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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 Unpublished cases appear in *Italics*.

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2. This opinion was moved from its original filing date and is published in Volume 285 of the N.C. App. Reports.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

KATHERINE GLEDHILL CASH (NOW MCGEE), PLAINTIFF
v.
MATTHEW CASH, DEFENDANT

No. COA21-156

Filed 21 June 2022

Child Custody and Support—motion to modify custody—substantial change in circumstances—best interest evidence disallowed—abuse of discretion

In a hearing addressing a father's motion to modify custody, the trial court abused its discretion and acted under a misapprehension of the law by strictly bifurcating the hearing and preventing the father from presenting evidence regarding the best interests of the child when he was testifying about changed circumstances, since the effect that changed circumstances have on the best interests of a child is necessarily relevant to a determination of whether a substantial change in circumstances affecting the welfare of the child has occurred that would justify modification. The order denying the motion to modify was vacated and the matter remanded for a new hearing.

Appeal by defendant from order entered 9 March 2020 by Judge Juanita Boger-Allen in District Court, Cabarrus County. Heard in the Court of Appeals 30 November 2021.

Fox Rothschild LLP, by Michelle D. Connell and Kip D. Nelson, for plaintiff-appellee.

Plumides, Romano & Johnson, P.C., by Richard B. Johnson, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant-Father appeals from a trial court's order denying his motion to modify a child custody order. Defendant challenges the trial court's order on four grounds, but we only reach one issue. Because consideration of the effect of changes in circumstances of the minor child includes consideration of how those changes affect the best interests of the child, the trial court abused its discretion by strictly bifurcating the hearing of Defendant's motion to modify the existing child custody order and preventing Defendant from presenting evidence regarding his contentions regarding the best interests of the child. We therefore vacate and remand for the trial court to hold a new hearing where both parties shall be allowed to present evidence regarding the motion for modification, including evidence regarding their contentions as to how the changes in circumstances may affect the best interests of the child, either negatively or positively, and for the court to enter a new order ruling on Defendant's motion to modify the child custody order following the hearing.

I. Background

¶ 2 Defendant-Father and Plaintiff-Mother married in 2007 and had one child in 2008. As part of their subsequent divorce, they entered into a consent child custody order on 12 February 2010. The consent child custody order granted primary legal and physical custody to Plaintiff with regular weekly and weekend visitation for Defendant as well as holiday visitation, summer visitation, and further visitation as the parties agreed. When the consent order was entered, the child was about a year and a half old.

¶ 3 During the next few years, Plaintiff remarried and had additional children. The child whose custody is at issue here began school and began receiving additional academic support as needed, including speech therapy and tutoring in math and reading. The child was also diagnosed with ADD and started medication as a result. Defendant only exercised his summer visitation twice and had different job schedules that affected his regular visitation. To account for the disruptions to Defendant's regular visitation, the parties agreed to allow Defendant additional visitation. Perhaps due to these accommodations as to the visitation schedule, Defendant did not file any contempt or modification motions for many years.

¶ 4 On or about 14 August 2018, Defendant filed a motion to modify the child custody order alleging a "substantial and material change in the circumstances" since the time of the consent custody order. Specifically, Defendant alleged: Plaintiff had denied him visitation; Plaintiff had placed conditions on contact with the child, including Defendant paying her more money; Plaintiff had blocked Defendant on the child's cellphone; Plaintiff berated Defendant in front of the child, "which is not in the best interest of the minor child"; Plaintiff told Defendant the child does not want custody to change; the child cries when Defendant drops him off at Plaintiff's residence and asks to spend more time with Defendant, which Plaintiff does not allow; Plaintiff does not keep Defendant informed about the child's medical treatment or medications; Plaintiff "interrogates the minor child" after his visitation with Defendant about Defendant's romantic relationships; Plaintiff schedules the child's activities for weekends Defendant has visitation; Plaintiff does not allow the child to be involved with sports; Plaintiff has other children and cannot devote enough time to care for the parties' child; and Defendant has his own house and accommodations for the child. Defendant also alleged "[i]t is in the best interest of all parties" to give Defendant primary custody of the child with appropriate visitation and requested modification of the consent child custody order.

¶ 5 The trial court held a hearing on the motion to modify the child custody order over two days, 2 October 2019 and 13 February 2020. At the hearing, Defendant presented testimony from five witnesses: himself, two co-workers of Defendant, Defendant's new wife, and Plaintiff. All the witnesses discussed the parties' current circumstances to address Defendant's allegation of substantial and material changes in circumstances since the entry of the consent custody order. But the trial court limited the Defendant's presentation of evidence regarding the best interest of the child, as discussed in more detail below.

¶ 6 In addition to Defendant's five witnesses, the trial court heard from the minor child off the record in chambers with both parties' attorneys present. Plaintiff did not present any evidence.

¶ 7 On 9 March 2020, the trial court entered an order denying Defendant's motion to modify the child custody order. First, the trial court recounted the consent custody order and incorporated it by reference. Then, the trial court recounted several changes since the entry of the consent custody order. Specifically, the trial court found: the child had grown from age one to age ten; the child had started school and received the additional support recounted above; the child had been diagnosed with ADD and been prescribed medication to treat it; both parties had remarried;

and Plaintiff had additional children. The trial court also made Findings regarding the parties' current circumstances such as their employment statuses. Finally, the trial court made Findings on all of Defendant's allegations and either found a lack of (credible) evidence to support them or found evidence that contradicted the allegations. Based on those Findings, the trial court further found and concluded Defendant "failed in his burden of demonstrating a substantial and material change in circumstances affecting" the child's welfare. Therefore, the trial court denied Defendant's motion to modify the existing child custody order.

¶ 8 Following the trial court's order, Defendant filed a motion for North Carolina Rule of Civil Procedure 59 relief.[1] The trial court denied the Rule 59 motion, and Defendant filed a written notice of appeal.

II. Analysis

¶ 9 Defendant challenges four components of the order denying his motion to modify the existing child custody order. First, he argues "the trial court abused its discretion by determining there had not been a substantial change of circumstances." (Capitalization altered.) Second, he contends parts of Finding of Fact 10(w) "are not supported by the evidence." (Capitalization altered.) Third, Defendant alleges "the trial court abused its discretion when it failed to make any Findings of Fact regarding its interview of the minor child and the wishes of the minor child." (Capitalization altered.) Finally, Defendant argues the trial court abused its discretion "when it prevented [him] from presenting evidence because it misunderstood the two prong test for a motion to modify child custody." (Capitalization altered.) We agree with Defendant's final argument, so we do not reach his other three arguments. We address that issue after explaining the general law on modifying child custody orders and the standard of review.

¶ 10 An existing child custody order "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances . . . ." N.C. Gen. Stat. § 50-13.7(a) (2019). Applying that statute in practice, the trial court has a multi-part analytical process:

> The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the

1. The Rule 59 motion tolled the 30-day time period for taking an appeal. *See* N.C. R. App. P. 3(c)(3) ("[I]f a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion . . . .").

> trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

Shipman v. Shipman, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003); *see also Lamm v. Lamm*, 210 N.C. App. 181, 185–86, 707 S.E.2d 685, 689 (2011) (explaining a trial court must make three separate conclusions to modify a child custody order: "(1) that 'there has been a substantial change in circumstances,' (2) that the substantial 'change affected the minor child,' and (3) that 'a modification of custody [is] in the child's best interests[.]' " (quoting *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254) (alterations in original)).

¶ 11 The requirement for a showing of changed circumstances reflects that

> [a] decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved.

Pulliam v. Smith, 348 N.C. 616, 620, 501 S.E.2d 898, 900 (1998) (quoting *Shepherd v. Shepherd*, 237 N.C. 71, 75, 159 S.E.2d 357, 361 (1968)) (alteration in original). The trial court's paramount focus on the welfare of the child thus reinforces the other part of the modification standard, the requirement that the modification be in the child's best interest. *See Shipman*, 357 N.C. at 474, 586 S.E.2d at 253 ("As in most child custody proceedings, a trial court's principal objective is to measure whether a change in custody will serve to promote the child's best interests.").

¶ 12 When conducting its analysis, the trial court must heed two different burdens of proof. "The party moving for modification bears the burden of demonstrating" a substantial change in circumstances affecting the welfare of the child has occurred. *Hibshman v. Hibshman*, 212 N.C. App. 113, 120, 710 S.E.2d 438, 443 (2011) (quotations and citation omitted). As to the best interest of the child, however, "there is no burden of proof on either party . . . ." *Lamond v. Mahoney*, 159 N.C. App. 400, 405, 583 S.E.2d 656, 659 (2003). "Instead, the parties have the obligation to present whatever evidence they believe is pertinent in deciding the best interests of the child. The trial court bears the responsibility of requiring production of any evidence that may be competent and relevant on the issue." *Id.*, 159 N.C. App. at 405, 583 S.E.2d at 659–60 (quotations and citations omitted). With this background on child custody modification law, we now turn to our standard of review of the trial court's determinations followed by Defendant's argument.

A. Standard of Review

¶ 13 Our Supreme Court has explained in detail how appellate courts review child custody modification orders:

> When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges. Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.
>
> In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard

> to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Shipman, 357 N.C. at 474–75, 586 S.E.2d at 253–54 (quotations and citations omitted).

¶ 14 The dispositive issue here—the trial court preventing Defendant from presenting certain evidence—is an evidentiary issue. "On appeal, the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion." *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006). A trial court abuses its discretion when it acts under a misapprehension of law. *See Riviere v. Riviere*, 134 N.C. App. 302, 307, 517 S.E.2d 673, 676 (1999) (concluding the trial court abused its discretion because it acted under a misapprehension of law); *see also Hines v. Wal-Mart Stores East, L.P.*, 191 N.C. App. 390, 393, 663 S.E.2d 337, 339 (2008) ("A discretionary ruling made under a misapprehension of the law, may constitute an abuse of discretion."); *State v. Nunez*, 204 N.C. App. 164, 170, 693 S.E.2d 223, 227 (2010) ("When a trial judge acts under a misapprehension of the law, this constitutes an abuse of discretion." (citing *Hines*, 191 N.C. App. at 393, 663 S.E.2d at 339, and *Riviere*, 134 N.C. App. at 307, 517 S.E.2d at 676)).

B. Exclusion of Best Interest Evidence

¶ 15 Defendant argues the trial court erred by preventing him from "presenting evidence because it misunderstood the two prong test for a motion to modify child custody." (Capitalization altered.) Specifically, Defendant contends the trial court erred by preventing him from presenting evidence related to the best interest of the child part of the modification standard. By doing this, the trial court improperly bifurcated the trial into two distinct portions: first, evidence regarding changes in circumstances, and second, only if Defendant met his burden of proving

substantial changes in circumstances, evidence regarding the best interests of the child.

¶ 16 We first note there is no question in this case that many changes in circumstances of the parties and child had occurred, and these changes are typically the types of changes which may be considered as substantial changes and can support a modification of custody. *See West v. Marko*, 141 N.C. App. 688, 692, 541 S.E.2d 226, 229 (2001) (determining evidence supported the conclusion of a substantial change in circumstances based on findings of fact about medical care, education, family living conditions, etc.). In fact, the trial court found several changes occurred. Over the seven years since entry of the prior order, both parties' home, family, and work circumstances had all changed; the child was no longer a toddler but was age ten and involved in school, sports, and social activities; and the child had been diagnosed and treated for ADD. This is not a case which presents one isolated change in circumstances or some change unrelated to the child's circumstances.

¶ 17 We recognize, as Plaintiff argues, that individual changes such as the mere passage of time, increased age of the child, a change in residence, or a change in family composition are not necessarily sufficient changes of circumstances to justify the modification of a custody order. *See Frey v. Best*, 189 N.C. App. 622, 637–39, 659 S.E.2d 60, 72 (2008) (after recognizing the same standards apply to modifying child custody and modifying visitation, determining the facts on changes in children's ages, parent's work schedule, and parent's residence did not support concluding a substantial change in circumstances occurred); *Evans v. Evans*, 138 N.C. App. 135, 140, 530 S.E.2d 576, 579 (2000) (explaining "remarriage, in and of itself, is not a sufficient change of circumstances affecting the welfare of the child to justify modification of the child custody order without a finding of fact indicating the effect of the remarriage on the child" and then further stating, "[s]imilarly, a change in the custodial parent's residence is not itself a substantial change in circumstances affecting the welfare of the child . . ."). Any one of those changes may or may not constitute a substantial change justifying modification of a custody order; to make this determination, the trial court must consider evidence regarding the effect of the particular change on the child, whether positive or negative. *See Warner v. Brickhouse*, 189 N.C. App. 445, 452, 658 S.E.2d 313, 318 (2008) ("[C]ourts must consider and weigh all evidence of changed circumstances *which affect or will affect the best interests of the child*, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child." (quoting *Metz*

v. Metz, 138 N.C. App. 538, 540, 530 S.E.2d 79, 81 (2000)) (emphasis added; other alteration in original)). In other words, the trial court must consider not only the change, but also if and how that change affects the child and the best interests of the child. Plaintiff argues "[Defendant-] Father has not explained how [the changes] affect[] the well-being of the child." But the trial court did not permit Father to explain how the changes affected the well-being of the child. Because the trial court bifurcated the hearing and prevented Father from addressing the best interests of the child, he could not present evidence as to his contentions of how the changes affected the child. If Father had been allowed to present this evidence, the trial court may or may not have found Father's evidence credible or it might have determined the effects of changes in circumstances were not so significant as to justify modification, but Father was entitled to the opportunity to present evidence to support his claim.

¶ 18 Our review of the hearing transcript reveals two instances where the trial court disallowed evidence on best interests. Defendant tried to present evidence related to how the current circumstances affected the child's best interests and how he believed changes in custody and visitation would serve the best interest of the child, but the trial court did not allow him to present such evidence. First, while Defendant testified, the following exchange took place:

> Q. A 50/50. And do you think that would work best if it was a week with you and then a week with [Plaintiff]?
>
> A. Yes. It would help him -- it would be in his best interest. Because right now, it's ---
>
> MS. JOHNSON: Again, Judge, we're talking about best interest, which I think is what the slant has been all along.
>
> MS. BELL: Your Honor, I would respectfully disagree. Again, it goes hand in hand. We're talking about a Consent Order from '09. So obviously, a great deal has changed since then. We were dealing with a one year old; now we're dealing with a ten year old. So there's going to be some crossover between best interest and substantial change.
>
> Just because this Order is so old. It's not like we're dealing with something that's just a few years. So there's been a lot that's changed. And so that's why I want to point out. Again, we're talking about things in the Consent Order, but we're also talking about a

> child. Obviously, when the law talks about substantial change, it doesn't have to be a negative effect on the child. It just has to be a substantial change affecting the child.
>
> And thankfully, a lot of the changes we've been talking about today have been positive, you know. We're dealing with a young man who's doing well. So I just want the Court to understand and hear my position that, again, there's going to be crossover between best interest and substantial change. Because not all substantial change is negative.
>
> So I just want to make that point to the Court.
>
> THE COURT: All right. And I do understand the objection that was made. *So I'm going ·to ask [Defendant] if he would not testify as to what would be in the child's best interest.*

(Emphasis added.) The other instance where the trial court indicated it would not accept best interest evidence came during a discussion about whether the minor child whose custody is in dispute would testify:

> MS. JOHNSON: . . . .
>
> *We're at the motion stage. We're not at best interest. And so asking him questions that are limited to what those allegations are on this motion, are the only thing that's going to be relevant to illicit [sic] from him.*
>
> THE COURT: Okay.
>
> MS. BELL: And Your Honor, if I may respond. If you look at the bench book, it talks about substantial change of circumstance. And how there's a correlation there with information that the child can provide. So you can ask questions about the child's well-being, their relationship with their parent, the child's wishes. All of that goes to substantial change of circumstance. And of course, there's some crossover with best interest as well.
>
> So I just want to put that on the record.
>
> MS. JOHNSON: And had she [sic] alleged that in his Motion, Judge, then that would have been fine. But it hasn't been.

(Emphasis added.) The court did not say anything further on the best interest evidence issue after this exchange; it just told the parties it would hear from a different witness then and from the child later.

¶ 19 In both these instances, the trial court abused its discretion by not allowing Defendant to present best interest evidence. In particular, the trial court appears to have based these rulings on a misapprehension of the law which led to a strict bifurcation of the evidence allowed in the two stages of the hearing. *See Riviere*, 134 N.C. App. at 307, 517 S.E.2d at 676 (concluding the trial court abused its discretion because it acted under a misapprehension of law). Defendant should have been allowed to present his contentions and evidence addressing both changed circumstances and best interests as part of his case-in-chief because both are part of the requirements to modify a child custody order. *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. As Defendant's attorney argued, there is "crossover between best interest and substantial change." Further, in the context of the best interest inquiry, the trial court has the affirmative "responsibility of requiring production of any evidence that may be competent and relevant on the issue." *Lamond*, 159 N.C. App. at 405, 583 S.E.2d at 659–60.

¶ 20 The trial court's exclusion of best interest evidence also conflicts with its "principal objective" in a child custody modification case, i.e., "to measure whether a change in custody will serve to promote the child's best interests." *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. As explained above, even the requirement to show changed circumstances serves to protect the child's best interests by ensuring stability. *Pulliam*, 348 N.C. at 620, 501 S.E.2d at 900. Further, this Court has recognized the link between changed circumstances and best interests as well as the potential for the evidence on the two inquiries to overlap. *See Warner*, 189 N.C. App. at 452, 658 S.E.2d at 318 ("[C]ourts must consider and weigh all evidence of changed circumstances *which affect or will affect the best interests of the child*, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child." (emphasis added)); *see also* 3 *Reynolds on North Carolina Family Law* § 8.43 ("Parties may offer evidence of any number of factors in support of a substantial change of circumstances. Like the original order, the factors must relate to the child's best interest and focus on the child's present or future well-being."). Thus, by excluding best interest evidence, the trial court shifted focus from its principal objective and also risked excluding evidence relevant to the changed circumstances inquiry as well as from the best interest inquiry.

¶ 21 The trial court's exclusion of best interest evidence is particularly striking here given Defendant presented significant evidence that could have supported finding a substantial change in circumstances affecting the welfare of the child, although the trial court found Defendant ultimately did not meet his burden under that inquiry. For example, the trial court found: the child was age one at the time of the original order and ten at the time of the modification hearing; the child has started school and received additional educational supports in the intervening time; the child has medical issues requiring medication; and both parents remarried and the child gained additional siblings since the time of the original order. As noted above, the passage of time alone is not necessarily a change affecting the child's welfare. *See Frey*, 189 N.C. App. at 637–39, 659 S.E.2d at 72 (explaining facts on, *inter alia*, children getting older did not justify conclusion a substantial change in circumstances occurred). But despite the trial court's findings of many major changes in circumstances, it did not address the effects these changes had on the child's best interests.

¶ 22 The trial court also made several findings noting that the prior order did not address certain issues and on this basis determined that there was no substantial and material change in circumstances to justify modification, particularly as to those issues. For example, the trial court found the prior order did not address phone calls between Father and the child and it did not address sporting activities. Because the prior order did not *specifically* address these issues, the trial court found that the evidence regarding phone calls and sports participation did not constitute "a substantial and material change in circumstances to warrant a modification." But a prior order need not address everything that may come up in a child's life before a party may later demonstrate a substantial change in circumstances justifying modification. When the consent order was entered, the child was under 2 years old. Sports participation and phone calls are not addressed in every child custody order and are typically not relevant for a one-year-old child but may become extremely important to a child who is age 10. We do not address whether the trial court erred when it characterized all the changes in circumstances it found not to be "substantial" changes in circumstances. Rather, the trial court here abused its discretion by operating under a misapprehension of the law and failing to consider all the relevant evidence needed to determine if these changes were substantial changes which affect the best interests of the child. It is impossible to consider whether a change is a *substantial* change affecting the child without considering if that change has an effect on the best interest of the child.

¶ 23 Plaintiff contends "the trial court did not abuse its discretion in excluding best-interest evidence" because the child custody modification process involves two steps such that the trial court cannot reach the best interest analysis before it finds a substantial change in the circumstances. (Capitalization altered.) As an initial matter, the two main cases on which Plaintiff relies are taken out of context. First, Plaintiff cites *Kanellos v. Kanellos* to support her argument "[m]odification of child custody awards is a two-step process." (Citing 251 N.C. App. 149, 158 n.4, 795 S.E.2d 225, 232 n.4 (2016).) This portion of *Kanellos*, 251 N.C. App. at 158 n.4, 795 S.E.2d at 232 n.4, comes from a footnote that relies on *Browning v. Helff*, 136 N.C. App. 420, 524 S.E.2d 95 (2000), and *Browning* itself was remanded for the trial court to make additional findings of fact on the effect on the child. 136 N.C. App. at 425, 524 S.E.2d at 99. The *Browning* Court did not address whether the trial court should have barred best interest *evidence* at the hearing; it only addressed whether the trial court's *analysis* followed the correct route. Plaintiff makes a similar error with her citation to *West v. Marko*. In *West*, this Court concluded the court incorrectly believed it could modify a child custody order based on best interests alone without finding a substantial change in circumstances. 141 N.C. App. at 691–92, 541 S.E.2d at 229. But the trial court had also made the appropriate findings on change in circumstances, so this Court upheld the order. *Id.*, 141 N.C. App. at 691–92, 694, 541 S.E.2d at 229, 231. Thus, again, the trial court did not bar a party from presenting best interest evidence. And this Court only faulted the trial court for not following the correct *analytical* steps.

¶ 24 These out-of-context cites also reveal the larger flaw in Plaintiff's counter argument. The trial court must find a substantial change in circumstances affecting the welfare of the child before it can *analyze* whether a change of custody would be in the best interest of the child. *See Garrett v. Garrett*, 121 N.C. App. 192, 196, 464 S.E.2d 716, 719 (1995), *disapproved of on other grounds by Pulliam*, 348 N.C. 616, 501 S.E.2d 898 ("The best interest *analysis* is rendered nugatory if the party requesting the custody change does not meet its burden on the substantial change of circumstances issue." (emphasis added)). But the trial court must still consider *evidence* relevant to best interest at the hearing on a motion to modify child custody, and in this case, there were clearly many changes in circumstances that are part of the typical considerations for modification—remarriage, relocation, additions to the family of stepparents and siblings, changes in the child's medical condition and educational needs, changes in work and school schedules, and more. *See West*, 141 N.C. App. at 692, 541 S.E.2d at 229 (finding evidence to support a substantial change in circumstances based on findings of

fact about medical care, education, family living conditions, etc.). Particularly because best interest evidence can overlap with the change in circumstances evidence, *see Warner*, 189 N.C. App. at 452, 658 S.E.2d at 318 (noting potential for overlap), the trial court should not finish its analysis before a party's case-in-chief is even done. As a result, the trial court abused its discretion by not allowing Defendant's evidence relating to best interest. The trial court could ultimately decide that despite the many changes in circumstances over the years since the prior order, the changes either had no substantial effect on the child, either positive or negative, or that despite the substantial changes in circumstances, a modification of custody would not be in the best interest of the child, but the child's best interests cannot be entirely removed from the evidence or analysis.

¶ 25 Plaintiff also argues even if the trial court should have received Defendant's best interest evidence, it did not reversibly err because Defendant "did not make an offer of proof." While counsel must usually make a specific offer of the excluded evidence to enable an appellate ruling, a proffer is not necessary when "the significance of the evidence is obvious from the record." *Currence v. Hardin*, 296 N.C. 95, 99–100, 249 S.E.2d 387, 390 (1978); *see also Waynick Const., Inc. v. York*, 70 N.C. App. 287, 292, 319 S.E.2d 304, 307 (1984) (explaining proffer is not necessary when "record plainly discloses the significance of the evidence"); N.C. Gen. Stat. § 1A-1, Rule 43(c) (explaining procedure for proffer). Here, the significance of the excluded best interest evidence is obvious, and Defendant addressed this issue with the trial court several times during the hearing. A trial court cannot grant a motion to modify child custody unless it is in the best interest of the child. *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. For this reason, we also reject Plaintiff's counter argument about Defendant not making a proffer of the best interest evidence.

¶ 26 Having rejected both of Plaintiff's counter arguments, we find the trial court abused its discretion by not allowing Defendant to present best interest evidence. We vacate and remand for a new hearing to allow both parties to present additional evidence regarding the child's current circumstances including evidence regarding the effect upon the best interests of the child of both current circumstances and any proposed change in the custodial arrangement. The trial court shall then enter a new order addressing Defendant's motion for modification of custody. We do not express any opinion on whether the trial court should or should not order any modification of custody; that decision is in the discretion of the trial court, after considering all the evidence, including any evidence

regarding the best interests of the child. Because we vacate and remand on this issue, we do not need to reach any of Defendant's three other arguments.

III. Conclusion

¶ 27 The trial court abused its discretion by preventing Defendant from presenting evidence regarding his contentions as to the best interests of the child; evidence regarding the best interests of the child may be part of the evidence supporting a party's claim that a particular change in circumstances is a substantial change in circumstances which may justify a modification of the custody order. As a result, we vacate and remand on that issue. Because we vacate and remand on this evidentiary issue, we do not need to reach Defendant's remaining issues. On remand, the trial court shall hold a new hearing and both parties shall have the opportunity to present evidence regarding how the changes in circumstances since the prior order have affected—or have not affected—the best interest of the child, either negatively or positively, and the trial court shall enter a new order on Defendant's motion to modify the child custody order following the hearing.

VACATED AND REMANDED.

Judges ZACHARY and GORE concur.

LISA BIGGS FORE, PLAINTIFF
v.
THE WESTERN NORTH CAROLINA CONFERENCE OF THE UNITED METHODIST CHURCH (A/K/A WESTERN NORTH CAROLINA CONFERENCE); AND THE CHILDREN'S HOME, INCORPORATED (A/K/A THE CHILDREN'S HOME, A/K/A THE CROSSNORE SCHOOL & CHILDREN'S HOME, A/K/A CROSSNORE CHILDREN'S HOME), DEFENDANTS

No. COA21-546

Filed 21 June 2022

Appeal and Error—interlocutory order—ex parte—disclosure of criminal investigation records from non-joined third parties

In a civil action against a church conference and an affiliated children's home (defendants), in which plaintiff alleged that she had been sexually abused as a minor at the home, the Court of Appeals dismissed defendants' appeal from an interlocutory ex parte order in which the trial court granted plaintiff's motion for production of criminal investigation records (pursuant to N.C.G.S. § 132-1.4) relating to alleged sexual abuse by the home's employees against any minor at the home. Defendants did not receive prior notice of plaintiff's motion, but because the motion concerned third parties who had not been joined to the action (the public agencies ordered to produce the records and the employees that the records described), defendants had no substantial right to prior notice and an opportunity to oppose the motion. Further, section 132-1.4 did not require plaintiffs to provide notice to defendants, defendants lacked standing to challenge the motion because they were not real parties in interest relating to the records request, and defendants could not assert the non-joined third parties' rights as a defense in the action.

Chief Judge STROUD dissenting.

Appeal by defendants from order entered 11 June 2021 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 April 2022.

Janet Janet & Suggs, LLC, by Richard Serbin and Matthew White, for plaintiff-appellee.

Ogletree Deakins, by Kelly S. Hughes and Ashley P. Cuttino, admitted pro hac vice, for defendant-appellant The Western

North Carolina Conference of the United Methodist Church (a/k/a Western North Carolina Conference).

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus, G. Gray Wilson and D. Martin Warf, for defendant-appellant The Children's Home, Incorporated (a/k/a The Children's Home, a/k/a The Crossnore School & Children's Home, a/k/a Crossnore Children's Home).

TYSON, Judge.

¶ 1 The Western North Carolina Conference of the United Methodist Church ("WNCCUMC") and The Crossnore School & Children's Home ("Children's Home") (together "Defendants") purport to appeal a trial court's *ex parte* order directing disclosure of non-joined, third-party records of alleged child sexual abuse. We dismiss this interlocutory appeal without prejudice.

I. Background

¶ 2 Plaintiff asserts she was sexually abused as a minor, while she resided at The Children's Home in Winston-Salem during the 1970s. Plaintiff claims she reported the alleged abuse by her former Children's Home employee-parents to officials in Rockingham County. Plaintiff filed a civil action in Mecklenburg County Superior Court against Defendants on 6 January 2021. Plaintiff claims Defendants negligently supervised the staff and breached fiduciary duties they owed to her.

¶ 3 Defendants filed motions to dismiss Plaintiff's complaint under Rule 12(b)(6), contending 2019 N.C. Sess. Laws 5 § 4.2(b) and N.C. Gen. Stat. § 1-56(b) (2021) are unconstitutional as-applied to them under Article I, Section 19 of the North Carolina Constitution. WNCCUMC moved to dismiss Plaintiff's claims pursuant to Rule 12(b)(1). These motions remain pending before the trial court.

¶ 4 On 3 June 2021, Plaintiff filed a motion for production of criminal investigation records pursuant to N.C. Gen. Stat. § 132-1.4 (2021). Plaintiff's motion sought confidential records of alleged child sexual abuse by any Children's Home employee against any minor residing therein from the surrounding counties' sheriff's offices, Departments of Social Services, and police departments.

¶ 5 Plaintiff prepared a proposed order and submitted it along with her motion, which was mailed to the Mecklenburg County Clerk's Office for

filing. Plaintiff did not file nor serve a notice of hearing on her motion for production of records on Defendants. On 11 June 2021, the trial court entered Plaintiff's proposed order, *ex parte*. The order decreed the various agencies and departments:

> *shall produce any and all information in whatever form it exists in connection with the alleged child sexual abuse* committed by [employee parents] or other employees of the Children's Home alleged to have sexually abused and/or engaged in sexual activities with a minor while a resident of the home. (emphasis supplied).

¶ 6 Defendants filed notice of appeal, separately sought and obtained a temporary stay, and petitioned for and obtained a writ of supersedeas.

II. Jurisdiction

¶ 7 Defendants' appeal is clearly interlocutory. Appellate review is proper pursuant to N.C. Gen. Stat. § 7A-27(b)(3) if the party proves one of the requirements therein.

¶ 8 "An order is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the rights of all the parties involved in the controversy." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) (citation omitted). Defendant is entitled to review "where 'the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.' " *Id.* (citation omitted).

III. Argument

¶ 9 Defendants argue their substantial rights are violated because they were not given prior notice and an opportunity to oppose Plaintiff's motion for the production of alleged child sexual abuse records of non-joined third parties from surrounding county public entities. For nearly seventy years, the courts of this state have held:

> *The notice required by these constitutional provisions in such proceedings is the notice inherent in the original process* whereby the court acquires original jurisdiction, and not notice of the time when the jurisdiction vested in the court by the service of the original process will be exercised . . . *After the court has once obtained jurisdiction in a cause through the service of original process, a party has*

> *no constitutional right to demand notice of further proceedings in the cause.*

Collins v. Highway Commission, 237 N.C. 277, 281, 74 S.E.2d 709, 713 (1953) (emphasis supplied).

¶ 10 Defendants cite *Mission Hosps., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 189 N.C. App. 263, 270, 658 S.E.2d 277, 281 (2008), and *Pask v. Corbitt*, 28 N.C. App. 100, 104, 220 S.E.2d 378, 382 (1975), to support their contention they were entitled to prior notice of the hearing. Defendants' reliance on these cases is misplaced.

¶ 11 *Mission Hospital* was a DHHS agency appeal, in which the party had directly violated North Carolina statutes forbidding a "member or employee of the agency making a final decision in the case [from] communicat[ing], *directly or indirectly*, in connection with any issue of fact, or question of law, *with any person or party or his representative, except on notice and opportunity for all parties to participate*." *Mission Hosps., Inc.*, 189 N.C. App. at 270, 658 S.E.2d at 281 (emphasis supplied) (citation omitted).

¶ 12 In *Pask*, the plaintiff filed a motion to add parties to the action pursuant to Rule 21 of our Rules of Civil Procedure, and this Court noted, "[l]ong prior to the adoption of G.S. 1A-1, Rule 21, North Carolina has held that existing parties to a lawsuit are entitled to notice of a motion to bring in additional parties." *Pask*, 28 N.C. App. at 103, 220 S.E.2d at 381. The facts and issues in *Mission Hospital* and *Pask* are wholly inapposite from those before us and do not show a substantial right to immediate review.

¶ 13 Here, both Defendants have been haled into court by five different plaintiffs under recent legislation titled SAFE Child Act, 2019 N.C. Sess. Laws 5 § 4.2(b). This statute revived previously time-barred claims for child sexual abuse for a period of two years. *Id.* The plaintiffs in the first two cases filed and served written discovery requests on Defendants. Defendants failed to produce any responses to discovery to date, instead delaying with objections to each request and a reference to pending motions for a protective order which they have not noticed for hearing.

¶ 14 Before Plaintiff could serve any written discovery requests, Defendants filed a motion to stay discovery pending the outcome of their motions to dismiss. Plaintiff was left with the choice to proceed without discovery or to file the contested motion seeking alternative means of locating evidence to support her claims.

¶ 15 Unlike the requirements in *Mission Hospital* and *Pask*, no statute or constitutional provision under these facts requires Plaintiff to provide prior notice to Defendants for a hearing seeking criminal records of non-joined third parties from public entities, and which may affect Defendants' prior employees, who are not joined as parties herein. Further, Defendants were aware through prior discovery requests of Plaintiff's demand and intent to obtain the evidence. No formal notice was needed, because the order to produce was related and made to, and was obtained from, non-joined third parties.

¶ 16 Defendants' arguments are without merit asserting prior notice of a records request to public entities concerning non-joined third parties as a substantial right to an immediate appeal. As further discussed below, Defendants have shown no "substantial right which would be lost absent immediate review." *Flitt*, 149 N.C. App. at 477, 561 S.E.2d at 513 (citations and internal quotation marks omitted).

IV. Jus Tertii

¶ 17 Purported claims or rights of a third party cannot be asserted as a defense by an unrelated litigant. "In general, *jus tertii* cannot be set up as a defense by the defendant, unless he can in some way connect himself with the third party." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 592, 2021-NCSC-6, ¶ 60, 853 S.E.2d 698, 723 (2021) (*quoting Holmes v. Godwin*, 69 N.C. 467, 470 (1873)).

¶ 18 *Jus Tertii* is a principle of law prohibiting a party from raising the claims or rights of third parties. *Id.* (citation omitted). *Jus Tertii* is defined as: "The right of a third party. The doctrine that [. . .] courts do not decide what they do not need to decide." *Jus Tertii*, Black's Law Dictionary (11th ed. 2019). "A *jus tertii* situation arises when the defendant has no defense of his own but wishes to defeat the plaintiff's action by alleging a defect in the plaintiff's title or the fact that the plaintiff has no title at all." *Jus Tertii Under Common Law and the N.I.L.*, 26 St. John's L. Rev. 135, 135 (1951).

¶ 19 The Idaho Supreme Court provides persuasive guidance in an illustrative case of mistaken assertion by a defendant of rights owned by a non-joined third party. *Gissel v. State*, 727 P.2d 1153, 1154 (Idaho 1986). Gissel had unlawfully harvested wild rice growing on lands jointly owned by the State of Idaho and the United States National Forest Service. *Id.* Gissel was convicted in state court of trespass. *Id.* Idaho officials seized and sold the harvested rice. *Id.* Because the State of Idaho owned only a one-half interest in the land, Gissel challenged the state's authority to seize, sell, and keep all profits from the sale of the rice. *Id.*

¶ 20 The Idaho Supreme Court held Gissel was entitled to one-half of the proceeds from the sale, because the State of Idaho did not effectively join or make the *jus tertii* argument on behalf or under the authority of the United States National Forest Service. *Id.* at 1156. "The Gissels, though trespassers and without legal title, which title rests with the Forest Service, still by mere possession have greater rights superior to that of the state" to the other one-half of the proceeds from the sale. *Id.*

¶ 21 Defendants are barred from asserting any of DSS' or non-joined former employees' third parties' purported rights to notice of records as a *jus tertii* defense, when neither are parties to this action, Defendants cannot collaterally attack the orders and judgment entered in other cases to which they were not a party. *Id.*

¶ 22 Plaintiff's motion to the court does not need a "mother may I" from Defendants to obtain relevant evidence to support their claims, particularly where Defendants are non-responsive to and delaying their access to that evidence. N.C. Gen. Stat. § 132-1.4(a) (2021); *Collins*, 237 N.C. at 281, 74 S.E.2d at 713. Their purported assertions of entitlement to prior notice of a motion seeking non-party and third-party records to challenge the order are without merit.

V. Standing

¶ 23 "Every claim shall be prosecuted in the name of the real party in interest[.]" N.C. Gen Stat. § 1A-1, Rule 17(a) (2021). "The real party in interest is the party who by substantive law has the legal right to enforce the claim in question." *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 19, 234 S.E.2d 206, 209 (1977) (citation omitted).

¶ 24 Here, Defendants are not the real party in interest relating to the request for records. Defendants are not the party investigated in the records requested. In fact, the records were requested from non-joined third-parties. Only those parties whose records were requested are "the real party in interest" with standing to challenge the motion to produce those records. Defendants do not have standing to challenge the motion in this case because they are not the real party in interest. *Id.*

VI. Records of Criminal Investigations

¶ 25 Presuming, *arguendo*, Defendants should have been given prior notice of the hearing under any theory, Defendants are not the subject of the criminal investigation records and were not entitled to prior notice on those grounds. Defendants and our dissenting colleague argue the production of the criminal records and investigation of purported

former employees ordered by the court will violate Defendants' procedural and substantial rights.

> Records of criminal investigations conducted by public law enforcement agencies, records of criminal intelligence information compiled by public law enforcement agencies, and records of investigations conducted by the North Carolina Innocence Inquiry Commission, are not public records as defined by G.S. 132-1. *Records of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information may be released by order of a court of competent jurisdiction.*

N.C. Gen. Stat. § 132-1.4(a) (2021) (emphasis supplied). Unlike the cases Defendants rely upon, the statute includes no restrictions on the trial court's power and discretion to release criminal investigation records, nor assert any right or requirement of prior notice to non-parties.

¶ 26 Further, Defendants have not shown they are "aggrieved" parties to merit immediate review. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) ("[O]nly a 'party aggrieved' may appeal a trial court order or judgment, and such a party is one whose rights have been directly or injuriously affected by the action of the court.") (citation omitted).

¶ 27 The record on appeal also omits the facts, pleadings, and orders from this Court on Defendants' motion for temporary stay, which was allowed on 12 July 2021, and their petition for a writ of supersedeas, which was allowed on 21 August 2021, staying the trial court's order "pending the outcome of petitioner's appeal to this Court." Our dissenting colleague agrees "this writ of supersedeas references the appeal before us." That order remains unaffected by the dismissal of this interlocutory appeal.

VII. Conclusion

¶ 28 Defendants have failed to carry their burden to show their substantial rights were violated by the superior court's order to warrant an immediate interlocutory review. Defendants moved for and received a temporary stay and petitioned for a writ of supersedeas, which this Court allowed. With no Rule 54(b) certification or showing of a substantial right which will be lost without immediate review, Defendants' interlocutory appeal is denied. This case is dismissed without prejudice.

DISMISSED WITHOUT PREJUDICE.

Judge ZACHARY concurs.

Chief Judge STROUD dissents with separate opinion.

STROUD, Chief Judge, dissenting.

¶ 29 The Majority's opinion dismisses Defendants' appeal on the ground it is interlocutory and Defendants cannot show a Rule 54(b) certification or loss of a substantial right absent immediate review. I agree Defendant's appeal is interlocutory and the trial court has not issued a Rule 54(b) certification. But I believe Defendants have demonstrated a substantial right because the trial court entered an *ex parte* order with no notice to the Defendants; the trial court should not take any action without proper notice of the hearing to all parties. Defendants have also demonstrated a substantial right based on the statutory protections they claim the *ex parte* order violates. Turning to the merits, I would hold the trial court erred both because it entered the order *ex parte*, without statutory authority to do so without notice to Defendants, and because the order released Department of Social Services ("DSS") records and law enforcement records of child abuse investigations protected by North Carolina General Statute § 7B-2901(b) without following its plain, unambiguous language about giving DSS proper notice and a chance to be heard. Finally, I disagree with the Majority Opinion when it claims the writ of supersedeas remains unaffected by our dismissal of this appeal.

¶ 30 "Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." *Matter of Duvall*, 268 N.C. App. 14, 19, 834 S.E.2d 177, 181 (2019) (quoting *Lankford v. Idaho*, 500 U.S. 110, 126, 111 S. Ct. 1723, 1732 (1991)). "In addition to prior notice, a 'fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.' " *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 902 (1976)) (internal quotations and citation from *Mathews* omitted). These fundamental components of due process extend to the issue at hand where Defendants had no notice of Plaintiff's request to the trial court for entry of an *ex parte* order requiring disclosure of documents from DSS and several law enforcement agencies to Plaintiff. *See In re Officials of Kill Devil Hills Police Dept.*, 223 N.C. App. 113, 118, 733 S.E.2d 582, 587 (2012) (finding a due process violation when the trial court entered an order "without providing notice or opportunity to be heard"). For example, in *In re Officials of Kill Devil Hills Police Dept.*, this Court found a trial court violated the appellants' due process rights when it ordered them

to turn over police personnel files because the implicated officers had no "notice or opportunity to be heard" since the trial court had never conducted a hearing. *Id.*, 233 N.C. App. at 114, 118, 733 S.E.2d at 584–85, 587. Here, likewise the trial court's actions raised due process concerns by granting Plaintiff's motion without hearing or prior notice to Defendant and ordering various government entities, including police departments and DSS, to turn over a broad range of documents regarding investigations of abuse of minors without any notice or an opportunity to be heard.

¶ 31 These due process concerns allow Defendants to demonstrate the trial court's interlocutory *ex parte* order "affects some substantial right claimed by . . . [them] and will work an injury to [them] 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 v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). This Court has "previously recognized the 'constitutional right to due process is a substantial right.' " *Hall v. Wilmington Health, PLLC*, 2022-NCCOA-204, ¶ 20 (quoting *Savage Towing Inc. v. Town of Cary*, 259 N.C. App. 94, 99, 814 S.E.2d 869, 873 (2018)). Since the trial court entered an *ex parte* order without notice to Defendants and thereby implicated their due process rights, Defendants have demonstrated a substantial right sufficient to allow us to hear their appeal from an interlocutory order.

¶ 32 The Majority Opinion rejects Defendant's notice argument by relying on *Collins v. N. Carolina State Highway & Pub. Works Comm'n*, 237 N.C. 277, 74 S.E.2d 709 (1953), to contend constitutional notice only requires notice of the original proceeding. But the constitutional due process landscape has developed significantly since 1953. As part of those developments, this Court has recognized "engaging in *ex parte* communications with one party without notice to the other parties" in the middle of proceedings violates due process. *See Mission Hospitals, Inc. v. N.C. Dept. of Health and Human Services, Div. of Facility Services*, 189 N.C. App. 263, 265, 267–69, 658 S.E.2d 277, 278, 280–81 (2008) (so holding when, after a hearing but before issuing the final agency decision, the decision-maker received additional materials and argument *ex parte*). The Majority Opinion dismisses *Mission Hospitals* on the grounds it relied on a statutory violation, but this Court clearly concluded the *ex parte* actions "compromised [appellant's] due process rights." *Id.*, 189 N.C. App. at 269, 658 S.E.2d at 281.

¶ 33 The Majority Opinion also contends Defendants cannot immediately appeal because they are not aggrieved parties given the statutes at

issue here do not require Plaintiff to provide Defendants notice about a hearing on Plaintiff's receipt of records from third parties. The Majority Opinion relies on *Bailey v. State*, 353 N.C. 142, 540 S.E.2d 313 (2000), to argue only an aggrieved party can appeal a trial court order or judgment. First, it is not clear *Bailey* applies to the situation here. *Bailey* involved a case where a non-party, our State's Attorney General, attempted to appeal a case in which he was not a party. 353 N.C. at 156, 540 S.E.2d at 322. By contrast, here Defendants-Appellants are parties.

