921.91 to Plaintiff's counsel for costs and expenses incurred in the litigation of the Third-Party Action,
- $16,666.67 to Plaintiff's counsel for attorneys' fees in the Third-Party Action, and
- $27,411.42 to Defendants towards Defendants' subrogation lien.

After careful review, we affirm the Commission's Opinion and Award in part, and we reverse in part and remand to the Commission with instructions to modify its order regarding the distribution of the proceeds.

Background

¶ 2 The full background of this case is set forth in our Supreme Court's opinion in *Walker v. K&W Cafeterias* (*Walker I*), 375 N.C. 254, 846 S.E.2d 679 (2020). We recite here the facts relevant to the appeals currently before us.

¶ 3 On 16 May 2012, Robert Lee Walker ("Decedent") was driving a vehicle owned by his employer, Defendant K&W Cafeterias, when he was involved in a fatal motor vehicle accident in Dillon, South Carolina. *Walker I*, 375 N.C. at 255, 846 S.E.2d at 680. As our Supreme Court recognized in *Walker I*, however:

> this case is not [P]laintiff's workers' compensation claim. That claim was fully resolved in 2013 when death benefits were paid to [P]laintiff under the Workers' Compensation Act due to [Decedent]'s work-related death. Instead, here we review what should happen to over $900,000 that was paid to [P]laintiff in the South Carolina wrongful death settlement with the at-fault driver. That settlement was

> reached in 2016, and to date, the money remains in the trust account of [P]laintiff's attorneys.

Id. at 258, 846 S.E.2d at 682.

¶ 4 On 21 August 2012, Plaintiff filed a worker's compensation claim for death benefits pursuant to N.C. Gen. Stat. §§ 97-38 to -40. *Id.* at 256, 846 S.E.2d at 681. On 7 January 2013, a deputy commissioner entered a Consent Opinion and Award ordering Defendants to pay $333,763.00 in workers' compensation death benefits to Plaintiff. *Id.*

¶ 5 In 2014, Plaintiff filed a wrongful death action in South Carolina (the "Third-Party Action"), seeking damages from the third-party driver at fault in the accident that resulted in Decedent's death. *Id.* "In 2016, [P]laintiff and the third-party [driver] reached a settlement agreement, according to which [P]laintiff recovered a total of $962,500[,]" composed of "(1) $50,000 in liability benefits from the [at-fault driver]'s insurer; (2) $12,500 in personal UIM proceeds from [P]laintiff's and [D]ecedent's own personal UIM policy; and (3) $900,000 in UIM proceeds from a commercial UIM policy that K&W purchased with its automobile insurance carrier." *Id.*

¶ 6 On 21 March 2016, Defendant Liberty Mutual asserted a subrogation claim; it "filed a request for a hearing with the North Carolina Industrial Commission in which it sought repayment of the workers' compensation death benefits it had paid to [P]laintiff beginning in 2013, claiming a lien under N.C.G.S. § 97-10.2 on the UIM proceeds that [Plaintiff] recovered from the South Carolina wrongful death settlement in 2016." *Id.* at 256–57, 846 S.E.2d at 681.

¶ 7 On 10 July 2017, a deputy commissioner concluded that Defendants "were entitled to subrogation under N.C.G.S. § 97-10.2(f)(1)(c), (h), and ordered that [D]efendants be reimbursed out of the third-party recovery [from the settlement in the Third-Party Action] for the $333,763 in workers' compensation benefits that they had paid to [Plaintiff] under the 7 January 2013 Consent Opinion and Award." *Id.* at 257, 846 S.E.2d at 681. Both the Commission and this Court affirmed the 10 July 2017 Opinion and Award. *Id.* Our Supreme Court, however, "conclude[d] that [D]efendants may not satisfy their workers' compensation lien by collecting from [P]laintiff's recovery of UIM proceeds in her South Carolina wrongful death settlement[,]" and reversed and remanded the case. *Id.* at 257–58, 846 S.E.2d at 682.

¶ 8 On remand following *Walker I*, the Commission entered an Amended Opinion and Award on 15 April 2021. The Commission concluded that,

pursuant to *Walker I*, the "proceeds recovered in the third-party action from the two UIM policies are governed by South Carolina law and may not be used to satisfy Defendants' workers' compensation lien under N.C. Gen. Stat. § 97-10.2." The Commission further concluded that "Defendants' lien attaches to the entire $50,000.00 in liability insurance proceeds and not just Plaintiff's share of those proceeds" pursuant to this Court's opinion in *In re Estate of Bullock*, 188 N.C. App. 518, 655 S.E.2d 869 (2008).

¶ 9 The Commission then ordered that Plaintiff's counsel disburse both the $900,000.00 in commercial UIM proceeds and $12,500.00 in personal UIM proceeds "free and clear of Defendants' subrogation interests under N.C. Gen. Stat. § 97-10.2[,]" and further ordered that:

> Plaintiff's counsel shall disburse the $50,000.00 in liability policy proceeds as follows:
>
> a. $5,921.91 to Plaintiff's counsel for costs and expenses incurred in the litigation of the [Third-Party Action],
>
> b. $16,666.67 to Plaintiff's counsel [for] attorney's fees in the [Third-Party Action],
>
> c. $27,411.42 to Defendants towards Defendants' subrogation lien.

¶ 10 On 15 April 2021, Plaintiff filed her notice of appeal. On 11 May 2021, Defendants filed their notice of appeal.

Standard of Review

¶ 11 "The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of" our Supreme Court. *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008), *reh'g denied*, 363 N.C. 260, 676 S.E.2d 472 (2009).

> Under the Workers' Compensation Act, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Therefore, on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law.

Id. (citations and internal quotation marks omitted). The Commission's conclusions of law, however, are reviewed de novo. *Walker I*, 375 N.C. at 258, 846 S.E.2d at 682.

Plaintiff's Appeal

¶ 12 **[1]** On appeal, Plaintiff argues that the Commission erred by imposing a workers' compensation lien against that portion of a wrongful death recovery that would have been distributed to heirs who did not receive any part of the workers' compensation award for the Decedent's death. Our Supreme Court declined to reach this issue in *Walker I*. *Id.* at 255 n.1, 846 S.E.2d at 680 n.1. In the present appeal, we are bound by controlling precedent to reject Plaintiff's argument.

¶ 13 Plaintiff concedes that this Court has already decided this issue in *Bullock*, in which this Court analyzed the plain language of N.C. Gen. Stat. § 97-10.2(f) and (h) and concluded that an employer and its insurer

> have a statutory lien against *any* payment made by a third-party tortfeasor arising out of an injury or death of an employee subject to the [Workers' Compensation] Act. This lien may be enforced against *any* person receiving such funds. It is a lien for all amounts paid or to be paid to the employee, and it is mandatory in nature.

188 N.C. App. at 524, 655 S.E.2d at 873 (citations and internal quotation marks omitted).

¶ 14 Further, we found "no language in [the Workers' Compensation Act] subrogating the rights of an employer to that of the beneficiaries of the workers' compensation award." *Id.* Accordingly, we determined that "[i]t was improper for the trial court to conclude that [the] respondents' rights were subrogated to those of the minor nephews where the General Assembly has not expressed, implied, or intended any such limit." *Id.* at 525, 655 S.E.2d at 873.

¶ 15 "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). Indeed, Plaintiff acknowledges that her arguments in favor of overturning *Bullock* are properly addressed to our Supreme Court and that "the current appeal is her next step" toward that goal. Thus, Plaintiff's argument is overruled.

Defendants' Cross-Appeal

¶ 16 On cross-appeal, Defendants argue that the Commission erred (1) by concluding that the proceeds recovered from the personal UIM policy were exempt from subrogation pursuant to N.C. Gen. Stat. § 97-10.2, and (2) by failing to distribute the costs and attorneys' fees *pro rata* pursuant to N.C. Gen. Stat. § 97-10.2(f)(2).

A. Subrogation of Personal UIM Policy Proceeds

¶ 17 **[2]** Defendants first argue that the Commission's Amended Opinion and Award "is in conflict with" our Supreme Court's opinion in *Walker I* because the Commission determined that the personal UIM policy proceeds were exempt from subrogation. We agree.

¶ 18 "Under N.C. Gen. Stat. § 97-10.2, a subrogation lien for the benefit of the workers' compensation carrier automatically attaches to the third[-]party proceeds received by a plaintiff for whom the carrier has paid medical expenses arising from the injury by accident." *Anglin v. Dunbar Armored, Inc.*, 226 N.C. App. 203, 206, 742 S.E.2d 205, 207 (2013). Section 97-10.2(f)(1) provides that

> [i]f the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission . . . .

N.C. Gen. Stat. § 97-10.2(f)(1).

¶ 19 In *Walker I*, our Supreme Court was presented with the issue of "whether to apply North Carolina or South Carolina law to the attempted subrogation of [P]laintiff's wrongful death settlement UIM proceeds." 375 N.C. at 258, 846 S.E.2d at 682. The applicable choice of law was crucial to determining the outcome of the subrogation issue, because "[u]nder South Carolina UIM law, an insurer is barred, without exception, from seeking to be reimbursed with UIM proceeds for benefits it has previously paid." *Id.*

¶ 20 Choice-of-law issues arising in North Carolina proceedings concerning injuries suffered in South Carolina have come before this Court on numerous occasions. In such cases, under well-settled conflict-of-laws principles, "the tort law of South Carolina governs the substantive issues

of liability and damages, while procedural rights are determined by the laws of North Carolina." *Robinson v. Leach*, 133 N.C. App. 436, 438, 514 S.E.2d 567, 568, *disc. review denied*, 350 N.C. 835, 539 S.E.2d 293 (1999).

¶ 21 Of particular relevance here, this Court has previously addressed the issue of "what law applies to [a] trial court's authority to adjust [a] North Carolina lien on [a] plaintiff's UIM funds, despite their origin" from a South Carolina insurance policy. *Anglin*, 226 N.C. App. at 206, 742 S.E.2d at 207. In *Anglin*, the plaintiff sought the "reduction or elimination of [a workers' compensation] subrogation lien pursuant to N.C. Gen. Stat. § 97-10.2(j)" on South Carolina UIM funds. *Id.* at 209, 742 S.E.2d at 209. In that "N.C. Gen. Stat. § 97-10.2(j) is remedial in nature and remedial rights are determined by the law of the forum," we concluded that "the trial court did not err in applying N.C. Gen. Stat. § 97-10.2(j) to [the] plaintiff's UIM funds received under a South Carolina insurance policy[,]" thus allowing the subrogation lien to be asserted against the UIM proceeds. *Id.* at 209–10, 742 S.E.2d at 209 (citation and internal quotation marks omitted).

¶ 22 In *Walker I*, Defendants relied on these choice-of-law precedents to argue that they were entitled to satisfy their subrogation lien against the commercial UIM proceeds pursuant to N.C. Gen. Stat. § 97-10.2 because "the commercial UIM policy purchased by K&W is not a South Carolina UIM policy. Specifically, they point[ed] out that the parties stipulated before the Commission that the commercial UIM policy was purchased and entered into in North Carolina." 375 N.C. at 259, 846 S.E.2d at 683.

¶ 23 However, rather than viewing this as "an abstract choice of law issue[,]" our Supreme Court concluded that this issue was "properly analyzed under contract law interpreting a choice-of-law clause." *Id.* at 259, 846 S.E.2d at 682. Crucial to our Supreme Court's consideration of this issue in *Walker I* was "the effect of the endorsement that was added to the commercial UIM policy on 7 July 2011 . . . . The clear intent and effect of this endorsement was to provide for the application of South Carolina law to all UIM payments under the policy." *Id.* at 260, 846 S.E.2d at 683. Our Supreme Court then reasoned that:

> [T]he vehicle operated by [D]ecedent at the time of the accident fell within the categories of vehicles for which the policy endorsement intended to apply South Carolina law. The endorsement modified the insurance policy for "a covered 'auto' licensed or principally garaged in" South Carolina. As found by the Commission in the 10 July 2017 Opinion and

> Award, the vehicle [D]ecedent was driving at the time of the accident was registered, garaged, and driven in South Carolina. These factors, and the fact that the policy endorsement explicitly provided as a matter of contract that South Carolina UIM law would apply to payments made under the commercial UIM policy, demonstrate that South Carolina law should apply here. Accordingly, we hold that the endorsement requires South Carolina UIM law to apply here.

Id.

¶ 24 "[H]aving concluded that South Carolina law applie[d] to proceeds paid under Liberty Mutual's UIM insurance policy," our Supreme Court held that "[D]efendants' subrogation lien under N.C.G.S. § 97-10.2 cannot be satisfied by the UIM proceeds that [P]laintiff received as part of the wrongful death settlement." *Id.* at 261, 846 S.E.2d at 683–84. Our Supreme Court thus reversed and remanded to the Commission for further proceedings. *Id.* at 261, 846 S.E.2d at 684.

¶ 25 On remand, in its Amended Opinion and Award, the Commission concluded that, pursuant to *Walker I*, "proceeds recovered in the third-party action from the two UIM policies are governed by South Carolina law and may not be used to satisfy Defendants' workers' compensation lien under N.C. Gen. Stat. § 97-10.2. *See* S.C. Code § 38-77-160 (2015)." However, Defendants correctly note that our Supreme Court did not indicate whether "its reasoning applied to both the personal UIM policy and the commercial UIM policy." Because *Walker I* relied on the commercial UIM policy as "a contract to which [D]efendants are party[,]" 375 N.C. at 258, 846 S.E.2d at 682, in deciding to analyze the issue at bar as one of contract interpretation, Defendants argue in the present appeal that "the Supreme Court's analysis, on its face, does not extend to the personal UIM policy[.]" Further, Defendants also suggest that "the factors cited by the Supreme Court to support its outcome – the conformity endorsement and the contractual relationship between Defendants and the UIM carrier – do not extend to the personal UIM policy."

¶ 26 Defendants' argument is persuasive; the contractual analysis undertaken by our Supreme Court in *Walker I* is inapplicable to the instant case. We thus return to the choice-of-law principles articulated in *Anglin*.

¶ 27 It is well established that subrogation pursuant to N.C. Gen. Stat. § 97-10.2 "is remedial in nature and that remedial rights are determined by the law of the forum." *Anglin*, 226 N.C. App. at 207, 742 S.E.2d at

208 (citation and internal quotation marks omitted). As in *Anglin*, the forum in this case is North Carolina. *See id.* at 209, 742 S.E.2d at 209. Accordingly, § 97-10.2 applies to the $12,500.00 in proceeds from the personal UIM policy, and the Commission erred by concluding otherwise.

¶ 28 Having so determined, and with Defendants' subrogation interest in the $12,500.00 in personal UIM proceeds in mind, we next review the Commission's distribution of costs and attorneys' fees.

B. Distribution of Costs and Attorneys' Fees

¶ 29 **[3]** Defendants next contend that the Commission erred in its distribution award.

¶ 30 The Commission ordered that Plaintiff's counsel disburse the $900,000.00 in commercial UIM proceeds and the $12,500.00 in personal UIM proceeds "free and clear of Defendants' subrogation interests under N.C. Gen. Stat. § 97-10.2." With regard to the liability policy proceeds, the Commission ordered that Plaintiff's counsel disburse the $50,000.00 in liability policy proceeds according to the following distribution:

- $5,921.91 to Plaintiff's counsel for costs and expenses incurred in the litigation of the Third-Party Action,
- $16,666.67 to Plaintiff's counsel for attorneys' fees in the Third-Party Action, and
- $27,411.42 to Defendants towards Defendants' subrogation lien.

¶ 31 In addition to the erroneous exclusion of the $12,500.00 in personal UIM proceeds from Defendants' subrogation interest, Defendants argue that the Commission's distribution contravenes the purpose of the Workers' Compensation Act by inequitably ordering the disbursement of costs and expenses from the $50,000.00 in liability policy proceeds rather than against Plaintiff's total $962,500.00 recovery, when "most of these costs did not go toward the fraction of the recovery that is subject to the lien." We disagree.

¶ 32 The Workers' Compensation Act specifically addresses the payment of costs and attorneys' fees from a third-party recovery:

> [A]ny amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for

> the following purposes and in the following order of priority:
>
> > a. First to the payment of actual court costs taxed by judgment and/or reasonable expenses incurred by the employee in the litigation of the third-party claim.
> >
> > b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and except for the fee on the subrogation interest of the employer such fee shall not be subject to the provisions of G.S. 97-90 but shall not exceed one third of the amount obtained or recovered of the third party.
> >
> > c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.
> >
> > d. Fourth to the payment of any amount remaining to the employee or his personal representative.

N.C. Gen. Stat. § 97-10.2(f)(1).

¶ 33 As regards attorneys' fees, § 97-10.2(f)(2) provides that "[t]he attorney fee paid under (f)(1) shall be paid by the employee and the employer in direct proportion to the amount each shall receive under (f)(1)c and (f)(1)d hereof and shall be deducted from such payments when distribution is made." *Id.* § 97-10.2(f)(2).