¶ 34 Second, Defendants are aggrieved parties. "A party aggrieved is one whose legal rights have been denied or directly and injuriously affected by the action of the trial court." *In re Winstead*, 189 N.C. App. 145, 151, 657 S.E.2d 411, 415 (2008) (quotations and citation omitted). Here, Defendants did not receive the notice of the hearing they were supposed to receive, thereby implicating their due process rights. As a result, Defendants are aggrieved parties who can appeal the order at issue. *See Wachovia Bank & Trust Co., N.A. v. Parker Motors, Inc.*, 13 N.C. App. 632, 634, 186 S.E.2d 675, 677 (1972) (linking whether a party is aggrieved to whether the order affects a substantial right).

¶ 35 In addition—as part of an argument that Defendants were not entitled to notice because they are not the subject of the requested criminal investigation records and thus do not have a substantial right—the Majority Opinion addresses only the Public Records statute regarding release of records of criminal investigations, but the records covered by the trial court's order include records of abuse of juveniles investigated by two Departments of Social Services in addition to records of law enforcement agencies. All the records sought, both as to criminal investigations and investigations by DSS, address sexual abuse of minor children. Confidentiality of records of child abuse and statutory procedures for release of these records is addressed in Chapter 7B, Article 29 of the General Statutes, specifically in North Carolina General Statute § 7B-2901(b)(2) (2021).

¶ 36 The Majority Opinion does not discuss Chapter 7B but relies solely upon North Carolina General Statute § 132-1.4, which deals with the limitations upon public records in the context of law enforcement investigations. N.C. Gen. Stat. § 132-1.4 (2021). As a general rule, "[t]he Public Records Act does not provide for disclosure of records of criminal investigations or criminal intelligence information . . . ." *Gannett Pacific Corp. v. North Carolina State Bureau of Investigation*, 164 N.C. App. 154, 160–61, 595 S.E.2d 162, 166 (2004). "Because records of criminal investigations and records of criminal intelligence information are not public records, a party seeking disclosure of such records must seek

release 'by order of a court of competent jurisdiction.' " *Id.*, 164 N.C. App. at 157, 595 S.E.2d at 164 (quoting N.C. Gen. Stat. § 132-1.4(a) (2003)[1]). This Court has previously recognized that the fact that a criminal investigation has concluded does not convert records of criminal investigations into public records because the justifications for protection of these records remain even after an investigation has ended:

> As noted by our Supreme Court,
>
> > "[i]t is clear that if investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired. Few persons would respond candidly to investigators if they feared that their remarks would become public record after the proceedings. Further, the investigative techniques of the investigating body would be disclosed to the general public." An equally important reason for prohibiting access to police and investigative reports arises from recognition of the rights of privacy of individuals mentioned or accused of wrongdoing in unverified or unverifiable hearsay statements of others included in such reports.
>
> [*News and Observer v. State; Co. of Wake v. State; Murphy v. State*, 312 N.C. 276,] 282–83, 322 S.E.2d [133,] 138 [(1984)] (citations omitted) (quoting *Aspin v. Department of Defense*, 491 F.2d 24, 30 (D.C.Cir.1973)).

Gannett Pacific Corp., 164 N.C. App. at 160, 595 S.E.2d at 166 (first alteration in original; case citations added). And the records Plaintiff sought deal with abuse of minors. Because the records deal with child abuse, §132-1.4 *specifically* requires compliance with Article 29 of Chapter 7B: "Records of investigations of alleged child abuse shall be governed by Article 29 of Chapter 7B of the General Statutes." N.C. Gen. Stat. § 132-1.4(*l*) (2021). Within Article 29 of Chapter 7B, North Carolina General Statute § 7B-2901(b)(2) specifically provides for notice to DSS in civil actions when a party seeks these types of records in a civil action

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1. The current version of § 132-1.4(a) contains the same language quoted by *Gannett*; the only change since the 2003 version of the statute is the addition of protection for records of investigations from the North Carolina Innocence Inquiry Commission. *Compare* N.C. Gen. Stat. § 132-1.4(a) (2003) *with* N.C. Gen. Stat. § 132-1.4(a) (2021).

and DSS is not already a party, thereby refuting the Majority Opinion's conclusion § 132-1.4 does not require prior notice to non-parties or entities that are not the subject of the criminal investigations.

¶ 37 The Majority Opinion further claims Plaintiff had no choice but to pursue her case without discovery or to file the motion to seek to locate evidence to support her case. Certainly Plaintiff has the option of seeking to locate evidence by requesting records from the law enforcement agencies and Departments of Social Services, but Plaintiff still has the obligation to follow statutory procedures in seeking these records and to give all parties to her lawsuit notice before asking the trial court to enter an order. Plaintiff was entitled to seek production of records, but she was not entitled to do so without following statutory procedures and without notice to Defendants—because Defendants are *parties* to this case, not because information in records is about Defendants.

¶ 38 The Majority Opinion finally notes there is no specific statute requiring Defendants to have notice of the hearing before the trial court, but *ex parte* hearings are the exception to the general rule and are allowed only in specific circumstances, as recognized by Rule 5 of the North Carolina Rules of Civil Procedure. Under Rule 5, "every written motion *other than one which may be heard ex parte*, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties." N.C. Gen. Stat. § 1A-1, Rule 5(a) (2021) (emphasis added). Numerous other rules reinforce the importance of and ensure the provision of notice. *See* General Rules of Practice for the Superior and District Court, Rules 6 (2021) (indicating "[m]otions may be heard and determined either at the pre-trial conference or on motion calendar as directed by the presiding judge"), 7 (requiring plaintiff and defendant attorneys to work together to schedule a pre-trial conference), 2(b) (indicating civil calendar be published "no later than four weeks prior to the first day of court")[2]; 26 Jud. Dist. Sup. Civil R. 12.1–12.3 (2021) (local rules applicable to Mecklenburg County Superior Court requiring filing party to calendar motions for a hearing and then file a "notice of hearing" which then "will be served on counsel for the opposing party or parties" within two business days); N.C. R. Prof. Conduct 3.5(a)(3), (d) (2021) (barring attorneys from communicating

2. The current version of the Rules of Practice for Superior and District Court now includes slightly different language around notice. *See* General Rules of Practice for the Superior and District Court, Rule 6 (eff. 1 Sept. 2021) (requiring an attorney "scheduling a hearing on a motion" to "make a good-faith effort to request a date for the hearing on which each interested party is available" except "if a motion is *properly* made ex parte" (emphasis added)).

ex parte "with the judge or other official regarding a matter pending before the judge or official" except where "authorized to do so by law or court order" where "[*e*]*x parte* communication means a communication on behalf of a party to a matter pending before a tribunal that occurs in the absence of an opposing party, without notice to that party, and outside the record"); North Carolina Code of Judicial Conduct Canon 3(A)(4) (2021) ("A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding."). Plaintiff did serve her motion on Defendants, but she did not serve any notice of hearing or notification that she would be requesting the trial court to enter an order without a hearing, and she has not identified any statutory basis to have had her motion heard *ex parte*.

¶ 39 Beyond the due process notice issue, Defendants also have a substantial right on the grounds they are asserting a statutory privilege. In *Sharpe v. Worland*, our Supreme Court recognized when "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right . . . ." 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999). This Court then extended the "reasoning set forth in *Sharpe*" to find an appeal "affect[ed] a substantial right" where the defendants challenged an order compelling discovery on the grounds it would lead to the release of "juvenile records, social services records, [and] law enforcement records" in violation of statutes requiring a court order to release those records, including North Carolina General Statutes §§ 7B-2901(b) and 132-1.4, both of which are at issue here.[3] *Jane Doe 1 v. Swannanoa Valley Youth Development Center*, 163 N.C. App. 136, 139, 592 S.E.2d 715, 717–18 (2004). Given Defendants here are asserting the same statutory privilege this Court, with the Majority Opinion's author concurring, determined implicated a substantial right before, Defendants' appeal here also involves a substantial right.

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3. Specifically, the defendants there challenged the order releasing those records on the grounds the North Carolina Industrial Commission was not a court that could order disclosure of the records as required by statute, but this Court found the Industrial Commission was a court for these purposes. *Jane Doe 1*, 163 N.C. App. at 139, 592 S.E.2d at 718. Regardless of the specific nature of the defendants' challenge on the merits in that case, *Jane Doe 1* should guide our decision here on the question of whether Defendants have demonstrated a substantial right because it found defendants asserting the same statutory protections at issue here had shown a substantial right as laid out above.

¶ 40 *Jane Doe 1* informs whether Defendants asserted a substantial right here despite the fact that case involved a discovery request directly to its defendants. *Id.*, 163 N.C. App. at 137–38, 592 S.E.2d at 717. In addition to my previous response to the Majority Opinion's aggrieved party argument, in *Jane Doe 1*, the defendants were not asserting a statutory privilege they explicitly directly held. Focusing on one of the common statutes at issue, North Carolina General Statute § 7B-2901(b), the protections there, based on the statute in effect in 2004, only indicated records "may be examined only by order of the court." N.C. Gen. Stat. § 7B-2901(b) (2003). The statute was silent on whether a party in litigation who did not hold those records could assert the protection afforded by § 7B-2901(b). *Id.* Despite the statute not stating they held the statutory protection, the defendants in *Jane Doe 1* had a substantial right based on asserting such protection, 163 N.C. App. at 139, 592 S.E.2d at 717–18, and similar reasoning applies here. Although the current statute does not say Defendants hold the statutory privilege, *see* N.C. Gen. Stat. § 7B-2901(b)(2) (2021) (providing for DSS to have "reasonable notice and an opportunity to be heard"), they can still claim a substantial right by asserting such protection.

¶ 41 Thus, on both due process notice grounds and statutory privilege grounds, Defendants have shown they have a substantial right which will be lost without review of their interlocutory appeal. I therefore dissent from the dismissal of the appeal.

¶ 42 Turning to the merits of the case, I would hold the trial court erred because § 7B-2901(b)(2) explicitly requires notification to DSS and in camera review of any records which may be released and that did not occur here. Specifically, § 7B-2901(b)(2) states records kept by DSS about juveniles under their care or court placement "may be examined only in the following circumstances":

> . . .
>
> (2) A district or superior court judge of this State presiding over a civil matter in which the department [DSS] is not a party may order the department to release confidential information, *after providing the department with reasonable notice and an opportunity to be heard* and then determining that the information is relevant and necessary to the trial of the matter before the court and unavailable from any other source. This subsection shall not be construed to relieve any court of its duty to conduct hearings

> and make findings required under relevant federal law before ordering the release of any private medical or mental health information or records related to substance abuse or HIV status or treatment. *The department may surrender the requested records to the court, for in camera review, if surrender is necessary to make the required determinations.*
>
> . . .

N.C. Gen. Stat. § 7B-2901(b) (emphasis added). The plain, unambiguous language of the statute requires DSS to receive notice and an opportunity to be heard before Plaintiff can examine the DSS records to which she is granted access under the trial court order. "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." *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Here, therefore, the trial court had to give DSS notice and an opportunity to be heard. Since nothing in our record indicates DSS received such notice or chance to be heard, I would hold the trial court erred.

¶ 43 This case also involves the scenario this statute aims to avoid. Section 7B-2901(b) provides for DSS to keep a list of sensitive records under protective custody and then includes a catch-all provision to protect "other information which the court finds should be protected from public inspection in the best interests of the juvenile." N.C. Gen. Stat. § 7B-2901(b). And as noted above, these same provisions apply to the records of the law enforcement agencies to the extent the records deal with investigations of child abuse, under North Carolina General Statute § 132-1.4(*l*). Based on the catch-all provision, the purpose of the statute is to protect sensitive information in the best interest of the juvenile. Section 7B-2901(b)(2) builds on that purpose by placing upon trial courts a further duty to help protect the sensitive information by ensuring DSS has notice and an opportunity to be heard before determining if the information "is relevant and necessary to the trial of the matter before the court and unavailable from any other source." *Id.* at (b)(2). These procedures help protect victims of abuse, in this case sexual abuse, who are not parties to the case because they ensure someone—specifically the trial court—can decide what should and should not be released and any conditions placed on the release. For example, even if the records Plaintiff seeks here are released to Plaintiff, they would likely be placed under seal and not simply released to the Plaintiff's attorney with no restrictions on how they are used or shared. By not following the DSS

notification procedures laid out in § 7B-2901(b)(2), the trial court has not fulfilled its duty under the statute to protect this sensitive information about victims of sexual abuse.

¶ 44 Finally, the Majority Opinion implies this Court's writ of supersedeas will remain in effect to stay the *ex parte* discovery order before us despite the dismissal of the appeal, thus preventing the wholesale release of records of sexual abuse of children, now adults, who may be harmed by the public release of this information. But the writ will not prevent the release of the records because it will no longer have any effect. " 'Supersedeas' is a writ issuing from an appellate court to preserve the status quo *pending the exercise of the appellate court's jurisdiction, is issued only to hold the matter in abeyance pending review*, and may be issued only by the court in which an appeal is pending." *City of New Bern v. Walker*, 255 N.C. 355, 356, 121 S.E.2d 544, 545–46 (1961) (per curiam) (all emphasis included has been added; emphasis from original removed) (citing *Seaboard Air-Line R. Co. v. Horton*, 176 N.C. 115, 96 S.E.2d 956 (1918)). In other words, the writ of supersedeas only applies when the appeal is pending before this Court. *See Craver v. Craver*, 298 N.C. 231, 237–38, 258 S.E.2d 357, 362 (1979) ("The writ of supersedeas may issue only in the exercise of, and as ancillary to, the revising power of an appellate court; its office is to preserve the *status quo pending the exercise of appellate jurisdiction.*" (emphasis added after "status quo")). The writ of supersedeas in this case recognizes that it only applies while this appeal is pending; it states, the *ex parte* order on appeal "is hereby stayed *pending the outcome of petitioner's* [Defendants'] *appeal to this Court.*"[4] COA# P21-243, Dkt. No. 1 (24 August 2021) (emphasis added). The Majority Opinion dismisses Defendants' appeal, and thus the writ of supersedeas can have no further effect; there is no longer an appeal pending to which its power can attach. The writ of supersedeas here and writs of supersedeas in general only apply when the appeal in connection with which they are issued is pending, and once the Majority Opinion dismisses the interlocutory appeal, the plain language of the writ here instructs the order on appeal is no longer stayed.

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4. The writ of supersedeas provides as follows: "The order entered by Judge Lisa C. Bell on 11 June 2021 ordering production of records in the custody of the Winston-Salem Police Department, the Richmond County Sheriff's office, the Richmond County Department of Social Services, the Richmond County Juvenile Division, the Richmond County Court, the Forsyth County Sheriff's office, and the Forsyth County Department of Social Services is hereby stayed pending the outcome of petitioner's appeal to this Court." COA# P21-243, Dkt. No. 1 (24 August 2021). The order referenced in the writ of supersedeas is the order on appeal here.

¶ 45 Because I believe Defendants have shown a substantial right on both due process and statutory grounds, I would not dismiss their appeal as interlocutory. Further, because Defendants were entitled to notice of the hearing of Plaintiff's motion by the trial court and the plain, unambiguous language of § 7B-2901(b) also requires the trial court to give DSS notice and the chance to be heard before releasing the DSS records at issue, I would find the trial court erred by entering the order *ex parte* and without prior notice to either Defendants or DSS. Lastly, since the Majority Opinion dismisses this appeal, the writ of supersedeas provides no further protection.

¶ 46 Respectfully, I dissent.

IN THE MATTER OF THE ESTATE OF
BOBBY RONALD GERRINGER, DECEASED

No. COA21-556

Filed 21 June 2022

Estates—surviving spouse—elective share—total net estate—property held jointly by decedent and another with right of survivorship—statute amended

In an estate dispute between a decedent's wife and his son, the superior court's order was vacated and remanded where, after the clerk of court awarded the wife an elective share of the decedent's estate, the superior court (hearing the son's appeal) entered an order reducing the amount of the elective share on grounds that the clerk had incorrectly determined under N.C.G.S. § 30-3.2(3f)(c) what portion of three bank accounts—jointly held by the decedent and his son with right of survivorship—should be included in the value of the decedent's total net estate. Because the General Assembly amended section 30-3.2(3f)(c) between the entry of the clerk's order and the superior court's review of respondent's appeal, the clerk's factual findings and legal conclusions were not based on "good law" when the superior court reviewed the clerk's order; therefore, the superior court should have remanded the matter to the clerk with instructions to apply the amended statute to the case.

Appeal by Petitioner from order entered 21 April 2021 by Judge Lora C. Cubbage in Guilford County Superior Court. Heard in the Court of Appeals 23 March 2022.

IN RE EST. OF GERRINGER

[284 N.C. App. 32, 2022-NCCOA-405]

Narron Wenzel, P.A., by Benton Sawrey and M. Kemp Mosley, for Petitioner-Appellant.

Casey Gerringer, pro se Respondent-Appellee.

COLLINS, Judge.

¶ 1 Petitioner appeals the superior court's order awarding her an elective share of her late husband's estate. We vacate the superior court's order and remand to the superior court with instructions to remand to the clerk of court for further proceedings.

I. Background

¶ 2 Bobby Ronald Gerringer ("Decedent") died testate in December 2017. Patricia Gerringer ("Petitioner") had been Decedent's wife for approximately forty-five years at the time he died. Casey Lynn Gerringer ("Respondent") is Decedent's son. Decedent's last will and testament was submitted to the Guilford County Clerk of Court in February 2018 and accepted for probate in common form. Decedent's will named Respondent executor of the estate and devised the entirety of his estate to Respondent.

¶ 3 On 20 February 2018, Petitioner filed a Petition for Elective Share by Surviving Spouse ("Petition"), seeking an elective share of 50% of Decedent's net estate, pursuant to N.C. Gen. Stat. § 30-3.1.

¶ 4 A preliminary hearing on the Petition was held before the Guilford County Assistant Clerk of Court ("Clerk") on 6 August 2018. A central issue at the hearing was what portion of three joint bank accounts held by Decedent and Respondent as joint tenants with right of survivorship should be included in the value of Decedent's net estate. The Clerk ordered Respondent to prepare a statement of Decedent's assets, pursuant to N.C. Gen. Stat. § 30-3.4(e2), and set a future hearing date at which Respondent could offer evidence of his contribution to the joint accounts. The Clerk also ordered a partial distribution of Decedent's estate in an amount of $158,617.47 be paid to Petitioner, without prejudice to either party.

¶ 5 Respondent submitted a statement of Decedent's assets on 5 September 2018, which showed total assets of $670,625.35. In addition to real property, personal property, and life insurance benefits, the statement listed two accounts held by Decedent alone, naming Respondent the sole beneficiary, and three joint accounts held by Decedent and

Respondent as joint tenants with rights of survivorship in the amounts of $386,630.39; $12,650.53; and $143,659.91, for a total of $542,940.83.

¶ 6 A hearing was held before the Clerk on 24 September 2018 to determine what percentage of the value of the joint accounts should be included in the value of Decedent's net estate. Respondent testified about his contributions to the three joint accounts as follows: Respondent deposited money into the joint accounts "a couple of different times." He deposited an unspecified amount in the year 2000 and again in 2010 or 2011, but did not have bank records confirming those deposits. He deposited $22,000 on 8 August 2014 and withdrew $35,000 that same day. Three days before Decedent died, Respondent transferred $250,000 from one of the joint accounts to another of the joint accounts. At the hearing, Respondent also informed the Clerk that Decedent's stepson, Anthony Gerringer, had filed a claim for $109,200 for personal services to the Decedent and Decedent's estate and that Respondent had denied the claim.

¶ 7 The Clerk entered her Order Awarding Elective Share ("Clerk's Order") on 7 November 2018, awarding Petitioner an elective share of fifty percent of the Decedent's net estate. The Clerk's Order found and concluded, in part:

> 8. Pursuant to the calculation of values listed on the Statement of Total Assets filed in this matter, the Total Assets of this Estate are $670,625.35.
>
> 9. Total Net Assets of the Estate are defined by North Carolina statute as the total assets reduced by claims and by year's allowances to persons other than the surviving spouse. One claim has been filed in this matter on October 4, 2018, by Anthony C. Gerringer, in the amount of $109,200.00. On September 6, 2018, the Executor filed a letter with the Clerk of Superior Court denying the claim made by Anthony C. Gerringer. No year's allowances to persons other than the surviving spouse have been allotted. Therefore, the Total Net Assets of this Estate are $670,625.35.
>
> 10. Pursuant to N.C. [Gen. Stat.] § 30-3.1, the applicable share of Total Net Assets to which the surviving spouse is entitled is ½ of Total Net Assets, a value of $335,312.68.
>
> 11. Pursuant to N.C. [Gen. Stat.] § 30-3.2, Property Passing to Surviving Spouse equals zero.

> 12. The amount of the elective share Petitioner is entitled to is determined by the following calculation: [$335,312.68 – 0 = $335,312.68.]
>
> 13. Parties agree that [Petitioner] has already received a partial distribution of her elective share in the amount of $158,617.47 from the Executor. The balance of the elective share then remaining due is $176,695.20. ($335,312.68 – $158,617.47 = $176,695.20).

¶ 8 The Clerk thus ordered Respondent to deliver a check to Petitioner in the amount of $176,695.20.

¶ 9 Respondent, through counsel, appealed the Clerk's Order on 21 November 2018. Respondent's sole alleged error was that the Clerk "ordered that the elective share would be one-half (1/2) of the gross assets without taking into consideration in (sic) an outstanding claim in excess of $100,000.00. Thus, [the Clerk's] Order Awarding Elective Share entered on November 7, 2018 is not based upon the net estate." Between the time that Respondent filed his appeal and the time the appeal came on for hearing before the superior court, Respondent's attorney withdrew. The attorney filed a claim against the estate for attorney's fees for $9,541.

¶ 10 Respondent's appeal was heard by the superior court on 23 March 2021. Respondent, appearing pro se, argued that the Clerk's Order had failed to consider outstanding claims against the estate, including the Decedent's stepson's $109,200 claim and Respondent's counsel's claim for $9,541. The superior court *sua sponte* raised the issue of whether the Clerk had used the correct value of the joint accounts when calculating Decedent's net estate.

¶ 11 The superior court entered its Order Awarding Elective Share ("Superior Court's Order") on 21 April 2021 finding, in part:

> 13. That after the review this Court determined that [] while the Assistant Clerk of Court found that pursuant to [N.C. Gen. Stat.] § 30-3.2(3f), fifty percent (50%) of the funds held in the joint accounts with the right of survivorship, listed on the statement of total assets filed September 6, 2018, were to be included in the sum of values used to calculate total assets, that the Assistant Clerk of Court erroneously used the total amount of funds in the aforementioned accounts as part of her calculation of the Total Assets of the

Estate that were to be used in calculating the elective share due to the Petitioner [].

14. That this Court agrees [N.C. Gen. Stat. §] 30-3.2(3f) allows only one half of the total funds in the joint accounts with the right of survivorship to be used in the calculation of Total Assets of the deceased when it comes to determining the amount of Petitioner's elective share.

15. That this Court recalculated only the Joint Accounts with Right of Survivorship using one half of the total amount in each account and finds the following:

. . . .

16. That when the recalculation is completed, the total of the Total Assets to be used in the calculation to determine the amount due Petitioner under the Elective Share statute is: $399,154.98.

. . . .

19. That this Court finds that attorney fees due out of the Estate are due to Attorney Tom Maddox in the amount of $9,541.00.

20. That this Court finds that claims due to be paid from the Estate are $11,989.30.

21. That this Court finds that Total Assets of the Estate of Bobby Ronald Gerringer are $399,154.98 – $21,530.30 = $377,624.68.

22. That this Court finds the Total Assets of the Estate of Bobby Ronald Gerringer is $377,624.68 for the purpose of calculating the Elective Share that is due to Petitioner [].

23. That this Court finds the Elective Share statute provides that Petitioner [] is entitled to one half of the Total Assets of the Estate of Bobby Ronald Gerringer which equates to: $377,624.68 [divided by] 2 = $188,812.34.

24. That this Court finds that the final amount remaining due to Petitioner [] from the Estate of Bobby

> Ronald Gerringer is: $188,812.34 – $158,617.47 = $30,194.87.

¶ 12 The superior court ordered Respondent to deliver a cashier's check to Petitioner "in the amount of $30,194.87 made payable to [Petitioner], representing the payment to her of the balance of the Claim for Elective Share owed to her." Petitioner timely appealed the Superior Court's Order.

II. Discussion

A. Standard of Review

¶ 13 The clerk of court has "jurisdiction of the administration, settlement, and distribution of estates of decedents including, but not limited to, estate proceedings as provided in [N.C. Gen. Stat. §] 28A-2-4." N.C. Gen. Stat. § 28A-2-1 (2021). Section 28A-2-4(a) provides that the clerk has "original jurisdiction of estate proceedings." *Id.* § 28A-2-4(a) (2021). "Estate proceedings" are "matter[s] initiated by petition related to the administration, distribution, or settlement of an estate, other than a special proceeding." *Id.* § 28A-1-1(1b). In estate proceedings, the clerk shall "determine all issues of fact and law . . . [and] enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment." *Id.* § 1-301.3(b).

¶ 14 "On appeal to the superior court of an order of the clerk in matters of probate, the [superior] court . . . sits as an appellate court." *In re Estate of Pate*, 119 N.C. App. 400, 402, 459 S.E.2d 1, 2 (1995) (citation omitted). The superior court's standard of review is as follows:

> Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:
>
> (1) Whether the findings of fact are supported by the evidence.
>
> (2) Whether the conclusions of law are supported by the findings of facts.
>
> (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

N.C. Gen. Stat. § 1-301.3(d) (2021).

¶ 15 The appellant must make specific exceptions to any finding or conclusion in the clerk's order with which he disagrees. *In re Swinson's Estate*, 62 N.C. App. 412, 415, 303 S.E.2d 361, 363 (1983). "[T]he [superior court] may review any of the clerk's findings of fact when the finding is

properly challenged by specific exception and may thereupon either affirm, modify or reverse the challenged findings." *Id.* at 416, 303 S.E.2d at 363 (quoting *In re Taylor*, 293 N.C. 511, 519, 238 S.E.2d 774, 778 (1977)). Unchallenged findings of fact "are presumed to be supported by competent evidence and are binding on appeal." *In re Estate of Harper*, 269 N.C. App. 213, 215, 837 S.E.2d 602, 604 (2020) (citation omitted).

¶ 16 "The standard of review in [the Court of Appeals] is the same as in the superior court." *Pate*, 119 N.C. App. at 403, 459 S.E.2d at 2-3. Errors of law by the superior court, including whether the superior court has applied the correct standard of review, are reviewed de novo. *In re Estate of Johnson*, 264 N.C. App. 27, 32, 824 S.E.2d 857, 861 (2019).

B. Superior Court's Review of Clerk's Order

¶ 17 The dispositive issue on appeal is whether the superior court erred in its review of the Clerk's Order.

¶ 18 N.C. Gen. Stat. § 30-3.1(a), which governs the elective share of a surviving spouse, provides as follows:

> The surviving spouse of a decedent who dies domiciled in this State has a right to claim an 'elective share', which means an amount equal to (i) the applicable share of the Total Net Assets. . . less (ii) the value of Net Property Passing to Surviving Spouse[1]. . . .

N.C. Gen. Stat. § 30-3.1 (2021). The "applicable share" of the Total Net Assets for a surviving spouse who had been married to the decedent for 15 years or more is 50%. *Id.* § 30-3.1(a)(4). "Total Net Assets" are "[t]he total assets reduced by year's allowances to persons other than the surviving spouse and claims." *Id.* § 30-3.2(4). "Total assets" are defined by N.C. Gen. Stat. § 30-3.2 and include property held jointly with right of survivorship. *Id.* § 30-3.2(3f)(c).

¶ 19 At the time that the Clerk heard the matter in September 2018 and entered the Clerk's Order in November 2018, N.C. Gen. Stat. § 30-3.2(3f)(c)(2) provided that

> property held by the decedent and one or more other persons other than the surviving spouse as joint

1. Net Property Passing to Surviving Spouse is "[t]he Property Passing to Surviving Spouse reduced by (i) death taxes attributable to property passing to surviving spouse, and (ii) claims payable out of, charged against or otherwise properly allocated to Property Passing to Surviving Spouse." N.C. Gen. Stat. § 30-3.2(2c) (2021).

> tenants with right of survivorship is included [in the calculation of "total assets"] to the following extent:
>
> > I. All property attributable to the decedent's contribution.
> >
> > II. The decedent's pro rata share of property not attributable to the decedent's contribution, except to the extent of property attributable to contributions by a surviving joint tenant.
>
> The decedent is presumed to have contributed the jointly owned property unless otherwise proven by clear and convincing evidence.

N.C. Gen. Stat. § 30-3.2(3f)(c)(2) (2018).

¶ 20 However, between entry of the Clerk's Order in November 2018 and the superior court hearing Respondent's appeal in April 2021, the North Carolina General Assembly amended N.C. Gen. Stat. § 30-3.2(3f)(c). This amendment became effective on 30 June 2020 and "applies to estate proceedings to determine the elective share which are not final on [30 June 2020] because the proceeding is subject to further judicial review." S.L. 2020-60, § 1. The amended version of N.C. Gen. Stat. § 30-3.2(3f)(c)(2) reads as follows:[2]

> Property held by the decedent and one or more other persons as joint tenants with right of survivorship is included [in the calculation of "total assets"] to the extent of the decedent's pro rata share of property attributable to the decedent's contribution.
>
> The decedent and all other joint tenants are presumed to have contributed in-kind in accordance

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2. The amended N.C. Gen. Stat. § 30-3.2(3f)(c)(2) deleted the marked-through text and added the bolded text, as illustrated below:

> Property held by the decedent and one or more other persons ~~other than the surviving spouse~~ as joint tenants with right of survivorship is included [in the calculation of "total assets"] to the ~~following extent:~~
>
> > ~~I. All property attributable to the decedent's contribution.~~
> >
> > ~~II. The~~ **extent of the** decedent's pro rata share of property ~~not~~ attributable to the decedent's **contribution**~~, except to the extent of property attributable to contributions by a surviving joint tenant~~.
>
> The decedent ~~is~~ **and all other joint tenants are** presumed to have contributed **in-kind in accordance with their respective shares for** the jointly owned property unless ~~contribution by another is~~ **otherwise** proven by clear and convincing evidence.

> with their respective shares for the jointly owned property unless otherwise proven by clear and convincing evidence.

N.C. Gen. Stat. § 30-3.2(3f)(c) (2021).

¶ 21 Essentially, where property was held by the decedent and one other person as joint tenants with right of survivorship, the amendment (1) changed the maximum percentage of the joint property attributable to the decedent from 100% to 50%, (2) changed the percentage the decedent is presumed to have contributed to the joint property from 100% to 50%, and (3) changed the burden of proof to rebut this presumption from the surviving joint tenant to the spouse seeking an elective share.

¶ 22 In this case, Petitioner is seeking an elective share of Decedent's estate. The estate proceeding to determine Petitioner's elective share was not final on 30 June 2020 because the Clerk's Order was, and still is, subject to further judicial review. Accordingly, while the former statute applied to the proceeding before the Clerk, the amended statute applied to the proceeding on appeal in the superior court. Consequently, the findings of fact and conclusions of law in the Clerk's Order were based on a statute that was no longer "good law" when the superior court reviewed it. As a result, the superior court could not review the Clerk's order under the applicable standard of review and should have remanded the matter to the Clerk with instructions to apply the amended statute.[3] *See*, *e.g.*, *Johnson*, 264 N.C. App. at 34, 824 S.E.2d at 862 ("When the order or judgment appealed from was entered under a misapprehension of the applicable law, the judgment, including the findings of fact and conclusions of law on which the judgment was based, will be vacated and the case remanded for further proceedings.") (citation omitted). In light of our holding, we do not reach Petitioner's remaining arguments.

III. Conclusion

¶ 23 We vacate the Superior Court's Order and remand the case to the superior court with instructions to remand to the clerk of court for further proceedings. The clerk of court may, in its discretion, receive more evidence.

VACATED AND REMANDED.

Judges ZACHARY and WOOD concur.

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3. It is not clear from the record or transcript that the superior court was aware that N.C. Gen. Stat. § 30-3.2 had changed between the date the matter was heard by the Clerk and the date the matter was heard in the superior court on appeal.

IN RE L.M.B.

[284 N.C. App. 41, 2022-NCCOA-406]

IN THE MATTER OF L.M.B.

No. COA21-544

Filed 21 June 2022

1. Termination of Parental Rights—grounds for termination—failure to pay a reasonable portion of the cost of care—findings of fact—"in kind" contributions

The trial court properly terminated respondent-parents' parental rights in their daughter on the ground of willful failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(3)), where the court's uncontested findings of fact showed that respondent-mother was employed throughout most of the case and received unemployment benefits when she lost her job, while respondent-father received disability payments and also was briefly employed. Although respondent-parents did provide their daughter with clothing, toys, diapers, and other items, the trial court was not required to consider these "in kind" contributions as a form of child support where there was no agreement in place allowing for these items to offset respondent-parents' support obligation.

2. Termination of Parental Rights—best interests of the child—consideration of dispositional factors—weighing of evidence

The trial court did not abuse its discretion in determining that termination of respondent-father's parental rights in his daughter was in the child's best interests, where the court considered and entered written findings addressing each dispositional factor in N.C.G.S. § 7B-1110, the findings were supported by competent evidence, and the court properly determined the weight of the evidence and the reasonable inferences to be drawn from it.

3. Judges—substitute judge—signing judgment on behalf of presiding judge—ministerial act

An order terminating parental rights in a minor child was valid where, although the judge presiding over the termination proceedings did not sign the order upon entry of judgment, a substitute judge—without altering the order or making any substantive determinations in the case—signed the order on behalf of the presiding judge in accordance with Civil Procedure Rule 63, which permits another judge to perform purely ministerial acts on behalf of a judge who is unavailable to complete those duties.

IN RE L.M.B.

[284 N.C. App. 41, 2022-NCCOA-406]

Appeal by respondent mother and respondent father from orders entered 17 May 2021 and 2 June 2021 by Judge Frederick B. Wilkins Jr. in Alamance County District Court. Heard in the Court of Appeals 22 February 2022.

Ewing Law Firm, P.C., by Robert W. Ewing, for respondent-appellant mother.

Kimberly Connor Benton for respondent-appellant father.

Jamie L. Hamlett for petitioner-appellee Alamance County Department of Social Services.

Matthew D. Wunsche for the Guardian ad Litem.

GORE, Judge.

I. Factual and Procedural Background

¶ 1 On 28 July 2019, the Burlington Police Department ("BPD") responded to a service call at the Knights Inn motel. When law enforcement arrived, respondent mother told the officer that respondent father had slapped her on the face and threw a remote control at her, which struck the infant L.M.B ("Lilly") on the head.[1] Respondent mother had a visible bruise from the slap. The responding officer also noticed Lilly needed a diaper change and to be fed. Lilly was less than three months old at the time. Respondent father was charged with assaulting respondent mother.

¶ 2 The Alamance County Department of Social Services ("DSS") received a report about the family on 8 August 2019. The social worker had difficulty arranging a meeting with respondent parents. When the social worker met with respondent mother, she denied any domestic violence with respondent father or that he hit Lilly with a remote, but she agreed to have no contact with him pursuant to a no-contact order. Once the no-contact order was lifted, however, respondent parents began living together again.

¶ 3 On 3 September 2019, BPD received a service call at the Knights Inn for a child welfare check. When the responding officer spoke to respondent mother, she was "incoherent and said she had been up all night because she was concerned about snakes" in the motel room. Respondent

1. We use a pseudonym to protect the identity of the juvenile and for ease of reading.

father was asleep on the bed and difficult to wake up. It took several more minutes for respondent father to become coherent after officers woke him. Respondent father also told the officers that there were snakes in the motel room. Officers did not find any snakes in the room and contacted DSS.

¶ 4 DSS reported the motel room was in "complete disarray" and there was no appropriate place for Lilly to sleep. There were open food containers, feminine hygiene products on the floor, and no sheets on the bed.

¶ 5 On 20 September 2019, DSS filed a petition alleging Lilly was neglected and dependent. DSS alleged respondent parents believed there were snakes in the motel room where they lived with Lilly, although none were present. DSS requested respondent parents submit to a drug screen, but both declined. During a later Child and Family Team meeting, respondent parents denied substance misuse and continued to assert there were snakes in the motel room. Respondent parents agreed to a Temporary Safety Plan, which included placement with a maternal aunt and uncle. Respondent father later objected to the placement. A Rule 17 Guardian ad Litem was appointed for respondent father due to him suffering bipolar and depressive episodes and a traumatic brain injury from being struck in the head.

¶ 6 On 6 November 2019, the trial court adjudicated Lilly neglected and dependent. In the dispositional portion of the order, the trial court ordered respondent mother: 1) maintain sufficient employment; 2) obtain and maintain safe and stable housing; 3) utilize mental health services and undergo psychological assessment; 4) engage in substance abuse treatment and submit to drug screens; 5) participate in parenting and domestic violence classes; and 6) update DSS about her progress on her case plan. The trial court ordered respondent father to take similar steps to achieve reunification, in addition to Substance Abuse Intensive Outpatient Program ("SAIOP") classes.

¶ 7 The trial court kept Lilly in her placement with the maternal aunt and uncle. The trial court granted respondent parents weekly supervised visits with Lilly. In a July 2020 order, the trial court expanded respondent parents' visitation.

¶ 8 In September 2020, the trial court entered an initial permanency planning order, which set a primary permanent plan of reunification and a secondary plan of adoption. The trial court again ordered specific steps towards reunification as outlined in its dispositional order. It further indicated visitation could expand to include unsupervised visits if there were no issues or concerns with visitation.

¶ 9 A subsequent November 2020 order suspended all unsupervised visits between respondent parents and Lilly. The trial court found that respondent parents had gone to the home of a known drug dealer, that respondent father had suffered a cardiac incident, and that respondent parents had submitted diluted urine samples for drug screens. At the hearing, respondent father interrupted respondent mother's testimony and attempted to direct her. The next permanency planning hearing was continued until January 2021, and the trial court changed the permanent plan to a primary plan of adoption with a secondary plan of reunification.

¶ 10 On 29 January 2021, DSS filed a motion to terminate respondent parents' parental rights to Lilly. As to both respondent parents, the motion alleged grounds of neglect, willful failure to make reasonable progress, and willful failure to pay a reasonable portion of the cost of care. As to respondent father only, the motion also alleged dependency.

¶ 11 At the termination hearing, social worker Freddie Omotosho testified that Lilly came into DSS custody because of concerns about respondent parents' domestic violence, substance misuse, hallucinations, and lack of proper care and supervision. Respondent parents were ordered in the initial disposition to resolve their housing, mental health, substance abuse, and domestic violence issues to achieve reunification with Lilly. Ms. Omotosho testified in detail about respondent parents' lack of progress on their case plans. Social worker Madalyn Schulz, who received the case after Ms. Omotosho, similarly described respondent parents' difficulties in working with the services offered by DSS to complete the goals of their respective case plans.

¶ 12 Dr. Julianna Ludlam conducted psychological evaluations on both respondent parents, which were admitted at the termination of parental rights adjudication hearing. Dr. Ludlam described how both respondent parents denied the existence of domestic violence and substance misuse despite evidence to the contrary, including police reports from prior incidents. Dr. Ludlam testified she did not have "major concerns" about respondent mother's substance misuse, but that respondent father's frequent trips to the hospital "showed the extent of his potential substance abuse problem," in part because some addicts use the emergency department as a method of obtaining prescription drugs. Respondent parents described one another as great parents, and they did not recognize any issues in their relationship with Lilly. According to Dr. Ludlam, respondent mother's ongoing relationship with respondent-father and her continued defense of him placed Lilly "at higher risk." Dr. Ludlam testified:

> So it was not my concern that either [respondent father] or [respondent mother] would purposefully, intentionally neglect or abuse their daughter. It was clear to me that both parents love their daughter and want the best for her. My concerns were, at the time of the evaluation, that [respondent father's] use of substances could—for one, could either lead to her being neglected or being exposed to risky situations involving drug use or the aftermath of drug use. I think that was my primary concern.

¶ 13 After hearing the evidence, the trial court adjudicated grounds to terminate respondent parents' parental rights based on neglect, willful failure to make reasonable progress, and willful failure to pay a reasonable portion of the cost of care. In a separate dispositional order, the trial court also concluded that termination of parental rights was in Lilly's best interests. The dispositional order indicates that the matter was heard by Judge Fred Wilkins, but the order is signed "F. Wilkins by Bradley Reid Allen 6/1/21."

II. Standard of Review

¶ 14 A termination of parental rights proceeding consists of a two-stage process: adjudication and disposition. N.C. Gen. Stat. §§ 7B-1109, -1110 (2020). At adjudication, the trial court examines the evidence and determines whether sufficient grounds exist under § 7B-1111 to authorize the termination of parental rights. § 7B-1109(e). The burden is upon the petitioner to demonstrate that grounds for termination exist, and the trial court's findings of fact must be based on "clear, cogent, and convincing evidence." § 7B-1109(f). "If the trial court determines that any one of the grounds for termination listed in § 7B-1111 exists, the trial court may then terminate parental rights consistent with the best interests of the child." *In re T.D.P.*, 164 N.C. App. 287, 288, 595 S.E.2d 735, 736-37 (2004); § 7B-1110(a).

¶ 15 "We review a trial court's adjudication under N.C.G.S.§ 7B-1111 to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed for abuse of discretion." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quotation marks and citations omitted). The trial court's conclusions of law are subject to *de novo* review. *In re N.D.A.*, 373 N.C. 71, 74, 833 S.E.2d 768, 771 (2019). An abuse of discretion occurs "where the court's ruling is manifestly unsupported by

reason or so arbitrary that it could not have been the result of a reasoned decision." *In re N.K.*, 375 N.C. 805, 819, 851 S.E.2d 321, 332 (2020).

¶ 16 "When the trial court is the trier of fact, the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate. In this situation, the trial judge acts as both judge and jury, thus resolving any conflicts in the evidence." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996) (citations omitted). "[O]ur appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984) (citations omitted). "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." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted). "Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58-59 (2019) (citation omitted).

III. Discussion

¶ 17 In the case *sub judice*, the trial court's adjudication order was based on finding grounds existed for terminating respondent parents' parental rights pursuant to § 7B-1111(a)(1), (2), and (3) by clear, cogent, and convincing evidence. Specifically, the trial court concluded as a matter of law that respondent parents had: (a) neglected Lilly within the meaning of § 7B-101 and there is a high likelihood of repetition of neglect if Lilly is returned to their care; (b) willfully left Lilly in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting those conditions which led to Lilly's removal, and respondent parents' inability to provide care is not based upon their poverty; and (c) willfully failed to pay a reasonable portion of the cost of care for Lilly although physically and financially able to do so while Lilly was in DSS custody for a continuous period of six months preceding the filing of the motion to terminate parental rights.

A. Adjudication

¶ 18 **[1]** We first address the third ground for termination, failure to pay a reasonable portion of the cost of care. Pursuant to § 7B-1111(a)(3), a parent's rights can be terminated if the parent willfully fails to pay, for six months preceding the filing of the motion to terminate parental rights, a reasonable portion of the cost of care for the juvenile although

physically and financially able to do so. § 7B-1111(a)(3). DSS filed its motion to terminate parental rights on 29 January 2021, and the relevant six-month period to determine whether respondent parents had the ability to pay their reasonable portion of the cost of care is from 29 July 2020 to 29 January 2021.

> Our Supreme Court has held that a finding that a parent has ability to pay support is essential to termination for nonsupport. However, this Court has further clarified that there is no requirement that the trial court make a finding as to what specific amount of support would have constituted a "reasonable portion" under the circumstances, and therefore that the only requirement is that the trial court make specific findings that a parent was able to pay some amount greater than the amount the parent, in fact, paid during the relevant time period.

In re N.X.A., 254 N.C. App. 670, 676, 803 S.E.2d 244, 248, (*purgandum*), *disc. rev. denied*, 370 N.C. 379, 807 S.E.2d 148 (2017).

¶ 19 Respondent parents selectively challenge several of the trial court's findings of fact as to each ground for termination. Regarding ground three, failure to pay a reasonable portion of the cost of care, they argue the trial court erred by failing to consider "in-kind" contributions they made in lieu of financial support and assert their lack of support was not willful. Respondent father also challenges findings of fact 88, 93 and 100, which indicate during the relevant six-month period, respondent parents provided zero dollars towards the cost of Lilly's care and made a conscious decision not to pay child support.

¶ 20 However, there are a total of 245 remaining unchallenged findings of fact which support the trial court's reasoning. The trial court made many uncontested findings of fact regarding child support which are binding on appeal. Some of those unchallenged findings include but are not limited to the following:

> 80. The Respondent Mother was employed throughout the majority of the life of the foster care case at K & W. During the start of COVID, the mother was laid off but received unemployment compensation.
>
> 81. The Respondent Mother then was employed through Goodwill. That employment was short term as the mother was terminated for stealing. She never

informed the social worker she was terminated or why she was terminated.

82. The Respondent Mother then reported employment at Food Lion. The Respondent Mother testified that she works 30 hours a week at Food Lion. She had provided one paycheck stub from Food Lion which indicates that Respondent Mother works less than twenty hours a week.

83. The Respondent Father has received disability payments through the life of the foster care case. He was briefly employed through K & W.

84. In the dispositional order, the Respondent Parents were ordered to provide child support and instructed on how to get child support established. The mother could work with Child Support Enforcement/IVD. The father could establish a trust account. This was repeated in every review and permanency planning order.

. . .

86. During the relevant six-month period, neither parent made any effort to establish child support payments through the appropriate options.

87. During the relevant six-month period, the mother provided zero dollars towards the cost of care of the juvenile despite having the ability to pay more than zero.

. . .

89. The parents have provided items during visitation such as clothing, toys, diapers and wipes. *There was no prior agreement between the parents and the Alamance County Department of Social Services that these items would be counted towards child support or offset their child support obligation.* In fact, during this period of time, there were *ongoing court orders requiring the parents to pay their reasonable portion of the cost of care of the juvenile.*

90. The mother is able-bodied and has been employed during the course of the foster care case and/or received unemployment benefits.

> 91. The Respondent Mother has willfully failed to pay her reasonable portion for the cost of foster care during the relevant six-month period.
>
> 92. The father has received disability funds throughout the time that [Lilly] has been in foster care. He also worked for a short period of time to supplement his income.
>
> . . .
>
> 94. In the relevant six-month period prior to filing of the motion to terminate parental rights, the parents paid zero towards the cost of care for [Lilly].
>
> . . .
>
> 97. In March of 2021, the Respondent Mother completed a Voluntary support Agreement. It required her to pay $50.00 a month effective March 1, 2021. The mother has made one payment.
>
> . . .
>
> 99. After filing of the motion to terminate parental rights, the Respondent Father paid $300.00 into a trust account established by the Alamance County Department of Social Services for the benefit of [Lilly].
>
> . . .
>
> 101. Further, during a Child and Family Team Meeting, the Respondent Mother stated that her attorney advised her not to worry about paying child support. This further indicates a deliberate decision by the mother not to pay child support despite a court order requiring such payments.
>
> 102. The Alamance County Department of Social Services has expended funds for the cost of care of the juvenile.

¶ 21 Here, the uncontested findings support the trial court's adjudication finding grounds for termination of parental rights based on failure to pay a reasonable portion of the cost of care. These findings indicate respondent mother was employed throughout most of the life of the case and received unemployment benefits when she lost her job. Respondent father also received disability payments and was briefly employed.

Respondent parents were ordered to establish child support and they failed to do so.

¶ 22 Respondent mother cites *In re J.A.E.W.*, 375 N.C. 112, 117, 846 S.E.2d 268, 271 (2020), for the proposition that a trial court is required to consider "in kind" contributions as a form of support. However, *In re J.A.E.W.* contains no such holding. This argument is premised upon one sentence, "[The respondent father] also did not buy [the juvenile] clothing or other necessities while she was in foster care." *Id.* In context, this statement simply reinforces the undisputed fact that the respondent father in that case failed to make any form of child support payment and failed to make any other contribution to the care of his child while she was in DSS custody. The *In re J.A.E.W.* decision does not require a trial court to consider items or gifts as a form of support.

¶ 23 In this case, the trial court specifically acknowledged respondent parents had provided "in kind" contributions in the form of clothing, toys, diapers, etc., during their visits, but there was no agreement in place that these items would offset their support obligation. It was not error for the trial court to acknowledge these gifts but also determine they did not qualify as court ordered financial support payments for Lilly's care.

¶ 24 Thus, the trial court's adjudication order finding grounds existed for termination of parental rights pursuant to § 7B-1111(a)(3) was based on clear, cogent, and convincing evidence. Where there is sufficient evidence to support one ground of termination for respondent parents' parental rights, it is unnecessary for this Court to address the remaining grounds for termination. *See In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982) ("If either of the three grounds aforesaid is supported by findings of fact based on clear, cogent and convincing evidence, the order appealed from should be affirmed."). Thus, we do not address respondent parents' remaining challenges to the trial court's adjudication pursuant to § 7B-1111(a)(1) and (2) for neglect and willful failure to make reasonable progress.

B. Best Interests Determination

¶ 25 **[2]** Respondent mother has not challenged the trial court's determination that the termination of her parental rights would be in Lilly's best interest. Therefore, we affirm the trial court's termination order with respect to respondent mother. Respondent father does argue the trial court erred by finding it was in Lilly's best interests for his parental rights to be terminated. We address his arguments as follows.

¶ 26 Respondent father challenges findings of fact 12 and 28-31 of the dispositional order and reasserts his prior challenges to the findings of

fact as adopted from the underlying adjudication order. However, most of his arguments do not allege the findings are unsupported by evidence, but that the trial court weighed the evidence improperly. In a termination of parental rights hearing, trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, the trial judge alone determines the credibility of the witnesses and which inferences to draw and which to reject. *In re Hughes*, 74 N.C. App. 751, 759, 300 S.E.2d 213, 218 (1985).

¶ 27 "After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." § 7B-1110(a).

> In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

Id.

¶ 28 Here, the trial court properly adjudicated grounds for terminating respondent father's parental rights. The dispositional order clearly states that the trial court "considered all factors as outlined" in § 7B-1110 and includes written findings addressing each of the relevant factors. We further note that these findings are supported by competent evidence in the record. We conclude that the trial court did not abuse its discretion by determining that it was in Lilly's best interest to terminate respondent father's parental rights. *See In re D.M.*, 378 N.C. 435, 440, 2021-NCSC-95, ¶ 11 (discerning no abuse of discretion where the trial court made written findings addressing each of the factors enumerated in § 7B-1110(a) and those findings were supported by competent evidence presented at the termination hearing).

C. Valid Best Interests Order

¶ 29 **[3]** In this case, Judge Bradley Reid Allen, Sr., signed the best interest order as follows: "F. Wilkins by Bradley Reid Allen, Sr., 6/1/21." Respondent parents contend the trial court's order terminating their parental rights was invalid because the presiding trial judge, Frederick B. Wilkins, did not sign the best interests order. We disagree.

¶ 30 North Carolina General Statutes Section 1A-1, Rule 52, governs findings by the trial court in non-jury proceedings. Under Rule 52, the trial court is "required to do three things in writing: (1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) to *enter judgment accordingly*." *Coggins v. Asheville*, 278 N.C. 428, 434, 180 S.E.2d 149, 153 (1971) (*purgandum*) (emphasis added). Pursuant to § 7B-804, these requirements apply to juvenile proceedings. Here, the presiding judge did not sign the termination of parental rights order upon entry of judgment.

¶ 31 However, Rule 63 provides a procedure to follow when a district court judge is unavailable:

> If by reason of death, sickness or other disability, resignation, retirement, expiration of term, removal from office, *or other reason*, a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, *including entry of judgment*, may be performed:
>
> . . .
>
> (2) In actions in the district court, by the chief judge of the district, or if the chief judge is disabled, by any judge of the district court designated by the Director of the Administrative Office of the Courts.
>
> If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing.

§ 1A-1, Rule 63 (2020) (emphasis added). "The function of a substitute judge under this rule is ministerial rather than judicial." *In re Savage*,

163 N.C. App. 195, 197, 592 S.E.2d 610, 611 (2004) (quotation marks and citations omitted).

¶ 32 Judge Allen did not sign the order in his own name, he signed it on behalf of Judge Wilkins, over a signature block with Judge Wilkins's name typed below. There is no indication in the record that Judge Allen made any substantive determinations in this case, and the written judgment is consistent with Judge Wilkins's oral rendering of judgment. Judge Allen signing the order on behalf of Judge Wilkins was a ministerial act consistent with the plain language of Rule 63.

IV. Conclusion

¶ 33 For the foregoing reasons, we affirm the trial court's adjudication and disposition orders terminating respondent parents' parental rights.

AFFIRMED.

Judges INMAN and ZACHARY concur.

IN RE R.J.P.

No. COA21-796

Filed 21 June 2022

1. Child Abuse, Dependency, and Neglect—guardianship—choice of family members—best interests of child

The trial court did not abuse its discretion by awarding guardianship of a child who was adjudicated neglected to his paternal great aunt and uncle and visitation only to the child's maternal grandparents—rather than granting co-guardianship to both couples as requested by the child's mother—where its unchallenged findings of fact were supported by competent evidence, and where those findings in turn supported the court's conclusion that this arrangement was in the best interests of the child.

2. Child Visitation—permanency planning order—mother denied visitation post-incarceration—abuse of discretion

In a permanency planning proceeding, the trial court abused its discretion by failing, pursuant to N.C.G.S. § 7B-905.1(a), to address a mother's visitation rights with her son upon the mother's then-imminent release from incarceration—after determining that

visitation would not be in the son's best interest while the mother was incarcerated.

Appeal by Respondent-Mother from orders entered 17 September 2021 by Judge Kathryn W. Overby in Alamance County District Court. Heard in the Court of Appeals 10 May 2022.

Jamie L. Hamlett, for Alamance County Department of Social Services, Petitioner-Appellee.

Parker Poe Adams & Bernstein LLP, by Adam C. Setzer, for Guardian ad Litem.

Anné C. Wright, for Mother-Appellant.

WOOD, Judge.

¶ 1 Respondent-Mother ("Mother") appeals from the trial court's orders granting guardianship of her son Ryan[1] to his paternal great aunt and uncle, Maria and Jordan Turner (the "Turners")[2], and granting visitation rights with Ryan to his maternal grandparents, Elly and Charles Palmer (the "Palmers")[3]. On appeal, Mother argues the trial court abused its discretion by 1) denying her visitation with Ryan, and 2) not granting co-guardianship of Ryan to the Turners and Palmers. After a careful review of the record and applicable law, we affirm in part the orders of the trial court and remand in part for an appropriate visitation plan.

I. Factual and Procedural Background

¶ 2 Mother and Father began a romantic relationship, and together, the couple had Ryan on July 22, 2014. In 2014, the Alamance County Department of Social Services ("DSS") received a report of a domestic violence incident between Mother and Father while Ryan was present. During the investigation, DSS became concerned Father was "aggressive in his behaviors towards . . . Mother[.]" DSS was also concerned both parties were engaging in substance abuse. Ultimately, DSS closed

1. A pseudonym is used to protect the identity of the minor child. *See* N.C. R. App. P. 42(b).

2. Pseudonyms are used to protect the identity of the minor child. *See* N.C. R. App. P. 42(b).

3. Pseudonyms are used to protect the identity of the minor child. *See* N.C. R. App. P. 42(b).

the case as Services Recommended when Mother voluntarily returned to a residential treatment program. DSS recommended Mother "complete the full treatment program; seek counseling for domestic violence; and have no further contact with Respondent Father."

¶ 3 Approximately three years later, DSS received another report concerning Ryan. The report alleged Ryan was injured during an automobile accident that occurred because Mother was driving while under the influence of cocaine, marijuana, amphetamines, opiates, and benzos. Mother drove off of a bridge, landing in the water below. Ryan and Mother were able to climb up to safety, but Ryan "suffered a skull fracture, hematoma to the forehead and abrasion to the left upper shoulder."

¶ 4 In response to this report, DSS found the family to be in need of services and transferred the case to In-Home Services in New Hanover County on August 11, 2017. On August 23, 2017, the New Hanover County Department of Social Services ("NHCDSS") received a report regarding Ryan. This report alleged Mother was driving under the influence with Ryan in the car and was giving Ryan Benadryl to make him sleep. A few days later, NHCDSS created an initial plan for Mother to receive Substance Abuse and Mental Health treatment and for Ryan to begin receiving therapy services.

¶ 5 On October 27, 2017, Father notified NHCDSS he was concerned about Mother's behaviors. When NHCDSS spoke with Mother, she admitted to have been using cocaine, heroin, and Percocet in Ryan's presence. Four days later, Mother and Father decided to place Ryan with the Palmers. On November 28, 2017, Mother also moved into the Palmer's home. NHCDSS verified the move the next day, and the In-Home Services case was then transferred back to Alamance County. On August 16, 2018, NHCDSS closed its In-Home Services case.

¶ 6 Eight days later, Alamance County DSS received another report concerning Ryan. This report alleged Mother was under the influence of methamphetamines and driving with Ryan in the vehicle. The report also alleged Mother had assaulted Elly Palmer while Ryan was present. As a result, a safety plan was developed and a 50-B domestic violence protective order was granted against Mother. Meanwhile, Ryan continued to live with the Palmers. After the 50-B protective order expired, Mother moved back in with Elly Palmer. Shortly thereafter, DSS closed the case with services recommended for mental health and substance abuse treatment.

¶ 7 On February 18, 2020, DSS received a new report regarding Ryan. This report alleged Mother was acting erratic, "off her rocker[,]" and was

tearing up the house. Both Father and Ryan were present during this incident. Because of Mother's behavior, Father and Ryan were forced to vacate the house and "did not have a place to stay." The report further alleged DSS had concerns Ryan may have neurological problems but that Mother and Father continued to deny or minimize any potential mental health needs Ryan may have.

¶ 8 On April 20, 2020, DSS determined the family was in need of services and transferred the case to In-Home Services to address 1) Mother's and Father's mental health needs and substance abuse, 2) continuing relationship discord between the parties, and 3) Ryan's mental health needs. Sometime afterwards, Father moved to Wilmington, North Carolina.

¶ 9 On May 5, 2020, the Alamance County Sheriff's Office received a call about a suspicious person walking in the road, staggering, and flashing a flash light outside of the power plant in Graham, North Carolina. Deputy Stone responded to the scene and observed Father staggering and holding a flashlight. Deputy Stone transported Father back to the couple's residence. On the way, Father told Deputy Stone there was a shotgun inside the residence and that Mother was a felon. Upon arrival, Deputy Stone received consent to search the residence and discovered on the floor of the residence an un-locked, loaded shotgun within Ryan's access. Corporal T. Ray and Detective Wood also responded to the residence. Mother was arrested subsequent to the search and charged with possession of a weapon by a felon and child abuse. DSS received a report of this incident the following day and promptly conducted a pre-petition child family team meeting. There, it was agreed Ryan would stay with the Turners. Due to incarceration and the short notice of the meeting, Mother was not present at the meeting.

¶ 10 On May 7, 2020, DSS filed a juvenile petition alleging Ryan to be a neglected juvenile. The trial court entered a nonsecure custody order the same day, placing Ryan with the Turners. The trial court held two additional hearings regarding nonsecure custody of Ryan that same month. Mother remained incarcerated at the time of each hearing. After these hearings, the trial court entered orders continuing Ryan's placement with the Turners. In each order, the trial court found "[t]hat it is not in the best interest of the juvenile to have visitation/contact with Respondent Mother due to her current incarceration."

¶ 11 On July 15, 2020, the trial court conducted an adjudication and disposition hearing. Mother remained incarcerated as of the date of this hearing. By order entered August 4, 2020, the trial court adjudicated Ryan a neglected juvenile and continued his placement with the Turners. The order also contained the following relevant decrees:

> 7. That at this time, it is not in the juvenile's best interest to have visitation with the Mother due to her current incarceration. However, she may write letters and send them to the social worker to review and provide to the juvenile.
>
> 8. That . . . [Mother] may call between 1:00 p.m. – 3:00 p.m. twice a week. . . . [Mother] will be responsible for the cost of telephone calls. Discussion must be age appropriate. Phone contact must be supervised by the . . . [Turners] at a high level of supervision (eyes and ears on). If child gets distressed or upset, the . . . [Turners] can discontinue the telephone calls.
>
> 9. That no discussions of the case should take place with . . . [Ryan]. That if the phone calls are negatively impacting the juvenile's mental health, the calls will no longer be permitted.

¶ 12 Thereafter, Mother was released from incarceration. Meanwhile, Ryan continued to reside with the Turners. Maria Turner stated Ryan was "doing better" at his placement, "learning what 'no' means[]"; however, "some days are more difficult than others in regards to his defiance, but he is adjusting well . . . ."

¶ 13 On October 6, 2020, the trial court entered a review and permanency planning order. The trial court found that Ryan had been diagnosed with "ADHD, Generalized Anxiety Disorder, Oppositional Defiance Disorder and Post-Traumatic Stress Disorder." The trial court continued Ryan's placement with the Turners, ordered a primary plan of reunification with a secondary plan of guardianship, and granted Mother one hour of supervised visitation per week. The Palmers also were granted "unsupervised visitation, to include overnight, and the first and third weekend . . . of the month from 6:00 p.m. on Friday until 6:00 p.m. on Sundays."

¶ 14 On December 23, 2020, the trial court entered another review and permanency planning order that continued Ryan's placement with the Turners, granted the Palmers unsupervised visitations every first and third weekend of each month, and granted Mother one hour of supervised visitation per week. A few months later, DSS filed a report with the trial court stating that Ryan "appears well bonded to each of his parents and his placement providers." Ryan told DSS he enjoyed spending time with Elly Palmer and his parents but, at other times, also stated he does not want to go on the weekend visits to the Palmers' residence.

¶ 15 On June 28, 2021, the trial court entered a review and permanency planning order changing Ryan's primary plan to guardianship with a secondary plan of reunification. Another review hearing was scheduled for July 28, 2021 but continued until August 11, 2021, and DSS and the guardian ad litem filed reports with the trial court on August 11, 2021. DSS reported Ryan stated he "wants to live with his dad or the . . . [Turners] and does not wish to live with . . . [Elly Palmer]." Ryan had, occasionally, refused to visit Mrs. Palmer's residence; however, a DSS social worker observed that Ryan seems to enjoy his visits when he did attend. Elly Palmer informed DSS that she was "on disability due to Clinical Depression" and "takes medication to assist with her depression but feels that she won't be sad anymore if . . . [Ryan] comes to live with her, as it will give her 'something to do.' " The DSS report further detailed various instances during which the Palmers and Turners experienced discord regarding Ryan's visitation, rearing, and transitioning between the Palmers' and Turners' residences. Notwithstanding, DSS and the guardian ad litem both recommended in their reports that the trial court appoint the Palmers and the Turners co-guardians of Ryan.

¶ 16 On August 11, 2021, the trial court held a review and permanency planning hearing. At the time of this hearing, Mother remained incarcerated with a projected release date of November 22, 2021. Ms. Lambert, the supervising social worker, testified at the hearing that there was a lot of animosity between the Palmers and Turners. She reported that the day prior, another social worker spoke with Elly Palmer to review DSS's recommendation of the Palmers' and Turners' co-guardship of Ryan. According to Ms. Lambert, when Elly Palmer heard this recommendation, she became "very upset" and stated DSS "was being inappropriate, that this was the wrong statements." Elly Palmer further told the social worker "we'll just have to pray for them to die" so that she could acquire sole guardianship of Ryan. When the social worker told Elly Palmer these were inappropriate statements, she responded by laughing. Ms. Lambert explained, DSS was "very concerned that was, first of all, an inappropriate response. We were also concerned that maybe there was some emotional instability there, and then, finally, we were concerned that was a very strong indicator that they would not be able to work together as co-parents." Ms. Lambert reported DSS's recommendation changed from the Palmers and Turners having co-guardianship of Ryan to granting the Turners sole guardianship of Ryan. The guardian ad litem agreed with the change in recommendation.

¶ 17 The trial court entered a permanency planning order on September 17, 2021, decreeing,

> 1. That legal and physical guardianship, in accordance with N.C.G.S. § 7B-600, of . . . [Ryan] is granted to . . . [Maria and Jordan Turner].
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> . . .
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> 3. That . . . [Ryan] will primarily reside with the . . . [Turners] with visitation with the . . . [Palmers] every other weekend.
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> . . .
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> 20. That, at this time, due to . . . [Mother's] incarceration, visitation is contrary to the best interest, health and safety of the juvenile. That . . . [Mother] may send cards, letters and other forms of written communication to the juvenile through Mr. . . . [Turner]. That . . . [Mother] is permitted to have a minimum of one telephone call a week with the juvenile that is to be highly supervised by his placement provider. That . . . [Mother] is responsible for cost associated with such communication. These calls shall be at reasonable times not past 9:00 p.m. or before 8:00 a.m. That the phone calls shall not unduly disrupt the juvenile's daily schedule. That all communication shall be age appropriate and the mother shall not make promises to the juvenile.
>
> 21. That during periods of their incarceration, it would not be in the best interest for the juvenile to participate in visitations with the parents due to the limitation of jail visits and current COVID concerns.

The same day, the trial court issued a guardianship short order granting guardianship of Ryan to the Turners. The guardianship short order, likewise, granted guardianship of Ryan to the Turners and allowed the Turners to "disclose this order to third parties in order to show their legal authority over the minor child or otherwise promote and protect the best interests of the minor child[] . . . ." Mother filed a timely notice of appeal from both of these orders.[4]

4. Father did not appeal these orders.

II. Standard of Review

¶ 18 This Court reviews a permanency planning order to determine "whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004) (citing *In re Eckard*, 148 N.C. App. 541, 544, 559 S.E.2d 233, 235 (2002)). The trial court's findings of fact are conclusive on appeal if they are supported by competent evidence. *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991); *see In re J.C.S.*, 164 N.C. App. at 106, 595 S.E.2d at 161; *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003). Whether the trial court's findings of fact support its conclusions of law is reviewed *de novo*. *In re A.S.*, 275 N.C. App. 506, 509, 853 S.E.2d 908, 911 (2020).

¶ 19 "In choosing an appropriate permanent plan . . . the juvenile's best interests are paramount." *In re J.H.*, 244 N.C. App. 255, 269, 780 S.E.2d 228, 238 (2015); *see In re L.G.*, 274 N.C. App. 292, 297, 851 S.E.2d 681, 685 (2020) ("The purpose of a permanency planning hearing is to identify the best permanent plans to achieve a safe, permanent home for the juvenile consistent with the juvenile's best interest." (internal quotation marks omitted)). Although "[w]e review a trial court's determination as to the best interest of the child for an abuse of discretion[,]" *In re J.H.*, 244 N.C. App. at 269, 780 S.E.2d at 238 (quoting *In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007)), we have also held the best interest determination is a conclusion of law and thus subject to a *de novo* standard of review. *In re Helms*, 127 N.C. App. 505, 510-11, 491 S.E.2d 672, 675-76 (1997).

¶ 20 A trial court's order regarding visitation rights is reviewed for an abuse of discretion. *In re C.M.*, 273 N.C. App. 427, 432, 848 S.E.2d 749, 753 (2020); *see In re I.K.*, 273 N.C. App. 37, 49, 848 S.E.2d 13, 23 (2020), *aff'd*, 377 N.C. 417, 2021-NCSC-60. "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason or upon a showing that the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision." *In re C.M.*, 273 N.C. App. at 432, 848 S.E.2d at 753 (cleaned up) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

III. Discussion

¶ 21 Mother raises several issues on appeal; each will be addressed in turn.

A. Guardianship

¶ 22 **[1]** Initially, Mother contends the trial court abused its discretion by determining it was in Ryan's best interest to appoint the Turners as his sole guardians. We disagree.

1. Findings of Fact

¶ 23 Mother first argues finding of fact number 106 is not supported by clear and convincing evidence. This finding states, Ms. Palmer "is not a safe and appropriate person to have fulltime care and/or decision-making responsibility over the juvenile." At the hearing, Ms. Lambert testified as to Ms. Palmer's reaction and comments after being notified of DSS's recommendation for co-guardianship. "She made statements . . . that the Department was being inappropriate, that this was the wrong statements." Ms. Lambert further testified Ms. Palmer "also made statements that the . . . [Turners] were old and idiots, and . . . we'll just have to pray for them to die so that she can get . . . [Ryan]." Ms. Lambert explained DSS was "very concerned that was, first of all, an inappropriate response. We were also concerned that maybe there was some emotional instability there, and then, finally, we were concerned that that was a very strong indicator that they would not be able to work together as co-parents."

¶ 24 The trial court made the following unchallenged findings of fact relevant to finding of fact number 106:

> 48. . . . [Mrs. Turner] has shared that when . . . [Ryan] was around two years old, she was changing his diaper and Mrs. . . . [Palmer] was at her home and came over and placed her hand over his mouth and nose when he was wiggling around. There is no documentation of this concern being shared with law enforcement or CPS at the time of the incident.
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> . . .
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> 50. Recently[] . . . [Ryan] refused to go to Mrs. . . . [Palmer's] home and did not visit during the week of July 10. It was reported that during the recent attempted transition, . . . [Ryan] refused to go to Mrs. . . . [Palmer's] home and ran around the house, having the adults chase him. Both parties had varying views of the events that took place, but both maintain that . . . [Ryan] refused to go with the . . . [Palmers] and remained at the . . . [Turner's] home. Mrs. . . . [Palmer] stated that Mrs. . . . [Turner] yelled at her that . . . [Ryan] was not going with her. Mrs. . . . [Turner] reported that Mrs. . . . [Palmer] was pulling . . . [Ryan] and trying to physically force him to go with her.

> . . .
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> 60. On July 22, 2021, SW observed . . . [Ryan's] transition back to the . . . [Turner's] home. When Mrs. . . [Palmer] exited the car, Mrs. . . . [Palmer] stated to SW, "early morning for you"! [sic] SW replied, "I'm just working!" Mrs. . . . [Palmer] asked SW where she worked. This interaction was concerning as Mrs. . . . [Palmer] did not appear to recognize SW, although Mrs. . . . [Palmer] has met with SW multiple times and talks frequently on the phone to SW.
>
> . . .
>
> 65. Mrs. . . . [Palmer] informed SW that she was on disability due to Clinical Depression, stemming from the loss of her two sons. Mrs. . . . [Palmer] stated that she takes medication to assist with her depression but feels that she won't be sad anymore if . . . [Ryan] comes to live with her, as it will give her "something to do." This is an inappropriate reason for a child to live with someone.

Because none of these findings were challenged by Mother, they are binding on appeal. *Isom v. Duncan*, 279 N.C. App. 171, 2021-NCCOA-453, ¶ 1. Therefore, based upon Ms. Lambert's testimony at the hearing, along with the additional findings of fact within the permanency planning order, we conclude competent evidence was presented to support finding of fact number 106.

¶ 25 To the extent Mother attempts to support her argument finding of fact number 106 is not supported by competent evidence by offering alternative evidence, "[f]acts found by the judge are binding upon this court if they are supported by any competent evidence notwithstanding the fact that the appellant has offered evidence to the contrary." *Williams v. Williams*, 261 N.C. 48, 56, 134 S.E.2d 227, 233 (1964) (first citing *Mercer v. Mercer*, 253 N.C. 164, 116 S.E.2d 443 (1960); then citing *Briggs v. Briggs*, 234 N.C. 450, 67 S.E.2d 349 (1951)); *see Heatzig v. MacLean*, 191 N.C. App. 451, 454, 664 S.E.2d 347, 350 (2008). Thus, because we are holding today finding of fact number 106 is supported by competent evidence, we need not address Mother's alternative evidence.

2. Conclusions of Law

¶ 26 Because we hold finding of fact number 106 is supported by competent evidence, and Mother has not challenged any other finding of

fact, we must determine whether the findings of fact support the trial court's conclusion of law. Specifically, Mother contends the trial court's conclusions of law numbers 20 and 24 are not supported by "clear, cogent, and convincing evidence." Conclusion of law number 20 provides, "[t]he current placement is appropriate and in the best interest of the juvenile." Similarly, conclusion of law number 24 states, "[t]hat this Order is in the best interest of the juvenile and consistent with the juvenile's health and safety."

¶ 27 Under N.C. Gen. Stat. § 7B-906.1,

> [t]he court may maintain the juvenile's placement under review or order a different placement, appoint a guardian of the person for the juvenile pursuant to G.S. 7B-600, or order any disposition authorized by G.S. 7B-903, including the authority to place the child in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the *best interests of the juvenile*.

N.C. Gen. Stat. § 7B-906.1(i) (2021) (emphasis added). "[T]he fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody, to wit, [is] that the best interest of the child is the polar star." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984).

¶ 28 As we stated *supra*, we review a permanency planning order's conclusions of law to determine whether they are supported by its findings of fact. *In re J.T.S.*, 268 N.C. App. 61, 67, 834 S.E.2d 637, 642 (2019); *In re J.C.S.*, 164 N.C. App. at 106, 595 S.E.2d at 161. Any unchallenged finding of fact is presumed to be supported by competent evidence and, thus, binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). In addition to the findings of fact stated *supra*, the trial court made the following findings of fact:

> 14. Freddie Omotosho[5] testified and verbally amended the recommendations in the written report to reflect a recommendation of guardianship to the . . . [Turners] only and visitation for the . . . [Palmers]. The change in the recommendation is based [sic] the fact that . . . [Ryan] has been with the . . . [Turners] for over

5. Social Worker Freddie Omotosho was not present at the hearing. Ms. Lambert supervises Mr. Omotosho and assisted with the preparation of DSS's report.

one year, the . . . [Turners] were hesitant to take on permanent care of . . . [Ryan] due to their age but are now willing to provide longer term care and on Ms. . . . [Palmer's] inappropriate reaction to the recommendation that she work with the . . . [Turners], which makes it unlikely the . . . [Turners and Palmers] would be able to work together for the best interest of the juvenile.

. . .

16. The Guardian *ad litem* testified and orally amended her recommendations to be in alignment with the revised, oral recommendations of the social worker.

. . .

33. . . . [Ryan] has continued to reside in the home of his paternal relatives, Mr. and Mrs. . . . [Turner], since coming into care in May 2020.

34. Apart from . . . [Ryan's] reluctant behavior in visiting Mrs. . . . [Palmer], the placement providers report no concerns in the placement home and SW has observed a loving and warm bond between . . . [Ryan] and the placement providers.

. . .

42. SW has been able to observe . . . [Ryan] with his parents, individually, as well as with the placement providers during the life of the case. . . . [Ryan] appears bonded to each of his parents and his placement providers.

43. . . . [Ryan] reports that he enjoys spending time with his parents and with the placement providers.

44. . . . [Ryan] stated that he wants to live with his dad or the . . . [Turners] and does not wish to live with Mrs. . . . [Palmer].

45. Previously, Mrs. . . . [Turner] has stated that given the ages of her and her husband that they cannot commit to permanent placement of . . . [Ryan]. More recently, the . . . [Turners] have stated that they are committed to providing permanence for . . . [Ryan] and wish to be considered as legal guardians.

. . .

52. During this . . . [Child and Family Team meeting], all parties were difficult to keep on track and often focused topics on their indifferences with one another. The facilitator had to redirect multiple times during the meeting.

. . .

58. Mrs. . . . [Palmer] has stated that sometimes . . . [Ryan] does refuse to come to her home but that after he is there, they always have a great time. . . .

67. In the fall of 2020, Mrs. . . . [Palmer] was struggling with managing her depression but as of the spring of 2021, has since become more stable and able to manage her symptoms more effectively. The Department was able to review her records and confirm compliance.

. . .

98. The . . . [Turners] have demonstrated for over one year the ability to meet the needs of . . . [Ryan], financially, emotionally and otherwise.

99. The . . . [Turners] express an understanding of the role and responsibility of guardians and willingness to take on that role.

100. The . . . [Turners and Palmers] have attempted to work together but appear to have difficulty with interactions. This will make it difficult for them to work together to make decisions in the best interests of the juvenile.

. . .

104. When the Department informed Ms. . . . [Palmer] about a change in recommendation to grant joint guardianship, the day prior to this hearing, Ms. . . . [Palmer] stated that she would just have to pray that the . . . [Turners] die. There have been some ongoing concerns about Ms. . . . [Palmer's] mental health. SW Omotosho testified, that her actions regarding the recommendation change appears to be a 'clear

> indicator' that she would not be able to co-parent with the . . . [Turners] successfully.

¶ 29 We conclude these findings of fact support conclusions of law numbers 20 and 24. Accordingly, we hold the trial court did not abuse its discretion by granting sole guardianship to the Turners and granting visitation only to the Palmers.

B. Visitation

¶ 30 **[2]** Mother next contends the trial court abused its discretion in denying her visitation with Ryan. We agree.

¶ 31 As a general rule, a parent has a "natural" and "legal" right to visit with his or her child and this should not be disturbed when awarding custody to another unless the parent's conduct is such that this right is forfeited, or the exercise of this right "would be detrimental to the best interest and welfare of the child." *In re Custody of Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 849 (1971). Thus, when an order "removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home[, the order] shall provide for visitation that is in the *best interests of the juvenile* consistent with the juvenile's health and safety, including no visitation." N.C. Gen. Stat. § 7B-905.1(a) (2021) (emphasis added); *see also Routten v. Routten*, 374 N.C. 571, 578, 843 S.E.2d 154, 159 (2020) ("[T]he trial court must apply the 'best interest of the child' standard to determine custody and visitation questions . . . ."), *cert. denied*, 141 S. Ct. 958, 208 L. Ed. 2d 495 (2020); *In re Custody of Stancil*, 10 N.C. App. at 552, 179 S.E.2d at 849.

¶ 32 "When the question of visitation rights of a parent arises, the court should determine from the evidence presented whether the parent by some conduct has forfeited the right or whether the exercise of the right would be detrimental to the best interest and welfare of the child." *In re Custody of Council*, 10 N.C. App. at 552, 179 S.E.2d at 849. If the trial court does not find the parent's conduct has forfeited his or her visitation right, or that such right is detrimental to the child's welfare and best interest, it "should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place and conditions under which such visitation rights may be exercised." *Id.*

¶ 33 We pause to note Mother, in her brief, specifically challenges finding of fact number 19, stating "[t]he trial court found that it was contrary to Ryan's best interest and inconsistent with his health and safety to have visitation with Mother. (R p 385, FOF #19). The finding of fact is not supported by clear, cogent, and convincing evidence." Our review of

the record reveals finding of fact number 19 does not address visitation as cited by Mother's brief.[6] Rather, conclusion of law number 19 states, "[t]hat it is contrary to the best interest of the juvenile and inconsistent with the juvenile's health and safety to have visitation with the Respondent Mother." Thus, we presume Mother intended to challenge conclusion of law number 19 and, as such, shall review whether the trial court's order findings of fact support its conclusion of law number 19. *Accord State v. Holland*, 230 N.C. App. 337, 344, 749 S.E.2d 464, 468 (2013)

¶ 34 Here, the trial court found Mother does not remain available to the court, DSS, and guardian ad litem; is not actively participating in or cooperating with the plan, DSS, and guardian ad litem; and is "acting in a manner inconsistent with the health and safety of the juvenile." It furthered that during the review period, the social worker "had very limited contact with . . . [Mother] due to her unknown whereabouts and incarceration[,]" and Mother was "sentenced to 9-20 months for . . . [a] probation revocation." Based upon these findings of fact, we conclude conclusion of law number 19 is supported by the findings of fact.

¶ 35 Here, the trial court ordered the following visitation plan between Mother and Ryan:

> 20. That, at this time, due to . . . [Mother's] incarceration, visitation is contrary to the best interest, health and safety of the juvenile. That . . . [Mother] may send cards, letters and other forms of written communication to the juvenile through Mrs. . . . [Turner]. That . . . [Mother] is permitted to have a minimum of one telephone call a week with the juvenile that is to be highly supervised by his placement provider. That . . . [Mother] is responsible for cost associated with such communication. These calls shall be at reasonable times not past 9:00 p.m. or before 8:00 a.m. That the phone calls shall not unduly disrupt the juvenile's daily schedule. That all communication shall be age appropriate and the mother shall not make promises to the juvenile.
>
> 21. That during periods of their incarceration, it would not be in the best interest for the juvenile to

6. Finding of fact number 19 states, "[t]he court has inquired and no one presents information that the juvenile is a Mexican Minor or American Minor as defined in the Memorandum of Agreement between the Consulate general of Mexico in Raleigh and the Government of the State of North Carolina."

> participate in visitations with the parents due to the limitation of jail visits and current COVID concerns.

Mother does not argue that her visitation should be not suspended while she is incarcerated; rather, she asserts the trial court made no findings regarding her visitation rights after she is released from prison. We agree.

¶ 36 Section 7B-905.1 provides the trial court "shall provide for visitation that is in the best interests of the juvenile . . . ." § 7B-905.1(a)(1). Our General Assembly's use of the language " 'shall' is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error." *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001) (citation omitted). Here, the trial court provided no guidance as to what visitation rights, if any, Mother has with Ryan upon her release from prison.

¶ 37 Indeed, the trial court was aware of Mother's pending release as it found, Mother "was transferred to the NC Women's Correctional Institution and anticipated to be released November 24, 2021." The permanency planning order was entered approximately two months prior to November 24, 2021. Because Mother's release from prison was imminent, the trial court should have provided for a visitation plan after her release that was in Ryan's best interest. We are mindful of that fact that Mother's projected release date will have long passed by the date of this opinion. Therefore, we remand to the trial court for further findings of fact regarding visitation between Mother and Ryan and an appropriate visitation schedule. In making the determination regarding an appropriate visitation schedule, the trial court may conduct a new hearing in order to examine the current circumstances of Ryan and Mother to determine what schedule is in the best interests of Ryan.

IV. Conclusion

¶ 38 For the foregoing reasons, we affirm the orders of the trial court granting guardianship to the Turners. However, we remand the September 17, 2021 permanency planning order to the trial court for further findings of fact and a determination of an appropriate visitation schedule between Mother and Ryan. It is so ordered.

AFFIRMED IN PART AND REMANDED IN PART.

Judges INMAN and ARROWOOD concur.

JAIN v. JAIN

[284 N.C. App. 69, 2022-NCCOA-408]

NEELIMA JAIN, PLAINTIFF
v.
ASHOKKUMAR JAIN, AA BUSINESS PROPERTIES, LLC AND INDIA FOUNDATION, AND KIDZCARE PEDIATRICS PC KIDZ CARE PLAZA CONDOMINIUM OWNERS ASSOCIATION, INC. AND JAIN PROPERTIES, LLC AND JAIN STERLING PROPERTIES, LLC AND 4A PROPERTIES, LLC AND PEDIATRIC FRANCHISING INC., DEFENDANTS

No. COA21-468

Filed 21 June 2022

Child Custody and Support—child's reasonable needs—competent evidence—post-separation support affidavit in separate hearing

An order requiring defendant-father to pay nearly $6,200 per month in child support to plaintiff-mother was vacated and remanded where the findings of fact concerning the child's reasonable needs for shelter, clothing, electricity, and utilities were not supported by competent evidence—and plaintiff-mother's post-separation support (PSS) affidavit, which was introduced in a separate hearing for PSS on the same day but not introduced in the child support hearing, could not be considered competent evidence in support of the findings in the child support order. In addition, the findings concerning the child's reasonable needs did not support the award of child support and gave no indication of any methodology applied in reaching the award.

Appeal by Defendant Ashokkumar Jain from order entered 22 April 2021 by Judge Toni S. King in Cumberland County District Court. Heard in the Court of Appeals 9 February 2022.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III, for Plaintiff-Appellee Neelima Jain.

Adams Burge & Boughman, by Harold Lee Boughman, Jr., for Defendant-Appellant Ashokkumar Jain.

COLLINS, Judge.

¶ 1 Defendant Ashokkumar Jain appeals from an order requiring him to pay $6,196.50 per month in child support to his former wife, Plaintiff Neelima Jain. Defendant argues that the trial court made unsupported findings of fact, failed to make sufficient findings of fact, and erred and

abused its discretion in its award of child support. Because the trial court's findings of fact concerning the minor child's reasonable needs for shelter, clothing, electricity, and utilities were unsupported by competent evidence adduced at the child support hearing, we vacate the order and remand to the trial court.

I. Background

¶ 2 Plaintiff and Defendant married in October 1994, had two children during their marriage, and separated in March 2016. Plaintiff filed this action in May 2017 seeking child support, equitable distribution, alimony, post separation support ("PSS"), and attorneys' fees.[1] Plaintiff and Defendant's older child reached the age of majority before they separated but their younger child, the subject of the child support claim, reached the age of majority during the pendency of this appeal.

¶ 3 On 1 February 2018, the trial court entered an order obligating Defendant to pay Plaintiff $2,370.00 per month for temporary child support for their minor child and $4,000 per month for PSS.

¶ 4 On 20 January 2021, the parties appeared before the trial court to address numerous issues. Plaintiff initially requested, "Administratively, can we proceed with the child support first since it's by testimony?" The trial court answered affirmatively. Defendant noted that he had an oral motion to dismiss PSS review because there was no substantial change in circumstances. The trial court stated that it would hold Defendant's motion until after addressing child support and confirmed that Plaintiff was "going to move forward with the permanent child support" claim. Plaintiff answered yes, and the trial court proceeded to hear Plaintiff's claim for permanent child support. The Exhibits/Evidence Log reflects that the trial court received the following as exhibits during the child support hearing: Defendant's 2019 W-2, Defendant's paystub for the first two weeks of May 2020, statements of Defendant's 2019 K-1 distribution income, a statement of Plaintiff and Defendant's joint BB&T account, a statement acknowledging payment of a First Citizens Bank loan, an insurance policy for a car driven by the minor child, copies of passports for Defendant and the minor child, a Wells Fargo credit card statement, and documentation of travel and basketball expenses for the minor child. After hearing testimony and argument, the trial court stated that it would "have to take this under advisement."

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1. Plaintiff and Defendant have been divorced in a separate proceeding in Cumberland County.

¶ 5 The trial court next held a hearing on motions to modify Defendant's PSS payment.[2] During this hearing, the trial court reminded the parties, "Generally we do the post-separation support by affidavits." The trial court and the parties referred to multiple financial affidavits including two executed by Plaintiff: a Post Separation Support Affidavit filed in September 2020 ("2020 PSS Affidavit") and another Post Separation Support Affidavit filed in July 2017 ("2017 PSS Affidavit"). The trial court marked the 2020 PSS Affidavit, 2017 PSS Affidavit, and other documents as "PSS Exhibits" in the Exhibits/Evidence Log under a separate heading from the exhibits received during the child support hearing. No live testimony was offered during the PSS hearing. At the conclusion of the PSS hearing, the trial court declined to modify Defendant's PSS payment. Immediately thereafter, the trial court rendered an oral ruling on child support. The trial court subsequently addressed issues concerning scheduling, discovery, expert witnesses, and interim equitable distribution.

¶ 6 On 22 April 2021, the trial court entered a Permanent Child Support Order and Interim Equitable Distribution Order ("Child Support Order"). The Child Support Order required Defendant to pay $6,196.50 per month for permanent child support, pay 70% of the minor child's healthcare costs not covered by insurance, provide private health insurance coverage for the minor child, and provide an insured vehicle for the benefit of the minor child. Defendant appealed.

II. Discussion

¶ 7 Defendant argues that the trial court made findings of fact unsupported by evidence properly before the trial court at the child support hearing; failed to make sufficiently specific findings concerning the minor child's reasonable needs; and erred and abused its discretion by ordering Defendant to pay $6,196.50 for child support.

¶ 8 Child support payments "shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." N.C. Gen. Stat. § 50-13.4(c) (2021). Ordinarily, the trial court "shall determine the amount of child support payments by applying the presumptive guidelines[.]" *Id.* However, where "the parents' combined adjusted gross income is more than $30,000 per month ($360,000 per year), the

2. The parties referred to multiple motions pertaining to PSS before the trial court, but those motions were not included in the record for the present appeal.

supporting parent's basic child support obligation cannot be determined by using the child support schedule." Determination of Support in Cases Involving High Combined Income, N.C. Child Support Guidelines (2021).

> [W]here the parties' income exceeds the level set by the Guidelines, the trial court's support order, on a case-by-case basis, must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. The determination of a child's needs is largely measured by the accustomed standard of living of the child.

Smith v. Smith, 247 N.C. App. 135, 145-46, 786 S.E.2d 12, 21 (2016) (quotation marks and citations omitted). "[O]ur appellate courts have long recognized that a child's reasonable needs are not limited to absolutely necessary items if the parents can afford to pay more to maintain the accustomed standard of living of the child." *Id.* at 146, 786 S.E.2d at 22 (citations omitted).