¶ 34 Defendants assert that § 97-10.2(f)(1)'s "distribution scheme breaks down" following *Walker I* because "[b]y statute, the lien attaches to 'any amount obtained by any person.' But here, the vast majority of the third-party recovery *cannot* be used to satisfy Defendants' lien." Instead, Defendants propose that the equitable approach would be "to employ a pro rata distribution of the costs and attorneys' fees that accounts for the disparity between the total recovery and the amount subject to the lien."

¶ 35 Regarding costs, the Commission noted that "[t]he parties stipulated that Plaintiff's attorneys incurred a total of $5,921.91 in actual costs and reasonable expenses in pursuing her claim against the Third Parties." *Walker I* makes clear that under South Carolina law, $900,000.00

of the $962,500.00 recovery is not subject to Defendants' subrogation lien, leaving $62,500.00 to distribute pursuant to § 97-10.2(f)(1). *See Walker I*, 375 N.C. at 261, 846 S.E.2d at 683–84. Section 97-10.2(f)(1)a gives the reimbursement of the "actual court costs taxed by judgment and/or reasonable expenses incurred by the employee in the litigation of the third-party claim" priority over a subrogation lien. N.C. Gen. Stat. § 97-10.2(f)(1)a. As the parties stipulated, the costs and expenses were incurred in the litigation of the liability claim. Accordingly, the sum of $5,921.91 should be disbursed from the $50,000.00 in proceeds of the personal liability policy.

¶ 36 Continuing with the distribution scheme laid out by § 97-10.2(f), we next address the disbursement of attorneys' fees. Here, the Commission found that "[u]nder the provisions of the attorney's fee agreements stipulated into the record herein and N.C. Gen. Stat. § 97-10.2(f)(1)b, Plaintiff's attorneys are entitled to a fee of one[-]third, or 33 1/3 percent, of any sum recovered from the liability policy proceeds, which amounts to $16,666.67." However, the Commission did not address the disbursement of attorneys' fees from the $12,500.00 in personal UIM policy proceeds.

¶ 37 Section 97-10.2(f)(2) requires that the parties shall pay attorneys' fees "in direct proportion to the amount each shall receive under (f)(1)c and (f)(1)d hereof[.]" *Id.* § 97-10.2(f)(2). As the Commission correctly concluded:

> The proportion of the amount Defendants were disbursed under N.C. Gen. Stat. § 97-10.2(f)(1)c ($[41,282.13]) to the amount Plaintiff was disbursed under N.C. Gen. Stat. § 97-10.2(f)(1)d ($0) is 100% to 0%. Defendants are therefore responsible for paying 100% of the $[20,833.33] attorney's fee pursuant to N.C. Gen. Stat. § 97-10.2(f)(2).

¶ 38 "Where a statute's language is clear and unambiguous, we are not at liberty to divine a different meaning through other methods of judicial construction. This Court must apply the law as enacted by the legislature." *Stahl v. Bowden*, 274 N.C. App. 26, 31, 850 S.E.2d 588, 592 (2020) (citation and internal quotation marks omitted). The language of § 97-10.2(f)(2) is "clear and unambiguous," and with the exception of the particular amounts in error due to the Commission's exclusion of the personal UIM proceeds from its calculation, the Commission correctly applied the statutory scheme in determining the proper distribution of the proceeds.

¶ 39 Accordingly, the sum of $5,921.91 shall be disbursed in reimbursement of the costs and reasonable expenses from the $50,000.00 in liability insurance policy proceeds. The sum of $16,666.67 in attorneys' fees shall be disbursed from the $50,000.00 in liability insurance policy proceeds, and the sum of $4,166.67 in attorneys' fees shall be disbursed from the $12,500.00 in personal UIM policy proceeds, for a total of $20,833.33 in attorneys' fees from these two policy proceeds. The sums remaining from the third-party recovery proceeds ($62,500.00 - $5,921.91 - $20,833.33 = $35,744.76) shall be disbursed to Defendants to satisfy their workers' compensation subrogation lien pursuant to N.C. Gen. Stat. § 97-10.2(f)(1)c.

Conclusion

¶ 40 Plaintiff's argument on appeal that the Commission erred by imposing a workers' compensation lien against that portion of a wrongful death recovery that would have been distributed to heirs who did not receive any part of the workers' compensation award for the Decedent's death is foreclosed by precedent. *See Bullock*, 188 N.C. App. at 524–25, 655 S.E.2d at 873. Thus, that portion of the Commission's Amended Opinion and Award is affirmed.

¶ 41 The Commission erred by concluding that the proceeds of the personal UIM policy are not subject to Defendants' subrogation lien pursuant to *Walker I*. However, the Commission properly ordered that the costs and reasonable expenses be distributed from the proceeds of the liability policy, and that one-third of the proceeds of each policy be distributed as attorneys' fees. Accordingly, we reverse that portion of the Amended Opinion and Award and remand to the Commission with instructions to enter an award distributing the proceeds as follows:

1) Plaintiff's counsel shall disburse the $900,000.00 in commercial UIM proceeds "free and clear of Defendants' subrogation interests under N.C. Gen. Stat. § 97-10.2."

2) Counsel shall disburse the $50,000.00 in third-party liability policy proceeds as follows:

    a. $5,921.91 to Plaintiff's counsel for costs and expenses incurred in the litigation of the Third-Party Action,

    b. $16,666.67 to Plaintiff's counsel for attorneys' fees, and

    c. $27,411.42 to Defendants in satisfaction of Defendants' subrogation lien.

3) Counsel shall disburse the $12,500.00 in Decedent's personal UIM proceeds as follows:

   a. $4,166.67 to Plaintiff's counsel for attorneys' fees, and

   b. $8,333.33 to Defendants in satisfaction of Defendants' subrogation lien.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges WOOD and GRIFFIN concur.

FRANCES SIGMON FOXX, PLAINTIFF
v.
GARY DWAYNE FOXX, DEFENDANT

No. COA21-346

Filed 5 April 2022

1. Divorce—equitable distribution—modification—authority on remand from prior appeal

On remand from a prior appeal of an equitable distribution order, with instructions from the Court of Appeals for the trial court to use its discretion to decide whether to hear additional evidence before making additional findings and conclusions, the trial court had authority to modify the unequal distribution of marital assets. Since the issue of the percent distribution of marital property was not raised or resolved in that appeal, it did not become the law of the case.

2. Divorce—equitable distribution—modification to percent of unequal distribution on remand—lack of findings

On remand from a prior appeal of an equitable distribution order, although the trial court made certain additional findings as directed, where it did not take new evidence about the parties' income, property, and liabilities at the time the division of property was to be effective, its order changing the unequal percent distribution of marital property was not supported by sufficient findings and was therefore vacated. This time on remand, if the parties requested, they could present new evidence limited to any relevant changes

in circumstances since the last evidentiary hearing which might pertain to an unequal distribution pursuant to N.C.G.S. § 50-20.

Appeal by defendant from Order entered 16 March 2021 by Judge Sherri W. Elliott in Catawba County District Court. Heard in the Court of Appeals 11 January 2022.

LeCroy Law Firm, PLLC, by M. Alan LeCroy, for plaintiff-appellee.

Wesley E. Starnes for defendant-appellant.

GORE, Judge.

¶ 1 Defendant, Gary Dwayne Foxx, appeals from the trial court's Equitable Distribution Order, modifying the percentage of distribution of marital assets following the first appeal to this Court. We vacate the Order and remand for further findings of fact.

I. Factual and Procedural Background

¶ 2 Frances Sigmon Foxx ("plaintiff") and defendant were married on 17 March 1995. In 1999, the parties formed Foxx Appraisals, Inc., primarily used for plaintiff's real estate appraisal business. In March 2011, defendant was injured while in the course of his employment for the City of Lincolnton. Defendant filed worker's compensation and personal injury claims following his injury. Plaintiff and defendant separated on 14 July 2014. Shortly after the parties separated, defendant settled his workers' compensation claim. A few months thereafter, he settled his personal injury claim. Once in 2014 and once in 2015, Foxx Appraisals, Inc. made distributions as payment to plaintiff for her work as a licensed appraiser for the company.

¶ 3 On 16 June 2016, plaintiff filed a complaint for divorce and equitable distribution. Plaintiff and defendant were granted absolute divorce on 15 September 2016. On 4 January 2018, the trial court entered an Equitable Distribution Order ("2018 Order"). Plaintiff and defendant subsequently appealed the 2018 Order. This Court vacated the 2018 Order on the grounds that (1) the trial court's findings ignored undisputed evidence of two post-separation distributions from Foxx Appraisals, Inc., to the plaintiff, and (2) the trial court applied an incorrect legal standard to the classification of the awards from the defendant's workers' compensation and personal injury lawsuits. *Foxx v. Foxx*, 266 N.C. App. 617, 830 S.E.2d 700 (2019) (unpublished).

¶ 4 This Court gave the trial court discretion to hear additional evidence, but the trial court elected to not conduct any further proceedings and issued a Remanded Equitable Distribution Order on 19 February 2021. On 25 February 2021, the trial court granted a Rule 60 Motion filed by the plaintiff to correct a clerical error in the 19 February 2021 Remanded Equitable Distribution Order. On 16 March 2021, the trial court entered an Amended Equitable Distribution Order ("2021 Order"). The trial court modified the percentage of equitable distribution of marital and divisible assets between the parties from the 2018 Order to the 2021 Order, increasing plaintiff's share from sixty percent to seventy-five percent and decreasing defendant's share from forty percent to twenty-five percent. Defendant timely filed and served notice of appeal.

II. Analysis

A. Modification of the Percentage of Equitable Distribution

¶ 5 **[1]** Defendant first contends that the trial court lacked the authority to modify the unequal percent distribution of marital assets between the parties following the first appeal because the issue was not raised. We disagree.

¶ 6 "[A]s a general rule when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal . . . ." *Hayes v. Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956) (citations omitted). "[O]nce a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case." *Carpenter v. Carpenter*, 245 N.C. App. 1, 8, 781 S.E.2d 828, 835 (2016) (quoting *North Carolina Nat'l Bank v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983)); *see also Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974).

> In North Carolina courts, the law of the case applies only to issues that were decided in the former proceeding, whether explicitly or by necessary implication, but not to questions which might have been decided but were not. The doctrine of the law of the case contemplates only such points as are actually presented and necessarily involved in determining the case.

Wetherington v. NC Dep't of Pub. Safety, 270 N.C. App. 161, 173, 840 S.E.2d 812, 822 (2020) (cleaned up).

¶ 7 "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." *Bodie v. Bodie*, 239 N.C. App. 281, 284, 768 S.E.2d 879, 881 (2015) (quoting *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962)). This Court vacated and remanded the matter "for the trial court to make additional findings of fact and, if appropriate, corresponding conclusions of law." *Foxx*, 266 N.C. App. 617, 830 S.E.2d 700. When this Court remands an equitable distribution order for more specific findings of fact, that remand authorizes the trial court to recalculate related portions of the order that are impacted by the findings made on remand if necessary. *See Bodie*, 239 N.C. App. at 285, 768 S.E.2d at 882.

¶ 8 In the case *sub judice*, the issue of percent distribution of marital property was not a question raised on appeal, nor was it discussed or otherwise adjudicated, either explicitly or implicitly by the prior panel of this Court. Thus, it did not become the law of the case. Moreover, on remand, the trial court was required to evaluate specific evidence and make findings of fact that would affect the corresponding conclusion of law regarding the net value of marital assets. Therefore, the trial court had the authority to reconsider the percentage of distribution.

B. Required Sufficient Findings of Fact

¶ 9 **[2]** Defendant next argues that the trial court erred by failing to make additional findings of fact to support the change of equitable distribution percentage from the 2018 Order to the 2021 Order. We agree.

¶ 10 We review the trial court's distribution of property for an abuse of discretion. *Carpenter*, 245 N.C. App. at 13, 781 S.E.2d at 838 (2016) (citations and quotations omitted); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

> The standard of review on the trial court's classification in an equitable distribution of property is well settled: when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.

Carpenter, 245 N.C. App. at 11, 781 S.E.2d at 837 (cleaned up). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White*, 312 N.C. at 777, 324 S.E.2d at 833.

¶ 11 There are twelve factors for the trial court to consider when determining whether unequal distribution of marital property and divisible property is equitable. *See* N.C. Gen. Stat. § 50-20(c) (2021). "[I]f evidence is presented as to several statutory factors, the trial court must make findings as to each factor for which evidence was presented." *Rosario v. Rosario*, 139 N.C. App. 258, 261, 533 S.E.2d 274, 276 (2000) (citations omitted). "The weight given each factor, however, is within the discretion of the trial court, and the trial court is not required to specifically state the weight given each factor to 'support the determination' an equitable distribution has been made." *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 395, 545 S.E.2d 788, 794 (2001) (quoting *White*, 312 N.C. at 777-78, 324 S.E.2d at 833). "Additionally, the weight given each factor by the trial court must be upheld on appeal absent a showing of abuse of discretion." *Id.* (citation omitted). "[A] finding stating that the trial court has merely given 'due regard' to the section 50-20 factors is insufficient as a matter of law." *Rosario*, 139 N.C. App. at 262, 533 S.E.2d at 276 (2000) (citations omitted).

¶ 12 "Findings of fact are sufficient to 'support the determination' an equitable division has been made when findings of fact have been made on the ultimate facts at issue in the case, and the findings of fact show the trial court properly applied the law in the case." *Friend-Novorska*, 143 N.C. App. at 395, 545 S.E.2d at 794 (quoting *Armstrong v. Armstrong*, 322 N.C. 396, 405-06, 368 S.E.2d 595, 600 (1988)). "The purpose for the requirement of specific findings of fact that support the court's conclusion of law is to permit the appellate court on review 'to determine from the record whether the judgment – and the legal conclusions that underlie it – represent a correct application of the law.' " *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986) (quoting *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)). *See also Armstrong*, 322 N.C. at 405, 368 S.E.2d at 600.

¶ 13 In the instant case, the trial court did not conduct any further proceedings on remand before filing the 2021 Order. Using the evidence in the existing record, which the trial court was permitted to do in its discretion from this Court's prior opinion, the trial court found the required specific findings of fact regarding Foxx Appraisal, Inc.'s distributions to the plaintiff and the defendant's lawsuit awards. These required findings by the trial court support a modification of the net value of marital property and the trial court found as such. The trial court also added an additional finding of fact regarding a section 50-20(c) factor in the 2021 Order. However, this finding amounted to a base assertion that the statutorily required factor was merely considered.

¶ 14 The trial court is not required to state the weight it gives to each factor it considers. *Rosario*, 139 N.C. App. at 260, 533 S.E.2d at 275. However, the trial court must support its determination by a measure greater than due regard, and in such fashion that an appellate court can determine from the record and judgment derived from legal conclusions that the correct application of law has been represented. *See Rosario*, 139 N.C. App. at 262, 533 S.E.2d at 276 (2000); *Friend-Novorska*, 143 N.C. App. at 395, 545 S.E.2d at 794; *Armstrong*, 322 N.C. at 405-06, 368 S.E.2d at 600.

¶ 15 In the case *sub judice*, the trial court did not hold additional proceedings on remand and modified the percent distribution of marital assets without considering additional evidence. In addition, one of the factors for consideration of an unequal distribution under N.C. Gen. Stat. Ann. § 50-20 is "[t]he income, property, and liabilities of each party at the time the division of property is to become effective." N.C. Gen. Stat. Ann. § 50-20. Since the most recent evidence was from the hearing before the entry of the 2018 order, the trial court could not address the "income, property, and liabilities" of the parties "at the time the division of property is to become effective." Thus, the findings of fact and evidence in the record do not justify a modification from the 2018 Order's percent distribution of marital assets because the evidence in the record for the trial court to consider between the orders remained the same and nothing in the 2021 Order justified a reweighing of the percent distribution of marital assets based on the same material evidence. Therefore, the trial court did not make sufficient findings of fact to justify its conclusion that the modification of the percentage of distribution of marital assets between the 2018 Order and the 2021 Order was proper.

III. Conclusion

¶ 16 For the foregoing reasons, we vacate the trial court's 16 March 2021 Amended Equitable Distribution Order and remand for further proceedings and entry of a new order. If either party requests the opportunity to present additional evidence for consideration prior to entry of the new order, the trial court shall allow the parties to present additional evidence limited to any relevant changes in circumstances which may affect an unequal distribution under N.C. Gen. Stat. Ann. § 50-20 since the last evidentiary hearing.

VACATED AND REMANDED.

Chief Judge STROUD and Judge TYSON concur.