¶ 9 "[T]o determine the reasonable needs of the child, the trial court must hear evidence and make findings of *specific* fact on the child's actual past expenditures and present reasonable expenses." *Jackson v. Jackson*, 280 N.C. App. 325, 2021-NCCOA-614, ¶ 16 (quotation marks and citation omitted). "These findings must, of course, be based upon competent evidence[.]" *Atwell v. Atwell*, 74 N.C. App. 231, 234, 328 S.E.2d 47, 49 (1985). We review a trial court's child support order for an abuse of discretion. *Jonna v. Yarmada*, 273 N.C. App. 93, 122, 848 S.E.2d 33, 54 (2020).

¶ 10 Here, the trial court made the following pertinent findings of fact in support of its award of $6,196.50 in monthly child support:

> 12. . . . Defendant's gross yearly income for 2019 is $1,945,664.60, giving Defendant a gross monthly income of $162,138.71.
>
> 13. The court has reviewed the financial affidavits, the prior order and findings, and the court further explained that it is taking judicial notice of the findings in prior orders in addition to the evidence presented.
>
> 14. The Court finds the minor child does have reasonable needs with regards to shelter, clothing, electricity and utilities.

15. The minor child also has reasonable needs for food, transportation, subscriptions to gym memberships and other recreational activities that the child was accustomed to when the parties had an intact marriage.

16. The minor child has reasonable expenses to travel to include trips to India at approximately $4,000.00 a ticket per year, trips to different countries of an average cost of $1,500.00 per year, and local trips within the United States at an average yearly cost of approximately $600.00.

17. The court finds the reasonable expenses for shelter for the minor child is approximately $1,850.00, and the minor child does reside with the Plaintiff mother, as well as the utilities expenses incurred in the home.

18. The minor child has a reasonable expense for a vehicle payment for a Nissan Altima. That the minor child previously had a vehicle, a 2020 Honda Civic, that Defendant was paying $434.48 per month, but that vehicle has since been sold. The current vehicle payment for the Altima is approximately $300.00.

19. There is a vehicle insurance premium of $342.80 per month, and that the Court concludes the premium is based on the minor child's maturity and lack of experience in driving.

20. That the minor child does have issues with his knee since he is an avid basketball player. The minor child has been referred to physical therapy for his knee, where there is [a] $70 co-pay for each visit. The minor child needs to go twice a week, but has been going one time per week.

21. The Court will find that the minor child has reasonable expenses that suit his accustomed standard of living of approximately $6,885.00 and therefore the court is going to order said amount.

22. The Court will find that Defendant has the means and ability to pay the child support based on the income that he earns. And the court will enter an order requiring the parties share in the minor child's reasonable expense.

. . . .

> 24. The Court finds the Defendant's share of the minor child's expenses will be 90% which is $6,196.50. . . .

¶ 11 Defendant challenges Finding 14 and Finding 17 as unsupported by competent evidence. We agree. Both Plaintiff and Defendant testified at the child support hearing, but neither testified concerning the minor child's expenses for shelter, clothing, electricity, or utilities. Plaintiff instead argues that values listed in her 2020 PSS Affidavit support the trial court's findings and underscores the trial court's statement that it "reviewed the financial affidavits" prior to making the child support award.[3]

¶ 12 This Court has recognized that parties may introduce affidavits in support of claims for child support. *See Smith*, 247 N.C. App. at 151, 786 S.E.2d at 25 ("Affidavits are acceptable means by which a party can establish" past expenditures for a child); *Row v. Row*, 185 N.C. App. 450, 460, 650 S.E.2d 1, 7 (2007) (holding that the parties' financial affidavits "were competent evidence [] which the trial court was allowed to rely on in determining the cost of raising the parties' children"); *Savani v. Savani*, 102 N.C. App. 496, 502, 403 S.E.2d 900, 904 (1991) ("[A]n affidavit is recognized by this court as a basis of evidence for obtaining support."). However, such affidavits must be properly before the trial court because the trial court is constrained to "determine what pertinent facts are actually established *by the evidence before it*[.]" *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (emphasis added).

¶ 13 In this case, the trial court held a child support hearing and a PSS review hearing on the same day. But, as both the parties and the trial court acknowledged on that day, the child support and PSS hearings were distinct proceedings. The trial court first held the child support hearing, took the issue under advisement, and then heard motions to modify PSS. While the parties and the trial court relied on the PSS Affidavits at the PSS hearing, neither Plaintiff nor Defendant sought to admit either affidavit during the child support hearing. As a result, the affidavits were not before the trial court during the child support hearing and cannot be considered competent evidence in support of the trial court's findings concerning the minor child's reasonable needs.

¶ 14 Plaintiff contends that a "plethora of cases hold that financial affidavits . . . are proper filings from which trial courts may compute child support." While true, none of the cases cited by Plaintiff stand for the

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3. Plaintiff's argument that the trial court's findings of fact are properly supported does not rely on the 2017 PSS Affidavit.

proposition that a financial affidavit relied upon during a different proceeding, and not submitted at the hearing on child support, is sufficient to support findings in an order for permanent child support. *See Koufman v. Koufman*, 330 N.C. 93, 98-99, 408 S.E.2d 729, 731-32 (1991) (holding that the trial court's adjustment of eleven fixed expenses claimed by the plaintiff was supported by plaintiff's affidavit of financial standing, filed with the trial court prior to the completion of the child support hearing); *Smith*, 247 N.C. App. at 151-52, 786 S.E.2d at 25-26 (affirming the trial court's findings of fact because the inconsistency in defendant's testimony explaining her financial affidavits was "only [a] credibility issue[] to be resolved by the trial court" and the "evidence before the court otherwise established [defendant's] expenditures for the relevant time period"); *Savani*, 102 N.C. App. at 501-02, 403 S.E.2d at 903-04 (rejecting "defendant's assertion that plaintiff's affidavit did not constitute evidence of actual expenditures" where plaintiff testified in explanation of the figures in the affidavit); *Byrd v. Byrd*, 62 N.C. App. 438, 440-41, 303 S.E.2d 205, 207-08 (1983) (rejecting plaintiff's argument that findings in the child support order were not sufficiently specific where the trial court "made specific reference to the defendant's affidavit" itemizing the children's expenses "rather than setting forth the specific facts regarding the needs of the children"); *McLeod v. McLeod*, 43 N.C. App. 66, 66-68, 258 S.E.2d 75, 76-77 (1979) (affirming child support and alimony awards where the trial court made findings "[o]n the basis of extended exhibits and testimony," including an affidavit of the wife's expenses, and "[n]o exception was taken from these findings of fact").

¶ 15 Plaintiff characterizes Defendant's argument as a "highly technical evidentiary argument." We recognize that trial courts may hear motions for child support and PSS concurrently, or may hear such motions consecutively with the parties agreeing, explicitly or implicitly, to have the trial court consider all evidence presented for both issues. *See, e.g.*, *Gilmartin v. Gilmartin*, 263 N.C. App. 104, 106-07, 822 S.E.2d 771, 773 (2018) (concluding it was clear from the conduct of the parties that the trial court heard claims for alimony and equitable distribution during the same hearing). But here, the trial court held clearly distinct child support and PSS review hearings on the same day and nothing in the record supports a conclusion that the parties agreed to have the trial court consider all evidence presented at each hearing for both issues. It is far from a technicality, and in fact it is a requirement, that the trial court is bound to "determine what pertinent facts are actually established by the evidence before it[.]" *Coble*, 300 N.C. at 712, 268 S.E.2d at 189.

¶ 16 For the same reasons, we strike Plaintiff's supplement to the record on appeal pursuant to N.C. R. App. P. 9(b)(5)(a), containing (1) an

18 November 2021 affidavit of her trial counsel seeking to explain the proceedings before the trial court, (2) the 2020 PSS Affidavit, and (3) the 2017 PSS Affidavit, and deny Plaintiff's motion to amend the record to incorporate these documents pursuant to N.C. R. App. P. 9(b)(5)(b). *See State v. McGaha*, 274 N.C. App. 232, 238, 851 S.E.2d 659, 663 (2020) (holding that a form which had never been filed with or presented to the trial court "could not supplement the record on appeal pursuant to Rule 9(b)(5)(a)" and "cannot be added to the record on appeal pursuant to Rule 9(b)(5)(b)").

¶ 17 Because the 2020 PSS Affidavit was not introduced during the child support hearing, it is not competent evidence in support of the trial court's findings concerning the minor child's reasonable needs. No other evidence in the record supports the trial court's findings concerning the minor child's reasonable needs for shelter, clothing, electricity, and utilities.

¶ 18 Even if we consider all the findings of fact, including those challenged by Defendant, the findings do not support the trial court's finding of $6,885.00 in reasonable expenses for the minor child and the consequent $6,196.50 award of monthly child support payments. Our Supreme Court has emphasized that in an order for child support,

> [e]vidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble, 300 N.C. at 714, 268 S.E.2d at 190. Here, the trial court found the following specific expenses for the minor child: travel expenses of $4,000 per year for trips to India, $1,500 per year for trips internationally, and $600 per year for trips domestically; shelter expenses of $1,850 per month; a $300 monthly car payment; a $342.80 monthly car insurance premium; and a $70 copay for physical therapy, which the minor child needed to attend twice weekly. These values total only $3,561.13 monthly. While the trial court found that "the minor child does have reasonable needs with regards to . . . clothing, electricity and utilities[,]" as well as "food, transportation, subscriptions to gym memberships and other recreational activities," the trial court did not find what those needs were. Contrary to Plaintiff's suggestion that the trial court's permanent

child support award is supported in part by her testimony that the $2,370 in temporary support was insufficient to meet the minor child's needs, there is no indication that the expenses found by the trial court in the Child Support Order were additional to, and not overlapping with, the expenses reflected in the previous award of temporary child support.

¶ 19 As Defendant argues, "there is no indication of any methodology applied by the trial court" to reach the finding of $6,885 in reasonable expenses for the minor child and the award of $6,196.50 in monthly child support payments. *See Diehl v. Diehl*, 177 N.C. App. 642, 653, 630 S.E.2d 25, 32 (2006) (concluding that it was "impossible to determine on appeal where the figures used by the trial court came from at all" where the trial court found only lump sum values for the children's reasonable needs and there was "no indication of what methodology or facts the trial court considered").

III. Conclusion

¶ 20 The trial court's findings concerning the minor child's reasonable needs for shelter, clothing, electricity, and utilities were unsupported by competent evidence in the record before the trial court in the child support hearing. Additionally, the trial court's findings concerning the minor child's reasonable needs did not support its award of child support. Accordingly, we vacate the Child Support Order and remand to the trial court. "On remand, the trial court, in its discretion, may enter a new order based on the existing record, or may conduct further proceedings including a new evidentiary hearing if necessary." *Kaiser v. Kaiser*, 259 N.C. App. 499, 511, 816 S.E.2d 223, 232 (2018) (citation omitted).

VACATED AND REMANDED.

Judges ZACHARY and CARPENTER concur.

K&S RES., LLC v. GILMORE

[284 N.C. App. 78, 2022-NCCOA-409]

K&S RESOURCES, LLC, PLAINTIFF
v.
JEANETTE DAVIS GILMORE, DEFENDANT

No. COA21-484

Filed 21 June 2022

Statutes of Limitation and Repose—renewal of judgment—amended pursuant to Rule 52(b)—validity of original judgment undisturbed

Plaintiff's action (filed 9 August 2019) attempting to renew a judgment against defendant was time-barred by the applicable ten-year statute of limitations (N.C.G.S. § 1-47(1)) where the limitations period began to accrue on the date when the original judgment was entered (20 July 2009), not on the date when the subsequent amended judgment was entered (29 September 2009, *nunc pro tunc* to 20 July 2009) pursuant to Civil Procedure Rule 52(b), which added twenty paragraphs to the findings and conclusions but did not recalculate damages or otherwise make any changes to the relief afforded to the plaintiff. Further, plaintiff failed to show the existence of any statutory tolling provision affecting the applicable ten-year statute of limitations in the action.

Appeal by defendant from judgment and order entered 1 June 2021 by Judge William A. Wood in Guilford County Superior Court. Heard in the Court of Appeals 8 March 2022.

Brown, Faucher, Peraldo & Benson, PLLC, by Drew Brown, for defendant-appellant.

Gordon Law Offices, by Harry G. Gordon, for plaintiff-appellee.

GORE, Judge.

¶ 1 Defendant Jeanette Davis Gilmore appeals from the trial court's Judgment and Order denying her Motion for Summary Judgment and granting Summary Judgment in favor of plaintiff assignee K&S Resources, LLC. We reverse.

I. Factual and Procedural Background

¶ 2 On 9 August 2019, plaintiff filed its Complaint in this action as "a suit on Judgment." Plaintiff aims to renew a prior amended judgment against

defendant, 08 CVS 7912, filed 29 September 2009 *nunc pro tunc* to 20 July 2009. As an affirmative defense, defendant pled plaintiff's action is barred by the 10-year statute of limitations and repose.

¶ 3 Pertinent to the instant appeal, this Court previously affirmed the trial court's 2009 amended judgment by unpublished opinion in *Henry James Bar-Be-Que v. Gilmore*, No. COA10-729, 2011 N.C. App. LEXIS 617 (Ct. App. Apr. 5, 2011) (unpublished), *disc. rev. denied*, 365 N.C. 206, 710 S.E.2d 17 (N.C. 2011). In the prior action,

> Henry James Bar-Be-Que, Inc., ([the] Plaintiff) filed a complaint on 4 June 2008 seeking to recover damages from Jeanette Davis Gilmore (Defendant) for breach of a commercial lease in the amount of $866,515.64. [The] Plaintiff also sought attorneys' fees in the amount of $129,977.35, as well as costs. This matter was tried before the trial court judge at the 27 April 2009 Civil Session of Superior Court, Guilford County. The trial court entered judgment in favor of [the] Plaintiff on 20 July 2009.

Id. at *1. "Defendant moved to amend the judgment on 30 July 2009, and the trial court entered an amended judgment on 29 September 2009, *nunc pro tunc* 20 July 2009. In its amended judgment, the trial court made additional findings of fact and conclusions of law . . . ." *Id.* at *5.

¶ 4 Both the original judgment filed 20 July 2009, and amended judgment filed 29 September 2009 *nunc pro tunc* 20 July 2009,

> order[ed] that [the] Plaintiff recover (1) the principal sum of $687,298.22, (2) pre-judgment accrued interest in the amount of $303,617.65, and (3) interest at the rate of eight percent per annum from 20 July 2009 until paid. The trial court also ordered Defendant to pay Plaintiff's reasonable attorney's fees in the amount of fifteen percent of the amount owed, from the date the action was commenced, which amount was $127,438.06.

Id. at *1-2. This Court affirmed. *Id.* at *24.

¶ 5 The plaintiff in 08 CVS 7912, Henry James Bar-Be-Que, Inc., proceeded with execution under the amended judgment but was unsuccessful in collecting any amount. On or about 14 April 2016, Henry James Bar-Be-Que, Inc., assigned the 2009 amended judgment to plaintiff K&S

Resources, LLC. The assignment of judgment was duly recorded with the Register of Deeds pursuant to N.C. Gen. Stat. § 1-246.

¶ 6 In the instant appeal, the trial court ultimately heard Cross-Motions for Summary Judgment on 18 May 2021. In an Order and Judgment filed 1 June 2021, the trial court concluded from the record that there is no genuine issue as to any material fact, and that plaintiff is entitled to judgment as a matter of law. The trial court denied defendant's Motion for Summary Judgment, granted Summary Judgment in favor of plaintiff, and awarded plaintiff recovery in the sum of $1,651,471.94 plus additional interest on the principal sum of $687,298.22 at the legal rate of eight percent (8%) per annum from 1 August 2019 until paid, plus the costs of this action.

¶ 7 On 22 June 2021, defendant timely filed notice of appeal.

II. Summary Judgment

¶ 8 On appeal, defendant argues the trial court erred in denying her Motion for Summary Judgment and granting Summary Judgment in favor of plaintiff. Specifically, defendant asserts plaintiff's action is time-barred because the 10-year statute of limitations on the commencement of a new action accrued from the original judgment entered 20 July 2009, and the subsequent amended Judgment, filed 29 September 2009 *nunc pro tunc* 20 July 2009, did not expand or toll the applicable 10-year statute of limitations. Thus, defendant contends, the wrong party prevailed.

A. Standard of Review

¶ 9 "The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

B. Statute of Limitations

¶ 10 In this case, plaintiff assignee filed a Complaint in Action to renew a prior judgment against defendant. North Carolina General Statutes § 1-47(1) governs the statute of limitations on the renewal of a prior judgment, for other than real property. The statute provides:

> Within *ten years* an action . . . [u]pon a judgment or decree of any court of the United States, or of any state or territory thereof, *from the date of its entry.* No such action may be brought more than once, or have the effect to continue the lien of the original judgment."

N.C. Gen. Stat. § 1-47(1) (2020) (emphasis added); *see also* § 1-46 (2020) ("The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this Article."). "[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court . . . ." N.C. R. Civ. P. 58.

¶ 11 "The question whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. When a defendant asserts the statute of limitations as an affirmative defense, the burden rests on the plaintiff to prove that his claims were timely filed." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 305, 603 S.E.2d 147, 162 (2004) (citation and quotation marks omitted).

¶ 12 Plaintiff contends the statute of limitations ran from the filing date of the amended judgment, not the original judgment. In the alternative, it argues that assuming the statute of limitations does run from the original judgment, there are multiple statutory tolling provisions that make its Complaint on Judgment timely filed.

¶ 13 After careful examination, we determine the statute of limitations ran from the original judgment, and plaintiff's alternative contention is without merit. Plaintiff filed its complaint after the expiration of the 10-year statute of limitations period, and its action is time-barred.

1. Amended Judgment

¶ 14 Throughout its brief, plaintiff contends defendant filed and prevailed upon a Motion to Alter or Amend Judgment pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. Plaintiff has not identified that Rule 59 Motion anywhere in the record. We do, however, note defendant filed a Motion to Amend Judgment pursuant to Rule 52(b) of the North Carolina Rules of Civil Procedure on 30 July 2009. Furthermore, defendant's notice of appeal and proposed issues on appeal from *Henry James Bar-Be-Que v. Gilmore* are included in the record. Those documents indicate the trial court declined to provide relief pursuant to Rule 52(b) and declined to enter the specific facts and conclusions the defendant requested. Contrary to plaintiff's contention, there is no indication in the record now before us that the trial court altered or amended the original judgment pursuant to Rule 59.

¶ 15 Rule 59(e) and Rule 52(b) are similar mechanisms. A party seeking post-judgment relief may, and often does, file both contemporaneously for consideration by the trial court. *See* N.C. R. Civ. P. 52(b) ("The motion may be made with a motion for a new trial pursuant to Rule 59.").

¶ 16 Rule 52(b) of the North Carolina Rules of Civil Procedure provides that "[u]pon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. However, Rule 52(b) is not intended to provide a forum for the losing party to relitigate aspects of their case. G. Gray Wilson, North Carolina Civil Procedure, Ch. 52, § 52-6 (Matthew Bender) (4th ed. 2021). "The primary purpose of a Rule 52(b) motion is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court." *Branch Banking & Tr. Co. v. Home Fed. Sav. & Loan Ass'n*, 85 N.C. App. 187, 198, 354 S.E.2d 541, 548 (1987). "If a trial court has omitted certain essential findings of fact, a motion under Rule 52(b) can correct this oversight and avoid remand by the appellate court for further findings." *Id.* at 198-99, 354 S.E.2d at 548 (citation omitted). "A complete record on appeal, resulting from a Rule 52(b) motion, will provide the appellate court with a better understanding of the trial court's decision, thus promoting the judicial process." *Parrish v. Cole*, 38 N.C. App. 691, 694, 248 S.E.2d 878, 880 (1978).

¶ 17 Rule 59 "is appropriate if the court has failed in the original judgment to afford the relief to which the prevailing party is entitled. A motion under this rule may also be employed by a party who seeks to have an order or judgment vacated in its entirety." G. Gray Wilson, North Carolina Civil Procedure, Ch. 59, § 59-17 (Matthew Bender) (4th ed. 2021). Under Rule 59(e), "[a] motion to alter or amend the judgment" must be based on one of the enumerated grounds in subsection (a). Rule 59(a) provides, in pertinent part:

> On a motion for a new trial in an action tried without a jury, the [trial] court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the *entry of a new judgment*.

N.C. R. Civ. P. 59(a) (emphasis added).

¶ 18 Thus, where the trial court sits without a jury, and enters an amended judgment pursuant to Rule 59(e), the amended judgment is a *new judgment*. Where the trial court amends a judgment pursuant to Rule 52(b) alone and includes additional findings of fact and conclusions of law without disturbing the ultimate relief afforded to the prevailing party, the validity of the original judgment is undisturbed. An amended judgment entered pursuant to Rule 52(b) includes additional findings of

fact and conclusions of law that supplement, but do not supplant, the original judgment.

¶ 19 Here, defendant filed a Motion to Amend Judgment pursuant to Rule 52(b) on 30 July 2009. Defendant requested the trial court adopt several proposed findings of fact and conclusions of law, and recalculate damages awarded in accordance with and consistent with those requested findings and conclusions. The trial court, in its discretion, elected to add 20 additional paragraphs to its findings of fact and conclusions of law, but declined to enter the specific facts and conclusions requested by defendant. Moreover, it did not recalculate damages, or otherwise make any alteration to the relief afforded to the plaintiff in the original judgment.

¶ 20 The amended judgment filed 29 September 2009, on its face, states "this the 25th day of September, 2009, *nunc pro tunc* to July 20, 2009," and refers to 20 July 2009 as "the date of this Judgment."

> A nunc pro tunc order is a correcting order. The function of an entry nunc pro tunc is to correct the record to reflect a prior ruling made in fact but defectively recorded. A nunc pro tunc order merely recites court actions previously taken, but not properly or adequately recorded. A court may rightfully exercise its power merely to amend or correct the record of the judgment, so as to make the court[']s record speak the truth or to show that which actually occurred, under circumstances which would not at all justify it in exercising its power to vacate the judgment. However, a nunc pro tunc entry may not be used to accomplish something which ought to have been done but was not done.

Rockingham Cnty. DSS ex rel. Walker v. Tate, 202 N.C. App. 747, 752, 689 S.E.2d 913, 917 (2010) (citation omitted).

¶ 21 Additionally, the record contains several printouts from our Civil Case Processing System ("VCAP"), where indexed judgments are abstracted electronically. Under § 1-233:

> Every judgment of the superior or district court, affecting title to real property, or requiring in whole or in part the payment of money, shall be indexed and recorded by the clerk of said superior court on the judgment docket of the court. The docket entry must contain the file number for the case in which the

> judgment was entered, the names of the parties, the address, if known, of each party and against whom judgment is rendered, the relief granted, *the date, hour, and minute of the entry of judgment under G.S. 1A-1, Rule 58*, and the date, hour, and minute of the indexing of the judgment.

§ 1-233 (2020) (emphasis added). Each VCAP document included in the record lists the judgment "clock" date as 20 July 2009. These judgment abstract summaries must, by statute, include the date of entry of the judgment as defined by Rule 58 of our Rules of Civil Procedure. Thus, plaintiff had additional notice through VCAP that 20 July 2009 is the entry date of judgment.

2. Statutory Tolling Provisions

¶ 22 Plaintiff also argues it filed its Complaint on Judgment in a timely fashion because N.C. R. Civ. P. 62(a) and (b), N.C. R. App. P. 3, § 1-234, § 1-15, and § 1-23, all have the effect of tolling the 10-year statute of limitations in § 1-47. Plaintiff's contention is without merit.

¶ 23 First, plaintiff argues that § 1-234 expressly provides a tolling provision for the 10-year statute of limitations period for a judgment. The statute provides, in pertinent part:

> But the time during which the party recovering or owning such judgment shall be, *or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the 10 years aforesaid*, as against the defendant in such judgment . . . .

§ 1-234 (2020) (emphasis added). Thus, plaintiff argues this tolling provision extends to the 10-year statute of limitations for commencement of an action for renewal of a judgment under § 1-47(1).

¶ 24 This Court's decision in *Fisher v. Anderson* is instructive on this issue. 193 N.C. App. 438, 667 S.E.2d 292 (2008). In *Fisher*, the plaintiff assignee filed an action in the trial court to enforce a judgment entered against the defendants pursuant to N.C. Gen. Stat. § 1-47. *Id.* at 438, 667 S.E.2d at 292-93. The trial court denied the plaintiff's motion for summary judgment and granted the defendants' motion to dismiss on grounds that the complaint was filed more than ten years after entry of the judgment. *Id.* at 438-39, 667 S.E.2d at 293. On appeal, the plaintiff argued

Rule 62(a) of the North Carolina Rules of Civil Procedure, when read in conjunction with § 1-234, operated to toll the ten-year statute of limitations in § 1-47(1) by thirty days. *Id.* at 439-40, 667 S.E.2d at 293.

¶ 25 This Court held that because the plaintiff failed to assert a claim within the ten-year statute of limitations, his complaint was properly dismissed. *Id.* at 440, 667 S.E.2d at 294. In reaching our decision, we noted that

> the ten-year period referred to in N.C. Gen. Stat. § 1-234 governs judgment liens on real property. Nothing in the plain language of N.C. Gen. Stat. § 1-234 indicates the limitations on the duration of a judgment lien should apply to the statutory period set forth in N.C. Gen. Stat. § 1-47(1).

Id. at 440, 667 S.E.2d at 294.

¶ 26 Plaintiff also argues N.C. R. Civ. P. 62(a) and (b) expressly stay execution upon a judgment, and these statutory prohibitions upon enforcement of a judgment also toll the 10-year statute of limitations in § 1-47(1). However, in *Fisher*, we also noted that "[n]othing in the plain language of Rule 62(a) indicates the legislature intended the automatic stay from execution to add thirty days to the ten-year statute of limitations on commencing an action to enforce a judgment." 193 N.C. App. at 440, 667 S.E.2d at 294. Similarly, the language in Rule 62(b), also applies to enforcement of an existing judgment, and not to the commencement of an action to renew a judgment under § 1-47(1). *See* N.C. R. Civ. P. 62(b).

¶ 27 Regarding plaintiff's additional arguments that §§ 1-15, 1-23, and N.C. R. App. P. 3, toll or extend the applicable 10-year statute of limitations in this case, the record is devoid of any reference to a stay or injunction on commencement of a new action that would implicate §§ 1-15 or 1-23. Moreover, Rule 3 of the North Carolina Rules of Appellate Procedure provides, in pertinent part, "if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period *for taking appeal is tolled* as to all parties . . . ." N.C. R. App. P. 3(c) (emphasis added). Yet nothing in the plain language of N.C. R. App. P. 3 could be construed to have the effect of also tolling the 10-year statute of limitations on the commencement of a new action under § 1-47(1). Thus, plaintiff has not shown to the satisfaction of this Court the existence of any statutory tolling provision affecting the applicable 10-year statute of limitations in this action.

III. Conclusion

¶ 28 For the foregoing reasons, we reverse the trial court's Judgment and Order denying defendant's Motion for Summary Judgment and granting Summary Judgment in favor of plaintiff.

REVERSED.

Judges CARPENTER and GRIFFIN concur.

JOHN-PAUL SHEBALIN, Plaintiff
v.
THERESA M. SHEBALIN, Defendant

No. COA21-425

Filed 21 June 2022

Appeal and Error—interlocutory orders—order for appointment of parenting coordinator—frivolous appeal—sanctions

Plaintiff-father's appeal from an order for appointment of a parenting coordinator was dismissed as interlocutory where, despite plaintiff's assertion, the order was not a final order; rather, it decreed that appointment of a parenting coordinator was just and necessary but left the appointment of a specific coordinator and other terms to be determined at a later date. Because plaintiff was aware of the interlocutory nature of the order yet chose to pursue a frivolous appeal, the appellate court sua sponte imposed sanctions on him and his attorney.

Appeal by plaintiff from order entered 8 September 2020 by Judge O. David Hall in Durham County District Court. Heard in the Court of Appeals 25 May 2022.

Cordell Law, LLP, by Stephanie Horton, for plaintiff-appellant.

Jonathan McGirt for defendant-appellee.

ARROWOOD, Judge.

¶ 1 John-Paul Shebalin ("plaintiff") appeals from an Order for Appointment of a Parenting Coordinator. Because the order from which plaintiff

appeals is interlocutory, and because we deem this appeal frivolous, we dismiss the appeal and impose sanctions.

I. Background

¶ 2 Theresa M. Shebalin ("defendant") and plaintiff (collectively, the "parties" or "parents") were married on 17 May 2010, shared a child born 15 September 2013, and divorced on 31 March 2016. Because the trial court and the parties agreed that the parties were engaged in "a high conflict case," on 22 July 2016 the trial court filed a "Consent Order Appointing Parenting Coordinator[,]" by which the trial court appointed a parenting coordinator for a term of two years. This parenting coordinator was replaced in 2017, and the second parenting coordinator was later re-appointed for a term of one year expiring 26 September 2019.

¶ 3 On 23 September 2019, defendant filed a Motion for Appointment of Parenting Coordinator due to the continued high conflict nature of the parties' case. On 1 October 2019, plaintiff filed a Reply and Motion to Dismiss.

¶ 4 The matter came on for hearing on 16 July 2020 in Durham County District Court, Judge Hall presiding. Following the hearing, the trial court entered an "Order for Appointment of Parenting Coordinator" on 8 September 2020 (the "2020 Order"). In the 2020 Order, the trial court concluded that "[t]his continues to be a high conflict case" and "the appointment of a [parenting coordinator] is in the best interests of the minor child[.]" Accordingly, the 2020 Order denied plaintiff's Motion to Dismiss, ordered that "[a] Parenting Coordinator shall be appointed for a one[-]year term[,]" and also decreed that the trial court "retains jurisdiction of this matter for the entry of further Orders." Pertinently, the 2020 Order did not appoint a parenting coordinator. On 29 September 2020, plaintiff filed a notice of appeal from the 2020 Order.

¶ 5 On 3 February 2021, the trial court commenced a hearing, held via WebEx, for the purpose of appointing a parenting coordinator following the 2020 Order. Plaintiff, through counsel, objected "to a WebEx hearing on the [parenting coordinator] appointment in general," as well as "to the [parenting coordinator] appointment conference on the basis of the fact that the [2020 Order] has been appealed more specifically."

¶ 6 Defendant's trial counsel responded:

> I just want to make sure that we have the background in place. [The trial court] heard the request, the motion for a [parenting coordinator] in July of last

> year. In September of 2020, [the trial court] signed an order for appointment of a [parenting coordinator].
>
> A [parenting coordinator] was not identified. An order appointment was not conducted. No order has been signed, so it's my position . . . that this is a premature appeal; that it's an impermissible interlocutory appeal.

¶ 7 Having heard these arguments, the trial court honored plaintiff's objection to a hearing conducted via WebEx and continued the hearing until 18 March 2021.

¶ 8 On 18 March 2021, the trial court resumed, in-person, the hearing on the appointment of a parenting coordinator. Prior to the hearing in open court, the trial court "conducted a brief *in camera* conference[,]" where plaintiff's counsel and both defendant's trial and appellate counsel were present. Therein, plaintiff's counsel "contended that the trial court did not have jurisdiction to proceed with appointment of a parenting coordinator, by virtue of [p]laintiff's Notice of Appeal filed on September 29, 2020." In response, both of defendant's trial and appellate counsel "contended that [p]laintiff's pending appeal was impermissibly interlocutory, and therefore that the trial court's jurisdiction continued uninterrupted." "Having heard these contentions, [the trial court] adjourned the *in camera* conference[.]"

¶ 9 After the hearing, the trial court returned and entered on the same day an "Order Appointing Parenting Coordinator" (the "2021 Order"). The 2021 Order, as written, stated the following:

> The Court, on September 7, 2020, entered an Order For Appointment of Parenting Coordinator, which was filed September 8, 2020. Said [2020] Order requires the appointment of a Parenting Coordinator for a one[-]year term. Plaintiff filed Appeal of said [2020] Order, which remains pending. To date, no Order For Appointment of Parenting Coordinator has been entered.

The trial court also found that it had jurisdiction and that, pursuant to the 2020 Order, "appointment of a Parenting Coordinator is necessary to assist the parents in implementing the terms of the existing child custody and parenting time order . . . ."

¶ 10 The trial court appointed a new parenting coordinator for a term of one year from the date of the 2021 Order and provided other details

pertinent to the parenting coordinator's role. The parenting coordinator's term expired 17 March 2022.

¶ 11 After multiple motions for extension of time were granted to both parties, plaintiff filed his appellate brief for his appeal from the 2020 Order on 1 November 2021; pertinently, therein, plaintiff asserts that the 2020 Order is a final order. Defendant filed a Motion to Dismiss Appeal on 17 February 2022, contending that the 2020 Order is interlocutory, an appellate brief on 4 March 2022, and another Motion to Dismiss Appeal, on the basis of mootness, on 20 May 2022.

II. Discussion

¶ 12 Plaintiff presents multiple arguments on appeal; plaintiff also asserts, quite simply, that the 2020 Order "is a final judgment and appeal to this court is proper pursuant to N.C. Gen. Stat. § 7A-27(b)." We disagree. Thus, we limit our review to the interlocutory nature of the 2020 Order and plaintiff's denial thereof.

¶ 13 "[A]ppeal lies of right directly to the Court of Appeals . . . [f]rom any final judgment of a district court in a civil action." N.C. Gen. Stat. § 7A-27(b)(2) (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. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted). Conversely, "[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 (citation omitted).

¶ 14 The 2020 Order is patently interlocutory. The purpose of the order was to decree that appointment of a parenting coordinator was just and necessary for the matter at issue, that said appointment would occur via another order at a later date, and that the to-be-appointed parenting coordinator would serve for a term of one year. Indeed, the 2020 Order did not dispose of the case, but "le[ft] it for further action by the trial court[,]" *see id.*, laying out a framework that the 2021 Order utilized in appointing a specific parenting coordinator for a term of one year, along with other, lengthy details binding the parties and the new parenting coordinator. This, in fact, is also made clear by the names of the orders themselves—the trial court filed the 2020 Order as the "Order *for Appointment* of Parenting Coordinator" and the 2021 Order as the "Order *Appointing* Parenting Coordinator[.]" (Emphasis added.) Accordingly, there was nothing within the 2020 Order that entitled plaintiff to appeal.

¶ 15 Furthermore, plaintiff was made aware of the interlocutory nature of the 2020 Order on multiple occasions, including during the 3 February 2021 hearing held over WebEx and during the *in camera* conversation immediately preceding the in-person 18 March 2021 hearing.

¶ 16 Despite plaintiff's assertions to the contrary, the 2020 Order is not a final order, and thus we dismiss this appeal as interlocutory. *See* N.C. Gen. Stat. § 7A-27(b)(2).[1] We now address how the frivolous nature of this appeal merits imposing sanctions.

¶ 17 Under our Rules of Appellate Procedure,

> [a] court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:
>
> (1) the appeal was *not well-grounded in fact* and was *not warranted by existing law* or a good faith argument for the extension, modification, or reversal of existing law;
>
> (2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or *needless increase in the cost of litigation*;
>
> (3) a petition, motion, brief, record, or other item filed in the appeal was grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly *disregarded the requirements of a fair presentation of the issues to the appellate court*.

N.C. R. App. P. 34(a) (emphasis added). The appropriate sanctions to a frivolous appeal include:

> (1) dismissal of the appeal;
>
> (2) monetary damages including, but not limited to,
>
> a. single or double costs,

1. We also note that the culmination of the 2020 Order has come to fruition and long lapsed due to: (1) the issuance of the 2021 Order appointing a parenting coordinator and (2) said parenting coordinator's one-year term having expired in March of this year. Thus, assuming *arguendo* that defendant had a valid argument on appeal, the issue would now be moot.

b. damages occasioned by delay,

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

N.C. R. App. P. 34(b).

¶ 18 Throughout this case, plaintiff has repeatedly and baselessly asserted that the 2020 Order from which he appeals is a final order, despite the order's interlocutory nature being apparent on its face, multiple admonitions from opposing counsel, and the fact that the sole purpose of the 2020 Order—namely, that of the trial court to appoint a parenting coordinator for a term of one year at a later date—has long since been satisfied.

¶ 19 Plaintiff's improper characterization of the 2020 Order, coupled with his insistence to pursue this frivolous appeal, was "not well-grounded in fact[,]" "was not warranted by existing law[,]" "needless[ly] increase[d] . . . the cost of litigation[,]" and "grossly disregarded the requirements of a fair presentation of the issues" to this Court. *See* N.C. R. App. P. 34(a). Indeed, this Court now receives an appeal devoid of anything for us to review.

¶ 20 We therefore tax both plaintiff in his personal capacity and plaintiff's counsel with double the costs of this appeal, as well as the attorney fees incurred therefrom by defendant in the defense of this appeal. "Pursuant to Rule 34(c), we remand this case to the trial court for a determination of the reasonable amount of attorney fees incurred by defendant in responding to this appeal." *Ritter v. Ritter*, 176 N.C. App. 181, 185, 625 S.E.2d 886, 888-89 (2006).

III. Conclusion

¶ 21 For the foregoing reasons, we dismiss the appeal as interlocutory. Furthermore, because plaintiff pursued a frivolous appeal, we, on our own initiative, impose sanctions on both plaintiff and plaintiff's counsel, remanding for the trial court to determine attorney fees.

DISMISSED AND REMANDED.

Judges MURPHY and CARPENTER concur.

SHROPSHIRE v. SHROPSHIRE

[284 N.C. App. 92, 2022-NCCOA-411]

FREDERICK SHROPSHIRE, PLAINTIFF
v.
SHEYENNE SHROPSHIRE, DEFENDANT

No. COA21-332

Filed 21 June 2022

1. Divorce—equitable distribution—reopening evidence—date-of-trial value of retirement accounts

In an equitable distribution matter, the trial court did not abuse its discretion by sua sponte reopening evidence after the close of the hearing in order to request that plaintiff-husband provide the date-of-trial value of his retirement accounts, where defendant-wife, who appeared pro se, had provided the same information about her own retirement accounts and had raised the issue with the trial court during the hearing. Further, the trial court did not improperly shift the burden of proof by requiring the information from plaintiff-husband where it offered to hold another hearing to give plaintiff-husband the opportunity to be heard and to present evidence regarding the classification and valuation of the retirement accounts—which he declined.

2. Divorce—equitable distribution—evidentiary support—record on appeal

The trial court's equitable distribution order was remanded where the appellate court was unable to determine from the record whether competent evidence existed to support the trial court's findings regarding plaintiff-husband's retirement account or whether plaintiff-husband intentionally omitted the evidence from the record on appeal, which was composed by plaintiff-husband and settled pursuant to Appellate Procedure Rule 11(b).

Appeal by plaintiff from order entered 17 November 2020 by Judge Tracy H. Hewett in Mecklenburg County District Court. Heard in the Court of Appeals 8 March 2022.

Plumides, Romano & Johnson, P.C., by Richard B. Johnson, for Plaintiff-Appellant.

Bratcher Adams Folk, PLLC, by Kalyn Simmons, Brice M. Bratcher, and Jeremy D. Adams, for Defendant-Appellee.

Sheyenne Shropshire, pro se, for Defendant-Appellee.

CARPENTER, Judge.

¶ 1 Frederick Shropshire ("Plaintiff") appeals from a judgment and order for equitable distribution (the "Order"). On appeal, Plaintiff argues the trial court abused its discretion by reopening evidence and requesting he provide evidence of his retirement plans' date of trial values. He further argues the trial court abused its discretion by: (1) making findings of fact and conclusions of law regarding his Fidelity 401(k) Plan[1]; (2) determining that an equal distribution of the marital estate was not equitable; and (3) ordering Plaintiff to pay Sheyenne Shropshire ("Defendant") a lump sum distributive award of $20,000.00. Because the record lacks sufficient evidence regarding Plaintiff's retirement plans to support the trial court's findings of fact, and in turn its conclusions of law, we remand the matter to the trial court to allow for entry of additional findings of fact and conclusions of law consistent with this opinion. Accordingly, we do not reach the remaining issues.

I. Factual & Procedural Background

¶ 2 The record reveals the following: Plaintiff and Defendant married on 15 June 2007, separated on 12 October 2016, and divorced on 25 April 2018. Three children were born of the marriage. Plaintiff initiated the instant action by filing a "Complaint for Child Custody and Motion for Ex-Parte Emergency Child Custody and/or in the Alternative Motion for Temporary Parenting Arrangement" (the "Complaint") on 12 October 2016. On 12 October 2016, the trial court entered a temporary emergency custody order, granting Plaintiff temporary custody of the three minor children.

¶ 3 On 24 October 2016, Defendant filed an answer to Plaintiff's Complaint as well as a motion to set aside the custody order entered 12 October 2016 and a claim for child custody. On 3 January 2017, Defendant filed an amended Answer to the Complaint, which included counterclaims for post-separation support, alimony, child custody, temporary and permanent child support, equitable distribution, and attorney's fees. On 6 March 2017, Plaintiff filed a "Reply, Defenses, and Motion in the Cause for Equitable Distribution, Child Support and Attorney's Fees." On 6 July 2017, the trial court entered an order denying Defendant's claims for post-separation support and attorney's fees.

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1. The record also refers to this retirement plan as the "Disney Savings and Investment Plan."

¶ 4 Following a pre-trial discovery conference on 19 July 2017, the trial court entered an "Initial Pretrial Conference, Scheduling, and Discovery Order in Equitable Distribution Matter," which ordered the parties to submit their equitable distribution affidavits no later than 4 August 2017.

¶ 5 On 2 August 2017, Defendant filed her equitable distribution affidavit, and on 4 August 2017, Plaintiff filed his equitable distribution affidavit. Both parties listed the Plaintiff's and Defendant's retirement plans, including Plaintiff's Fidelity 401(k) Plan, under Part I – Marital Property of the affidavit. Both parties also noted "TBD" under the "date of separation" and "net value" columns pertaining to Plaintiff's two retirement plans. The parties did not list any property under Part II – Divisible Property, of their respective equitable distribution affidavits. On 9 November 2017, the trial court entered a "Status Conference Checklist and Order for Equitable Distribution Matter," which set the equitable distribution hearing for 5 January 2018.

¶ 6 The equitable distribution trial was conducted on 7 August 2018 before the Honorable Tracy H. Hewett, judge presiding. Defendant appeared *pro se* at the hearing. Both parties testified at the hearing, and neither party offered expert witnesses.

¶ 7 On 1 October 2018, Judge Hewett sent an e-mail to Defendant and counsel for Plaintiff advising she would be reopening evidence in the equitable distribution matter to obtain: (1) the date of trial values for Defendant's two investment accounts, including the Fidelity 401(k) Plan, and (2) the value of the parties' marital residence. She also informed the parties that she would schedule another hearing to admit the requested evidence. Alternatively, she would allow the parties to agree "to submit th[e] information 'on paper.' "

¶ 8 In response to the trial court's request, Plaintiff filed an "Objection, Notice of Objection, Exception and Motion to Recuse" on 18 October 2018, in which he objected to Judge Hewett's request for evidence regarding his retirement accounts and sought Judge Hewett's recusal. On the same day, Defendant filed an objection to Plaintiff's motion. On 12 December 2018, the Honorable Chief Judge for Mecklenburg County District Court, Regan Miller, entered an order denying Plaintiff's motion to recuse. Chief Judge Miller found, *inter alia*, "the Court's request for additional documents or evidence prior to the close of all of the evidence can in no way be classified as 'unfair surprise,' and is not grounds for a recusal."

¶ 9 A hearing was held on 9 May 2019 in which the trial court put its requests on the record and allowed the parties an opportunity to put

their objections on the record. The trial court notified the parties that it would withdraw its request for an appraisal of the marital home but was still requesting "the evidence regarding the passive appreciation for [Plaintiff's Fidelity 401(k) Plan]."

¶ 10 Counsel for Plaintiff objected to the reopening of evidence on the ground Plaintiff would be prejudiced since the parties did not identify any divisible property in their equitable distribution affidavits nor did they supplement their affidavits to add such property. Counsel further argued Defendant failed to meet her burden to identify Plaintiff's retirement accounts as divisible property and proffer evidence as to the value of the accounts. The trial court overruled counsel's objections, reasoning Defendant requested the information at the equitable distribution hearing and offered the divisible property value associated with her own retirement plan. At the end of the hearing, the trial court requested the parties bring documentation by 12 May 2019 regarding the value of Plaintiff's retirement plan as of the 7 August 2018 trial.

¶ 11 On 17 November 2020, the trial court entered the Order. Plaintiff timely filed written notice of appeal from the Order.

II. Jurisdiction

¶ 12 This Court has jurisdiction to review the Order pursuant to N.C. Gen. Stat. § 7A-27(c) (2021) and N.C. Gen. Stat. § 50-19.1 (2021).

III. Issues

¶ 13 The issues before the Court are whether: (1) the trial court abused its discretion by reopening evidence after the close of the equitable distribution trial; (2) the trial court abused its discretion by requesting Plaintiff provide the date of trial value of his Fidelity 401(k) Plan; (3) findings of fact 31, 34, 40–43, 55, 57–58, and 60–62 of the Order are supported by competent evidence; (4) the trial court abused its discretion when it determined an equal distribution of the marital estate was not equitable; and (5) the trial court abused its discretion by ordering Plaintiff to make a lump sum $20,000.00 cash distributive award to Defendant.

IV. Reopening the Evidence

¶ 14 **[1]** In his first argument, Plaintiff contends the trial court abused its discretion by reopening evidence after the close of trial. Specifically, Plaintiff maintains the trial court "was operating under the misapprehension of law that Plaintiff-Appellant was obligated to provide the date of trial value of his [Fidelity 401(k)] Plan . . . ." Defendant asserts the trial court acted properly because it "set forth in the record that the evidence

needed to be presented . . . and exercised its discretion to reopen the case in order for the value to be produced." In light of the broad discretion afforded to a trial judge as well as a judge's duty to provide a fair and just trial, we conclude Judge Hewett, as the presiding judge, did not abuse her discretion by reopening evidence on her own initiative.

¶ 15 An "equitable distribution is a three-step process; the trial court must (1) 'determine what is marital [and divisible] property'; (2) 'find the net value of the property'; and (3) 'make an equitable distribution of that property.' " *Cunningham v. Cunningham*, 171 N.C. App. 550, 555, 615 S.E.2d 675, 680 (2005); *see Robinson v. Robinson*, 210 N.C. App. 319, 324, 707 S.E.2d 785, 790 (2011) ("[T]he [trial] court must . . . classify all of the property and make a finding as to the value of all [distributable] property."); *see also* N.C. Gen. Stat. § 50-20 (2021).

¶ 16 Marital property includes "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property . . . ." N.C. Gen. Stat. § 50-20(b)(1). Divisible property includes, *inter alia*, "[p]assive income from marital property received after the date of separation," such as interest or dividends. N.C. Gen. Stat. § 50-20(b)(4). "[A]ll appreciation and diminution in value of marital and divisible property is presumed to be divisible property unless the trial court finds that the change in value is attributable to the postseparation actions of one spouse." *Cheek v. Cheek*, 211 N.C. App. 183, 184, 712 S.E.2d 301, 303 (2011) (citation omitted and emphasis in original). "[M]arital property shall be valued as of the date of the separation of the parties," while "[d]ivisible property . . . shall be valued as of the date of distribution." N.C. Gen. Stat. § 50-21(b) (2021).

¶ 17 On appeal, neither party offers a case or statute that specifically addresses whether the trial court judge may *sua sponte* reopen the evidence in a civil proceeding prior to the entry of judgment, absent a motion by a party or agreement by the parties. After careful review of the relevant law, we see no reason to distinguish between a trial court reopening evidence on its own initiative, and a trial court reopening evidence upon a party's motion. *See*, *e.g.*, *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260 (concluding the trial court did not abuse its discretion by allowing the defendant's motion to reopen evidence two weeks after the original hearing), *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985); *Coburn v. Roanoke Land & Timber Corp.*, 259 N.C. 100, 130 S.E.2d 30 (1963) (affirming the trial court's denial of the plaintiff's request for leave to admit additional evidence).

¶ 18 It is well-established that "[t]he trial court has discretionary power to permit the introduction of additional evidence after a party has rested. Whether the case should be reopened and additional evidence admitted [is] discretionary with the presiding judge." *McCurry v. Painter*, 146 N.C. App. 547, 553, 553 S.E.2d 698, 703 (2001) (citations omitted). "A trial court may even re-open the evidence weeks after holding the original hearing, or "[w]hen the ends of justice require[.]" *In re B.S.O.*, 225 N.C. App. 541, 543, 740 S.E.2d 483, 484 (2013) (citations omitted). Our Supreme Court has considered whether the party affected by the introduction of the evidence would be "surprise[d] or improperly prejudice[d]." *Miller v. Greenwood*, 218 N.C. 146, 150, 10 S.E.2d 708, 711 (1940).

¶ 19 "Because it is discretionary, the trial judge's decision to allow the introduction of additional evidence after a party has rested will not be overturned absent an abuse of that discretion." *McCurry*, 146 N.C. App. at 553, 553 S.E.2d at 703 (citations omitted). An abuse of discretion occurs when the decision to reopen evidence is "manifestly unsupported by reason," or "so arbitrary that it could not have been the result of a reasoned decision." *State v. Mutakbbic*, 317 N.C. 264, 273–74, 345 S.E.2d 154, 158–59 (1986) (citations omitted).

¶ 20 Further, a trial court "has broad discretion to control discovery" because its principal role "is to control the course of the trial as to prevent injustice to any party . . . ." *Capital Res., LLC v. Chelda, Inc.*, 223 N.C. App. 227, 234, 735 S.E.2d 203, 209 (2012) (citations omitted). Additionally, it is the duty of the trial court judge "to see to it that each side has a fair and impartial trial." *Miller*, 218 N.C. at 150, 10 S.E.2d at 711. In doing so, the judge has "discretion to take any action to this end within the law . . . ." *Id.* at 150, 10 S.E.2d at 711.

¶ 21 The North Carolina Rules of Evidence, which afford the trial court discretion, also support the conclusion a trial court may, on its own motion, reopen a case to allow for additional evidence. *See generally* N.C. Gen. Stat. § 8C-1 (2021). We note the rules are to "be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth be ascertained and proceedings justly determined." N.C. Gen. Stat. § 8C-1, Rule 102 (2021). Furthermore, the trial court judge is "empowered to hear any relevant evidence," N.C. Gen. Stat. § 8C-1, Rule 104, cmt. (2021), and is not limited by the rules of evidence in determining "preliminary questions concerning . . . the admissibility of evidence . . . ." N.C. Gen. Stat. § 8C-1, Rule 104 (2021). The trial court has a duty to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make

the interrogation and presentation effective for the ascertainment of the truth." N.C. Gen. Stat. § 8C-1, Rule 611 (2021). In fact, the trial court has the authority to "appoint witnesses of its own selection," N.C. Gen. Stat. § 8C-1, Rule 706 (2021), including expert witnesses to appraise property in an equitable distribution action. *See Dorton v. Dorton*, 77 N.C. App. 667, 676, 336 S.E.2d 415,422 (1985).

¶ 22 In this case, the trial judge took the equitable distribution matter under advisement at the close of the 7 August 2018 hearing. On 1 October 2018, the trial judge sent an email to Plaintiff's counsel and Defendant, who was not represented by counsel at the time. Judge Hewett sought, *inter alia*, the date of trial values of Plaintiff's two retirement accounts.

¶ 23 A hearing was held on 9 May 2019 regarding the request. The trial court again requested the value of Plaintiff's retirement plans as of the date of trial. The trial court reasoned at the 9 May 2019 hearing that Defendant offered the passive income value on her own retirement account, so she would be prejudiced by Plaintiff not offering the same information on his accounts. Counsel for Plaintiff objected to the reopening of evidence, and the trial court overruled her objection. Thereafter, Plaintiff took the stand and was asked on direct examination if he knew "the amount of [his] retirement [plan as of] August . . . 7th, 2018." He responded, "[n]o." At the end of the hearing, the trial court requested the parties provide documentation to show the values of Plaintiff's retirement accounts by the end of the week—12 May 2019.

¶ 24 In their respective equitable distribution affidavits, both parties listed the retirement accounts as marital property. Moreover, neither party contended in their affidavits that there was divisible property for the trial court to distribute. Based on the affidavits, there is no dispute that Plaintiff's retirement accounts have marital property aspects. *See* N.C. Gen. Stat. § 50-20(b)(1). Nevertheless, Defendant's question to the trial court at the 7 August 2018 hearing raised the issue of whether the retirement plans also include divisible property:

> [Defendant]: You're [sic] honor—and I don't know if you can answer this, but I'm just unsure why, uh, [Plaintiff] contends that the value would be more given [my retirement] statement. They have date of separation, what they felt was the value at $68,000. I don't know why they would value it at $75,000, but you said it only [sic] date of separation. Is that correct?
>
> [Trial court]: Right. And then, there can be, um, the passive—[or] active gain, which is, uh, classified as something else. But, uh—but we can get to that later.

> [Defendant]: Okay. And then, his, uh, second 401k that he started at this job, I don't have a statement from them, so I can't confirm the value . . . .

¶ 25 During Defendant's cross-examination of Plaintiff, the trial court returned to the issue of active and passive gains:

> [Trial court]: All right. Um, let me just make sure I'm clear on one thing right quick, and that is on the—we have the passive gain on [Defendant's]—I don't know if it was termed to 401k. Um, do we have active or passive gain on the TEGNA or the [Fidelity 401(k) Plan] account?
>
> [Counsel for Plaintiff]: Your [sic] asking me or no?
>
> [Trial court]: Yes, ma'am.
>
> [Counsel for Plaintiff]: I'm looking. I don't think I have it. Let me see.

¶ 26 Again, during closing arguments, Defendant raised her concern over Plaintiff's undisclosed passive gains.

> [Defendant]: They have the appreciated value, the passive appreciation for mine, but not theirs, so I—you know, I would hope that you would not count that or count it equitably. I can't—I mean, you can't just list whatever yours was at the date of separation, and whatever mine was, and add this $17,000 to it without adding something to his. I'm sure he could pull it up just like I did on my phone.

¶ 27 In this case, Judge Hewett found that the "ends of justice" and equity required reopening the evidence based on her own action of not returning to Defendant's question of active and passive income at the 7 August 2018 hearing after noting she would. *See In re B.S.O.*, 225 N.C. App. at 543, 740 S.E.2d at 484. Judge Hewett also based her decision to reopen evidence on Plaintiff using Defendant's retirement plan statement to obtain passive gains on her account despite not alleging any divisible property in his equitable distribution affidavit. Plaintiff then refused to offer the same evidence for his retirement accounts. Plaintiff was not "surprise[d]" by the reopening of evidence because the trial court requested the information at the initial equitable distribution hearing. *See Miller*, 218 N.C. at 150, 10 S.E.2d at 711. Chief Judge Miller, the neutral and impartial judge ruling on Plaintiff's motion to recuse Judge

Hewett, also found the request did not create a surprise for Plaintiff. Further, Plaintiff was not "improperly prejudice[d]" by the request because Defendant volunteered the passive gains earned on her own retirement plan, which the trial court would equitably divide between the parties. *See id.* at 150, 10 S.E.2d at 711.

¶ 28 Therefore, the trial judge made a "reasoned decision," *see Mutakbbic*, 317 N.C. at 274, 345 S.E.2d at 159, and did not abuse her discretion by reopening evidence to value Plaintiff's retirement accounts as of the date of trial. *See McCurry*, 146 N.C. App. at 553, 553 S.E.2d at 703.

V. The Trial Court's Request for Evidence Regarding Plaintiff's Retirement Account

¶ 29 In his second argument, Plaintiff contends the trial court abused its discretion by "shifting the burden of proof by ordering Plaintiff-Appellant to provide documentation or evidence of the value of his Fidelity 401(k) [Plan] at the date of trial and failing to give Plaintiff-Appellant the ability to rebut the presumption that it was divisible property." Defendant argues the trial court did not abuse its discretion by requesting information regarding Plaintiff's retirement account because it was necessary to equitably distribute the divisible property. We find Plaintiff's argument unpersuasive.

¶ 30 Here, the trial court judge offered to hold a hearing to allow the parties full opportunity to be heard and to present additional evidence relating to Plaintiff's retirement accounts. As an alternative, the judge allowed the parties to submit documentation if the parties so agreed. Although Plaintiff was given an opportunity—but not ordered—to testify or admit additional evidence at a hearing as to the classification and valuation of property, he declined.

¶ 31 Plaintiff cites to *Miller v. Miller*, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990) (holding the trial court did not err in failing to classify and distribute a debt where husband failed to meet his burden of proving the debt's value and classification), *Atkins v. Atkins*, 102 N.C. App. 199, 208, 401 S.E.2d 784, 788 (1991) (holding the husband did not satisfy his burden of proving a tract of land was separate property), *Albritton v. Albritton*, 109 N.C. App. 36, 41, 426 S.E.2d 80, 83 (1993) (refusing to remand a case where the "trial court failed to make a specific finding as to the present discount value" of a party's pension plan, and the party did not offer evidence as to the pension plan's value), and *Montague v. Montague*, 238 N.C. App. 61, 68, 767 S.E.2d 71, 76–77 (2014) (holding the trial court did not abuse its discretion by failing to omit a lawnmower from its equitable distribution where the husband did not provide

the requisite evidence), to argue the trial court improperly shifted Defendant's burden of presenting evidence regarding the classification and valuation of Plaintiff's retirement plans to Plaintiff. We disagree.

¶ 32 As discussed above, the trial court did not abuse its discretion by reopening the evidence. The cases on which Plaintiff relies are distinguishable from the instant case where the trial court, on its own motion, reopened the evidence to allow additional information on an item of divisible property. Thus, we cannot conclude the trial court improperly shifted the burden of proof. Although the trial court was under no obligation to request the evidence, it found the evidence was necessary to accurately value marital and divisible property and achieve a fair and just equitable distribution judgment.

VI. Findings of Fact

¶ 33 **[2]** In his third argument, Plaintiff contends findings of fact 31, 34, 40–43, 55, 57–58, and 60–62 of the Order are not supported by the evidence. Defendant argues "the trial court's findings of fact were supported by competent evidence from the record and are detailed enough to not be disturbed on appeal." Defendant further argues it was Plaintiff who provided the information regarding his Fidelity 401(k) Plan to the trial court; thus, he may not challenge the evidence.

¶ 34 We review a judgment entered after a non-jury trial to determine "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Montague*, 238 N.C. App. at 63, 767 S.E.2d at 74. "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Lund v. Lund*, 244 N.C. App. 279, 287, 779 S.E.2d 175, 181 (2015) (citation omitted). Additionally, competent evidence is "admissible or otherwise relevant." *State v. Bradley*, 2022-NCCOA-163, ¶ 14. We note the record on appeal in this case was settled pursuant to Rule 11(b) of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 11(b).

¶ 35 Under Rule 11(b),

> [i]f the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within thirty days . . . after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other

> parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval of objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

Id.

¶ 36 Here, Plaintiff composed the record on appeal and served the proposed record upon Defendant on 30 April 2021. There is no evidence Defendant objected to, or approved of, the record "within thirty-days . . . after service." *See id.* Therefore, Plaintiff's "proposed record on appeal . . . constitutes *the record on appeal*." *See id.* (emphasis added).

¶ 37 Plaintiff first challenges findings of fact 31 and 34. Finding of fact 31 provides: "During the trial, both parties requested of the other, date of trial values on their respective retirement accounts set out above." Although the transcripts of the 7 August 2018 hearing reveal Defendant asked the trial court about potential passive income on Plaintiff's retirement accounts, and again commented on the subject during her closing argument, there is no evidence she requested *from Plaintiff* the date of trial values of his retirement accounts. Rather, the trial court told Defendant they would return to the issue, and during Defendant's cross examination of Plaintiff, the trial court asked Plaintiff's counsel whether passive or active gains had been earned on Plaintiff's retirement plans. Defendant again raised the issue during her closing argument. Therefore, we conclude finding of fact 31 is not supported by competent evidence. *See Montague*, 238 N.C. App. at 63, 767 S.E.2d at 74.

¶ 38 Finding of fact 34 provides: "When Defendant asked for this information during cross examination, the Court determined this would be provided at a later time during trial and then neglected to return to Defendant and allow the question." The transcripts tend to show Defendant was testifying on *direct examination* regarding marital property and the values she assigned to the property when she asked the trial court why Plaintiff valued her account using the date of trial value. The trial court explained that Plaintiff's valuation concerns passive or active gain and that the court would return to the issues. The finding that the question occurred on *cross examination* is not supported by the competent evidence; however, this error was harmless. *See Hart v. Hart*,

74 N.C. App. 1, 5, 327 S.E.2d 631, 634 (1985). We conclude the remaining findings within finding of fact 34 are supported by competent evidence. *See Montague*, 238 N.C. App. at 63, 767 S.E.2d at 74.

¶ 39 Plaintiff next challenges findings of fact 40, 41, 42, and 43 which provide the following:

> 40. Plaintiff provided information only on the Fidelity 401(k) Plan which showed that on, or about July 16th 2018, and without notice to Defendant/Wife or accountability for post separation increases, Husband withdrew the entirety of the funds from the account, leaving a zero balance on the date of trial.
>
> 41. No evidence was presented showing that the Fidelity 401(k) Plan had been rolled into another 401(k).
>
> 42. The total of the amount withdrawn by Husband from the Fidelity 401(k) Plan, approximately twenty-one (21) days prior to trial, was one hundred ninety-three thousand one hundred seventy-nine dollars and fifty-two cents ($193,179.52), which is thirty four thousand dollars and fifty cents ($34,000.50) more than the amount on the statement provided at trial which showed the date of separation value.
>
> 43. There were no post separation deposits made by Husband, so the passive gain to the Fidelity 401(k) Plan of thirty-four thousand dollars and fifty cents ($34,000,50), is a marital asset to be distributed as such to the Plaintiff.

¶ 40 We are unable to determine from the record before us whether competent evidence exists to support the trial court's findings regarding Plaintiff's Fidelity 401(k) Plan, or whether this evidence was intentionally omitted from the record on appeal. Nonetheless, Defendant did not object to the proposed record on appeal, so it "constitutes the record on appeal." *See* N.C. R. App. P. 11(b). In any event, findings of fact 40, 41, 42, 43 concerning Plaintiff's Fidelity 401(k) Plan are not supported by competent evidence based upon the record on appeal. *See Montague*, 238 N.C. App. at 63, 767 S.E.2d at 74. Because the trial court relied on these unsupported findings to make additional findings on the distribution factors under N.C. Gen. Stat. § 50-20(c) and related conclusions of law, we must remand the matter to the trial court. On remand, the trial

court may hold an evidentiary hearing and, in its discretion, admit additional evidence if it deems necessary as to findings 40, 41, 42, and 43. *See Lund*, 244 N.C. App. at 287, 779 S.E.2d at 181; *Bradley*, 2022-NCCOA-163, ¶ 14. Because we remand the matter, we need not consider Plaintiff's arguments as to the trial court's conclusions of law, its unequal division of property, and its order for Plaintiff to make a distributive award.

REMANDED.

Judges GORE and GRIFFIN concur.

JAY SINGLETON, D.O., AND SINGLETON VISION CENTER, P.A., PLAINTIFFS
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROY COOPER, GOVERNOR OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; MANDY COHEN, NORTH CAROLINA SECRETARY OF HEALTH AND HUMAN SERVICES, IN HER OFFICIAL CAPACITY; PHIL BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, IN HIS OFFICIAL CAPACITY; AND TIM MOORE, SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA21-558

Filed 21 June 2022

1. Hospitals and Other Medical Facilities—certificate of need — as-applied constitutional challenge—procedural due process —jurisdiction

In a declaratory judgment action brought by a doctor and his ophthalmology clinic (plaintiffs) against the Department of Health and Human Services and multiple state government officials (defendants), the trial court lacked subject matter jurisdiction to review plaintiffs' as-applied constitutional challenge in which plaintiffs argued that N.C.G.S. § 131E-175—the law requiring plaintiffs to obtain a certificate of need (CON) in order to perform surgeries at the clinic—violated their procedural due process rights under the state constitution. Specifically, plaintiffs failed—before seeking the court's review—to first exhaust the administrative remedies available to them, such as applying for a CON, or to show that such remedies would have been inadequate. Defendants were permitted to raise this jurisdictional defect on appeal under Appellate Rule 28(c), and because jurisdictional defects may be raised at any time during a legal proceeding.

2. Hospitals and Other Medical Facilities—certificate of need — as-applied constitutional challenge—substantive due process —jurisdiction

In a declaratory judgment action brought by a doctor and his ophthalmology clinic (plaintiffs) against the Department of Health and Human Services and multiple state government officials (defendants), the trial court had subject matter jurisdiction to review plaintiffs' as-applied constitutional challenge in which plaintiffs argued that N.C.G.S. § 131E-175—the law requiring plaintiffs to obtain a certificate of need (CON) in order to perform surgeries at the clinic—violated their substantive due process rights under the state constitution. Unlike plaintiffs' claims asserting procedural due process violations, plaintiffs' substantive due process claim could be brought in a declaratory judgment action in superior court regardless of whether administrative remedies had been exhausted.

3. Hospitals and Other Medical Facilities—certificate of need— as-applied constitutional challenge

In a declaratory judgment action brought by a doctor and his ophthalmology clinic (plaintiffs) against the Department of Health and Human Services and multiple state government officials (defendants), the trial court properly dismissed plaintiffs' as-applied constitutional challenge to N.C.G.S. § 131E-175, which required plaintiffs to obtain a certificate of need (CON) in order to perform surgeries at the clinic. Although recent legal precedent foreclosing a facial challenge to section 131E-175 did not preclude plaintiffs from raising an as-applied challenge to the law, plaintiffs failed to show that section 131E-175 violated their substantive due process rights under the state constitution's Law of the Land Clause.

Appeal by plaintiffs from order entered 11 June 2021 by Judge Michael O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 22 March 2022.

Institute for Justice, by Joshua A. Windham and Renée D. Flaherty, admitted pro hac vice, and Narron Wenzel, P.A., by Benton Sawrey, for plaintiffs-appellants.

Attorney General Joshua H. Stein, by Solicitor General Ryan Y. Park, Assistant Solicitor General Nicholas S. Brod, Assistant Attorney General Derek L. Hunter and Assistant Attorney General John H. Schaeffer, for defendants-appellees.

K&L Gates LLP, by Gary S. Qualls, Susan K. Hackney and Anderson M. Shackelford, for amici curiae Charlotte-Mecklenburg Hospital Authority d/b/a Atrium Health, University Health Systems of Eastern Carolina, Inc. d/b/a Vidant Health, and Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Health System.

Fox Rothschild, by Marcus C. Hewitt and Troy D. Shelton, for amicus curiae Bio-Medical Applications of North Carolina, Inc.

Law Office of B. Tyler Brooks, PLLC, by B. Tyler Brooks and Lusby Law, PA, by Christopher R. Lusby for amicus curiae Certificate of Need Scholars.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, by Kenneth L. Burgess, Matthew F. Fisher, and Iain M. Stauffer for amici curiae NCHA, Inc. d/b/a North Carolina Healthcare Association, North Carolina Healthcare Facilities Association, North Carolina Chapter of the American College of Radiology, Inc., and North Carolina Senior Living Association.

Parker, Poe, Adams, & Bernstein LLP, by Robert A. Leandro for amici curiae Association for Home and Hospice Care of North Carolina and North Carolina Ambulatory Surgical Center.

John Locke Foundation, by Jonathan D. Guze, for amicus intervenor John Locke Foundation.

TYSON, Judge.

¶ 1 Jay Singleton, D.O. and Singleton Vision Center, P.A. (collectively "Plaintiffs") appeal from an order entered, which granted the motion to dismiss by the North Carolina Department of Health and Human Services ("DHHS"); Roy Cooper, in his capacity as Governor of the State of North Carolina; Mandy H. Cohen, in her capacity as Secretary of the North Carolina Department of Health and Human Services; Phillip E. Berger, in his capacity as President *Pro Tempore* of the North Carolina Senate; and, Timothy K. Moore, in his capacity as Speaker of the North Carolina House of Representatives (collectively "Defendants"). We dismiss in part and affirm in part.

I. Background

¶ 2 Jay Singleton, D.O. ("Dr. Singleton") is a board-certified ophthalmologist, licensed as a medical doctor by the North Carolina Medical Board, and practices in New Bern. Dr. Singleton founded Singleton Vision Center, P.A. (the "Center") in 2014 and serves as its President and Principal. The Center is a full-service ophthalmology clinic, which provides routine vision checkups, treatments for infections, and surgery.

¶ 3 Dr. Singleton provides all non-operative patient care and treatments at the Center. Dr. Singleton performs the majority of his outpatient surgeries at Carolina East Medical Center ("Carolina East") in New Bern. Carolina East is the only licensed provider with an operating room certificate of need located in the tri-county planning area of Craven, Jones, and Pamlico Counties. This current single need determination has not been revised for over ten years since 2012.

¶ 4 To perform surgeries at the Center, Dr. Singleton must obtain both a facility license under the Ambulatory Surgical Facility Licensure Act, N.C. Gen. Stat. § 131E-145 *et seq*. (2021) and a Certificate of Need ("CON") under N.C. Gen. Stat. § 131E-175 *et seq*. (2021). DHHS makes determinations of operating room needs each year in the State Medical Facilities Plan to become effective two years later.

¶ 5 The 2021 State Medical Facilities Plan states there is "no need" for new operating room capacity in the Craven, Jones, and Pamlico Counties planning area. The tri-county planning area encompasses an area of approximately 1,814 square miles. Representatives of Carolina East informed Plaintiffs they will oppose any application they submit for an additional operating room CON within the tri-county area.

¶ 6 Plaintiffs filed suit on 22 April 2020, alleging the CON law as applied to them violates the North Carolina Constitution. Plaintiffs sought an injunction preventing Defendants from enforcing the CON law, a declaration the CON law is unconstitutional as applied to them, and to recover nominal damages.

¶ 7 Defendants filed motions to dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6) on 29 June 2020 and 31 July 2020. Following a hearing, the trial court denied Defendants' Rule 12(b)(1) motion and allowed Defendants' Rule 12(b)(6) motion on 11 June 2021. Plaintiffs appeal the trial court's order granting Defendants' Rule 12(b)(6) motion. Defendants failed to cross-appeal the denial of their 12(b)(1) motion.

II. Jurisdiction

¶ 8 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021). "[T]he issue of subject matter jurisdiction may be raised at any time, even on appeal." *Huntley v. Howard Lisk Co., Inc.*, 154 N.C. App. 698, 700, 573 S.E.2d 233, 235 (2002).

A. Failure to Appeal

¶ 9 **[1]** Defendants argue the trial court lacked subject matter jurisdiction because Plaintiffs failed to exhaust or even attempt to invoke statutory and administrative remedies available to them. This argument was incorporated into Defendants' Rule 12(b)(1) motion to dismiss, which the trial court denied. Defendants were not required to take a cross-appeal of the trial court's order dismissing the case under Rule 12(b)(6) in order to raise arguments under Rule 12(b)(1). Defendants' subject matter jurisdiction arguments fall under N.C. R. App. P. 28(c): "Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment . . . from which appeal has been taken." N.C. R. App. P. 28(c) (2021).

¶ 10 In addition to Rule 28(c), "there are two types of rules governing the manner in which legal claims are pursued in court: jurisdictional rules, which affect a court's power to hear the dispute, and procedural rules, which ensure that the legal system adjudicates the claim in an orderly way." *Tillet v. Town of Kill Devil Hills*, 257 N.C. App. 223, 225, 809 S.E.2d 145, 147 (2017) (citation omitted). This Court further held: "jurisdictional requirements cannot be waived or excused by the court." *Id.* (citation omitted).

¶ 11 "Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties." *Feldman v. Feldman*, 236 N.C. 731, 734, 73 S.E.2d 865, 867 (1953). Our Supreme Court has long held: "A defect in jurisdiction over the subject matter cannot be cured by waiver, consent, amendment, or otherwise." *Anderson v. Atkinson*, 235 N.C. 300, 301, 69 S.E.2d 603, 604 (1952).

¶ 12 Our Supreme Court further stated: "A lack of jurisdiction or power in the court entering a judgment always avoids the judgment, and a void judgment may be attacked whenever and wherever it is asserted." *State ex rel. Hanson v. Yandle*, 235 N.C. 532, 535, 70 S.E.2d 565, 568 (1952) (citations omitted). "Where a plaintiff has failed to exhaust its administrative remedies, its action brought in the trial court may be dismissed for

lack of subject matter jurisdiction." *Vanwijk v. Prof'l Nursing Servs.*, 213 N.C. App. 407, 410, 713 S.E.2d 766, 768 (2011) (citation omitted).

¶ 13 "So long as the statutory procedures provide effective judicial review of an agency action, courts will require a party to exhaust those remedies." *Flowers v. Blackbeard Sailing Club*, 115 N.C. App. 349, 352, 444 S.E.2d 636, 638 (1994).

¶ 14 Our Supreme Court has also held:

> 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. This is especially true where a statute establishes, as here, a procedure whereby matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose.* In such a case, the legislature has expressed an intention to give the administrative entity most concerned with a particular matter the first chance to discover and rectify error. *Only after the appropriate agency has developed its own record and factual background upon which its decision must rest should the courts be available to review the sufficiency of its process.* An earlier intercession may be both wasteful and unwarranted. To permit the interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies.

Presnell v. Pell, 298 N.C. 715, 721-22, 260 S.E.2d 611, 615 (1979) (internal citations and quotation marks omitted) (emphasis supplied).

¶ 15 Plaintiffs acknowledge they could have applied for a CON and have sought and challenged any administrative review to invoke or ripen their constitutional procedural due process claims. *See* N.C. Gen. Stat. § 131E-175 *et seq*. Plaintiffs failed to file an application for a CON or to seek or exhaust any administrative remedy from DHHS prior to filing the action at bar. *Id.* Plaintiff has not shown the inadequacy of statutorily available administrative remedies to review and adjudicate his claims to sustain a deprivation of procedural due process. *Id.*; *see Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 272, 620 S.E.2d 873, 879 (2005).

¶ 16 The procedural due process violation:

> is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by the statute[.]

Edward Valves, Inc. v. Wake Cty., 343 N.C. 426, 434, 471 S.E.2d 342, 347 (1996) (citing *Zinermon v. Burch*, 494 U.S. 113, 125-26, 108 L. Ed. 2d 100, 114 (1990)).

¶ 17 Plaintiffs seek to excuse their failure to seek any administrative review and remedy and assert, "a party who seeks to challenge the constitutionality of [the CON law] must bring an action pursuant to . . . the Declaratory Judgment Act" citing *Hospital Group of Western N.C. v. N.C. Dep't of Human Resources*, 76 N.C. App. 265, 268, 332 S.E.2d 748, 751 (1985). However, Plaintiffs omit the sentence preceding the quoted language, which qualifies: "By amending G.S. 131E-188(b), the Legislature has opted to bypass the superior court in a *contested certificate of need case*, and review of a *final agency decision* is properly in this Court." *Id.* (emphasis supplied). No "contested certificate of need case" was ever brought before DHHS, and no "final agency decision" has been entered. *Id.*

¶ 18 Plaintiffs further baldly assert they are not required to seek and exhaust administrative remedies because the statutory and administrative remedies are inadequate, and the administrative agencies do not have jurisdiction to hear their constitutional claims, nor to grant declaratory or injunctive relief. The focus of Plaintiffs' complaint sought a permanent injunction, preventing enforcement of the CON law against Plaintiffs. *See id.*

¶ 19 The remedy Plaintiffs admittedly and essentially seek is for a fact-finding administrative record and decision thereon to be cast aside and a CON to be summarily issued to them by the Court. This we cannot do. *Presnell*, 298 N.C. at 721, 260 S.E.2d at 615 ("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"). "Only after the appropriate agency has developed

its own record and factual background upon which its decision must rest should the courts be available to review the sufficiency of its [procedural due] process. An earlier intercession may be both wasteful and unwarranted." *Id.* at 721-22, 260 S.E.2d at 615. Had Plaintiffs sought any administrative review or the procedures were shown to be inadequate, their claim would be ripe for the superior court to exercise jurisdiction over their procedural claims.

¶ 20 Plaintiffs' procedural due process constitutional challenges under both Article I, Section 32 ("No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.") and Article I, Section 34 ("Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.") of the North Carolina Constitution are properly dismissed under Rule 12(b)(1). N.C. Const. art I, §§ 32, 34.

B. Article I, Section 19

¶ 21 **[2]** Plaintiffs also asserted a substantive due process claim under Article I, Section 19 of the North Carolina Constitution. Contrary to the State's adamant assertions otherwise, Plaintiffs correctly assert this substantive violation may be brought in a declaratory judgment claim in superior court, "regardless of whether administrative remedies have been exhausted." *Good Hope Hosp.*, 174 N.C. App. at 272, 620 S.E.2d at 879 (Holding a "[v]iolation of a substantive constitutional right may be the subject of a § 1983 claim, *regardless of whether administrative remedies have been exhausted*, because the violation is complete when the prohibited action is taken.") (citation omitted) (emphasis supplied).

¶ 22 This Court possesses jurisdiction to review the superior court's ruling over Plaintiffs' substantive due process as applied claims under Article I, Section 19 of the North Carolina Constitution. *See id.*

III. Issues

¶ 23 Plaintiffs argue the trial court erred by granting Defendants' Rule 12(b)(6) motion.

IV. Defendants' Rule 12(b)(6) Motion

¶ 24 **[3]** Plaintiffs assert the CON statutes, N.C. Gen. Stat. § 131E-175 *et seq.*, violates Article I, § 19 of the North Carolina Constitution. Plaintiffs' allegations properly assert an as-applied challenge to N.C. Gen. Stat. § 131E-175 *et seq.* "[A]n 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). "An as-applied challenge contests whether the statute can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable." *State v. Packingham*, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015) (citation omitted), *rev'd and remanded on other grounds*, ____U.S. ____, 198 L. Ed. 2d 273 (2017).

A. Standard of Review

¶ 25 This Court's standard of review of a Rule 12(b)(6) motion and ruling is well established. "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).

¶ 26 "On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]" *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (citation and internal quotation marks omitted) (ellipses in original).

¶ 27 This Court "consider[s] the allegations in the complaint [as] true, construe[s] the complaint liberally, and only reverse[s] the trial court's denial of a motion to dismiss if [the] plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Id.* (citation omitted).

B. Article I, Section 19

¶ 28 The North Carolina Constitution's Law of the Land Clause, provides, *inter alia*: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art I, § 19. The Law of the Land Clause has been held to be the equivalent of the Fourteenth Amendment's Due Process Clause in the Constitution of the United States. *See State v. Collins*, 169 N.C. 323, 324, 84 S.E. 1049, 1050 (1915).

¶ 29 "[A] decision of the United States Supreme Court interpreting the Due Process Clause is persuasive, though not controlling, authority for interpretation of the Law of the Land Clause." *Evans v. Cowan*, 132 N.C.

App. 1, 6, 510 S.E.2d 170, 174 (1999) (citation omitted). Our Supreme Court has expressly "reserved the right to grant Section 19 relief against unreasonable and arbitrary state statutes in circumstances where relief might not be attainable under the Fourteenth Amendment to the United States Constitution." *In re Meads*, 349 N.C. 656, 671, 509 S.E.2d 165, 175 (1998) (citation omitted).

¶ 30 Our Supreme Court held: "The law of the land, like due process of law, serves to limit the state's police power to actions which have a real or substantial relation to the public health, morals, order, safety or general welfare." *Poor Richard's Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988) (internal quotation marks omitted). Contrary to Plaintiffs' counsel's adamant assertions, for almost twenty years, this Court has held "economic rules and regulations do not affect a fundamental right for purposes of due process[.]" *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 537, 571 S.E.2d 52, 60 (2002) (citations omitted).

¶ 31 In *Hope—A Women's Cancer Ctr., P.A. v. State of N.C.*, 203 N.C. App. 593, 603, 693 S.E.2d 673, 680 (2010), this Court articulated a "rational basis" analysis when examining due process challenges to the CON law, which are claimed to be an invalid exercise of the State's police power. Our Court held: "(1) whether there exists a legitimate governmental purpose for the creation of the CON law[;] and[,] (2) whether the means undertaken in the CON law are reasonable in relation to this purpose." *Id.* (citations omitted).

¶ 32 Our Supreme Court held the protections under Article I, Section 19 "have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose." *Poor Richard's*, 322 N.C. at 64, 366 S.E.2d at 699.

¶ 33 In enacting the CON law, the General Assembly made voluminous findings of fact, including: "[T]he general welfare and protection of lives, health, and property of the people of this State require that new institutional health services to be offered within this State be subject to review and evaluation as to need, cost of service, accessibility to services, quality of care, feasibility, and other criteria." N.C. Gen. Stat. § 131E-183(a) (2021). This Court previously held this legislative finding is "a legitimate government purpose." *See Hope—A Women's Cancer Ctr., P.A.*, 203 N.C. App. at 603, 693 S.E.2d at 680 (citation omitted).

¶ 34 In *Hope—A Women's Cancer Ctr., P.A.*, this Court examined a facial challenge to the CON law under Article I, Section 19 and held:

> the General Assembly determined that approving the creation or use of new institutional health care services based in part on the need of such service was necessary in order to ensure that all citizens throughout the State had equal access to health care services at a reasonable price, a situation that would not occur if such regulation were not in place.

Id. at 604, 693 S.E.2d at 681.

¶ 35 This Court reasoned that affordable access to necessary health care by North Carolinians "is a legitimate goal, and it is a reasonable belief that this goal would be achieved by allowing approval of new institutional health services only when a need for such services had been determined." *Id.* at 605, 693 S.E.2d at 681. This Court held the CON law prohibiting a provider from expanding services in their practice did not facially violate a provider's due process rights under Article I, Section 19. *Id.* at 606, 693 S.E.2d at 682.

¶ 36 Defendants assert this Court's analysis here is controlled by *Hope—A Women's Cancer Ctr., P.A.* While *Hope* is instructive, contrary to the State's and Defendants' assertions, this Court's prior holding foreclosing *a facial challenge* does not foreclose a future *as-applied challenge*, nor does that decision control our analysis of Plaintiffs' claims in the complaint.

¶ 37 "A facial challenge is an attack on a statute itself as opposed to a particular application" to an individual litigant. *City of Los Angeles v. Patel*, 576 U.S. 409, 414, 192 L. Ed. 2d 435, 443 (2015). "In a facial challenge, the presumption is that the law is constitutional, and a court may not strike it down if it may be upheld on any reasonable ground." *Affordable Care, Inc. v. N.C. State Bd. Of Dental Exam'rs*, 153 N.C. App. 527, 539, 571 S.E.2d 52, 61 (2002).

¶ 38 Facial challenges are "the most difficult challenge to mount" successfully. *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987). To mount a successful facial challenge, "a plaintiff must establish that a law is unconstitutional in *all of its applications*." *Patel*, 576 U.S. at 418, 192 L. Ed. 2d at 445 (citation and internal quotation marks omitted) (emphasis supplied).

¶ 39 In contrast, an as-applied challenge attacks "only the decision that applied the ordinance to his or her property, not the ordinance in general." *Town of Beech Mountain*, 247 N.C. App. at 475, 786 S.E.2d at 356. Contrary to the State's assertions at oral argument, a future as-applied

challenge to a statute is not foreclosed and a litigant is not bound by the Court's holding in a prior facial challenge. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). An as-applied challenge asserts that a law, which is otherwise constitutional and enforceable, may be unconstitutional in its application to a particular challenger on a particular set of facts. *Id.*

¶ 40 Plaintiffs and *amicus* assert our Supreme Court's analysis from *In re Certificate of Need for Aston Park Hospital, Inc.*, 282 N.C. 542, 551, 193 S.E.2d 729, 735 (1973) is controlling instead of *Hope—A Women's Cancer Ctr., P.A.*, 203 N.C. App. 593, 693 S.E.2d 673 (2010). In *Aston Park*, our Supreme Court invalidated a prior codification of the CON law because it violated the plaintiff-provider's substantive due process rights. *Aston Park*, 282 N.C. at 551, 193 S.E.2d at 735. The prior CON statute prohibited the issuance of a CON unless it was "necessary to provide new or additional impatient facilities in the area to be served." *Id.* at 545, 193 S.E.2d at 732 (internal quotation marks omitted).

¶ 41 The General Assembly had made limited findings of fact at that time concerning how this prohibition promoted the public welfare. *Id.* at 544, 193 S.E.2d at 731. This Court held no evidence tended to show or suggest market forces and competition would not "lower prices, [create] better service and more efficient management" for healthcare to sustain the prohibition. *Id.* at 549, 193 S.E.2d at 734.

¶ 42 This earlier codification has been amended, enlarged and re-codified to include additional legislative findings to show how the CON law affects the public welfare. The General Assembly has specifically found and emphasized "[t]hat if left to the marketplace to allocate health service facilities and health care services, geographical maldistribution of these facilities and services would occur." N.C. Gen. Stat. § 131E-175(3).

¶ 43 Plaintiffs' asserted deficiencies, which were identified by this Court in *Aston Park*, are no longer present in the current CON law. *Hope—A Women's Cancer Ctr., P.A.*, 203 N.C. App. at 607, 693 S.E.2d at 682 (internal citations and quotation marks omitted). These additional legislative findings do not mean triable issues and challenges are foreclosed, as they may arise and continue to exist in a future plaintiff's as-applied challenge to the CON statute.

¶ 44 While counsel for Defendants clearly and correctly admitted the CON statutes are restrictive, anti-competitive, and create monopolistic policies and powers to the holder, and Plaintiffs correctly assert the CON process is costly and fraught with gross delays, and service needs are not kept current, those challenges can also be asserted before the

General Assembly, Commissions, and against the agency where a factual record can be built.

¶ 45 At least twelve sister states, including New Hampshire, California, Utah, Pennsylvania, and Texas, have re-examined the anti-competitive, monopolistic, and bureaucratic burdens of their CON statutes' health care allocations, and the scarcity created by and delays inherent in that system, and have abolished the entire CON system within their states. National Conference of State Legislatures, *Certificate of Need (CON) State Laws*, https://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx (last visited May 15, 2022).

¶ 46 Plaintiffs' complaint has also not asserted a violation of North Carolina's unfair and deceptive trade practices or right to work statutes located in Chapter 75 or Chapter 95 of our General Statutes. *See* N.C. Gen. Stat. § 75.1.1 *et seq*.; N.C. Gen. Stat. § 95-78 (2021) ("The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion.").

¶ 47 Plaintiffs also failed to assert it had sought re-classification of certain surgical and treatment procedures under its medical or other licenses and certifications, which can be safely done at its Center and clinic, without the need for a CON operating room. *See North Carolina State Bd. of Dental Exam'rs v. FTC* 574 U. S. 494, 514, 191 L. Ed. 2d 35, 54 (2015) (State dental board cannot confine teeth whitening to licensed dental offices.).

¶ 48 Advances in lesser and non-invasive procedures and technological treatments develop rapidly and have reduced or eliminated the need for a traditional operating theater and allowed for ambulatory clinical environments for patients. Yael Kopleman, MD, Raymond J. Lanzafame, MD, MBA & Doron Kopelman, MD, *Trends in Evolving Technologies in the Operating Room of the Future*, Journal of the Society of Laparoendoscopic Surgeons vol. 17,2 (2013).

¶ 49 We express no opinion on the potential viability, if any, of claims not alleged in this complaint. The trial court correctly held Plaintiffs' substantive due process allegations, even taken as true and in the light most favorable to them, failed to state a claim upon which relief can be granted. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2021). Plaintiffs' argument is overruled.

V. Conclusion

¶ 50 Absence of subject matter jurisdiction may be raised at any time, this Court possesses no jurisdiction over Plaintiffs' procedural challenges, as alleged and analyzed above. Plaintiffs' appeal is dismissed in part.

¶ 51 Plaintiffs' as-applied challenges in their complaint, taken as true and in the light most favorable to them, fail to state any legally valid cause of action. The trial court did not err in granting Defendants' Rule 12(b)(6) motion to dismiss.