OSBORNE v. REDWOOD MOUNTAIN, LLC

[282 N.C. App. 727, 2022-NCCOA-239]

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

No. COA21-515

Filed 5 April 2022

Easements—motion to dismiss—conversion to summary judgment—declaratory judgment claim—prescriptive easement claim

In an easement dispute concerning a gate, the trial court's order converting defendant's motion to dismiss into a motion for summary judgment—and granting that motion while denying plaintiffs' motion for summary judgment—was affirmed where defendant's Rule 12(b)(6) motion was filed after its Rule 12(b)(3) motion, where the trial court heard evidence and arguments outside the pleadings, where there were no genuine issues of material fact, and where plaintiffs' claims for a declaratory judgment or prescriptive easement were improper due to there being no dispute as to the validity of a prior judgment establishing plaintiffs' easement rights and due to plaintiffs' failure to satisfy the twenty-year requirement for a prescriptive easement.

Appeal by plaintiffs from order entered 20 April 2021 by Judge Richard S. Gottlieb in Wilkes County Superior Court. Heard in the Court of Appeals 9 March 2022.

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

THB Law Group, by Bryan W. Tyson, for defendant-appellee.

TYSON, Judge.

¶ 1 Brown and Jennifer Osborne ("Plaintiffs") appeal from a trial court's order converting Redwood Mountain, LLC's ("Defendant") motion to dismiss into a motion for summary judgment and granting that same motion. We affirm.

I. Background

¶ 2 This is the second appeal from these parties before this Court. *Osborne v. Redwood Mountain, LLC*, 275 N.C. App. 144, 852 S.E.2d 699

(2020). The prior appeal resolved the issue of venue for the action. *Id.* Defendant is the record owner of real property that is located in both Alexander County and in Wilkes County ("Defendant's lot"). Plaintiffs are the record owners of real property, that is located adjacent to that portion of Defendant's lot in Wilkes County ("Plaintiffs' lot").

¶ 3 Plaintiffs filed an easement action in Wilkes County Superior Court in November 2002, asserting Plaintiffs held an easement over the portion of Defendant's lot located in Wilkes County. Plaintiffs were granted a default judgment in that easement action against Defendant's predecessor-in-interest, Almedia Myers.

¶ 4 The default judgment granted in the easement action was subsequently recorded with the Wilkes County Register of Deeds on 3 September 2003. The default judgment entered against Ms. Myers declared the property was located entirely within Wilkes County. In June 2018, this lot was transferred by General Warranty Deed to Defendant and the deed was recorded with the Register of Deeds in both Wilkes and Alexander Counties.

¶ 5 A dispute arose over a gate installed by Defendants in February 2019. Plaintiffs filed a complaint alleging the gate was erected across the easement.

II. Procedural History

¶ 6 Plaintiffs filed their Complaint against Defendant with the Wilkes County Superior Court in February 2019 and requested relief via declaratory judgment by virtue of a prescriptive easement. Defendant filed a motion to change venue to Alexander County, which was denied, and that order was affirmed by this Court in December 2020. *Osborne*, 275 N.C. App. at 150, 852 S.E.2d at 704.

¶ 7 Defendant filed a motion to dismiss pursuant to Rule 12(b)(6); Plaintiff filed a motion for summary judgment. The trial court entered its order on 14 April 2021. The order converted Defendant's Rule 12(b)(6) motion to dismiss to a motion for summary judgment; granted summary judgment in favor of Defendant; dismissed Plaintiffs' claims "without prejudice"; and, denied Plaintiffs' motion for summary judgment on the grounds "Plaintiff[s] ha[ve] failed to state cognizable claim for declaratory judgment or prescriptive easement." Plaintiffs appeal.

III. Jurisdiction

¶ 8 Appellate review is proper pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

IV. Issues

¶ 9 Plaintiffs argue the trial court erred by: (1) failing to deny Defendant's motion to dismiss; (2) converting Defendant's motion to dismiss into a summary judgment motion; (3) refusing to continue Defendant's motion to dismiss once it was converted to a summary judgment; (4) granting summary judgment for Defendant; and, (5) denying Plaintiffs' motion for summary judgment.

V. Motion to Dismiss

¶ 10 Plaintiff argues the trial court erred by failing to deny Defendant's motion to dismiss.

A. Standard of Review

¶ 11 "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." *Grich v. Mantelco, LLC*, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013) (citations omitted). "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." *Id.* (citation omitted).

B. Rule 12(b)(6)

> Every 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:
>
> . . . .
>
> (6) *Failure to state a claim upon which relief can be granted*

N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2021) (emphasis supplied).

¶ 12 The trial court may rule on a motion to dismiss at any time prior to a verdict.

> A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. *If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule*

> *permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted*, except a motion as provided in section (h)(2) hereof on any of the grounds there stated.

N.C. Gen. Stat. § 1A-1, Rules 12(g) (2021) (emphasis supplied).

> When a pleader has failed to state a claim upon which relief can be granted, his adversary is now permitted by Rule 12(b)(6) to assert this defense either in a responsive pleading or by motion to dismiss, and this motion performs substantially the same function as the old common law general demurrer.

Forrester v. Garrett, 280 N.C. 117, 119, 184 S.E.2d 858, 859–60 (1971).

¶ 13 Here, Defendant filed a motion pursuant to Rule 12(b)(3) on 7 May 2019, to address whether Wilkes County was the appropriate venue. Rule 12(g) provides a party is not required to "join with it any other motions." N.C. Gen. Stat. § 1A-1, Rule 12(g).

¶ 14 Defendant did not waive its right to pursue a Rule 12(b)(6) motion, as such motion can be made any time prior to a verdict and may be properly made following a Rule 12(b)(3) motion. The trial court did not rule on the Defendant's 12(b)(6) motion to dismiss, but instead converted the motion as one for summary judgment. The trial court did not err by not ruling on Defendant's motion to dismiss. Plaintiffs' arguments are without merit.

VI. Converting to Summary Judgment

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

¶ 16 Plaintiffs argue Defendant is barred from a Rule 12(b)(6) defense because he did not plead it in his answer.

¶ 17 N.C. Gen. Stat. § 1A-1, Rule 12(h)(2) provides exceptions to Rule 12(g). These exceptions include:

> *A defense of failure to state a claim upon which relief can be granted*, a defense of failure to join a necessary party, and an objection of failure to state a

> legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

N.C. Gen. Stat. § 1A-1, Rule 12 (h)(2) (2021) (emphasis supplied).

¶ 18 When a trial court hears matters beyond the facts asserted on the face of the complaint during a motion to dismiss under Rule 12(b)(6), the motion is converted into a Rule 12(c) motion for judgment on the pleadings, or into a motion for summary judgment under Rule 56. "[A]ll parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." N.C. Gen. Stat. § 1A-1, Rule 12(b) and (c).

¶ 19 Plaintiffs filed a motion for summary judgment on 17 February 2021. Plaintiffs had filed a verified complaint, and several supporting cases along with their motion for summary judgment, as evidence to be considered for their summary judgment motion and argued "there is no genuine issue as to any material fact." Defendant presented the opinion of this Court regarding the aforementioned Rule 12(b)(3) motion to change venue in this matter. *See Osborne*, 275 N.C. App. at 149, 852 S.E.2d at 703.

¶ 20 Defendant admitted the existence of the 2003 recorded default judgment establishing the easement, and presented cases in opposition to Plaintiffs' motion for summary judgment. Both Plaintiffs and Defendant had adequate opportunities to present evidence, as is demonstrated in the court's findings and conclusions in its order.

¶ 21 Further, the trial court acted within the Rule 12(h)(2) exceptions by permitting a conversion from a Rule 12(b)(6) failure to state a claim motion into a summary judgment motion. *See* N.C. Gen. Stat. § 1A-1, Rule 12(h)(2) and Rule 56.

¶ 22 Plaintiffs' claims for a declaratory judgment or prescriptive easement are improper because a dispute does not exist between the parties over the validity of the easement. The easement arising from the 2003 default judgment is recorded and valid. The trial court considered matters outside the pleadings, properly converted Defendant's motion to dismiss into a motion for summary judgment, and ruled appropriately. *See* N.C. Gen. Stat. § 1A-1, Rule 56.

VII. Failing to Continue Defendant's Converted Summary Judgment Motion

¶ 23 For the reasons stated above and in light of Plaintiff's prior pending motion for summary judgment, we hold the trial court did not err in

converting Defendant's motion to dismiss into a summary judgment and granting it for failure to find any genuine issue of material fact.

VIII. Granting Summary Judgment for Defendant

¶ 24 Also, for the reasons provided above, we hold the trial court, upon reviewing the parties' verified pleadings evidence, authorities and arguments acted wholly within its authority to grant summary judgment in the absence of any disputed genuine issues of fact. The trial court did not err in granting Defendant's motion for summary judgment.

IX. Denying Plaintiffs' Summary Judgment

¶ 25 Plaintiffs' complaint set forth a claim for relief labeled "Declaratory Judgment" and a second alternative claim for a "Prescriptive Easement." The trial court stated in its order "While Plaintiffs may have a claim arising from an alleged interference with the rights established in the 2003 Judgment [i.e. the easement rights established thereby], they do not have a claim for declaratory judgment where there is no dispute as to the validity of the 2003 Judgment."

¶ 26 "[A] declaratory judgment action is appropriate when it will alleviate uncertainty in the interpretation of a written instrument." *Integon Nat'l Ins. Co. v. Helping Hands Specialized Transp., Inc.*, 233 N.C. App. 652, 658, 758 S.E.2d 27, 32 (2014) (citations and internal quotation marks omitted).

¶ 27 The necessary elements in a prescriptive easement claim require Plaintiffs to show:

> (1) that the use is adverse, hostile, or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least *twenty years*; and (4) that there is substantial identity of the easement claimed throughout the *twenty-year* period.

Town of Carrboro v. Slack, 261 N.C. App. 525, 535, 820 S.E.2d 527, 535 (2018) (emphasis supplied).

¶ 28 The trial court found no uncertainty in the existence of the easement recorded in 2003. A declaratory judgment action is improper. The 2003 easement has only been in existence for nineteen years, was only sixteen years old when Plaintiffs brought their complaint, and this claim fails to satisfy the twenty-year requirement for a prescriptive easement. *Id.*

¶ 29 The trial court, upon reviewing the parties' sworn pleading and other material and evidence, acted wholly within its authority to grant summary judgment after Plaintiffs failed to establish the existence of genuine issues of material fact.

X. Conclusion

¶ 30 The trial court followed the proper statutory guidelines, heard the parties' evidence and arguments outside the pleadings, and determined to convert Defendant's motion to dismiss into a motion for summary judgment and to grant the motion. Plaintiffs' claim for a declaratory judgment or prescriptive easement is improper. Defendant does not dispute the existence of Plaintiffs' easement established in the 2003 default judgment, that is lawfully recorded. The trial court's award of summary judgment for Defendant is affirmed. *It is so ordered.*

AFFIRMED.

Judges DIETZ and COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 APRIL 2022)

BROWN v. WORTHAM WILLIAMS & SON, INC. 2022-NCCOA-220 No. 21-488	Anson (20CVS88)	Dismissed
CARPENTER v. BANK OF AM. CORP. 2022-NCCOA-221 No. 21-478	Wake (17CVS15044)	Affirmed
CARROLL AT BELLEMEADE, LLC v. KABUTO, INC. 2022-NCCOA-222 No. 21-291	Guilford (20CVD7106)	Affirmed
GREENE v. LANE 2022-NCCOA-224 No. 21-407	Forsyth (20CVS5827)	Affirmed
HILL v. GRANT 2022-NCCOA-225 No. 21-479	Bertie (20CVS175)	Dismissed
IN RE C.J.O. 2022-NCCOA-226 No. 21-582	Vance (20JT8)	Affirmed
IN RE WILL OF GARD 2022-NCCOA-227 No. 21-543	Dare (16E160)	Affirmed
IN RE K.A.B. 2022-NCCOA-228 No. 21-413	Mecklenburg (18JA251) (18JA252)	Vacated and Remanded
IN RE K.W. 2022-NCCOA-229 No. 21-632	Lenoir (19JA96)	Dismissed in part; affirmed in part.
IN RE S.M. 2022-NCCOA-230 No. 21-574	Onslow (20JA111-112)	Vacated and Remanded
IN RE S.P.B. 2022-NCCOA-231 No. 21-524	Rowan (20JT54)	Affirmed

IN RE W.A. 2022-NCCOA-232 No. 21-536	Cumberland (18JA191)	Vacated
KUMAGA v. KUMAGA 2022-NCCOA-233 No. 21-341	Mecklenburg (13CVD18699)	Affirmed
MARSHALL v. WORTHAM WILLIAMS & SON, INC. 2022-NCCOA-234 No. 21-489	Anson (20CVS89)	Dismissed
MORRIS v. MORRIS 2022-NCCOA-235 No. 21-179	Cumberland (14CVD5521)	Affirmed
N.C. STATE CONF. OF THE NAACP v. STATE OF N.C. 2022-NCCOA-236 No. 21-446	Wake (20CVS5194)	Vacated
NEWTON v. NEWTON 2022-NCCOA-237 No. 21-604	Sampson (15CVD266)	Dismissed
O'NEAL v. BURLEY 2022-NCCOA-238 No. 21-539	Hyde (19CVS60)	APPEAL DISMISSED.
SMITH v. GRANT 2022-NCCOA-240 No. 21-67	Cabarrus (18CVD701)	Vacated and Remanded
SMITH v. SMITH 2022-NCCOA-241 No. 21-195	Durham (19CVD357)	Affirmed
STATE v. CLARK 2022-NCCOA-242 No. 21-510	Carteret (18CRS54528) (19CRS415)	No Error
STATE v. EVANS 2022-NCCOA-243 No. 21-145	Mecklenburg (15CRS247086) (15CRS247158-59) (15CRS247161-62) (16CRS200319-23)	No Error

STATE v. GREEN 2022-NCCOA-244 No. 21-391	New Hanover (17CRS52998)	PETITION FOR WRIT OF CERTIORARI DENIED; APPEAL DISMISSED WITHOUT PREJUDCE TO FILING AN MAR WITH THE TRIAL COURT.
STATE v. GRIFFIN 2022-NCCOA-245 No. 21-304	Wake (10CRS4678) (10CRS51075) (20CRS2644)	Affirmed
STATE v. HAWKINS 2022-NCCOA-246 No. 20-881	Transylvania (17CRS284-85) (17CRS288-91) (17CRS51409-10) (17CRS51412)	No Error
STATE v. HENDRICKS 2022-NCCOA-247 No. 21-180	Currituck (15CRS624) (16CRS21) (16CRS24)	Affirmed.
STATE v. HORNE 2022-NCCOA-248 No. 21-545	Lenoir (19CRS52026)	No Error
STATE v. JORDAN 2022-NCCOA-249 No. 21-90	Mecklenburg (18CRS206212) (19CRS4889)	Affirmed
STATE v. LEWIS 2022-NCCOA-250 No. 20-912	New Hanover (18CRS57159-60)	No Error
STATE v. POINT 2022-NCCOA-251 No. 21-507	New Hanover (20CRS50146)	AFFIRM IN PART, VACATE AND REMAND IN PART FOR A HEARING ON ASSESSMENT OF ATTORNEYS' FEES.
STATE v. POWELL 2022-NCCOA-252 No. 20-824	Durham (17CRS3499) (17CRS59048-49)	No Error
STATE v. TRULL 2022-NCCOA-253 No. 21-464	Cabarrus (00CRS4650) (99CRS11458) (99CRS11495-96	Affirmed

STATE v. TURNER 2022-NCCOA-254 No. 21-377	Cherokee (17CRS563,) (20CRS1026)	NO ERROR IN PART; NO PLAIN ERROR IN PART; VACATED AND REMANDED IN PART.
STATE v. WHITFORD 2022-NCCOA-255 No. 20-725	Craven (18CRS50355)	No Error
VALDIVIEZ v. SUP. MAINT. ORG. 2022-NCCOA-256 No. 21-2	N.C. Industrial Commission (17-013615)	Affirmed
WEBB v. N.C. STATE HIGHWAY PATROL 2022-NCCOA-257 No. 21-570	N.C. Industrial Commission (TA-26735)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

with clients or witnesses, even their own, at any deposition. Although the order was interlocutory, where the restriction on the right to counsel implicated constitutional due process rights, the order affected a substantial right requiring immediate review. **Hall v. Wilmington Health, PLLC, 463.**

Interlocutory order—substantial right—order disqualifying counsel—In a legal malpractice action, in which defendant-attorney sought to appear pro se and as counsel for his co-defendant (the law firm he worked for), the trial court's order granting plaintiffs' motion to disqualify counsel was immediately appealable because such orders, though interlocutory, affect a substantial right. **Rosenthal Furs, Inc. v. Fine, 530.**

Interlocutory order—substantial right—parent's consent to adoption—A father was entitled to immediate appellate review of an interlocutory order denying his motion to dismiss an adoption petition, where the order implicated his substantial right to consent to his minor daughter's adoption. **In re Adoption of C.H.M., 102.**