¶ 52 Considering the allegations in the complaint, as applied to Plaintiffs, the CON law does not violate Plaintiffs' rights under the Law of the Land Clause. N.C. Const. art I, § 19. The order of the trial court is affirmed, without prejudice for Plaintiffs to assert claims before DHHS, or otherwise. *It is so ordered.*

DISMISSED IN PART AND AFFIRMED IN PART.

Judges HAMPSON and CARPENTER concur.

STATE OF NORTH CAROLINA, EX REL. ELIZABETH S. BISER, SECRETARY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, PLAINTIFF

CAPE FEAR RIVER WATCH, PLAINTIFF-INTERVENOR
v.
THE CHEMOURS COMPANY FC, LLC, DEFENDANT

No. COA21-225

Filed 21 June 2022

Civil Procedure—intervention—timeliness—factors—water pollution litigation

In an environmental action brought by the State arising from defendant chemical company's discharge of per- and polyfluoroalkyl substances (PFAS) into groundwater and the Cape Fear River, the trial court did not abuse its discretion by denying proposed intervenor Cape Fear Public Utility Authority's (CFPUA) motion to intervene as untimely. When CFPUA filed its motion to intervene, the parties had already resolved the State's claims by agreeing to a consent order, which constituted a final judgment; intervention would have been highly prejudicial to the parties by subjecting the matter to relitigation after the years of investigation, analysis, and negotiation involved in reaching the consent order; there were no changed circumstances justifying CFPUA's delay; CFPUA remained able to pursue relief in its federal lawsuit against defendant; and CFPUA had long been aware of the litigation, made comments in multiple instances, conferred with the State party on several occasions, and

repeatedly asserted throughout the proceedings that the State was failing to adequately represent CFPUA's interests.

Appeal by Proposed Intervenor Cape Fear Public Utility Authority from order entered 30 November 2020 by Judge Douglas B. Sasser in Bladen County Superior Court. Heard in the Court of Appeals 15 December 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Francisco J. Benzoni and Assistant Attorney General Asher P. Spiller, for Plaintiff-Appellee State of North Carolina.

Southern Environmental Law Center, by Geoffrey R. Gisler, Jean Y. Zhuang, and Kelly Moser, for Plaintiff-Intervenor-Appellee Cape Fear River Watch.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Joseph A. Ponzi, George W. House, and V. Randall Tinsley, for Proposed Plaintiff-Intervenor-Appellant Cape Fear Public Utility Authority.

Robinson, Bradshaw & Hinson, P.A., by R. Steven DeGeorge, and Wachtell, Lipton, Rosen & Katz, by John F. Savarese, for Defendant-Appellee The Chemours Company FC, LLC.

COLLINS, Judge.

¶ 1 Proposed Intervenor Cape Fear Public Utility Authority ("CFPUA") appeals from the trial court's order denying its 8 September 2020 motion to intervene in this environmental action brought in 2017 by the State of North Carolina against Defendant, The Chemours Company FC, LLC. CFPUA argues that the trial court erred by denying its motion to intervene as untimely, erred by denying intervention as of right, and abused its discretion by denying permissive intervention. Because the trial court did not abuse its discretion by denying CFPUA's motion as untimely, we affirm.

I. Background

¶ 2 Chemours owns the Fayetteville Works facility ("Facility"), a chemical manufacturing plant adjacent to the Cape Fear River in Bladen County, North Carolina. Chemours produces certain per- and polyfluoroalkyl substances ("PFAS"), including a chemical commercially known as GenX, at the Facility. The Facility discharges water into the Cape Fear

River through multiple avenues. CFPUA, a public utility authority which provides potable water to residents of New Hanover County and the City of Wilmington, owns and operates a raw water intake on the Cape Fear River downstream of the Facility.

¶ 3 On 7 September 2017, the State, through the Department of Environmental Quality ("DEQ"), filed a Verified Complaint, Motion for Temporary Restraining Order, and Motion for Preliminary Injunctive Relief against Chemours alleging violations of multiple water quality laws and regulations based on discharges of PFAS from the Facility into groundwater and the Cape Fear River. The State sought a temporary restraining order requiring Chemours to "immediately cease discharging" certain substances "from its manufacturing process into surface waters" and to "continue to prevent the discharge of process wastewater containing GenX into waters of the State." The State also sought preliminary and permanent injunctive relief. The following day, the trial court entered a Partial Consent Order requiring Chemours to continue existing measures to "prevent the discharge of process wastewater containing GenX . . . into waters of the State," immediately prevent the discharge of certain compounds identified in the complaint, and provide certain information to DEQ and the Environmental Protection Agency.

¶ 4 On 16 October 2017, CFPUA sued Chemours in the United States District Court for the Eastern District of North Carolina ("Federal Suit"). *See* Complaint, *Cape Fear Public Utility Authority v. The Chemours Co. FC, LLC*, No. 7:17-cv-195, (E.D.N.C. 2017), E.C.F. No. 1.[1] In the Federal Suit, CFPUA and other regional water suppliers and governmental entities assert claims for public nuisance, private nuisance, trespass to real property, trespass to chattels, negligence, negligence per se, failure to warn, and negligent manufacture against Chemours. Along with the other plaintiffs, CFPUA seeks compensatory damages, punitive damages, and injunctive relief. *See* Amended Master Complaint of Public Water Suppliers at 6-7, 45-54, *Cape Fear Public Utility Authority v. The Chemours Co. FC, LLC*, No. 7:17-cv-195 (E.D.N.C. 2019), E.C.F. No. 75.

¶ 5 The day after filing its Federal Suit, CFPUA moved to intervene in the present action ("First Motion to Intervene"). CFPUA sought to intervene permissively and as of right under N.C. Gen. Stat. § 1A-1, Rule 24. CFPUA asserted that it had "an interest in the injunctive relief granted" in this action "to assure that such relief adequately protects CFPUA's

1. We take judicial notice of CFPUA's filings in the federal court. *See State v. Watson*, 258 N.C. App. 347, 352, 812 S.E.2d 392, 395 (2018) ("[O]ur courts, both trial and appellate, may take judicial notice of documents filed in federal courts.").

interests" and contended that its "ability to obtain relief may be impaired if the State either fails to prevail (in whole or in part) . . . or if the State compromises this underlying action in a manner detrimental to CFPUA." CFPUA also argued that its interests were "not adequately represented by the State" because its Federal Suit asserted "interests unique to a public water supply authority which are not addressed or protected by the relief sought by the State" and the State's failure to provide public notice and opportunity to comment prior to entry of the Partial Consent Order "call[ed] into question whether the State recognize[d] CFPUA's rights."

¶ 6 CFPUA withdrew its First Motion to Intervene on 15 November 2017 after the parties stipulated that the State would provide notice and comment procedures "with respect to any proposed settlement between" the State and Chemours. The parties also stipulated that the Partial Consent Order was "not a final resolution of any claims asserted" by the State.

¶ 7 On 9 April 2018, the State filed an Amended Complaint and Motion for Preliminary Injunctive Relief containing further allegations based on information gathered during further investigation and seeking additional injunctive relief.[2]

¶ 8 The State published notice of a Proposed Consent Order and commenced a public comment period on 26 November 2018. In a 17 December 2018 comment, CFPUA argued that the Proposed Consent Order was "fundamentally flawed in a number of important respects," including that certain remedial provisions "effectively abandon[ed] the downstream users of the Cape Fear River, leaving them to fend for themselves in private litigation." CFPUA protested that the Proposed Consent Order would provide filtration systems for private well owners whose water exceeded a threshold level of contamination with certain PFAS but would not provide comparable relief for downstream users whose water presented the same level of contamination. In an additional comment, CFPUA provided results of "recent PFAS testing at the CFPUA water intake on the Cape Fear River, and of the treated 'finished' water." According to CFPUA, "out of 51 sampling events" of raw and finished water, only 4 fell below the threshold for private well filtration under the Proposed Consent Order.

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2. The requested injunctive relief included requiring Chemours to address air emissions of GenX Compounds, address other sources of GenX Compounds "such that they no longer cause or contribute to any violations of North Carolina's groundwater rules," refrain from discharging process wastewater into the Cape Fear River prior to issuance of a new permit, account for other discharges, and generally "[c]ease and abate all ongoing violations of North Carolina's water and air quality laws."

¶ 9 CFPUA again moved to intervene on 20 December 2018 ("Second Motion to Intervene"). CFPUA alleged in its Second Motion to Intervene that it was unaware the parties were negotiating or had reached a proposed settlement until the Proposed Consent Order was published. CFPUA contended that the Proposed Consent Order did not "account for or seek to remedy the ongoing harms inflicted on CFPUA and its customers." CFPUA set its Second Motion to Intervene for hearing but removed the motion from the calendar on 10 January 2019.

¶ 10 The State moved for the entry of the Revised Proposed Consent Order on 20 February 2019. The State, Chemours, and Cape Fear River Watch, another proposed plaintiff-intervenor,[3] each consented. At a hearing on the Revised Proposed Consent Order, counsel for CFPUA requested the trial court withhold entering the order until CFPUA's Board of Directors considered whether it should withdraw the Second Motion to Intervene. The trial court declined to do so and entered the Revised Proposed Consent Order as a Consent Order on 25 February 2019.

¶ 11 The Consent Order obligates Chemours to undertake compliance measures to address air, groundwater, surface water, and drinking water contamination and imposes monitoring and reporting requirements. In addition, Paragraph 12 of the Consent Order establishes a process for amending the Consent Order "to reduce PFAS contamination in the Cape Fear River and in the raw water intakes of downstream public water utilities on an accelerated basis[.]" Paragraph 12 provides that,

> within six months of entry of this Order, Chemours shall submit to DEQ and Cape Fear River Watch a plan demonstrating the maximum reduction in PFAS loading from the Facility (including loading from contaminated stormwater, non-process wastewater, and groundwater) to surface waters . . . that are economically and technologically feasible, and can be achieved within a two-year period . . . . The plan shall be supported by interim benchmarks to ensure continuous progress in reduction of PFAS loading. If significantly greater reductions can be achieved in a longer implementation period, Chemours may propose, in addition, an implementation period of up to five years supported by interim benchmarks to ensure

3. Cape Fear River Watch is a "§ 501(c)(3) nonprofit public interest organization . . . that engages residents of the Cape Fear watershed through programs to preserve and safeguard the river." Cape Fear River Watch filed a motion to intervene on 12 December 2018.

> continuous progress in reduction of PFAS loading. . . . Chemours shall simultaneously transmit the plan to downstream public water utilities. DEQ will make DEQ staff available to meet with downstream public water utilities to receive input on the plan.

Upon reaching an agreement, the parties were required to file a joint motion to amend the Consent Order "to incorporate any agreed upon reductions as enforceable requirements" of the Consent Order. If the parties were unable to reach an agreement within eight months of entry of the Consent Order, they were permitted to either jointly stipulate to additional time or to "bring any dispute regarding the additional reductions before the Court for resolution."

¶ 12 The Consent Order also released and resolved

> civil and administrative claims for injunctive relief and civil penalties by Plaintiff against Chemours relating to the release of PFAS from the Facility that have been or could have been brought based on information known to DEQ prior to the lodging of the original Proposed Consent Order on November 28, 2018 for past and continuing violations of the following statutes and regulations: the Clean Water Act and regulations promulgated thereunder; the Clean Air Act and regulations promulgated thereunder; and the North Carolina statutes and regulations referenced in the Complaint, the Amended Complaint and the [Notices of Violation] . . . . Furthermore, DEQ agrees that, based on information known to DEQ prior to the lodging of the original Proposed Consent Order on November 28, 2018, this Consent Order addresses and resolves any violation or condition at the Facility insofar as it could serve as the basis for a claim, proceeding, or action pursuant to Section 13.1(a) or (c) of North Carolina Session Law 2018-5.

The Consent Order did not "release[] Chemours from any liability it may have to any third parties arising from Chemours' actions or release[] any claims by any third party, including the claims in" CFPUA's Federal Suit.

¶ 13 Chemours submitted a proposed plan under Paragraph 12 to DEQ on 26 August 2019. CFPUA commented on this submission on 27 September 2019 and met with DEQ to discuss the submission on 30 September 2019. Chemours submitted a revised proposal on 4 November 2019 which

"was made publicly available on DEQ's website." Following negotiations between the parties, the State released a Proposed Addendum to the Consent Order for public comment on 17 August 2020.

¶ 14 CFPUA filed a Renewed and Amended Motion to Intervene on 8 September 2020 ("Third Motion to Intervene"). CFPUA again alleged that the Consent Order, and further alleged that the Proposed Addendum, provided disparate standards for groundwater users near the Facility and surface water users downstream of the Facility. CFPUA therefore sought a declaration that the Consent Order and Proposed Addendum were arbitrary and capricious and an abuse of discretion under the North Carolina Administrative Procedure Act, and denied equal protection in violation of the state and federal constitutions. CFPUA also sought a declaration that the violations alleged by the State in its amended complaint have occurred or are threatened, and the Consent Order and Proposed Addendum failed to abate these violations.

¶ 15 The State moved to enter the Proposed Addendum on 6 October 2020 and filed a corrected motion two days later. The trial court heard CFPUA's Third Motion to Intervene and the motion for entry of the Proposed Addendum on 12 October 2020. The trial court entered the Proposed Addendum as an Addendum to Consent Order Paragraph 12 ("Addendum") following the hearing and an order denying CFPUA's Third Motion to Intervene on 30 November 2020. The trial court concluded that CFPUA's Third Motion to Intervene was untimely and that CFPUA failed to meet the requirements for either permissive intervention or intervention as of right.

¶ 16 CFPUA appealed the denial of its Third Motion to Intervene to this Court.

II. Discussion

¶ 17 CFPUA first argues that the trial court erred by denying its Third Motion to Intervene as untimely.

¶ 18 It is well-established that "[w]hether a motion to intervene is timely is a matter within the sound discretion of the trial court[.]" *Hamilton v. Freeman*, 147 N.C. App. 195, 201, 554 S.E.2d 856, 859 (2001); *see also Malloy v. Cooper*, 195 N.C. App. 747, 750, 673 S.E.2d 783, 786 (2009); *Home Builders Ass'n of Fayetteville N.C. Inc. v. City of Fayetteville*, 170 N.C. App. 625, 630-31, 613 S.E.2d 521, 525 (2005). An abuse of discretion occurs only where the trial court's ruling is "manifestly unsupported by reason" or is "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

¶ 19 Both intervention of right and permissive intervention are governed by N.C. Gen. Stat. § 1A-1, Rule 24, which provides:

> (a) Intervention of right.–Upon timely application anyone shall be permitted to intervene in an action:
>
> (1) When a statute confers an unconditional right to intervene; or
>
> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive intervention.–Upon timely application anyone may be permitted to intervene in an action[:]
>
> (1) When a statute confers a conditional right to intervene; or
>
> (2) When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, such officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

N.C. Gen. Stat. § 1A-1, Rule 24 (2020).

¶ 20 A motion to intervene, whether of right or permissively, must be timely. *See id.*; *State ex rel. Easley v. Philip Morris Inc.*, 144 N.C. App. 329, 332, 548 S.E.2d 781, 783 (2001) (citing N.C. Gen. Stat. § 1A-1, Rule 24). "Timeliness is the threshold question to be considered in any motion

for intervention." *State Employees Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264, 330 S.E.2d 645, 648 (1985) (citation omitted). In determining the timeliness of a motion to intervene, the trial court must consider "(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances." *Procter v. City of Raleigh Bd. of Adjustment*, 133 N.C. App. 181, 183, 514 S.E.2d 745, 746 (1999) (citing *Gentry*, 75 N.C. App. at 264, 330 S.E.2d at 648). "In situations where a judgment has been entered, motions to intervene are granted only upon a finding of 'extraordinary and unusual circumstances' or a 'strong showing of entitlement and justification.' " *Id.* (citing *Gentry*, 75 N.C. App. at 264, 330 S.E.2d at 648).

1. Status of the Case

¶ 21 CFPUA argues that the trial court failed to appropriately assess the first factor bearing on timeliness, the status of the case. CFPUA specifically contends that the trial court erred because the Consent Order "is not a final judgment, and does not constitute a judgment for purposes of the intervention analysis." We disagree.

¶ 22 The trial court addressed this factor as follows:

> This Court entered judgment in this case in the form of a Consent Order on February 25, 2019, over eighteen months ago. CFPUA's delay must be measured from entrance of this Consent Order. CFPUA was fully aware of the Consent Order. In fact, CFPUA was present in Court on the day it was entered. There are no extraordinary or unusual circumstances that justify CFPUA's long delay. Therefore, this factor weighs heavily against CFPUA and is itself a sufficient basis for denial of CFPUA's Third Motion to Intervene.

(Citations omitted).

¶ 23 The Consent Order contains a comprehensive release of

> civil and administrative claims for injunctive relief and civil penalties by Plaintiff against Chemours relating to the release of PFAS from the Facility that have been or could have been brought based on information known to DEQ prior to the lodging of the original Proposed Consent Order on November 28, 2018 for past and continuing violations of the following

> statutes and regulations: the Clean Water Act and regulations promulgated thereunder; the Clean Air Act and regulations promulgated thereunder; and the North Carolina statutes and regulations referenced in the Complaint, the Amended Complaint and the [Notices of Violation] . . . . Furthermore, DEQ agrees that, based on information known to DEQ prior to the lodging of the original Proposed Consent Order on November 28, 2018, this Consent Order addresses and resolves any violation or condition at the Facility insofar as it could serve as the basis for a claim, proceeding, or action pursuant to Section 13.1(a) or (c) of North Carolina Session Law 2018-5.

In consideration of this release, Chemours agreed to be bound by the obligations detailed in the Consent Order. The parties thus resolved the State's claims by agreeing to implement the Consent Order, and the trial court retained jurisdiction only "for the duration of the performance of the terms and provisions of [the] Consent Order to effectuate or enforce compliance with the terms of [the] Consent Order[.]"

¶ 24 Citing to the Consent Order's requirement that the parties develop and implement a plan for toxicity studies of certain PFAS, a provision permitting Chemours to request less frequent sampling for certain wastewater and stormwater sampling after two years, and Paragraph 12, CFPUA argues that the Consent Order is not a final judgment. Though these provisions envision approval and enforcement by the trial court, they do not obviate the Consent Order's resolution of the State's claims and therefore do not diminish the Consent Order's effect as a final judgment. Under the release of claims in the Consent Order, there is to be no further adjudication of the merits of the State's claims. *See Duncan v. Duncan*, 366 N.C. 544, 545, 742 S.E.2d 799, 801 (2013) ("A final judgment generally is one which ends the litigation on the merits." (quotation marks and citation omitted)).

¶ 25 The Consent Order in this case is analogous to the consent decree this Court treated as a final judgment when analyzing the timeliness of a motion to intervene in *State ex rel. Easley v. Philip Morris Inc.* The *Philip Morris* consent decree provided for "the creation of a non-profit corporation to control fifty percent of all monies" received under a settlement agreement, "subject to the North Carolina General Assembly's approval of the creation of the non-profit corporation prior to 15 March 1999." 144 N.C. App. at 330, 548 S.E.2d at 782. Pursuant to the consent decree, the trial court entered a consent order "to create a private

trust to benefit tobacco growers and quota owners in North Carolina and other states" and "retained jurisdiction to interpret, implement, administer and enforce the trust agreement." *Id.* at 331, 548 S.E.2d at 782. Approximately ten months after entry of the consent decree and two and a half months after entry of the consent order, the proposed intervenors sought to intervene "on behalf of all North Carolina taxpayers" and filed a proposed complaint in intervention "alleging numerous constitutional and statutory violations in the implementation" of the consent decree and consent order. *Id.* This Court treated the consent decree as a final judgment although it required further action, including the creation and approval of a non-profit; the trial court retained jurisdiction over future proceedings; and payments were to continue for approximately 25 years. *Id.* at 333-34, 548 S.E.2d at 784.

¶ 26 In the present case, the trial court did not err by treating the Consent Order as a final judgment when assessing the timeliness of CFPUA's Third Motion to Intervene. The trial court therefore did not fail to appropriately assess the status of the case and properly required CFPUA to demonstrate "extraordinary and unusual circumstances" or a "strong showing of entitlement and justification" for intervention. *See Gentry*, 75 N.C. App. at 264, 330 S.E.2d at 648.

2. Possible Unfairness or Prejudice to Existing Parties

¶ 27 CFPUA also argues that the trial court abused its discretion by concluding that the risk of unfairness or prejudice to the existing parties weighed against the timeliness of CFPUA's Third Motion to Intervene. The trial court addressed this factor as follows:

> CFPUA asserts that "there is no risk of unfairness or prejudice to the existing parties." The Court disagrees. The Court finds that CFPUA's intervention would be highly prejudicial to the existing parties especially given the extraordinary relief that CFPUA seeks—specifically, a trial and a judgment declaring the Consent Order and the proposed Addendum arbitrary and capricious and unconstitutional. Intervention would set back and significantly delay, or even derail, the parties' extensive efforts to reach settlement and address PFAS contamination from the Facility. Indeed, the Court finds that CFPUA's intervention could delay relief for CFPUA's own customers as well as for the many thousands of North Carolinians who stand to benefit from the numerous

> PFAS reduction measures required in the Consent Order and Addendum. This factor, even taken alone, is sufficient for this Court to deny CFPUA's Third Motion to Intervene.

(Citations omitted).

¶ 28 In its proposed complaint in intervention, CFPUA sought a trial and declaratory judgment that the Consent Order and subsequent Addendum were arbitrary and capricious, unconstitutional, and in violation of DEQ's statutory mandate. Despite the Consent Order's detailed release of the State's claims, CFPUA also sought a declaration that "the statutory and regulatory violations alleged by the State in this action have occurred or are threatened."

¶ 29 The trial court reasoned that CFPUA's intervention for these purposes would subject the numerous remedial matters addressed in the Consent Order and Addendum, which the trial court found were "the product of years of negotiation as well as time-intensive analysis and investigation involving numerous experts across multiple fields of specialty," to relitigation. The trial court did not abuse its discretion by concluding that CFPUA's intervention "would be highly prejudicial to the existing parties" and this factor weighed against the timeliness of CFPUA's intervention. *See Home Builder's Ass'n of Fayetteville*, 170 N.C. App. at 631, 613 S.E.2d at 525 (concluding that intervention "would prejudice the [existing parties] by destroying their settlement"); *see also Charles Schwab & Co. v. McEntee*, 225 N.C. App. 666, 675-76, 739 S.E.2d 863, 869 (2013) (concluding that the trial court did not abuse its discretion by denying permissive intervention where intervention in the estate dispute "might have eradicated the [settlement agreement] and delayed adjudication of the rights of the Named Parties, potentially to the detriment of the creditors and other beneficiaries of the Estate").

¶ 30 CFPUA challenges the trial court's consideration of "how CFPUA's intervention might interfere with the existing parties' settlement negotiations and decisions" as "untethered to any prejudice which was caused by CFPUA's delay." CFPUA argues that instead, the trial court should only have considered prejudice to the parties arising from the period between "the date CFPUA learned DEQ would not protect its interests" and the filing of its Third Motion to Intervene, a period CFPUA contends was just 26 days.

¶ 31 CFPUA now asserts that it was unaware DEQ would not protect its interests until DEQ published the Proposed Addendum on 17 August 2020. However, CFPUA alleged that DEQ had failed to adequately

represent its interests on multiple instances prior to 17 August 2020. In its First Motion to Intervene, filed 17 October 2017, CFPUA alleged that the State had failed to provide notice and an opportunity for comment prior to filing the original complaint or proposing the Consent Order. CFPUA also alleged that the relief sought would not adequately represent "interests unique to a public water supply authority" such as CFPUA. In an April 2018 memorandum in opposition to a motion to dismiss its Federal Suit, CFPUA argued that DEQ's amended complaint did not seek "relief for third-parties who have suffered injury as a result of the contamination." In its Second Motion to Intervene, filed 20 December 2018, CFPUA declared that it was "clear now that CFPUA's interests are not adequately represented by the State in this action." CFPUA further argued that DEQ had "given little attention to CFPUA's interests in pursuing this enforcement action or to advocating or negotiating relief for the harms caused by the pollutant discharges that are adversely impacting downstream users[.]" Additionally, as the trial court determined, the entry of the Consent Order on 25 February 2019 placed CFPUA "on notice regarding the requirements for the Addendum." The trial court found—and CFPUA does not contest—that (1) CFPUA commented on Chemours' initial proposal under Paragraph 12 on 27 September 2019; (2) CFPUA met with DEQ three days later, in part to discuss the proposal; (3) Chemours published a revised proposal for compliance with Paragraph 12 on its website on 4 November 2019; and (4) CFPUA again met with DEQ on 17 July 2020. CFPUA's 27 September 2019 comment criticized the proposed addendum as "fundamentally flawed in a number of important respects."

¶ 32 CFPUA's argument that the trial court considered too broad a period in assessing prejudice to the existing parties because CFPUA did not "learn[] DEQ would not protect its interests" until 17 August 2020, and therefore delayed just 26 days before filing its Third Motion to Intervene, is without merit. *See Philip Morris*, 144 N.C. App. at 333, 584 S.E.2d at 783 (noting that while proposed intervenors contended the plaintiff had "failed to represent their interests throughout the process," "information about the underlying case ha[d] been widely available" in the ten-month period between entry of judgment and the motion to intervene).

3. Reason for Delay in Moving for Intervention

¶ 33 CFPUA also argues that the trial court abused its discretion because it "made no effort to address CFPUA's evidence and argument on the changed circumstances" that led to its Third Motion to Intervene. To the contrary, the trial court rejected CFPUA's explanation that changed

circumstances accounted for its delay in seeking to intervene. In its Third Motion to Intervene, CFPUA argued that the Consent Order was "based on a flawed premise" that "its implementation would result in the continued reduction of PFAS levels in the Cape Fear River." CFPUA contended that data collected after the entry of the Consent Order revealed that "PFAS levels in the Cape Fear River have been variable—not decreasing—and are largely dependent on river flows." Presented with these arguments, the trial court determined that CFPUA had "articulated no legitimate reason for its delay in seeking intervention."

¶ 34 As the trial court noted, the Consent Order put CFPUA on notice of the requirements to which the Addendum had to conform. Paragraph 12 specified that the parties were required to formulate "a plan demonstrating the maximum reductions in PFAS loading from the Facility (including loading from contaminated stormwater, non-process wastewater, and groundwater) to surface waters . . . that are economically and technologically feasible, and can be achieved within a two-year period[.]"

¶ 35 Contrary to CFPUA's argument that changed circumstances justified its delay, the record indicates that CFPUA had a longstanding concern that implementation of the Consent Order would not reduce PFAS levels in the Cape Fear River to its satisfaction. In its Second Motion to Intervene, CFPUA alleged that "even if the [Facility] immediately ceases all emissions and discharges of PFAS pollutants into the Cape Fear River, those pollutants will continue to contaminate the surface water in the Cape Fear River for decades to come (since pollution in the vegetation, soils, and groundwater in a large and unknown radius around the [Facility] and in river sediments will continue to migrate into the river water through groundwater flow and surface run-off)[.]" Similarly, in its Federal Suit, CFPUA alleged that contaminants originating from the Facility would be "re-introduced into the waters of the Cape Fear River and be subject to being transported to CFPUA's water intake and introduced into CFPUA's public water supply system" when "disturbed by the natural processes of the river ecosystem, including the normal use of the river by people and water-craft." *See* Complaint at 22, *Cape Fear Public Utility Authority v. The Chemours Co. FC, LLC*, No. 7:17-cv-195 (E.D.N.C. 2017), E.C.F. No. 1.

¶ 36 The trial court therefore did not abuse its discretion by rejecting CFPUA's changed circumstances theory, determining that CFPUA did not offer a legitimate reason for its delay, and concluding that CFPUA's delay therefore weighed heavily against the timeliness of its Third Motion to Intervene.

4. Prejudice to the Party Seeking to Intervene

¶ 37 CFPUA also challenges the trial court's conclusion that the potential prejudice to CFPUA of denying intervention weighed heavily against the timeliness of CFPUA's intervention.

¶ 38 The trial court addressed this factor as follows:

> First, CFPUA has its own pending litigation against Chemours. As CFPUA acknowledges, the Consent Order and Addendum do not in any way impair CFPUA's efforts to vindicate its interests in its separate federal litigation. To the contrary, the Consent Order expressly provides that Chemours is not released from any liability it may have to any third parties arising from Chemours' actions. Second, with respect to the Consent Order, counsel for CFPUA stated in open court that the Consent Order "address[es] many of the concerns, if not most of the concerns, [CFPUA] initially raised . . . ." Counsel for CFPUA also acknowledged that "the requirements of the order are beneficial to the public." With respect to the Addendum, Chemours is required to achieve maximum feasible reductions of PFAS contributions from residual sources at the Facility to the Cape Fear River on an expedited basis. Downstream communities, including CFPUA and its customers, will be the primary beneficiaries of this accelerated remediation.

(Citations omitted).

¶ 39 CFPUA argues that the trial court's analysis of the potential prejudice to CFPUA "fails to consider the changed circumstances" that it contends led to its Third Motion to Intervene. However, as discussed above, the trial court did not abuse its discretion by rejecting CFPUA's changed circumstances theory.

¶ 40 CFPUA also contends that its Federal Suit will not provide the same relief as direct involvement in this action and is "an inferior means to protect [CFPUA's] interests in prompt and effective remediation of the contamination." The trial court's analysis, however, did not assume that the Federal Suit would provide the same relief as CFPUA's intervention. Instead, the trial court reasoned that CFPUA would remain able to pursue its Federal Suit absent intervention and the implementation of the Consent Order and Addendum would benefit downstream users,

including CFPUA. CFPUA does not challenge the trial court's findings that the Consent Order "contains numerous provisions to substantially reduce PFAS discharges and emissions to the environment from ongoing operations at the Facility," the Addendum "requires measures to substantially reduce PFAS loading to surface water from historic sources including contaminated groundwater and contaminated soils," and such sources are "currently the most significant source[s] of PFAS loading to the Cape Fear River."

¶ 41 The trial court's assessment that the potential prejudice to CFPUA weighed against intervention is not "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *See White*, 312 N.C. at 777, 324 S.E.2d at 833.

5. Unusual Circumstances

¶ 42 CFPUA argues that the trial court abused its discretion in concluding that there are "unusual circumstances that warrant denying CFPUA's [Third Motion to Intervene] as untimely." The trial court addressed this factor as follows:

> [T]he "unusual circumstances" that [CFPUA] lists are unrelated to its long delay and are irrelevant to its failure to timely move for intervention. While extraordinary or unusual circumstances are generally analyzed to support a late motion to intervene, the Court finds that, here, there are unusual circumstances that warrant denying CFPUA's motion to intervene as untimely. Unlike most settlements, both the Consent Order and the Addendum were publicly noticed, allowing CFPUA and other members of the public a chance to be heard on both documents prior to entry by the Court. CFPUA availed itself of this opportunity and commented on both the Consent Order and the Addendum as well as on Chemours' submission describing how it proposed to comply with the requirements of Paragraph 12 of the Consent Order. Moreover, the Consent Order was unusual in that it expressly provided downstream utilities, including CFPUA, with a unique role in the process that led to development of the Addendum. Specifically, the Consent Order required Chemours to share its plan under Paragraph 12 with CFPUA and other utilities and required DEQ to make relevant staff

> available to meet with downstream utilities, including CFPUA, to discuss their comments on Chemours' plan. Finally, the nature of this Addendum also constitutes an unusual circumstance favoring the denial of the motion to intervene. The Addendum addresses an issue of paramount importance to the citizens of North Carolina—the requirement of significant reductions of PFAS loading to surface waters from residual sources at the Facility. Intervention at this stage could delay or derail implementation of measures necessary to achieve these reduction[s]. These unusual circumstances weigh against the timeliness of CFPUA's Third Motion to Intervene.

(Citations omitted).

¶ 43 CFPUA does not challenge the trial court's determination that the notice and comment procedures, CFPUA's involvement under Paragraph 12, and the public benefit of prompt implementation of the Consent Order and Addendum were unusual circumstances weighing against CFPUA's intervention. Instead CFPUA argues, as it did in its Third Motion to Intervene, that "unusual circumstances" existed in DEQ's "consistent, carefully considered unwillingness to confer with CFPUA about the remediation measures that DEQ is considering and that directly impact [CFPUA's] customers." CFPUA suggests that this amounts to "conduct by an existing party that makes it more difficult for potential intervenors to apprehend the need to intervene[.]"

¶ 44 In support of this argument, CFPUA cites *Stallworth v. Monsanto Co.*, 558 F.2d 257 (1977), but *Stallworth* is distinguishable from the present case. There, the plaintiff-employees opposed the defendant-employer's request to notify non-party employees of the suit and "give them a reasonable opportunity to intervene, or be joined as defendants[.]" *Id.* at 260-61. The trial court denied the request to notify the non-party employees and subsequently entered a consent order partially settling the case. *Id.* at 261. The non-party employees "first felt the impact" of the consent order ten days later and filed their motion to intervene "just under one month after the entry of" the order. *Id.* at 261-62. The trial court denied the motion to intervene as untimely, but the Fifth Circuit reversed. *Id.* at 260. The Fifth Circuit reasoned that "[s]ince the plaintiffs urged the district court to make it more difficult for the [non-party employees] to acquire information about the suit early on," the plaintiffs should not "be heard to complain that [the non-party employees] should have known about it or appreciated its significance sooner." *Id.* at 267. The refusal to

permit notification of non-party employees of the pendency and potential impact of the lawsuit "constitute[d] an unusual circumstance which tilt[ed] the scales toward a finding that the" motion to intervene was timely. *Id.*

¶ 45 Here, by contrast, the trial court's unchallenged findings of fact demonstrate that CFPUA has long been aware of this litigation, made comments on multiple instances, and conferred with DEQ on several occasions. Additionally, CFPUA's argument that the State's conduct impeded its ability to apprehend the need to intervene is undercut by CFPUA's repeated assertions, beginning early in the proceedings, that the State failed to adequately protect CFPUA's interests.

¶ 46 The trial court did not abuse its discretion in concluding that the unusual circumstances cited by CFPUA are "unrelated to its long delay and are irrelevant to its failure to timely move for intervention," and to the contrary, "there are unusual circumstances that warrant denying CFPUA's" Third Motion to Intervene as untimely.

III. Conclusion

¶ 47 The trial court did not abuse its discretion in determining that CFPUA's Third Motion to Intervene was untimely. Because "[t]imeliness is the threshold question to be considered in any motion for intervention," *Gentry*, 75 N.C. App. at 264, 330 S.E.2d at 648, we affirm the trial court's order denying CFPUA's Third Motion to Intervene without reaching CFPUA's arguments that the trial court erred by denying intervention as of right and abused its discretion by denying permissive intervention under Rule 24(a) and (b).

AFFIRMED.

Judges DIETZ and ARROWOOD concur.

STATE v. ANTHONY

[284 N.C. App. 135, 2022-NCCOA-414]

STATE OF NORTH CAROLINA
v.
KENNETH RUSSELL ANTHONY, DEFENDANT

No. COA18-1118-3

Filed 21 June 2022

Satellite-Based Monitoring—lifetime—reasonableness—aggravated offender

The trial court's order imposing lifetime satellite-based monitoring (SBM) on defendant upon his release from prison based on his status as an aggravated offender was affirmed where, after considering the totality of the circumstances—including defendant's reduced expectation of privacy due to having to register as a sex offender, the State's legitimate interest in protecting the public and in preventing and solving future sex crimes, and the limited intrusion caused by lifetime SBM for aggravated offenders—the application of SBM was reasonable in defendant's case.

Judge HAMPSON concurring in result only.

Appeal by defendant from order entered on or about 26 April 2018 by Judge Lori I. Hamilton in Superior Court, Rowan County. Heard in the Court of Appeals 8 May 2019, and opinion filed 20 August 2019. Remanded to this Court by order of the North Carolina Supreme Court for further consideration in light of *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019). Opinion filed 17 November 2020. Remanded to this Court by order of the North Carolina Supreme Court for further consideration in light of *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, *State v. Strudwick*, 379 N.C. 94, 2021-NCSC-127, and the General Assembly's recent amendments to the satellite-based monitoring program in 2021 North Carolina Laws S.L. 2021-138 (Sept. 2, 2021, eff. 1 December 2021).

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya M. Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant.

STROUD, Chief Judge.

¶ 1 Defendant Kenneth Russell Anthony appeals a trial court order directing him to enroll in satellite-based monitoring ("SBM") for life following his plea to an aggravated sex offense. We are reviewing Defendant's case for a third time; the North Carolina Supreme Court remanded the case to us to reconsider our holding in light of *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, *State v. Strudwick*, 379 N.C. 94, 2021-NCSC-127, and the General Assembly's recent amendments to the SBM program from Session Law 2021-138, § 18. 2021 North Carolina Laws S.L. 2021-138 (Sept. 2, 2021, eff. 1 December 2021). Based upon these recent Supreme Court rulings and the newly revised statutes applicable to this SBM order, we find the trial court conducted an adequate hearing as to the reasonableness of SBM in Defendant's case and thus we reject his argument the State failed to prove lifetime SBM was reasonable as applied to him. Because we further conclude SBM is reasonable as applied to Defendant after our own *de novo* review, we affirm.

I. Background

¶ 2 As this is the third time this case is before us, we draw on our previous opinions to give the factual background of the case, adding details only as necessary for this current opinion. Our first opinion summarized the underlying facts of the case:

> Defendant entered an *Alford* plea to attempted first-degree sex offense, habitual felon, assault on a female, communicating threats, interfering with emergency communication, first-degree kidnapping, incest, and second-degree forcible rape. Defendant's charges were consolidated into a single judgment and the trial court imposed a sentence of 216 to 320 months. On the same day judgment was entered, Defendant submitted a motion to dismiss the State's petition for SBM. The trial court held a hearing regarding SBM. The trial court denied Defendant's motion and entered an order directing Defendant to submit to lifetime SBM upon his release from prison. Defendant timely appealed the order requiring him to submit to lifetime SBM.

State v. Anthony, 267 N.C. App. 45, 46, 831 S.E.2d 905, 906–07 (2019) ("*Anthony I*").

¶ 3 To expand upon that summary with the facts relevant to this appeal, the plea hearing included a summary of the evidence, to which Defendant had consented. Specifically, the trial court heard summarized

evidence on a previous felony sex offense Defendant had committed, a previous sex offender registry violation, and the factual basis for the two charges to which Defendant pled in this case. The trial court later used the factual basis for these charges to conclude Defendant had committed an aggravated offense that made him eligible for SBM.

¶ 4 As *Anthony I* indicated, the trial court also held a hearing regarding SBM, and Defendant's motion to dismiss the State's petition for it, immediately after the plea hearing. 267 N.C. App. at 46, 831 S.E.2d at 906. Defendant argued in his motion to dismiss SBM was unconstitutional facially and as applied to him under the Fourth Amendment to the United States Constitution and Article I, § 20 of the North Carolina Constitution. In the current appeal, Defendant only argues SBM violates the Fourth Amendment as applied to him.

¶ 5 As part of that argument, Defendant highlighted the Fourth Amendment requires searches to be reasonable and the United States Supreme Court in *Grady v. North Carolina*, 575 U.S. 306, 135 S. Ct. 1368 (2015) ("*Grady I*") (per curiam), held SBM is a search. Thus, the trial court conducted an analysis of reasonableness of SBM as to Defendant and found as follows:

> In this matter, the defendant is already, as a convicted sex offender, required to register as a sex offender. Those registration requirements already impose a burden upon the defendant and the -- the additional burden of satellite-based monitoring would be a slight additional burden or infringement on the defendant's life and liberty. That, in fact, the satellite-based monitoring does not actually curtail the defendant's liberty. It does not require that he be locked up or placed in any sort of detention facility, but rather makes his whereabouts known for the purposes of serving greater governmental interests and legitimate State interests such as protecting society from, in this particular case, a twice convicted sex offender and deterring the conduct of what is, in this case, a twice convicted sex offender.
>
> I will note also that studies show that sex offenders generally have a higher recidivism rate than does the general population of convicted felons, and for that reason -- for that reason and others, the State does have a legitimate State interest and a legitimate concern for the protection of society and the

> deterrence of future conduct. And for those reasons, I will -- that and the fact that I have now made findings of fact sufficient to justify the imposition of satellite-based monitoring will require that the defendant enroll in the satellite-based monitoring program for a period of his natural life, unless monitoring is earlier terminated pursuant to G.S. §14-208.43.

The trial court then denied Defendant's motion to dismiss the State's SBM petition and imposed SBM. As *Anthony I* noted, Defendant then "timely appealed the order requiring him to submit to lifetime SBM." 267 N.C. App. at 46, 831 S.E.2d at 907.

¶ 6 While we explain the nature of our prior rulings in our analysis below, we briefly review the procedural history of Defendant's appeal. Following our opinion reversing the SBM order in *Anthony I*, 267 N.C. App. at 52, 831 S.E.2d at 910, the North Carolina Supreme Court remanded "for reconsideration in light of" *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*"). *State v. Anthony*, No. COA18-1118-2, slip op. at 2, 274 N.C. App. 356 (2020) ("*Anthony II*") (unpublished), *remanded for reconsideration in* 379 N.C. 668, 865 S.E.2d 851 (2021). In *Anthony II*, we again reversed the trial court's order imposing lifetime SBM. *Id.*, slip op. at 6–7. Our Supreme Court remanded again for reconsideration in light of *Hilton*, *Strudwick*, and the legislative changes to the SBM program. 379 N.C. 668, 865 S.E.2d 851. Following the latest remand, we ordered supplemental briefing from each party. We now address Defendant's arguments from that briefing, which again challenges the trial court's order imposing lifetime SBM.

II. Analysis

¶ 7 Defendant argues the trial court erred by imposing SBM because "[t]he State failed to prove that SBM would be a reasonable search as applied to" him. Specifically, Defendant asserts that, just as our first opinion in this case determined, "the State 'presented no evidence as to the reasonableness of SBM,' " so "the order imposing SBM should be reversed." (Quoting *Anthony I*, 267 N.C. App. at 47, 831 S.E.2d at 907.) Defendant also contends the Supreme Court's recent decisions in *Hilton* and *Strudwick* do not impact his argument because they were facial challenges in contrast to his as-applied challenge.

¶ 8 We first address the standard of review. Then, to aid in the understanding of Defendant's arguments, we provide a brief overview of the recent history of SBM litigation and legislation as well as its impact on this case. Finally, we address his argument directly.

A. Standard of Review

¶ 9 We review a trial court order to determine "whether the trial judge's underlying findings of fact are supported by competent evidence, . . . and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Carter*, 2022-NCCOA-262, ¶ 14 (quoting *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008)) (alteration in original). "We review a trial court's determination that SBM is reasonable *de novo*." *Id.* (citing *State v. Gambrell*, 265 N.C. App. 641, 642, 828 S.E.2d 749, 750 (2019)).

B. Brief History of Recent SBM Litigation and Legislation

¶ 10 With that standard of review in mind, we now provide a brief history of recent SBM litigation and how this case fits within that history. This Court's recent opinion in *Carter* provides a helpful overview of the history:

> The Supreme Court of the United States held in *Grady v. North Carolina*, 575 U.S. 306, 135 S. Ct. 1368, 191 L. Ed. 2d 459 (2015) ("*Grady I*"), that the imposition of SBM constitutes a warrantless search under the Fourth Amendment and necessitates an inquiry into reasonableness under the totality of the circumstances. 575 U.S. at 310, 135 S. Ct. at 1371, 191 L. Ed. 2d at 462.

Carter, ¶ 15. *Grady I* served as the basis for Defendant's motion to dismiss the State's SBM petition. And the trial court issued its SBM ruling with *Grady I* as the leading case on the matter.

¶ 11 We also issued our first opinion in this case, *Anthony I*, before the *Grady* case had reached the North Carolina Supreme Court again in *Grady III*. *See Anthony II*, slip op. at 2 (noting the Supreme Court remanded the case "for reconsideration in light of" *Grady III*). As Defendant highlights, we reversed the trial court order in *Anthony I* because "the State presented no evidence supporting the reasonableness of SBM as applied to Defendant." 267 N.C. App. at 46, 831 S.E.2d at 906. In *Anthony I*, we evaluated reasonableness by analyzing: "the defendant's risk of recidivism and the efficacy of SBM to accomplish a reduction of recidivism." *Id.*, 267 N.C. App. at 47, 831 S.E.2d at 907. Our lack-of-evidence holding focused on the second part of that analysis, the State's failure to present any evidence on whether SBM effectively prevents recidivism. *Id.*, 267 N.C. App. at 52, 831 S.E.2d at 910. Notably, our ruling was based on *State v. Grady*, 259 N.C. App. 664, 817 S.E.2d 18

(2018) ("*Grady II*"). *See Anthony I*, 267 N.C. App. at 52, 831 S.E.2d at 910 (including language about being bound by *Grady II*).

¶ 12 *Grady III*, however, changed the way courts analyze reasonableness within the SBM context. Specifically, it replaced the two-pronged analysis used in *Anthony I* with a new set of three factors "to be considered in determining whether SBM is reasonable under the totality of the circumstances." *See Carter*, ¶ 17 (noting this Court used *Grady III* "for guidance as to the scope of the reasonableness analysis" required by *Grady I*). Under *Grady III*, courts had to weigh an offender's privacy interests, SBM's " 'intrusion' " into those interests, and the State's " 'without question legitimate' interest in monitoring sex offenders." *Id.* (quoting *Grady III*, 372 N.C. at 527, 534, 538, 543–44, 831 S.E.2d at 557, 561, 564, 568).

¶ 13 Thus, Defendant's emphasis on our previous determination in *Anthony I* that the State failed to present evidence supporting the reasonableness of SBM overlooks the difference in what reasonableness meant then versus now and thus what type of evidence the State needed to present. In *Anthony I*, we held that the State failed to provide evidence of SBM's efficacy. 267 N.C. App. at 52, 831 S.E.2d at 910. *Grady III* instead explained the State had to show SBM was reasonable under the totality of the circumstances as measured by its three factors. *Carter*, ¶ 17 (citing *Grady III*, 372 N.C. at 527, 534, 538, 543–44, 831 S.E.2d at 557, 561, 564, 568). As explained more below, our Supreme Court's recent cases have made clear the State need not prove SBM's efficacy, only the three factors from *Grady III*. *See Hilton*, ¶ 28 ("Since we have recognized the efficacy of SBM in assisting with the apprehension of offenders and in deterring recidivism, there is no need for the State to prove SBM's efficacy on an individualized basis."); *Hilton*, ¶¶ 19, 29, 32 (laying out three factors for SBM reasonableness analysis that mirror those from *Grady III*). Thus, we reject Defendant's argument our holding on lack of evidence from *Anthony I* has any bearing on our analysis of his argument in this appeal.

¶ 14 Following *Grady III*, the Supreme Court remanded this case to us "for reconsideration in light of" *Grady III*, which led to our opinion in *Anthony II*. *Anthony II*, slip op. at 2. In *Anthony II*, we again determined the State could not establish SBM was reasonable; the State did not prove SBM would be a reasonable search in the distant future when Defendant was released from prison—18 years at the time of the opinion—which was the time when SBM would begin. *Anthony II*, slip op. at 6–7.

¶ 15 Since our decision in *Anthony II*, our Supreme Court has issued two further relevant decisions on SBM, *Hilton* and *Strudwick*. In *Hilton*, the Supreme Court "narrowly construed *Grady III*'s holding" noting *Grady III* " 'left unanswered the question of whether the SBM program is constitutional as applied to sex offenders who are in categories other than that of recidivists who are no longer under State supervision.' " *Carter*, ¶ 18 (quoting *Hilton*, ¶ 2). That includes people such as Defendant who falls under SBM's purview because he committed an aggravated offense. *See Hilton*, ¶ 21 (differentiating between the recidivist and aggravated offense categories in the SBM context). *Hilton* answered the question of the constitutionality of SBM for at least the aggravated offense category by laying out a three-step reasonableness inquiry under the totality of the circumstances, which resembles the inquiry from *Grady III*. *See Hilton*, ¶ 19 ("The first step of our reasonableness inquiry under the totality of the circumstances requires . . . ."). Specifically, courts must analyze: (1) "the legitimacy of the State's interest," (2) "the scope of the privacy interests involved," and (3) "the level of intrusion effected by the imposition of" SBM. *Hilton*, ¶¶ 19, 29, 32. *Hilton* concluded the SBM statute is not unconstitutional for the aggravated offender category because the SBM search is reasonable in that context. *Hilton*, ¶ 36.

¶ 16 *Strudwick* confirmed the three-step reasonableness inquiry. *See Strudwick*, ¶ 20 ("[W]e are bound to apply the instructions which we enunciated in *Grady III*—and further developed in *Hilton*—in order to determine the reasonableness of the trial court's imposition of lifetime SBM in defendant's case." (citing *Hilton*, ¶ 18)). In *Strudwick*, the Supreme Court again concluded lifetime SBM for the defendant was reasonable because the "legitimate and compelling government interest" outweighed "its [SBM's] narrow, tailored intrusion into defendant's expectation of privacy in his person, home, vehicle, and location." *Id.*, ¶ 28.

¶ 17 *Strudwick* included two additional relevant discussions. First, the Supreme Court clarified the reasonableness determination takes place in the present, not the future:

> [T]he State is *not* tasked with the responsibility to demonstrate the reasonableness of a search at its effectuation in the future for which the State is bound to apply in the present; rather, the State *is* tasked under a legislative enactment presumed to be constitutional with the responsibility to demonstrate the reasonableness of a search at its evaluation in the present for which the State is bound to apply for the future effectuation of a search.

Id., ¶ 13 (emphasis in original). *Strudwick* thus makes clear our decision in *Anthony II* cannot stand because it relied on the State's failure to prove reasonableness at the time Defendant will be released from prison. *Anthony II*, slip op. at 6–7.

¶ 18 The second relevant additional aspect of *Strudwick* is its discussion on how to reevaluate SBM orders as time moves forward and circumstances change. *Strudwick*, ¶¶ 15–17. *Strudwick* indicates a defendant could file a petition under Rule 60 of the North Carolina Rules of Civil Procedure on the grounds "it is no longer equitable that the judgment should have prospective application" or "[a]ny other reason justifying relief from the operation of the judgment." *Id.*, ¶ 16 (quoting N.C. Gen. Stat. § 1-1A, Rule 60(b)(5)–(6) (2019)); *see also id.*, ¶ 17 (further explaining how sub-sections (5) and (6) could provide paths to relief). The Supreme Court also noted a defendant could file a petition under North Carolina General Statute § 14-208.43 (2019). *Strudwick*, ¶ 15.

¶ 19 *Strudwick*'s second option of statutory relief still exists, but subsequent statutory changes—the ones we are to consider on remand—have slightly altered the statute and process for defendants already ordered to enroll in SBM at the time of the changes.[1] The General Assembly rewrote § 14-208.43 to focus only on "offender[s] who [are] ordered on or after December 1, 2021, to enroll in satellite-based monitoring" and the means by which they can file a petition to terminate or modify SBM after five years of enrollment. N.C. Gen. Stat. § 14-208.43(a) (eff. 1 Dec. 2021); *see also* S.L. 2021-138 § 18(h) (showing changes made to § 14-208.43). For offenders ordered to enroll in SBM before that date, such as Defendant, the new § 14-208.46 allows them to file a petition to terminate or modify the monitoring. N.C. Gen. Stat. § 14-208.46(a) (2021); *see also* S.L. 2021-138 § 18(i) (showing creation of § 14-208.46). If the offender files the petition before he has been enrolled for 10 years, then "the court shall order the petitioner to remain enrolled in the satellite-based monitoring program for a total of 10 years"; if the offender has been enrolled for at least 10 years already, "the court shall order the petitioner's requirement to enroll in the satellite-based monitoring

1. It is unclear why the Supreme Court mentioned only the old statute and not the statutory changes since the updated statute had already been signed into law by the time *Strudwick* was filed. *Compare Strudwick*, 2021-NCSC-127 (filed 29 October 2021) *with* 2021 North Carolina Laws S.L. 2021-138 (approval date of 2 September 2021). The old law also would not have applied to the defendant in *Strudwick* because it required at least a year of post-release SBM, *Strudwick*, ¶ 15, and the defendant would not be released within a year. *See id.* ¶¶ 3, 7 (explaining the defendant was sentenced to 30 to 43 years in prison in 2017).

program be terminated." N.C. Gen. Stat. § 14-208.46(d)–(e).[2] Combined with a change setting a ten-year maximum on new SBM enrollments, N.C. Gen. Stat. § 14-208.40A(c1), *see also* S.L. 2021-138 § 18(d) (showing changes made to § 14-208.40A), the statutory system now limits SBM to ten years for all offenders.[3]

¶ 20 As a final piece of our review of the recent history of SBM, we address Defendant's argument that *Hilton* and *Strudwick* do not constrain his overall argument because they both "primarily involved facial challenges" and he has an as-applied challenge. In *Grady III*, our Supreme Court explained the distinction between facial and as-applied challenges does not neatly apply to our SBM jurisprudence. *See* 372 N.C. at 546–47, 831 S.E.2d at 569–70 ("[T]he remedy we employ here is neither squarely facial nor as-applied." (citing *Citizens United v. FEC*, 558 U.S. 310, 331, 130 S. Ct. 876 (2010))). Specifically, in *Grady III*, the Supreme Court noted its ruling was as-applied in the sense that it did not apply to "all

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2. The full language of (d) and (e) categorizes petitioners not enrolled "for at least 10 years" versus enrolled "for more than 10 years":

> (d) If the petitioner has not been enrolled in the satellite-based monitoring program for at least 10 years, the court shall order the petitioner to remain enrolled in the satellite-based monitoring program for a total of 10 years.
>
> (e) If the petitioner has been enrolled in the satellite-based monitoring program for more than 10 years, the court shall order the petitioner's requirement to enroll in the satellite-based monitoring program be terminated.

N.C. Gen. Stat. § 14-208.46(d)–(e).

Given (d) indicates courts should only order petitioners to remain enrolled in SBM for 10 years, not more, it appears the General Assembly intended to define two categories of offenders: those not enrolled for at least 10 years and those enrolled for at least 10 years. *See State v. Alexander*, 2022-NCSC-26, ¶ 34 ("The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." (quotations and citation omitted)); *North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Dana*, 379 N.C. 502, 2021-NCSC-161, ¶ 16 ("Legislative intent controls the meaning of a statute." (quotations and citation omitted)).

This Court's recent opinion in *Carter* also recognizes our view without further explanation of the wording in sub-section (e). *See Carter*, ¶ 22 (quoting sub-section (e) as part of a citation supporting the following sentence, "However, during the pendency of this appeal, our legislature amended the SBM statutes, in part, to create an avenue by which [d]efendant may petition a superior court to terminate his monitoring after ten years of enrollment.").

3. *See* Jamie Markham, *Revisions to North Carolina's Satellite-Based Monitoring Law*, UNC School of Government Blog (Oct. 11, 2021), https://nccriminallaw.sog.unc.edu/revisions-to-north-carolinas-satellite-based-monitoring-law/ ("Former lifetime categories are changed to 10 years, and the abuse-of-a-minor category ('conditional' offenders) is capped at 10 years."); *see also id.* (explaining legislative changes in more detail).

of the program's applications" given its limits to a specific category, but the ruling was facial "in that it is not limited to defendant's particular case." *Id.*

¶ 21 *Hilton* and *Strudwick* reflect the difficulty in separating facial from as-applied challenges in the SBM context. The *Hilton* court said it was addressing the constitutionality of the SBM program "as applied to defendants who fall outside" of *Grady III*, which both uses the as-applied language but was not limited to the particular defendant before the court. *Hilton*, ¶¶ 18, 36. Similarly, *Strudwick* involves language related to facial challenges when discussing the timing of the reasonableness determination, *Strudwick*, ¶ 14, and language about applying *Grady III* and *Hilton*'s reasonableness test "in order to determine the reasonableness of the trial court's imposition of lifetime SBM *in defendant's case*." *Id.*, ¶ 20 (emphasis added).

¶ 22 Thus, rather than trying to distinguish between facial and as-applied challenges, our courts' "practice is to examine searches effected by the SBM statute categorically." *Hilton*, ¶ 37 (citing *Grady III*, 372 N.C. at 522, 831 S.E.2d at 553). As this Court has recently clarified, trial courts must still conduct a Fourth Amendment reasonableness analysis, and we review that analysis *de novo*. *Carter*, ¶¶ 20–21. As part of the analysis, reviewing courts are bound by categorical determinations made by the Supreme Court. *See, e.g.*, *id.* ¶ 27 (explaining because the defendant fit within a certain category, this Court "must follow the Supreme Court's holding in *Hilton* that he requires continuous lifetime SBM to protect public safety"). But if the defendant does not fit within one of the categorical determinations already made, a reviewing court's analysis is not constrained in the same way. *See id.*, ¶¶ 24–25 (determining the defendant did not fit into the categories in *Grady III* or *Hilton* so conducting its own analysis based upon the reasoning of those cases). Given this background, we need not determine precisely whether *Hilton* and *Strudwick* made facial or as-applied rulings; we will follow the review framework set out in *Carter*.

C. Reasonableness in this Case

¶ 23 Having reviewed the recent legal changes and determined the impact on our prior opinions in this case, we now conduct the required review as laid out above. First, we evaluate whether the trial court properly considered if monitoring was constitutional under the Fourth Amendment. *Carter*, ¶¶ 20–21. Then we conduct our own *de novo* review of the trial court's determination. *Id.*

1. Trial Court's Reasonableness Inquiry

¶ 24 While *Hilton* proclaims " 'the SBM statute as applied to aggravated offenders is not unconstitutional' because the 'search effected by the imposition of lifetime SBM on the category of aggravated offenders is reasonable under the Fourth Amendment,' " *Carter*, ¶ 18 (quoting *Hilton*, ¶ 36), "trial courts must continue to conduct reasonableness hearings before ordering SBM unless a defendant waives his or her right to a hearing or fails to object to SBM on this basis." *Id.*, ¶ 19 (citing *State v. Ricks*, 378 N.C. 737, 2021-NCSC-116, ¶ 10). Defendant preserved his objection on Fourth Amendment grounds via his motion to dismiss, which he also incorporated into his argument to the trial court at the SBM hearing.

¶ 25 Turning to *Carter* as an example of how to review a trial court's reasonableness hearing, this Court found the trial court "conducted a hearing regarding the facts and applicable law, and weighed the State's interests against [d]efendant's expectation of privacy." *Id.*, ¶ 20. Specifically, the trial court heard testimony concerning: the statutory category authorizing SBM; the defendant's risk assessment; the failure of the defendant's previous sex offender registration to "deter his conduct or protect public safety"; and the defendant's prior sex offender registry violations. *Id.* Because the trial court weighed that against "the State's interest in protecting the public from a recidivist sex offender" and determined SBM was reasonable as applied to the defendant, this Court concluded the trial court's inquiry was appropriate. *Id.* While *Carter* involved a defendant required to enroll in SBM "solely because of his status as a recidivist" and thus focused on recidivism when evaluating the State's interest in public safety, *id.*, ¶¶ 20, 24, its explanation of the type of evidence a trial court should examine still aids our review here.

¶ 26 Here, the SBM hearing immediately followed Defendant entering his *Alford* plea and being sentenced. As part of the *Alford* plea, Defendant consented "to the Court hearing a summary of the evidence." The summary of the evidence included a previous felony sex offense, a sex offender registry violation, and the factual bases for the two charges to which Defendant pled. The summary of the evidence thus provided support for the trial court's Finding Defendant committed an aggravated offense under North Carolina General Statute § 14-208.6(1a) (eff. Dec. 1, 2017) because the second-degree forcible rape and incest conviction included a sexual act using "force or the threat of serious violence." *See* N.C. Gen. Stat. § 14-208.6(1a) (eff. Dec. 1, 2017) (defining "aggravated offense" as a criminal offense that includes, *inter alia*, "engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of

any age through the use of force or the threat of serious violence"). The trial court could also use the summary of the evidence to conduct its reasonableness assessment.

¶ 27 Turning to the reasonableness assessment, the trial court heard no additional evidence during the SBM hearing, only argument from counsel. Although the trial court did not have the benefit of any rulings past *Grady I*, it is still held to the latest standard announced in *Hilton* and *Strudwick*. *See State v. Yancey*, 221 N.C. App. 397, 400 & n.1, 727 S.E.2d 382, 385–86 & n.1 (2012) (applying latest standard in *Miranda* jurisprudence from a case coming after an order on appeal because "new rules of criminal procedure must be applied retroactively 'to all cases, state or federal, pending on direct review or not yet final' " (quoting *State v. Zuniga*, 336 N.C. 508, 511, 444 S.E.2d 443, 445 (1994) (in turn quoting *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 716 (1987)))). Thus, the trial court had to balance: the State's interest; Defendant's privacy interest; and the "level of intrusion effected by the imposition of" SBM. *Hilton*, ¶¶ 19, 29, 32.

¶ 28 The trial court's entire reasonableness analysis was:

> In this matter, the defendant is already, as a convicted sex offender, required to register as a sex offender. Those registration requirements already impose a burden upon the defendant and the -- the additional burden of satellite-based monitoring would be a slight additional burden or infringement on the defendant's life and liberty. That, in fact, the satellite-based monitoring does not actually curtail the defendant's liberty. It does not require that he be locked up or placed in any sort of detention facility, but rather makes his whereabouts known for the purposes of serving greater governmental interests and legitimate State interests such as protecting society from, in this particular case, a twice convicted sex offender and deterring the conduct of what is, in this case, a twice convicted sex offender.
>
> I will note also that studies show that sex offenders generally have a higher recidivism rate than does the general population of convicted felons, and for that reason -- for that reason and others, the State does have a legitimate State interest and a legitimate concern for the protection of society and the deterrence of future conduct. And for those reasons, I

> will -- that and the fact that I have now made findings of fact sufficient to justify the imposition of satellite-based monitoring will require that the defendant enroll in the satellite-based monitoring program for a period of his natural life, unless monitoring is earlier terminated pursuant to G.S. §14-208.43.

¶ 29 The trial court conducted the required reasonableness analysis. At the start, the trial court noted Defendant's status as a registered sex offender imposes burdens, and that discussion addresses his privacy interest. The trial court then discussed "the additional burden of satellite-based monitoring," which addresses the level of intrusion from imposing SBM. Finally, the trial court recounted the State's interest in imposing SBM. Thus, the trial court addressed the three factors it had to balance as part of its reasonableness assessment. *See Hilton*, ¶¶ 19, 29, 32 (recounting the factors).

¶ 30 A comparison to our review in *Carter* also reveals the adequacy of the trial court's reasonableness analysis. As in *Carter*, ¶ 20, the trial court here heard evidence about the statutory category authorizing SBM, namely that Defendant had committed an aggravated offense. The trial court also heard evidence, as in *Carter*, *id.*, about Defendant's previous sex offender registration, which apparently failed to deter his conduct in the instant offenses, as well as evidence he had previously committed sex offender registry violations.

¶ 31 The only difference between the evidence before the trial court in *Carter* and in this case is the lack of information in the record about a risk assessment of Defendant. *See id.* (listing risk assessment as part of evidence before trial court). But that difference does not change our determination the trial court conducted an adequate reasonableness hearing. The statute concerning court-imposed SBM in effect at the time of Defendant's hearing did not require the trial court to order a risk assessment if an offender had committed an aggravated offense, as Defendant did. *See* N.C. Gen. Stat. § 14-208.40A(c) (eff. Dec. 1, 2017) (requiring court to order offender who has committed an aggravated offense to enroll in lifetime SBM with no mention of a risk assessment).[4] Further, the

4. Under the version of § 14-208.40A in effect at the time of Defendant's trial, if the offender did not commit an aggravated offense or fit into one of the other categories in (c), sub-section (d) required the trial court to order a risk assessment if the offender committed an offense involving a minor. N.C. Gen. Stat. § 14-208.40A(d) (eff. Dec. 1, 2017). Further, the current version of § 14-208.40A(c) requires the trial court to order a risk assessment of offenders who have committed an aggravated offense. N.C. Gen. Stat. § 14-208.40A(c) (eff. Dec. 1, 2021).

risk assessment at most could have further justified the State's interest in SBM. But the State already had significant other evidence supporting its interest such as the previous sex offender registration failing to deter the instant offense and the previous sex offender registry violations. As a result, the lack of evidence of a risk assessment of Defendant does not persuade us the outcome here should differ from *Carter*.[5]

¶ 32 We therefore conclude the trial court held an adequate reasonableness hearing as required. *See Carter*, ¶ 19 (explaining trial courts must continue to conduct hearings on the reasonableness of SBM). Further the trial court made adequate findings to support its conclusion SBM was reasonable as applied to Defendant.

2. De Novo Review of Reasonableness Determination

¶ 33 Since we have determined the trial court conducted an adequate reasonableness analysis, we now review *de novo* its determination SBM is reasonable as applied to Defendant. *Carter*, ¶ 21. As part of our *de novo* review, we must evaluate the reasonableness of SBM under the totality of the circumstances considering: (1) the legitimacy of the State's interest; (2) the scope of Defendant's privacy interests; and (3) the intrusion imposed by SBM. *Hilton*, ¶¶ 19, 29, 32.

a. Legitimacy of the State's Interest

¶ 34 We start by considering the State's interest in monitoring Defendant. *Hilton* and *Strudwick* both recognized the dual interests served by SBM imposed on aggravated offenders in "preventing and prosecuting future crimes committed by sex offenders." *Strudwick*, ¶ 26; *see also Hilton*, ¶ 25 ("assisting law enforcement agencies in solving crimes") and ¶ 27 ("protecting the public from aggravated offenders by deterring recidivism"). Our courts have long recognized these dual interests are "both legitimate and compelling," *Strudwick*, ¶ 26, particularly for aggravated offenses. *See Hilton*, ¶ 21 ("[T]he State's interest in protecting the public from aggravated offenders is paramount."). As the Supreme Court made clear in *Hilton*, "after our decision in *Grady III*, the three categories of

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5. Defendant also later brings up the lack of risk assessment when arguing we should remand for the trial court to conduct a risk assessment because the current version of §14-208.40A(c) requires such assessment for all people subject to SBM. However, when making that change, the General Assembly made clear it would only apply to SBM determinations "on or after" 1 December 2021. *See* S.L. 2021-138 § 18(d) (adding risk assessment provisions to § 14-208.40A(c) as laid out above and in Footnote 4); *id.* § 18(p) (explaining all subsections of § 18 in the session law "appl[y] to [SBM] determinations on or after" 1 December 2021 with the exception of (b), (i), and (o)). Defendant's SBM determination took place on or about 26 April 2018, so the General Assembly clearly did not intend for him to benefit from the changes in the statute. Therefore, we reject Defendant's argument.

offenders who require continuous lifetime SBM to protect public safety are (1) sexually violent predators, (2) aggravated offenders, and (3) adults convicted of statutory rape or a sex offense with a victim under the age of thirteen (adult-child offenders)." *Id.*, ¶ 23 (footnote omitted).

¶ 35 Here, Defendant committed an aggravated offense under N.C. Gen. Stat. § 14-208.6(1a) (eff. Dec. 1, 2017) because the second-degree forcible rape and incest conviction included a sexual act using "force or the threat of serious violence." So under *Hilton*, Defendant requires continuous lifetime SBM to protect public safety. *Hilton*, ¶¶ 21, 23.

¶ 36 Defendant argues his case is distinguishable from *Strudwick* because his offenses "were committed against two known victims in his home" who "identified him to investigators" rather than against a stranger in a public space. He asserts that, as a result, the State's interests in using SBM to solve crimes and for deterrence "are lessened" in his case because SBM would not solve or prevent his crimes.

¶ 37 We reject Defendant's attempt to distinguish from our binding precedent. First, this argument ignores *Hilton*, on which *Strudwick* relied when articulating the State's interest. *Strudwick*, ¶ 26. In *Hilton*, SBM was imposed in a case where the victim in the case was also a victim in a case in which that defendant was previously convicted. *Hilton*, ¶ 6. That situation resembles the situation in Defendant's argument here, as Defendant contends a victim who knows a perpetrator could identify him to investigators, as opposed to a victim who is a "stranger . . . in a public space."

¶ 38 Further, on a broader level, Defendant misconstrues the nature of the State's interest. Defendant assumes the State's interest is in preventing or prosecuting the crime which triggered SBM (or a repeat of the same scenario), but the State's interest is broader. It encompasses all potential future sex crimes. *See, e.g.*, *Hilton*, ¶ 21 (defining interest as "protecting children and others from sexual attacks" without limitation) (quotations, citation, and alterations omitted). Thus, as long as SBM could prevent or solve a future sex crime, regardless of the exact facts of that scenario, the State's interest is served. Since our Supreme Court has concluded that is true for aggravated offenders like Defendant, we conclude the State has a legitimate interest here.

b. Scope of Defendant's Privacy Interest and Intrusion Imposed by SBM

¶ 39 Next we consider the scope of Defendant's privacy interest and the intrusion upon that interest caused by SBM. *Hilton* concluded an

aggravated offender, such as Defendant, "has a diminished expectation of privacy both during and after any period of post-release supervision" because of the "numerous lifetime restrictions that society imposes upon him," especially via the sex offender registration requirements. *Hilton*, ¶¶ 36, 31.

¶ 40 *Hilton* and *Strudwick* also explain the intrusion imposed by SBM. *Hilton* determined "the imposition of lifetime SBM causes only a limited intrusion into that diminished privacy expectation." *Hilton*, ¶ 36. Specifically, *Hilton* noted SBM is less invasive than criminal sanctions or civil commitment. *Id.*, ¶¶ 33, 35. The *Hilton* court also highlighted the similarities of SBM to sex offender registration and the ability of a defendant to petition to be removed from SBM via the mechanism we discussed above. *Id.*, ¶ 34. Relying on these portions of *Hilton*, *Strudwick* likewise concluded "the imposition of lifetime SBM . . . constitutes a pervasive but tempered intrusion upon . . . Fourth Amendment interests." *Strudwick*, ¶ 25 (citing *Hilton*, ¶ 35).

¶ 41 Defendant argues we should not reach the same conclusion as *Hilton* and *Strudwick* on the intrusion into his privacy interests caused by SBM because they failed to consider "two significant privacy interests that are not diminished following post-release supervision." Specifically, he argues our Supreme Court's previous decisions failed to consider SBM "will involve a search of [his] house" and "of the whole of [his] movements for the rest of his life."

¶ 42 We reject Defendant's arguments because *Hilton* and *Strudwick* considered those privacy interests and the intrusions thereupon caused by SBM. As a general note, *Hilton* specifically concluded aggravated offenders have a diminished expectation of privacy "*after any period of post-release supervision*." *Hilton*, ¶ 36 (emphasis added).

¶ 43 As to the search into Defendant's home, *Strudwick* includes an explanation of how *Grady III* determined *State v. Bowditch*, 364 N.C. 335, 700 S.E.2d 1 (2010), "sufficiently incorporate[d] . . . the invasion of a defendant's home" into an evaluation of offenders' expectations of privacy and the impact of SBM thereupon. *Strudwick*, ¶ 22 (citing *Grady III*, 372 N.C. at 532, 831 S.E.2d 542). While the *Strudwick* court noted *Grady III*'s discussions of *Bowditch*'s limitations, it ultimately still relied on *Bowditch* for the idea "that it is constitutionally permissible for the State to treat a sex offender differently than a member of the general population" because of their sex offense conviction. *Strudwick*, ¶ 22 (citing *Hilton*, ¶ 30). Given *Strudwick*'s reliance on *Bowditch* and its emphasis on how *Bowditch* covered a search of offenders' homes, our

Supreme Court has considered SBM effecting a search of the home and found those concerns did not justify finding SBM searches unreasonable for aggravated offenders. If that was not clear enough, *Strudwick* also explicitly said SBM was reasonable given the government interest outweighed SBM's intrusion "into defendant's expectation of privacy in his person, *home*, vehicle, and location. *Strudwick*, ¶ 28 (emphasis added). As a result, we reject Defendant's argument on the search of his house.

¶ 44 *Hilton* and *Strudwick* also considered the search of Defendant's movements for the rest of his life; they scarcely could have avoided it considering such monitoring is inherent in SBM. *See Hilton*, ¶ 35 (minimizing intrusion of "SBM's collection of information regarding physical location and movements"). *Strudwick* also specifically found SBM reasonable even when considering its intrusion into a defendant's "expectation of privacy in his . . . location." *Strudwick*, ¶ 28. *Hilton* emphasized once an offender is unsupervised, "no one regularly monitors the defendant's location, significantly lessening the degree of intrusion." *Hilton*, ¶ 35. Building on that, *Strudwick* recognized using the data tracking offenders' movements for anything other than the State's permissible purpose of preventing and solving crimes "would present an impermissible extension of the scope of the authorized search" that could change the calculus. *See Strudwick*, ¶ 23 (citing *Terry v. Ohio*, 392 U.S. 1, 19–20, 88 S. Ct. 1868 (1968)) (explaining the State has an "ongoing" burden to establish the reasonableness of the search as a result of the possibility of an impermissible extension of the scope of the search). As a result, our Supreme Court has already weighed the search of all an offender's movements for the rest of his life and determined that adequate protections are in place. We therefore reject Defendant's argument *Hilton* and *Strudwick* failed to address the matter.

c. Reasonableness under the Totality of the Circumstances

¶ 45 Examining the reasonableness of SBM under the totality of the circumstances, we weigh the State's legitimate interest in "preventing and prosecuting future crimes committed by sex offenders," *Strudwick*, ¶ 26, against Defendant's "diminished expectation of privacy both during and after any period of post-release supervision," *Hilton*, ¶ 36, and the "limited intrusion" caused by lifetime SBM for aggravated offenders. *Id.* Given *Hilton* and *Strudwick* balanced these factors for aggravated offenders like Defendant, *Hilton*, ¶¶ 36–37, *Strudwick*, ¶ 28, and we have rejected Defendant's arguments trying to differentiate his case from those cases, we conclude after *de novo* review that SBM is reasonable in Defendant's case.

III. Conclusion

¶ 46 We reject Defendant's argument the State failed to present sufficient evidence to the trial court for it to make a determination of the reasonableness of SBM. Following our *de novo* review, we also conclude SBM is reasonable in Defendant's case. Therefore, we affirm the trial court's order imposing lifetime SBM on Defendant. Defendant can, however, petition to terminate or modify the SBM with the superior court in Rowan County, which would be required to terminate the monitoring after 10 years enrolled, under the terms of § 14-208.46.

AFFIRMED.

Judge CARPENTER concurs.

Judge HAMPSON concurs in result only.

STATE OF NORTH CAROLINA
v.
DEREK JACK CHOLON

No. COA21-635

Filed 21 June 2022

Constitutional Law—effective assistance of counsel—implied admission of guilt—elements of sexual offenses

Defense counsel committed a per se *Harbison* violation by admitting in his closing argument that defendant committed sexual acts with a 15-year-old—based on an incriminating statement defendant denied making to law enforcement—after which defendant was found guilty of first-degree statutory sex offense and taking indecent liberties with a minor. However, where the trial court did not make specific findings in its order denying defendant's motion for appropriate relief regarding whether defendant consented in advance to his counsel's strategy, the order was reversed and the matter remanded for a determination on that issue.

Appeal by defendant from order entered 31 March 2021 by Judge Phyllis M. Gorham in Onslow County Superior Court. Heard in the Court of Appeals 10 May 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden William Hayes, for the State.

Joseph P. Lattimore for defendant-appellant.

ARROWOOD, Judge.

¶ 1 Derek Jack Cholon ("defendant") appeals from the trial court's order denying his motion for appropriate relief ("MAR") claiming ineffective assistance of counsel. Defendant contends the trial court erred in concluding that defendant's trial counsel did not concede defendant's guilt without his consent and that trial counsel did not override defendant's autonomy to decide the objective of the defense. For the following reasons, we reverse and remand.

I. Background

¶ 2 On 8 April 2014, an Onslow County grand jury indicted defendant on charges of first-degree statutory sexual offense, crime against nature, and taking indecent liberties with a minor. The indictment alleged that on 6 March 2013 defendant engaged in a sexual act with M.B.,[1] "a person of the age of 15 years." Prior to trial, the State dropped the crime against nature charge and offered defendant a plea agreement with no active prison time. Defendant maintained his innocence and rejected the plea agreement.

¶ 3 The matter came on for trial on 7 July 2015 in Onslow County Superior Court. At trial, the State presented evidence establishing that M.B. was 15 years old, and that defendant was 41 years old at the time of the alleged acts. M.B. testified that he had met defendant through an online dating app,[2] and that, when they met in-person on 6 March 2013, defendant performed oral sex on M.B. Officer Taylor Wright ("Officer Wright") testified that on 6 March 2013, she had "responded to the scene" after receiving a call about "a suspicious vehicle[,]" and found defendant and M.B. According to Officer Wright, defendant initially told her that he and M.B. "were just sitting [in the car] talking[,]" but later told her that "he had performed oral sex on [M.B.], and that they were kissing." Officer Wright arrested defendant and took him to the police station, where he gave a written statement after being *Mirandized*. In

1. The juvenile's initials are used to protect his identity and for ease of reading.

2. M.B. stated that the app required users to be at least 18 years old, and that he had indicated that he was 18 years old on his profile.

the statement, defendant stated that M.B.'s profile "said 18[,]" and that, when M.B. entered defendant's car, defendant "asked him if he is really 19, and he corrected me and said he was 18." Defendant also stated that "[b]efore the police arrived, I gave [M.B.] oral and we kissed."

¶ 4 Defendant filed a motion to suppress defendant's verbal and written statements to police. In his affidavit in support of the motion, defendant swore that, on 6 March 2013, he and M.B. were sitting in his car talking when police arrived. Defendant also averred that he had no recollection of giving a written statement at the police station, indicating that he had hypoglycemia which he believed caused him to "blackout" at the police station. After conducting a *voir dire* of Officer Wright and hearing arguments from both sides, the trial court denied the motion to suppress. Defendant's written statement was admitted into evidence and published to the jury.

¶ 5 During closing statements, defendant's trial counsel stated as follows, in relevant part:

> [M.B.], apparently was, and I don't think otherwise, that on this occasion he was 15 years old. And he was in high school. Those . . . two facts . . . were concealed from [defendant] on this occasion we're talking about. [M.B.] didn't tell him that. He lied.
>
> . . . .
>
> What does [defendant] say? The officer comes back there, Officer Wright comes back there and begins to talk to him and he tells this officer the truth; tells her what happened between the two of them. "I gave him oral, and we were kissing." But now we know that there's more than kissing going on with [M.B.].
>
> . . . .
>
> [Defendant] did not say anything that was not truthful, apparently except, "We were just talking." And when the officers persisted with the asking about what happened, he told them the truth. He didn't lie to them. He wrote it down in a statement, which you read. So here he is. He's looking -- subject to go to prison for such a long time.
>
> . . . .

> I submit to you, ladies and gentlemen, that [defendant] is not entitled to sympathy. He's not entitled to any special treatment more than any other citizen who comes into the court charged with a crime.
>
> When you leave this court building today to go back to your homes and your families, you should feel when you leave here, I've done what's right.
>
> . . . .
>
> We ask you to find him not guilty of these offenses. Thank you.

¶ 6 On 9 July 2015, a jury convicted defendant of first-degree statutory sex offense and taking indecent liberties with a minor. The trial court sentenced defendant to a mitigated-range term of 144 to 233 months imprisonment on the statutory sex offense conviction, and a concurrent 10 to 21 months term on the indecent liberties conviction.

¶ 7 Shortly after the trial, defendant sent a letter to the trial court requesting a review of his trial and a mistrial "on the grounds that [his trial counsel] entered an admission of guilt on my behalf without my permission during his closing statement." Defendant also asserted that he advised his trial counsel of "health conditions which are in the law books as a valid medical condition to overturn a statement of confession and he would not research it."

¶ 8 On 2 March 2016, defendant filed an MAR with this Court alleging that his trial counsel had provided *per se* ineffective assistance of counsel under *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985) by admitting defendant's guilt, without defendant's consent, during closing arguments.

¶ 9 On 7 February 2017, this Court filed an opinion holding that defendant had not established a claim under *Harbison* because defendant's "counsel did not expressly concede [d]efendant's guilt" and "did not admit each element of each offense." *State v. Cholon*, 251 N.C. App. 821, 827, 796 S.E.2d 504, 507 (citation omitted), *review allowed*, *decision vacated*, 370 N.C. 207, 804 S.E.2d 187 (2017). This Court also held that "the record reveals such overwhelming evidence of [d]efendant's guilt that we cannot conclude that but for defense counsel's ineffective assistance, the result of the trial would have been different." *Id.* at 828, 796 S.E.2d at 508. This Court found no error in defendant's trial and denied the MAR. *Id.* at 829, 796 S.E.2d at 509.

¶ 10 On 14 March 2017, defendant petitioned our Supreme Court for discretionary review on the grounds that his trial counsel conceded his guilt during closing argument by admitting to every contested element of both charges. On 28 September 2017, our Supreme Court allowed defendant's petition "for the limited purpose of vacating the decision of the Court of Appeals and remanding to that court with instructions for further remand to the trial court to hold an evidentiary hearing on defendant's motion for appropriate relief in light of . . . relevant authority." *State v. Cholon*, 370 N.C. 207, 804 S.E.2d 187 (2017). The Supreme Court directed the trial court to "enter findings of fact and conclusions of law and determine whether defendant is entitled to relief." *Id.*

¶ 11 On 6 May 2019, the trial court held a hearing on defendant's MAR. At the hearing, the trial court received an affidavit from defendant's trial counsel, but did not receive any other evidence or testimony. Defendant's trial counsel's affidavit averred as follows:

> 11. In my argument to the jury I did not expressly argue the elements of the offenses which [defendant] was charged in the bill of indictments. My argument was intended to draw a sharp contrast between the statements of [defendant] and those made by M.B. Nowhere in my argument did I concede the guilt of [defendant], but in fact, I argued that the jury should find him not guilty.
>
> 12. I did not get permission from [defendant] to make these statements and I did not request that the Court make an inquiry of [defendant] pursuant to *State v. Harbison*.
>
> 13. I was aware of *State v. Harbison*, however, I did not believe that I needed to get [defendant]'s permission to make the statements because I did not believe I was making a full admission to all the elements of the crime.

¶ 12 On 28 May 2019, the trial court entered an order denying defendant's MAR and request for new trial. The trial court concluded that defendant's trial counsel "did not concede each element of either offense, did not claim [d]efendant was guilty, and did not admit to any lesser included offenses." Additionally, the trial court concluded that though "defense counsel conceded that M.B. was 15 years old at the time, he never conceded [d]efendant's age nor did he concede that [d]efendant's action

was willful. Furthermore, . . . defense counsel argued that there was reasonable doubt and that the jury should find [d]efendant not guilty."

¶ 13 On 24 January 2020, defendant filed a Petition for *Writ of Certiorari* ("PWC") with this Court. On 11 February 2020, this Court determined that the 28 May 2019 order "failed to comply with the North Carolina Supreme Court's order entered on 28 September 2017" and allowed the PWC "for the limited purpose of vacating the trial court's order and remanding for an evidentiary hearing."

¶ 14 The trial court conducted an evidentiary hearing on 30 September 2020. The State acknowledged during its opening statement that the trial court was to address defendant's claim that his trial counsel violated his "ability to maintain autonomy over his defense[.]" The trial court heard testimony from defendant and his trial counsel, and received several documentary exhibits, including the trial counsel's affidavit and copies of text messages between defendant and his trial counsel. The trial court took the matter under advisement at the conclusion of the hearing.

¶ 15 On 31 March 2021, the trial court entered an order again denying defendant's MAR. The trial court found that defendant's trial counsel contended "that he asked the jury to find [d]efendant not guilty twice in his closing and that the references to truthfulness were in an attempt to discredit the State's witness, in concert with [d]efendant's preferred trial strategy." The trial court further found that defendant's trial counsel contended "that [d]efendant never told him that [d]efendant did not want to concede that the sexual acts took place."

¶ 16 In its conclusions of law, the trial court recognized *State v. McAllister*, 375 N.C. 455, 847 S.E.2d 711 (2020), which extended the *Harbison* test to include implied admissions of guilt. The trial court concluded that defendant's trial counsel "requested that the jury find [d]efendant not guilty for all charges. Given this difference from *McAllister*, and the Supreme Court's statements about its narrow holding, [d]efendant's case here does not constitute admission of guilt."

¶ 17 On 11 June 2021, defendant filed a PWC with this Court requesting review of the trial court's 31 March 2021 order. On 22 July 2021, this Court allowed the PWC to review the order.

II. Discussion

¶ 18 Defendant contends the court erred in ruling that his trial counsel's closing argument did not amount to a concession of guilt and did not violate defendant's right to autonomy over the objective of the defense.

A. Standard of Review

¶ 19 Upon reviewing a trial court's ruling on an MAR, this Court reviews "to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Matthews*, 358 N.C. 102, 105-106, 591 S.E.2d 535, 538 (2004) (citations and quotation marks omitted). A trial court's conclusions of law in an order denying an MAR are reviewed *de novo*. *State v. Martin*, 244 N.C. App. 727, 734, 781 S.E.2d 339, 344 (2016) (citation omitted).

B. Admission of Guilt

¶ 20 Under the Sixth and Fourteenth Amendments to the United States Constitution, a "defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771, 25 L. Ed. 2d 763, 773 (1970)). Generally, in order to establish ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

¶ 21 In some cases, however, there exist "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *State v. Harbison*, 315 N.C. 175, 179, 337 S.E.2d 504, 507 (1985) (citations and quotation marks omitted).

> When 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. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent.

Id. at 180, 337 S.E.2d at 507. Accordingly, "ineffective assistance of counsel, per se in violation of the Sixth Amendment, 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." *Id.*, 337 S.E.2d at 507-508.

¶ 22 In *McAllister*, our Supreme Court considered the application of *Harbison* to an implied concession of guilt. *McAllister*, 375 N.C. at 473, 847 S.E.2d at 722. The defendant in *McAllister* was charged with assault on a female, assault by strangulation, second-degree sexual offense, and second-degree rape. *Id.* at 458-59, 847 S.E.2d at 714. During closing

arguments, the defendant's trial counsel repeatedly asked the jury to find the defendant not guilty of three charged offenses but made no reference to the fourth offense. *Id.* at 460-61, 847 S.E.2d at 715. Specifically, the defendant's trial counsel stated:

> You heard him admit [to police] that things got physical. You heard him admit that he did wrong, God knows he did. They got in some sort of scuffle or a tussle or whatever they want to call it, she got hurt, he felt bad, and he expressed that to detectives. Now, they run with his one admission and say "well, then everything Ms. Leonard—everything else Ms. Leonard said must be true." Because he was being honest, they weren't honest with him.
>
> . . . .
>
> I asked you at the beginning [to] make the State prove their case, make them. Have they? Anything but conjecture and possibility? All I ask is that you put away any feelings you have about the violence that occurred, look at the evidence and think hard. Can you convict this man of rape and sexual offense, assault by strangulation based on what they showed you? You can't. Please find him not guilty.

Id.

¶ 23 The Court held "that a *Harbison* violation is not limited to such instances and that *Harbison* should instead be applied more broadly so as to also encompass situations in which defense counsel impliedly concedes his client's guilt without prior authorization." *Id.* at 473, 847 S.E.2d at 722. The Court noted that the attorney's statements were problematic for several reasons, including that the attorney "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[,]' " as well as by reminding the jury "that [the] defendant had admitted he 'did wrong' during the altercation" and by asking the jury to find the defendant not guilty on three charges, but not the fourth. *Id.* at 474, 847 S.E.2d at 722-23.

¶ 24 "The Court of Appeals majority [in *McAllister I*] applied an overly strict interpretation of *Harbison* here by confining its analysis to (1) whether defense counsel had expressly conceded [the] defendant's guilt of the assault on a female charge; or (2) whether counsel's statements

'checked the box' as to each element of the offense." *Id.* at 475, 847 S.E.2d at 723. Instead, "our inquiry must focus on whether defense counsel admitted [the] defendant's guilt to a charged offense without first obtaining his consent." *Id.* at 476, 847 S.E.2d at 724.