Interlocutory orders—issuing sanctions—immediately appealable as final orders—law of the case—In litigation between a separated husband and wife regarding real estate and funds held by a company owned by the husband, discovery orders imposing sanctions under Civil Procedure Rule 37(b) were immediately appealable as final judgments where the only arguments, with one exception, targeted the sanctions themselves and not the underlying discovery orders. Regarding the exception, which involved the trial court's order of a forensic examination of electronic devices, that issue could be addressed under the law of the case, where, in a prior appeal that was dismissed by the Court of Appeals, the issue was referred to the current panel in order for the discovery order and sanctions order to be decided together. **Dunhill Holdings, LLC v. Lindberg, 36.**

Interlocutory orders—substantial right—attorney fees award—in conjunction with Rule 11 sanctions—Defendant wife's appeal from an order granting plaintiff husband's motion for sanctions pursuant to Civil Procedure Rule 11 and ordering defendant to pay $15,000 in attorney fees to plaintiff in their divorce case was dismissed where, although an interlocutory order requiring payment of a significant amount of money may be immediately appealed if it is shown to affect a substantial right, defendant failed to make that showing here. The disposal of the attorney fees issue did not fully dispose of any underlying substantive issue in the divorce case; rather, the award's purpose was to deter defendant's sanctionable conduct from continuing in the ongoing litigation. Furthermore, defendant's status as the dependent spouse had no bearing on whether the order affected a substantial right, and defendant made no arguments in her appellate brief showing how a substantial right had been affected. **Preston v. Preston, 518.**

Mootness—discovery order—forensic examination of electronic devices—liability issues resolved—In litigation between a separated husband and wife regarding real estate and funds held by a company owned by the husband, a challenge to the trial court's order requiring the company and the husband to submit to a forensic examination of electronic devices was rendered moot by the court's sanctions on both parties based on multiple discovery violations, since those sanctions resolved all issues of liability in favor of the wife, thereby negating the need for the examination. **Dunhill Holdings, LLC v. Lindberg, 36.**

Mootness—no practical effect in existing controversy—two appeals—resolution reached in one appeal—In an estate dispute, where the decedent's

APPEAL AND ERROR—Continued

siblings filed two appeals—one challenging a declaratory judgment naming the decedent's former sister-in-law an heir under his will and another challenging the trial court's dismissal of the siblings' caveat action seeking to invalidate the will—the Court of Appeals dismissed the siblings' appeal in the caveat action after ruling in their favor in the other appeal. The siblings sought the same practical result in both actions—to take their brother's estate as sole heirs by intestacy—and, therefore, the favorable result in one appeal eliminated any practical effect that a resolution of the other appeal would have had on the existing controversy. **In re Magestro, 115.**

Mootness—public interest exception—deposition limits—counsel's physical presence barred—In an appeal from a discovery order in a medical malpractice case, in which the trial court barred counsel on both sides from being physically present with clients or witnesses, even their own, during depositions due to the public health concerns of the ongoing coronavirus pandemic and related travel restrictions, and applied those limitations to all depositions without regard to the location or particular circumstances of the people involved, the appellate court rejected plaintiff's argument that defendant's due process challenge only applied to depositions already conducted and that she did not plan to depose any more of defendant's employees. Where plaintiff essentially argued the issue raised by defendant was moot, the public interest exception applied given the importance of this issue of first impression, and a party's voluntary cessation of challenged conduct did not foreclose the issue arising anew if circumstances changed or the party were to change their mind, especially since defendant had not yet designated its expert witnesses. **Hall v. Wilmington Health, PLLC, 463.**

Preservation of issues—Batson analysis—second step—no waiver—In an appeal from the trial court's order overruling a criminal defendant's *Batson* claim on grounds that the prosecutor met his burden at the second step of the *Batson* analysis and defendant failed to meet his burden at *Batson*'s third step, defendant did not implicitly waive appellate review of his arguments relating to *Batson*'s second step. Although the hearing transcript shows that the parties' discussions of steps two and three were not neatly divided, the transcript showed that defendant began raising an argument relating to the second step, the trial court cut him off and said it was accepting the prosecutor's representation on the matter, and defendant proceeded to address the third step. **State v. Bennett, 585.**

Preservation of issues—collateral estoppel—not asserted in trial court—In an action brought by two recipients of long-term state disability benefits (plaintiffs) challenging the reduction in their monthly benefits by the administering state agency (defendant), where defendant raised the doctrine of collateral estoppel for the first time on appeal, its failure to first raise the affirmative defense in the trial court rendered the issue unpreserved for appellate review. **Moss v. N.C. Dep't of State Treasurer, 505.**

Preservation of issues—criminal case—constitutional argument—covered by general motion to dismiss for insufficiency of evidence—In a trial for extortion, defendant was not required to state a specific ground for her motion to dismiss for lack of sufficient evidence in order to preserve for appeal a constitutional argument (that the First Amendment required a narrow interpretation of N.C.G.S. § 14-118.4, the criminal statute at issue) because a motion to dismiss preserves all arguments related to insufficiency of the evidence. **State v. Bowen, 631.**

Preservation of issues—deposition limits—counsel's physical presence barred—due process implications—no opportunity to object—In an appeal from a

CITIES AND TOWNS—Continued

to the town than what the court determined it had. **TAC Stafford, LLC v. Town of Mooresville, 686.**

Subdivision development—approvals conditioned on off-site improvements—no statutory authority—A town lacked authority under N.C.G.S. § 160A-372 to require plaintiff, the developer of a residential subdivision within the town, to make improvements to off-site public transportation locations as a condition for issuing development approvals for the subdivision, and therefore the trial court properly granted summary judgment to plaintiff on its claims for declaratory judgment and injunctive relief against the town. The unambiguous text of section 160A-372 only authorized the town to require the developer to "consider existing or planned streets when it plats streets or highways within its subdivision" or, alternatively, to require the developer to provide funds so that the town itself could construct roads outside of the subdivision. **TAC Stafford, LLC v. Town of Mooresville, 686.**

Subdivision development—approvals conditioned on off-site improvements—writ of mandamus—mootness of remaining issues—Where a trial court ruled in favor of plaintiff, the developer of a residential subdivision within a town, on its claims for declaratory judgment and injunctive relief against the town, which plaintiff filed after the town unlawfully conditioned its development approvals for the subdivision on the construction of certain off-site improvements, and where the court subsequently issued a writ of mandamus requiring the town to issue development approvals for the subdivision without requiring the unlawful condition, the court properly dismissed plaintiff's remaining claims against the town, with prejudice, where the writ of mandamus's issuance rendered those claims moot. **TAC Stafford, LLC v. Town of Mooresville, 686.**

Violation of zoning ordinance—civil penalties—enforcement of prior judgment—no right of appeal—In a town's lawsuit to collect civil penalties from developers for failure to repair certain roads within a residential subdivision, which the developers had refused to do despite a prior judgment ordering the repairs after finding the developers in violation of the town's zoning ordinance, the trial court properly granted summary judgment in the town's favor. The civil penalties did not constitute a final judgment or order that the developers could appeal from, but rather they were the means through which the town enforced the prior judgment. Therefore, because the developers had already unsuccessfully appealed the prior judgment and the town's ordinances did not establish a separate right to appeal civil penalties, the developers had no available avenue to challenge the town's imposition of those penalties. **Town of Midland v. Harrell, 354.**

Water and sewer—capacity fees—not used for contemporaneous services—imposed without authority—A city exceeded its authority under N.C.G.S. § 160A-314(a) by collecting water and sewer capacity fees from two developers as a mandatory precondition to connecting new users to the existing city water and sewer system, because the fees, although purportedly charged to pay for the capacity costs associated with new development, were not used for the provision of contemporaneous services (a separate tapping fee was charged to cover the connection cost) but were placed in a general water and sewer fund for future discretionary spending. **Daedalus, LLC v. City of Charlotte, 452.**

Zoning enforcement action—civil penalties assessed while appeal pending—stayed under statutory amendment—In the second appeal arising from a dispute between a town and the developers of a residential subdivision, where, in the first appeal, the developers challenged the notice of violation of the town's zoning

CONSTITUTIONAL LAW—Continued

therefore the trial court was not required to conduct a *Harbison* inquiry to ensure that defendant consented to these statements. Specifically, when saying that what happened between defendant and his wife was a "brutal, calculated assault," defense counsel was referring to the wife's act of stabbing defendant with a knife during the incident, and counsel's statement that defendant "beat" his wife was a recitation of an uncontroverted fact at trial (supported by defendant's own testimony in which he repeatedly admitted to beating his wife). Finally, although defense counsel only argued against the severest charge (first-degree murder) during closing arguments and the jury found defendant guilty of five of the six unmentioned assault charges, counsel's failure to mention those six charges did not constitute *Harbison* error. **State v. Guin, 160.**

Effective assistance of counsel—pro se defendant—Where defendant chose to proceed pro se in a prosecution for his failure to bring his property into compliance with a city ordinance, he could not claim on appeal that he received ineffective assistance of counsel for his own deficient performance as counsel. **State v. Hales, 178.**

First Amendment—extortion—criminal speech not protected—true threat analysis inapplicable—Defendant's conviction for extortion pursuant to N.C.G.S. § 14-118.4—based on defendant's promise not to publish a tell-all if the victim paid for defendant to sign a confidentiality agreement, years after defendant and the victim met through an online match-making exchange and then conducted an extra-marital sexual relationship—was based on ample evidence and did not violate the First Amendment because the statute was narrowly tailored to prohibit extortionate speech, and since such speech constitutes criminal conduct, it was not constitutionally protected speech to which a "true threat" analysis must be applied. **State v. Bowen, 631.**

North Carolina—Fines and Forfeitures Clause—"clear proceeds"—interlocal agreement—fines from red light cameras—The funding framework in an interlocal agreement between a city and a local school board regarding the cost-sharing of the city's red light camera enforcement program violated the Fines and Forfeitures Clause of the North Carolina Constitution (Art. IX, section 7) and N.C.G.S. § 115C-437 where the school board did not receive the "clear proceeds" of the fines collected from the program—defined as the sum total of penalties from which the actual costs of collection, but not any enforcement costs, are to be deducted, with the costs not to exceed 10% of the amount collected—since, even though the school board initially received all of the penalties collected, it then had to pay nearly 30% back to the city to pay the costs of the program. **Fearrington v. City of Greenville, 218.**

North Carolina—local act—funding for red light camera enforcement program—not related to health—A three-judge panel correctly determined that a local act regarding funding to operate a red light camera enforcement program did not relate to health and therefore did not violate the North Carolina Constitution's limitation on local laws relating to health and sanitation. The act, which was limited to prescribing how the city could hire and pay a private entity to run the program, did not shift responsibility for administering the program from the municipality nor change how the program would operate—aspects which were governed by a separate act. The Court of Appeals declined to address the constitutionality of the underlying act authorizing red light cameras, which had not been challenged. **Vaitovas v. City of Greenville, 393.**

SEARCH AND SEIZURE—Continued

Reasonable expectation of privacy—lawful, public vantage points—public roadway and neighbor's property—In a prosecution for violation of N.C.G.S. § 14-4 for defendant's failure to bring his property into compliance with a city ordinance, the trial court properly denied defendant's motion to suppress where the evidence against defendant was obtained by a city code inspector's observations from a public roadway and from a neighboring property where he had the owner's permission to be. **State v. Hales, 178.**

Search warrant—probable cause—defendant's residence—murder investigation —In prosecution for the first-degree murder of a victim who was shot in the head in his own home, the trial court did not err in denying defendant's motion to suppress evidence seized during the search of his residence where the search warrant affidavit alleged, among other things, that defendant had two 9-millimeter firearms in his truck when he was arrested, there were blood smears in his truck and on his hands, the ammunition in his truck was consistent with the shell casings around the victim's body, he was arrested near the scene of the crime, he had shown a pistol to a witness while suggesting he had a motive to kill the victim, the witness's description of that pistol matched the pistol in defendant's truck, and an officer had seen bullets on a shelf in defendant's home workshop the previous day—all allowing the reasonable inference that evidence related to the murder could likely be found at defendant's residence. Further, the conclusions of law in the trial court's order on the motion were supported by the findings of fact, which were supported by competent evidence. **State v. Gallion, 305.**

Traffic stop—consent to search residence—ongoing narcotics investigation— There was no error in the trial court's denial of defendant's motion to suppress evidence of a firearm and drugs seized from the apartment he shared with his girlfriend based on consent given during a traffic stop of defendant and his girlfriend where the traffic stop was initiated based on a speeding infraction and extended based on the smell of marijuana coming from the vehicle, the officer made a five- to seven-minute phone call after discovering marijuana in the vehicle to inquire whether he should inform defendant and his girlfriend about the ongoing investigation of narcotics sales from their apartment, and the officer had not yet decided whether to arrest defendant for the marijuana found in the vehicle at the time he requested consent to search the apartment. Even assuming the mission of the stop was already completed, the officer was justified in extending the stop because he had reasonable suspicion—based on prior surveillance and a controlled drug purchase—that defendant and his girlfriend were selling narcotics from their apartment. Finally, the consent to search the apartment was freely and voluntarily given where the officer stated that he believed the police had probable cause to apply for a search warrant. **State v. Jordan, 641.**

Warrantless entry—private residence of another—lack of exigent circumstances or lawful consent—no probable cause—In a drug prosecution arising from evidence seized from a private residence during the course of officers' investigation into a stolen vehicle, the trial court erred by denying defendant's motion to suppress where there was no evidence that exigent circumstances existed, as argued by the State, that justified the officers' warrantless entry of the residence to follow a suspect who could have destroyed evidence, or that the officers had obtained lawful consent to enter. Further, although the officers obtained a search warrant to search the house and a safe contained therein, the supporting affidavit did not establish probable cause because it related information that was tainted by the illegal entry. **State v. Jordan, 651.**

WORKERS' COMPENSATION—Continued

from plaintiff's and decedent's personal uninsured/underinsured motorist (UIM) policy was subject to subrogation (contrary to the Industrial Commission's determination), the Court of Appeals ordered that one-third of that amount be disbursed to pay plaintiff's attorneys' fees and the remainder in satisfaction of defendants' (decedent's employer and the employer's insurer) subrogation lien. Disbursements of proceeds from defendant employer's commercial UIM policy ($900,000)—free and clear of defendants' subrogation interests—and the third-party tortfeasor's liability policy ($50,000)—split between costs, attorneys' fees, and satisfaction of defendants' subrogation lien—were left undisturbed. **Walker v. K&W Cafeterias, 708.**

Lien—third-party wrongful death recovery—multiple UIM policies—subrogation—In an action involving a wrongful death settlement and a workers' compensation lien arising from a fatal car accident that occurred in South Carolina, the Industrial Commission erred by determining that the proceeds recovered from the personal uninsured/underinsured motorist (UIM) policy held by decedent and his wife (plaintiff) in the South Carolina-based wrongful death action were exempt from subrogation under N.C.G.S. § 97-10.2. Although the Supreme Court held in *Walker v. K&W Cafeterias*, 375 N.C. 254 (2020), that South Carolina law applied to proceeds paid under defendant employer's commercial UIM policy (due to choice-of-law contract principles), and therefore those proceeds ($900,000) could not be used to satisfy defendants' workers' compensation lien, the same reasoning did not apply to the personal UIM policy. Therefore, the proceeds of that policy ($12,500) were subject to North Carolina law as the governing forum and to defendants' subrogation rights. **Walker v. K&W Cafeterias, 708.**

Lien—third-party wrongful death recovery—subrogation—The Industrial Commission did not err by imposing a workers' compensation lien against a wrongful death recovery, including any portion that would have been distributed to heirs who did not share in the worker's compensation award for decedent's death, since, as established in *In re Estate of Bullock*, 188 N.C. App. 518 (2008), the plain language of N.C.G.S. § 97-10.2(f) and (h) allows such a lien to be enforced against any person receiving payment from a third-party tortfeasor for the death of an employee. Further, nothing in the statute permits subrogating the rights of an employer to those of the beneficiaries of a workers' compensation award. **Walker v. K&W Cafeterias, 708.**

ZONING

Special use permit—denied by city council—standard of review by superior court—Where a city council denied petitioner charity organization a special use permit to build a halfway house on the basis that the charity did not meet its burden of production to show that its proposed use met a certain standard in the city's ordinance, the superior court on appeal erred by applying the whole record test rather than conducting a de novo review of whether petitioner had, in fact, met its burden of production. **Dismas Charities, Inc. v. City of Fayetteville, 29.**

Special use permit—prima facie showing by applicant—authority of city to deny permit—A city council erred by denying petitioner charity organization a special use permit to build a halfway house where, contrary to the city council's determination, the charity met its burden of production to show that its proposed use met a certain standard in the city's ordinance—that the proposed use "allows for the protection of property values and the ability of neighboring lands to develop the

uses permitted in the zoning district"—and further, where no competent, material, substantial evidence was presented to counter petitioner's evidence. **Dismas Charities, Inc. v. City of Fayetteville, 29.**