¶ 25 In this case, defendant maintained his innocence throughout trial and rejected a plea agreement prior to trial. Defendant also sought to suppress statements made to the police due to a stated medical condition. It appears that defendant did not, at any time, authorize his trial counsel to admit defendant's guilt or enter a guilty plea; the trial counsel acknowledged the lack of permission in his affidavit. However, during closing arguments, defendant's trial counsel acknowledged that M.B. was 15 years old and that he lied to defendant about his age, apparently in an effort to rebut M.B.'s testimony. The trial counsel further stated that defendant told Officer Wright "the truth" about "what happened between the two of them[;] 'I gave him oral, and we were kissing.' " Prior to this statement, the State presented evidence establishing that M.B. was 15 years old, that defendant was 41 years old, and that they were not lawfully married to each other.

¶ 26 Defendant's trial counsel's statement effectively admitted and established that defendant had, in fact, engaged in a sexual act with M.B., the remaining element to be established for both charges. Significantly, the statement was in reference to an apparent admission by defendant to a law enforcement officer, which defendant denied making. This statement is substantially similar to the statements in *McAllister*, as the trial counsel argued to the jury that defendant was being honest when he spoke with Officer Wright. Although the trial court did acknowledge *McAllister*, we disagree with the conclusion that defendant's trial counsel's request that the jury find defendant not guilty was sufficient to distinguish this case from *McAllister*. Simply asking the jury to find defendant not guilty did not serve to negate the trial counsel's prior statements. More importantly, the trial counsel's statements in this case that he told "this officer the truth" is indistinguishable from the attorney's attestations in *McAllister*.

¶ 27 While recognizing the *McAllister* Court's admonition "that a finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence[,]" *McAllister*, 375 N.C. at 376, 847 S.E.2d at 724, we believe this case presents such a rare occurrence. Although defendant specifically maintained his innocence and filed an affidavit denying that he made incriminating statements to police, his trial counsel stated the opposite during his closing argument.

¶ 28 "[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." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507. Based on the circumstances, we hold that defendant's trial counsel impliedly admitted to defendant's guilt, constituting a per se *Harbison* violation. *McAllister*, 375 N.C. at 475, 847 S.E.2d at 723 ("In cases where . . . 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."). However, since the trial court did not make specific findings regarding whether defendant consented to his trial counsel's statements, the appropriate remedy is to remand to the trial court for an evidentiary hearing. *See McAllister*, 375 N.C. at 477, 847 S.E.2d at 725.

III. Conclusion

¶ 29 For the foregoing reasons, we reverse the trial court's order and remand for an evidentiary hearing to be held as soon as practicable for the sole purpose of determining whether defendant knowingly consented in advance to his trial counsel's admission of guilt to both charged offenses.

REVERSED AND REMANDED.

Judges INMAN and WOOD concur.

STATE v. GRIMES

[284 N.C. App. 162, 2022-NCCOA-416]

STATE OF NORTH CAROLINA
v.
CHRISTOPHER DEMOND GRIMES

No. COA21-663

Filed 21 June 2022

1. Kidnapping—second-degree—removal—for purpose of inflicting serious bodily harm

For purposes of proving second-degree kidnapping, the State presented substantial evidence that defendant intended to cause serious bodily harm to the victim when he started driving his car with the victim sitting in the passenger's seat with her door still open and one leg hanging out. Further, the victim begged to be let out of the car; defendant grabbed the victim repeatedly while driving, attempted to choke her, and continued hitting her after he stopped the car; and defendant then held the victim down and grabbed her around the throat.

2. Criminal Law—jury instructions—second-degree kidnapping —no definition of "serious bodily injury"

The trial court did not plainly err in its instructions to the jury regarding second-degree kidnapping where, although it did not define "serious bodily injury," there was no requirement for the court to do so, and the instructions were given in accordance with the pattern jury instructions.

3. Appeal and Error—preservation of issues—assault on a female —facial constitutional challenge—not raised at trial

Where defendant did not present his challenge to the constitutionality of the offense of assault on a female (N.C.G.S. § 14-33(c)(2)) at trial, he failed to preserve the issue for appellate review, and his request for review pursuant to Appellate Rule 2 was denied.

Appeal by Defendant from judgment entered 20 May 2021[1] by Judge William D. Wolfe in Beaufort County Superior Court. Heard in the Court of Appeals 10 May 2022.

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1. The judgment is not file stamped. Judge William D. Wolfe signed the judgment on 18 May 2021. Handwritten in the top right corner of the judgment is, "Corrected 5-20-21."

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State-Appellee.

Caryn Strickland for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals a judgment entered upon jury verdicts of guilty of second-degree kidnapping and assault on a female. Defendant argues (1) that the trial court erred by denying his motion to dismiss where the State failed to offer evidence of Defendant's intent; (2) that the trial court plainly erred by failing to define serious bodily injury in its jury instructions; and (3) that N.C. Gen. Stat. § 14-33(c)(2), which criminalizes assault on a female by a male person, is facially unconstitutional.

¶ 2 There was no error in the trial court's denial of Defendant's motion to dismiss, and no plain error in the trial court's jury instructions. Defendant's constitutional argument is unpreserved, and we decline to exercise our discretion under Rule 2 to review the statute's constitutionality.

I. Background

¶ 3 The evidence at trial tended to show the following: On the late evening of 7 June 2020, Defendant Christopher Demond Grimes and his girlfriend at the time, Colby Harding ("Ms. Harding"), were at the home they shared in Greenville, North Carolina. The two got into an argument about Defendant's infidelity; the situation escalated and things "got physical." Defendant "smashed [an] ice cube tray over [Ms. Harding's] head and busted [her] head," resulting in cuts and bleeding.

¶ 4 Shortly after this incident, Ms. Harding left the house alone and drove to a relative's home in Chocowinity, North Carolina. Once there, Ms. Harding was texting "back and forth" with Defendant. Defendant asked Ms. Harding if he could come get her, and she said no. Explaining that she did not want to cause "a bunch of fussing and arguing" or "a bunch of drama," Ms. Harding told Defendant that "he could come but [she] wasn't leaving with him."

¶ 5 Later that night, Defendant arrived by car at the house where Ms. Harding was staying.[2] Ms. Harding went out to meet Defendant and the

2. Ms. Harding testified that Defendant arrived around 2:00am or 3:00am. A cousin of Ms. Harding's daughter, Jimmy Stokes, who was at the house that evening, testified that Defendant arrived at 10:00pm or 11:00pm.

couple began arguing. Ms. Harding got into the front seat of Defendant's car. She kept the door open and had one leg hanging out so that she could "try to jump out," if necessary, because she "didn't trust him." She told Defendant "she didn't want to go with him." Defendant "threw the car in reverse" and took off with the door open. When he drove off, the door shut. Ms. Harding managed to open the door and tried to get her legs out of the car while it was still moving. Ms. Harding "begged and pleaded" with Defendant to let her go, but Defendant did not stop. While driving, Defendant had "his hands around [her] neck," had her in a "chokehold," and was choking her with "one arm." According to Ms. Harding, Defendant finally pulled over when he saw the blue lights of a law enforcement vehicle behind him; she stated the entire incident lasted about two or three minutes.

¶ 6 Jimmy Stokes, a cousin of Ms. Harding's daughter, witnessed the entire altercation, and followed Defendant and Ms. Harding in his own car. Mr. Stokes called 911 and related the night's events to the operator. As he followed "two car lengths behind" them, Mr. Stokes saw Ms. Harding "trying to get out" but Defendant kept "grabbing her by the hair." According to Mr. Stokes, Defendant had been driving for about 15 minutes when he stopped and pulled over into a cul-de-sac. Mr. Stokes testified that once Defendant had stopped, Mr. Stokes also stopped behind him. He observed that Ms. Harding "kept trying to get out of the car" but Defendant "grabbed her again, grabbed her by her neck, and he was hitting her." Mr. Stokes stayed on the phone with 911. Once law enforcement arrived a few minutes after Defendant had stopped, Mr. Stokes left the scene and "let [law enforcement] handle it."

¶ 7 Sergeant Jason Buck ("Sgt. Buck") of the Beaufort County Sheriff's Office responded to the incident. Sgt. Buck testified that he received a radio transmission at around 4:40am notifying him that "there was an active assault occurring in a vehicle" and providing the vehicle's approximate location. Sgt. Buck arrived at the scene and initiated a traffic stop. He approached the vehicle and observed Ms. Harding in the passenger seat "very upset, crying." Ms. Harding told Sgt. Buck that the reason she had fled to her relative's house was that "she was scared of [Defendant] and thought he was going to kill her." She told Sgt. Buck that after Defendant stopped, he "held her down and grabbed her around her throat." Sgt. Buck observed that Ms. Harding "had a lot of marks on her arms, her chest area. There was redness around her neck, and she had some marks on her face and on her head." He also observed that she had marks on her neck that were "reddish" or "pinkish," as if "[s]omebody had rubbed on it or grabbed it." Photos of Ms. Harding's

injuries taken by Sgt. Buck were introduced at trial. Because the marks could not be seen very well in photographs, Sgt. Buck demonstrated on himself where he had seen the marks. Sgt. Buck also had interviewed Mr. Stokes, who related to him the evening's events.

¶ 8 Defendant was indicted on 14 September 2020 for first-degree kidnapping and assault on a female. The case came on for trial on 17 May 2021. Defendant did not put on any evidence. At the close of the State's evidence and all the evidence, Defendant moved to dismiss all charges. The trial court denied the motion. The jury convicted Defendant of second-degree kidnapping and assault on a female. The trial court entered judgment and sentenced Defendant to 30 to 48 months' imprisonment. Defendant timely appealed.

II. Discussion

A. Motion to Dismiss

¶ 9 **[1]** Defendant argues that the trial court erred when it denied his motion to dismiss the kidnapping charge for insufficient evidence. Specifically, Defendant argues that the State failed to offer sufficient evidence that Defendant removed Ms. Harding with the specific intent to do serious bodily harm.

1. Standard of Review

¶ 10 "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Golder*, 374 N.C. 238, 250, 839 S.E.2d 782, 790 (2020) (quotation marks and citation omitted).

> In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion. In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. In other words, if the record developed at trial contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant

> committed it, the case is for the jury and the motion to dismiss should be denied.

Id. at 249-50, 839 S.E.2d at 790 (brackets, quotation marks, and citations omitted). Further, any contradictions in the evidence are to be resolved in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

2. Analysis

¶ 11 Pursuant to N.C. Gen. Stat. § 14-39(a)(3), a person is guilty of kidnapping if they "unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . for the purpose of . . . [d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person . . . ." N.C. Gen. Stat. § 14-39(a)(3) (2021).[3]

¶ 12 In the context of kidnapping, serious bodily harm means "physical injury [that] causes great pain or suffering." *See* N.C.P.I.–Crim. 210.25 n.5 (June 2016) ("Serious bodily injury may be defined as 'such physical injury as causes great pain or suffering.' *See S. v. Jones*, 258 N.C. 89 (1962); *S. v. Ferguson*, 261 N.C. 558 (1964)."); *State v. Bonilla*, 209 N.C. App. 576, 585, 706 S.E.2d 288, 295 (2011) (holding that this definition was "clear" and "appropriate" when provided in a jury instruction on kidnapping). "Terrorizing is defined as more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension." *Bonilla*, 209 N.C. App. at 579, 706 S.E.2d at 292 (quotation marks and citations omitted).

¶ 13 When considering the sufficiency of the evidence regarding a defendant's intent to cause serious bodily harm, the question is "whether [the] defendant's actions could show a specific intent on his part to do serious bodily harm to [the victim]." *State v. Washington*, 157 N.C. App. 535, 539, 579 S.E.2d 463, 466 (2003). "A defendant's intent is rarely susceptible to proof by direct evidence; rather, it is shown by his actions and the circumstances surrounding his actions." *State v. Rodriguez*, 192 N.C. App. 178, 187, 664 S.E.2d 654, 660 (2008).

¶ 14 In the instant case, the State presented substantial evidence from which a jury could find that Defendant's intent was to do serious bodily

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3. The offense is kidnapping in the first-degree "[i]f the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted . . . ." N.C. Gen. Stat. § 14-39(b) (2021). The offense is kidnapping in the second-degree "[i]f the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted[.]" *Id.*

harm to Ms. Harding, including testimony from Ms. Harding, Mr. Stokes, and Sgt. Buck showing that: Ms. Harding drove to a relative's house "to get away from [Defendant]" after he struck her in the head with an ice cube tray. Defendant later showed up at the house and the two began arguing. Ms. Harding got in Defendant's car but left the door open and her leg hanging out, in case she needed to jump out. With the passenger door open and Ms. Harding's leg hanging out, Defendant threw the car in reverse and took off. Ms. Harding "begged and pleaded" for him to let her out; but Defendant continued driving. While driving, Defendant grabbed Ms. Harding by the hair, grabbed her around the neck with his hands, and put her in a "chokehold" using his arm. Once Defendant stopped the car, he continued grabbing Ms. Harding's hair and hitting her. He "held her down and grabbed her around the throat."

¶ 15 When viewed in the light most favorable to the State, the evidence of Defendant's "actions and the circumstances surrounding his actions" was sufficient to persuade a rational juror that Defendant removed Ms. Harding for the purpose of doing serious bodily harm. *See Rodriguez*, 192 N.C. App. at 187, 664 S.E.2d at 660.

¶ 16 Defendant contends that "the injuries [Ms.] Harding suffered were not serious bodily [harm] under any possible meaning of that term." However, when considering whether the evidence is sufficient to show that Defendant had the specific intent to do serious bodily harm, the question is "not the extent of physical damage to the victim," *State v. Boozer*, 210 N.C. App. 371, 376, 707 S.E.2d 756, 761 (2011), but "whether [the] defendant's actions could show a specific intent on his part to do serious bodily harm to [the victim]," *Washington*, 157 N.C. App. at 539, 579 S.E.2d at 466 (rejecting defendant's argument that the state failed to provide substantial evidence of specific intent where the victim suffered only minor cuts and bruises, explaining that "the extent of physical damage to [the victim] is not in issue"). The severity of Ms. Harding's injuries is inapposite to the question of Defendant's intent, and Defendant's arguments to the contrary are overruled.

¶ 17 When viewed in the light most favorable to the State, and affording the State every reasonable inference, we conclude that the State presented substantial evidence to show that Defendant removed Ms. Harding for the specific purpose of doing serious bodily harm. *See id.* at 536-37, 540, 579 S.E.2d at 464-66. Defendant's argument is without merit.

B. Jury Instructions

¶ 18 **[2]** Defendant next argues that the trial court plainly erred when it failed to define "serious bodily injury" in its jury instructions. Defendant

argues that specific intent is an essential element of kidnapping, and thus, it is probable that a different outcome would have occurred had the trial court defined "serious bodily injury" in its instructions to the jury.[4]

¶ 19 To show plain error, Defendant must demonstrate that a fundamental error occurred at trial. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice— that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.*

¶ 20 The trial court instructed the jury on first and second degree kidnapping in accordance with pattern jury instruction N.C.P.I.–Crim. 210.25. N.C.P.I.–Crim. 210.25 does not define "serious bodily injury" in the body of the instruction. Footnote 5 to the instruction provides, in pertinent part, "Serious bodily injury may be defined as 'such physical injury as causes great pain or suffering.' *See S. v. Jones*, 258 N.C. 89 (1962); *S. v. Ferguson*, 261 N.C. 558 (1964)." Defendant did not specifically request that the trial court give the definition in the footnote.

¶ 21 This Court has repeatedly held that where a defendant "fails to cite to any caselaw or statute which requires the trial court to define [specific] terms during its jury instruction," the defendant has failed to meet his burden under plain error review to warrant a new trial. *E.g.*, *State v. Wood*, 174 N.C. App. 790, 794, 622 S.E.2d 120, 123 (2005) (where the defendant failed to cite to any authority that required the trial court to define the terms "driving with license revoked," "negligent driving," and "reckless driving," the trial court did not commit plain error in failing to define those terms).

¶ 22 Defendant cites *Bonilla* in support of his argument that "the 'appropriate' instruction would have been that 'serious bodily injury may be defined as such physical injury as causes great pain or suffering.' " *See Bonilla*, 209 N.C. App. at 585, 706 S.E.2d at 295. But *Bonilla* did not address whether the trial court was required to define "serious bodily injury"; rather, in *Bonilla* the trial court provided the definition, and the issue on appeal was whether the provided definition was "clear"

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4. Pattern jury instruction N.C.P.I.–Crim. 210.25 uses the phrase "serious bodily injury" while N.C. Gen. Stat. § 14-39 uses the phrase "serious bodily harm." The phrases are used synonymously in the kidnapping context. *See Bonilla*, 209 N.C. App. at 585, 706 S.E.2d at 295 (holding that the definition of "serious bodily injury" provided in N.C.P.I.–Crim. 210.25, was an appropriate definition for "serious bodily harm"); *Boozer*, 210 N.C. App. at 376-77, 707 S.E.2d at 761-62 (using "harm" and "injury" interchangeably).

and "appropriate." Defendant has not cited to any authority requiring a trial court to define "serious bodily injury" and therefore, Defendant has failed to meet his burden under plain error. Defendant's argument is overruled.

C. Rule 2

¶ 23 **[3]** Finally, Defendant requests this Court to review the constitutionality of the offense of assault on a female, N.C. Gen. Stat. § 14-33(c)(2), which makes it a Class A1 misdemeanor for "a male person at least 18 years of age" to assault a "female." N.C. Gen. Stat. § 14-33(c)(2) (2021). Defendant argues that this statutory subsection discriminates based on sex, and thus, is facially unconstitutional as a violation of the Fourteenth Amendment's equal protection clause.

¶ 24 Defendant concedes that he did not raise this issue at trial and therefore, the issue has not been preserved for appellate review. N.C. R. App. P. 10(a)(1) (2021); *see Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) ("A constitutional issue not raised at trial will generally not be considered for the first time on appeal."). Nonetheless, Defendant requests this Court to exercise its discretion pursuant to Rule 2 of our Rules of Appellate Procedure and review the constitutionality of N.C. Gen. Stat. § 14-33(c)(2). *See* N.C. R. App. P. 2 (providing that an appellate court may "suspend or vary the requirements or provisions of any of these rules" in order to "prevent manifest injustice to a party, or to expedite decision in the public interest"). We decline to exercise our discretion under Rule 2 to review the constitutionality of N.C. Gen. Stat. § 14-33(c)(2).

III. Conclusion

¶ 25 In the light most favorable to the State, the State presented sufficient evidence to show Defendant intended to remove Ms. Harding for the purpose of doing serious bodily harm. Therefore, it was not error for the trial court to deny Defendant's motion to dismiss. Further, the trial court did not plainly err in failing to define "serious bodily injury" in its jury instructions. Finally, we decline to exercise our discretion pursuant to Rule 2 and address Defendant's unpreserved argument that N.C. Gen. Stat. § 14-33(c)(2) unconstitutionally discriminates based on sex. We thus discern no error and no plain error in the judgment of the trial court.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Chief Judge STROUD and Judge CARPENTER concur.

STATE OF NORTH CAROLINA
v.
JERMAINE LYDELL SANDERS, DEFENDANT

No. COA21-358

Filed 21 June 2022

Drugs—currency seized by local law enforcement—released to federal authorities—jurisdiction

The trial court erred by issuing orders purporting to exercise *in rem* jurisdiction over currency seized from defendant's rental vehicle during a drug investigation, requiring the town police department to return the currency to defendant after the department had relinquished it to federal authorities due to a federal agency's adoption of the case, and holding the department in civil contempt for failure to return the currency to defendant. North Carolina's criminal forfeiture proceedings are based on *in personam*, not *in rem* jurisdiction, and defendant's sole avenue for attempting to retrieve the seized currency was through the federal courts.

Appeal by Town of Mooresville and Mooresville Police Department from orders entered 24 November 2020 by Judge Deborah Brown and 26 January 2021, and 11 February 2021 by Judge Christine Underwood in Iredell County District Court. Appeal dismissed by order entered 20 April 2021 by Judge Christine Underwood. We allowed a petition for writ of certiorari by the Town of Mooresville and the Mooresville Police Department to review orders entered 24 November 2020 by Judge Deborah Brown and 26 January 2021, 11 February 2021, and 20 April 2021 by Judge Christine Underwood in Iredell County District Court. Heard in the Court of Appeals 26 January 2022.

Perry Legal Services, PLLC, by Maria T. Perry, for defendant-appellee.

Cranfill Sumner LLP, by Steven A. Bader and Patrick H. Flanagan, for appellants.

Acting United States Attorney William T. Stetzer, by Assistant United States Attorney J. Seth Johnson, amicus curiae.

Kristi L. Graunke and Leah J. Kang for American Civil Liberties Union of North Carolina Legal Foundation, Inc.; Dawn N. Blagrove and Elizabeth G. Simpson for Emancipate NC, Inc.;

Daryl Atkinson and Whitley Carpenter for Forward Justice; and Laura Holland for North Carolina Justice Center, amici curiae.

MURPHY, Judge.

¶ 1 Judicial proceedings pertaining to criminal seizures of personal property in North Carolina are based on *in personam*, not *in rem*, jurisdiction. These proceedings differ from federal civil forfeiture proceedings, which are based on *in rem* jurisdiction over the property at issue. For this reason, where a federal court adopts a seizure of property by North Carolina law enforcement, federal courts assume exclusive, *in rem* jurisdiction over the seizure, as no state-level *in rem* jurisdiction exists to take priority over the federal exercise of *in rem* jurisdiction; the ordinary rule prioritizing the *in rem* jurisdiction of the first in time to exercise it does not apply unless *in rem* jurisdiction exists in the first place. Here, where the trial court issued orders purporting to exercise *in rem* jurisdiction, it erred. Accordingly, we must vacate the trial court's orders and remand for further proceedings consistent with this opinion.

BACKGROUND

¶ 2 This appeal arises out of a seizure of property belonging to Defendant Jermaine Lydell Sanders by the Mooresville Police Department ("MPD"). On or about 15 November 2020, MPD officers discovered a vehicle in a hotel parking lot matching the description of a vehicle provided by night shift officers. The vehicle, which Defendant was renting, contained $16,761.00 in cash in a plastic bag in the center console. Defendant, who was inside the hotel, fled upon seeing the officers. Meanwhile, the MPD seized the cash.

¶ 3 On 19 November 2020, Defendant appeared through counsel before the Iredell County District Court and filed a *Motion for Personal Property to be Released to Defendant* ("November Motion") arguing the currency's seizure was unlawful. However, the following day, while the November Motion was under consideration, an officer of the United States Department of Homeland Security ("DHS") informed the MPD that, because Defendant was being investigated for money laundering under 18 U.S.C. § 1956, the DHS was "adopting the case." On 23 November 2020, the MPD relinquished the currency to the DHS, and a DHS officer converted the funds into a check payable to United States Customs and Border Protection.

¶ 4 The District Court granted Defendant's November Motion in an order entered 24 November 2020 ("November Order"). Defendant's counsel

promptly notified the MPD of the November Order and attempted to coordinate the return of Defendant's cash; however, the MPD indicated in response that it could not return the cash due to the adoption. Having received this response, Defendant filed a *Verified Motion to Show Cause* on 10 December 2020 briefly describing the foregoing events and alleging, *inter alia*, that the MPD unconstitutionally seized the $16,761.00, "has the financial ability to comply with the [trial] [c]ourt's November [] [O]rder to return [Defendant's] cash[,]" "inexcusably failed to do so[,]" and "is subject to being held in contempt until it complies with the order." In response, the District Court, in an order dated 26 January 2021 ("January Order"), "decreed that the [MPD] will be held in contempt unless a representative from [the MPD] appears in person on [9 February] 2021 . . . to show cause why [it] should not be held in contempt for failure to return funds to [Defendant] as ordered . . . ."

¶ 5 A hearing was held on 9 February 2021 in accordance with the January Order, shortly after which the District Court entered another order ("February Order"). The trial court made the following relevant findings of fact in the February Order:

> 1. On [15 November 2020], the [MPD] seized $16,761.00 in cash as a part of a search of [Defendant's] rental vehicle, in violation of [his] 4th, 5th and 8th Amendment U.S. constitutional rights, as made applicable to the states by the 14th Amendment.
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> . . . .
>
> 7. This [c]ourt acquired in rem jurisdiction over the cash on [19 November 2020—]the date [Defendant] filed the motion for return of property.
>
> . . . .
>
> 17. The [MPD] is an agency of the Town of Mooresville [("Mooresville")], and it operates under the supervision and control of . . . Mooresville. Together or severally, the said town and [the MPD] have the financial means to comply with the [November Order].
>
> 18. Although Counsel for the [MPD] argued, in defense of not being held in contempt, that . . . Mooresville and the [MPD] are incapable of returning the seized funds because a federal agency has them, this argument has previously been resolved [by the November Order] and is res judicata.

> 19. Furthermore, this argument is meritless in view of . . . Mooresville and [the MPD's] ability to use funds, or to liquidate assets, at their disposal so as to enable them to comply with the subject order by releasing $16,761.00 to [Defendant].
>
> 20. Finally, [the November Order] did not premise release of the amount of $16,761.00 on the [MPD's] ability to effect reversal of its wrongful transfer of a different $16,761.00 to a third party.
>
> 21. The [MPD] may never be able to reverse its unauthorized conduct in attempting to remove from this court's jurisdiction rem over which the court had jurisdiction. However, should said department later be successful in recovering $16,761.00 from federal authorities, it will obviously be entitled to keep those funds to replenish the payment required by [the November Order].
>
> 22. The [c]ourt also takes note that the [MPD] has not filed an appeal of the November . . . Order, nor a motion to set aside the [o]rder.
>
> 23. By its conduct, the [MPD] has willfully failed to comply with [the November Order].
>
> 24. . . . Mooresville and the [MPD] have had 77 days to make arrangements to comply with the [November] Order.
>
> 25. . . . Mooresville, by and through the [MPD], which town also had notice of the November . . . [O]rder, has willfully failed to comply with [the November Order].

Based upon these findings of fact, the District Court "conclude[d] as a matter of law[] [that it had] jurisdiction over the subject matter and parties[,]" that "[t]he failure of . . . Mooresville and the [MPD] to comply with [the November Order was] willful, and [that] . . . Mooresville and the [MPD] have the present ability to comply with the [November] Order." Accordingly, it "decreed that the [MPD] and . . . Mooresville are held in civil contempt of [c]ourt[] and shall purge themselves by returning $16,761.00 to [Defendant] within seven business days of entry of [the] [February] Order . . . ."

¶ 6 On 15 February 2021, Mooresville and the MPD filed a *Notice of Appeal* from the November Order, January Order, and February Order. However, in an order entered 20 April 2021 ("April Order"), the District Court dismissed the appeal on the basis that it was not timely filed and failed to invoke Rule 3 appellate jurisdiction. We allowed Mooresville's and the MPD's petition for writ of certiorari on 7 May 2021 to review the November, January, February, and April Orders.

ANALYSIS

¶ 7 On appeal, Mooresville and the MPD argue that the trial court lacked *in rem* jurisdiction and, as such, erred in issuing the four challenged orders because it was prevented from interfering with the federal courts' exclusive *in rem* jurisdiction.

¶ 8 Under 21 U.S.C. § 881, "[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance" are "subject to forfeiture to the United States . . . ." 21 U.S.C. § 881(a)(6) (2021). Moreover, federal courts "shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress[.]" 28 U.S.C. § 1355 (2021). As such, the determinative question in this case is whether, in light of federal law, the District Court actually possessed the *in rem* jurisdiction on which it purported to base its orders.

¶ 9 *In rem* jurisdiction is a specialized form of personal jurisdiction. *Coastland Corp. v. N.C. Wildlife Res. Comm'n*, 134 N.C. App. 343, 346, 517 S.E.2d 661, 663 (1999). "The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record"; however, "[w]e review *de novo* the issue of whether the trial court's findings of fact support its conclusion of law that [it had] personal jurisdiction over [a] defendant." *Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011), *disc. rev. denied*, 365 N.C. 574, 724 S.E.2d 529 (2012). Here, because Appellants challenge only whether the trial court possessed *in rem* jurisdiction as a matter of law, we review de novo.

¶ 10 As an initial matter, we note that the existence or nonexistence of *in rem* jurisdiction at the state level in this case is of great import, as a court assuming *in rem* jurisdiction precludes the subsequent exercise of *in rem* jurisdiction by all other courts:

> Where the judgment sought is strictly in personam, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as res adjudicata in the other. But, if the two suits are in rem or quasi in rem, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. To avoid unseemly and disastrous conflicts in the administration of our dual judicial system and to protect the judicial processes of the court first assuming jurisdiction, the principle, applicable to both federal and state courts, is established that *the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other*.

Penn General Cas. Co. v. Pennsylvania ex rel. Schnader, 294 U.S. 189, 195, 79 L. Ed. 850, 855 (1935) (citations omitted) (emphasis added). However, contrary to its assertions in the February Order, the District Court never exercised *in rem* jurisdiction over the seized currency.

¶ 11 Unlike the federal government, North Carolina does not have a general-purpose civil forfeiture statute. *See generally* 19 U.S.C. § 1607 (2021). The statute applicable to this case is N.C.G.S. § 90-112, which provides, in relevant part, for the *criminal* forfeiture of "[a]ll money . . . which [is] acquired, used, or intended for use, in selling, purchasing, manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance . . . [.]" N.C.G.S. § 90-112(a)(2) (2021). As a procedural safeguard, forfeitures under N.C.G.S. § 90-112 require

> process issued by any [D]istrict or [S]uperior [C]ourt having jurisdiction over the property except that seizure without such process may be made when[] (1) [t]he seizure is incident to an arrest or a search under a search warrant; [or] (2) [t]he property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding . . . .

N.C.G.S. § 90-112(b) (2021). While federal civil forfeiture is, quite literally, an action against the property itself,[1] North Carolina does not employ this conceptual framework; instead, our criminal forfeiture proceedings take place under the purview of a defendant's criminal trial. *See, e.g.*, *State v. Johnson*, 124 N.C. App. 462, 478 S.E.2d 16 (1996), *cert. denied*, 345 N.C. 758, 485 S.E.2d 304 (1997).

¶ 12 In *State v. Hill*, we held that criminal forfeiture proceedings are categorically predicated upon *in personam* jurisdiction—one of the many distinguishing factors between North Carolina's criminal forfeiture proceedings and the *in rem* proceedings associated with civil forfeiture. *State v. Hill*, 153 N.C. App. 716, 718, 570 S.E.2d 768, 769 (2002) ("It is important to note that our forfeiture provisions operate *in personam* and that forfeiture normally follows conviction."). Moreover, we previously held that law enforcement may—and, indeed, must—cooperate with federal authorities and permit adoption by the federal government where applicable:

> State and local agencies are allowed to cooperate and assist each other in enforcing the drug laws. [N.C.G.S.] § 90-95.2 (2001). Cooperation by state and local officers with federal agencies is *mandated* by [N.C.G.S.] § 90-113.5 which provides:
>
> > It is *hereby made the duty* of . . . all peace officers within the State, including agents of the North Carolina Department of Justice, and all State's attorneys, to enforce all provisions of this Article [Controlled Substances Act] . . . *and to cooperate with all agencies charged with the enforcement of the laws of the United States*, of this State, and all other States, relating to controlled substances.
>
> [N.C.G.S.] § 90-113.5 (2001) (emphasis added).

Id. at 721, 570 S.E.2d at 771. Here, where Defendant's currency was taken from the vehicle pursuant to N.C.G.S. § 90-112, we are bound by our decision in *Hill* to hold that any challenge to that forfeiture would have necessarily been predicated on *in personam* jurisdiction, not *in rem* jurisdiction.

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1. In federal civil forfeiture proceedings, the "party" opposite the government is—in an exercise of legal fiction—the very item seized. *See, e.g.*, *United States v. $119,000 in U.S. Currency*, 793 F. Supp. 246 (D. Haw. 1992); *United States v. One Black 1999 Ford Crown Victoria LX*, 118 F. Supp. 2d 115 (D. Mass. 2000).

¶ 13 As the trial court never exercised *in rem* jurisdiction, the trial court erred in any legal conclusion in the challenged orders premised on the exercise of *in rem* jurisdiction. In *Hill*, we held that "[o]nce a federal agency has adopted a local seizure, a party may not attempt to thwart the forfeiture by collateral attack in our courts, for at that point exclusive original jurisdiction is vested in the federal court." *Id.* at 722, 570 S.E.2d at 772. The proposition that *in rem* jurisdiction attaches due to the actions of law enforcement stands in clear opposition to *Penn General*, in which the United States Supreme Court held that "the *court* first assuming jurisdiction over the property"—not the executive agents—"may maintain and exercise [*in rem*] jurisdiction to the exclusion of the other"; however, as we are without power to override our prior holdings, *Hill* remains in effect until such time as it may be corrected by our Supreme Court. *Penn General*, 294 U.S. at 195, 79 L. Ed. 2d at 855 (emphasis added); *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."). Accordingly, under *Hill*, the November Order was issued by a court without *in rem* jurisdiction; and, as the three subsequent orders were premised on the validity of the November Order, those orders are void.[2]

CONCLUSION

¶ 14 We are hamstrung by *Hill*; we must therefore hold that Defendant's sole avenue for retrieving the currency unlawfully seized from him by the MPD is to seek redress from federal authorities. Accordingly, we vacate the trial court's orders and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges DILLON and ZACHARY concur.

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2. With certiorari having been allowed and the underlying orders having been entered in error, any further issues arising from the April Order are moot. *See McVicker v. Bogue Sound Yacht Club, Inc.*, 257 N.C. App. 69, 73, 809 S.E.2d 136, 139–40 (2017) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.").

STATE v. WRIGHT

[284 N.C. App. 178, 2022-NCCOA-418]

STATE OF NORTH CAROLINA
v.
NICODEMUS WRIGHT, DEFENDANT

No. COA20-250

Filed 21 June 2022

1. Sexual Offenders—failure to notify of change of address—subject matter jurisdiction—sufficiency of indictment—essential elements of offense

The trial court had subject matter jurisdiction over a case involving the offense of failure to notify the last registering sheriff of a change of address pursuant to N.C.G.S. § 14-208.11(a)(2) where the indictment sufficiently alleged all essential elements, even if not done so explicitly, by including the factual basis for why defendant was required to register (based on his previous conviction of a reportable offense) and by tracking the statutory language in its statement that defendant willfully violated the registration program by failing to notify the sheriff of a change of address in accordance with statutory requirements.

2. Criminal Law—jury instructions—failure to update address—willfulness

There was no plain error in the trial court's jury instructions on failure to notify the last registered sheriff of a change of address pursuant to N.C.G.S. § 14-208.11(a)(2) where the instructions as a whole explicitly referred to the proper burden of proof as guilty beyond a reasonable doubt and where the instructions regarding willfulness were consistent with the pattern jury instructions. Even if the instructions were unclear, they were not sufficiently prejudicial to impact the jury's verdict.

3. Sexual Offenders—failure to notify change of address—willfulness—sufficiency of evidence

The State presented substantial evidence that defendant's failure to notify the sheriff's office of a change of address as required by N.C.G.S. § 14-208.9(a) was willful, including that defendant was aware of his obligation to update his address and was capable of doing so but that, at a minimum, he did not notify the sheriff's office within three business days of leaving a drug treatment program in another county, even though he did not return to his former address at a men's shelter.

4. Criminal Law—habitual felon status—underlying convictions —sufficiency of evidence

Where the State presented an exhibit listing incident dates and other information pertaining to defendant's prior felony convictions, there was sufficient evidence regarding the date of commission of two previous felony offenses that were used to establish defendant's habitual felon status. The underlying offenses were committed after defendant turned eighteen years old, and there was no overlap where each was committed after defendant pleaded guilty to the previous offense used.

5. Criminal Law—right to allocution—sentencing hearing—denied

Defendant was entitled to a new sentencing hearing for failure to update his address and attaining habitual felon status where the trial court erred by depriving defendant of his right to allocution, pursuant to N.C.G.S. § 15A-1334(b), after defendant expressed his desire to make a statement to the court but was not allowed to do so. Although defendant also asked more than once to be given papers, to which the court responded, "we're not going to do that," defendant clearly invoked his right to be heard but was not asked whether he wanted to make a statement without his papers prior to sentencing.

6. Appeal and Error—civil judgment for attorney fees—no judgment entered—petition for writ of certiorari denied

Defendant's request for a writ of certiorari to review a civil judgment for attorney fees was denied where there was no indication that the civil judgment was filed with the clerk of court.

Appeal by Defendant from judgment entered 18 September 2019 by Judge Michael A. Stone in Wake County Superior Court. Heard in the Court of Appeals 13 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.

Daniel J. Dolan for defendant-appellant.

MURPHY, Judge.

¶ 1 An indictment must sufficiently allege all essential elements, or the facts underlying all essential elements, of an offense to put a defendant

on notice as to the offense being charged in order to grant the trial court jurisdiction to hear a felony case. However, an indictment need not follow hyper-technical rules to be valid. Here, the trial court properly recognized the validity of the indictment, which sufficiently alleged the underlying facts essential for each element to apprise Defendant that he was charged with a failure to notify the last registering sheriff of a change of address.

¶ 2 Jury instructions are subject to plain error review when a defendant fails to preserve an alleged instructional error for appellate review, requiring a showing that the alleged error had a probable impact of the jury's verdict as opposed to a possible impact. Here, the trial court did not plainly err in instructing the jury regarding the State's burden of proof as it properly instructed that the State was required to prove all elements beyond a reasonable doubt. Additionally, the trial court did not plainly err in instructing the jury on the elements of failure to notify the last registering sheriff of a change of address, even assuming it erred by not indicating that there must be a *willful* failure to notify the sheriff's office of a change of address, because such an error would not have had a probable impact on the jury's verdict due to the clear, accurate statement of the mens rea requirement immediately prior to the assumed error.

¶ 3 A motion to dismiss for insufficiency of the evidence should be denied if, when viewing the evidence in the light most favorable to the State, there is substantial evidence of each essential element of the offense. Here, there was substantial evidence of each essential element of Defendant's failure to notify the last registering sheriff of a change of address and his attaining habitual felon status.

¶ 4 In non-capital cases, defendants have a statutory right to allocution when they assert that right prior to sentencing. Here, because the trial court denied Defendant his right to allocution after he clearly and repeatedly articulated his desire to exercise this right, we vacate the trial court's sentence and remand for a new sentencing hearing.

¶ 5 Finally, a petition for writ of certiorari is a discretionary writ that should only be allowed when the petition shows merit in the underlying issue. There can be no merit in an appeal regarding an underlying issue when the record does not show the order from which a defendant requests review was actually entered. An order is not considered entered where it has not been filed with the county clerk of court. Here, the civil judgment order for attorney fees for which Defendant seeks our review does not reflect that it was filed with the county clerk of court, and therefore there is no merit to the petition for writ of certiorari. We

deny Defendant's petition for writ of certiorari and dismiss the portion of his appeal related to the civil judgment order for attorney fees.

BACKGROUND

¶ 6 Defendant Nicodemus Wright was convicted of second-degree rape in 2006. In November 2011, following his release from prison, he was required to enroll in the sex offender and public protection registry and required to inform his local sheriff's office of his address in accordance with N.C.G.S. § 14-208.7. In early July 2015, Defendant's registered address was a men's shelter in Raleigh; however, on 9 July 2015, Defendant was taken to a month-long drug treatment program in Goldsboro by his post-release supervisor. Defendant left this program after two days and did not return to the men's shelter. From 11 July 2015, when Defendant left the drug treatment program, until his eventual arrest on 4 August 2015, Defendant did not update his registered address. As a result, Defendant's registered address remained listed as the men's shelter in Raleigh, but he did not stay there at any point after he left the program.

¶ 7 Defendant's former girlfriend, Linda Burt, testified that Defendant began staying at her home two days after his departure from the program, kept his clothes and books at her home during this time period, and was staying with her at the time of his arrest.

¶ 8 Following the State's evidence, Defendant made motions to dismiss on the basis of the indictment being fatally defective and for insufficiency of the evidence. Specifically, Defendant alleged that the indictment failed to state explicitly that he was required to register as a sex offender and to notify the sheriff's office of a move within three days. The indictment read:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the [4 August] 2015, in Wake County, the defendant named above unlawfully, willfully and feloniously did violate the North Carolina Sex Offender and Public Protection Registration Program, by having been convicted in Wake County Superior Court on 18th day of September 2006 of Second[-]Degree Rape, a reportable offense and failing to notify the Sheriff of Wake County of a change of address as required by [N.C.G.S.] § 14-208.9. This act was done in violation of [N.C.G.S.] § 14-208.11(A)(2)[.]

The trial court denied the motions.

¶ 9 Defendant then presented evidence. Defendant testified that he understood his obligation to notify his local sheriff's office of any address change and he had consistently updated his address. Defendant testified on cross-examination that, in 2011, he had acknowledged his understanding of his obligations regarding the registry in writing. Additionally, Defendant testified that the Goldsboro program had registered him in Goldsboro and that he never lived with his girlfriend, instead claiming he stayed in Goldsboro until around 2 August 2015.

¶ 10 Defendant also called his post-release officer to testify. Defendant's post-release officer confirmed that a program officer had indicated that the program was going to notify the Wayne County Sheriff's Office of Defendant's change of address, but he was unaware if this actually occurred. Defendant renewed his motions to dismiss at the conclusion of all evidence, and the trial court again denied the motions. The trial court instructed the jury, and the jury found Defendant guilty of violating the sex offender and public protection registry.

¶ 11 Defendant was then tried for having attained habitual felon status. Two prior convictions for attempted robbery and attempted criminal sale of a controlled substance in the fifth degree from New York were used as the first two underlying felonies, with the third being his second-degree rape conviction in North Carolina. At the conclusion of the State's evidence, Defendant made a motion to dismiss, which the trial court denied. Defendant was found guilty of attaining habitual felon status, and the trial court proceeded to sentencing. At sentencing, the following exchange occurred:

> THE COURT: All right. Stand up, [Defendant]. Anything you want to say?
>
> THE DEFENDANT: Yes. I need – to say what I want to say, I need to get my paperwork.
>
> THE COURT: Well, we're not going to do that. Anything you want to say to me right now before you're sentenced?
>
> THE DEFENDANT: Yes. I asked to get it before I even came out here, and they rushed me and said, "Come on now." Please. I mean, this is my chance to speak to you.
>
> THE COURT: Anything you want to say to me before you're sentenced?
>
> THE DEFENDANT: Yes, I do. I have it right there in –

> THE COURT: All right. Your papers aren't relevant right now. All right. Moving to sentencing, Madam Clerk, it is a class C on the habitual felon status, record level two. The sentence will be in the presumptive range. He's sentenced to a minimum term of 83 months, maximum terms of 112 months active time. He's to receive credit for all pretrial confinement. All right. Good luck to you, [Defendant] . . . .
>
> MS. STROMBOTNE: Sorry, Judge. I didn't mean to interrupt. I would like to enter notice of appeal in open court.
>
> THE COURT: All right. Enter notice of appeal.
>
> THE DEFENDANT: I don't just – I don't get to say anything now to you, Judge?
>
> THE COURT: No.

¶ 12 On 18 September 2019, the trial court imposed an active sentence of 83 to 112 months. The criminal judgment provided for $0.00 in attorney fees. On 25 October 2019, a *Non-Capital Criminal Case Trial Level Fee Application Order for Payment Judgment Against Indigent* was signed by the trial court, purporting to approve a civil judgment for attorney fees in the amount of $3,562.50.

ANALYSIS

¶ 13 On appeal, Defendant argues (A) "[t]he judgment must be vacated because the indictment charging a violation of the sex offender and public protection registry fails to allege three essential elements, depriving the trial court of jurisdiction and violating [Defendant's] right to due process"; (B) "[Defendant] must receive a new trial because the trial court plainly erred by [(1)] failing to instruct the jury as to an element of an offense and [(2)] by misstating an element of an offense"; (C) "[t]he trial court erroneously denied [Defendant's] motion to dismiss the charge of a violation of the sex offender and public protection registry and the charge of attaining habitual felon status because there was not substantial evidence of either charge"; (D) "[t]his case must be remanded for a new sentencing hearing because the trial court deprived [Defendant] of his right to allocution"; and (E) "[t]he trial court erred by ordering [Defendant] to pay attorney[] fees and the attorney appointment fee without affording him notice and an opportunity to be heard."[1]

1. Defendant has also filed a petition for writ of certiorari regarding this issue, which we address in our discussion of this issue.

A. Sufficiency of the Indictment for Failure to Notify the Last Registering Sheriff of a Change of Address

¶ 14 **[1]** Defendant contends the indictment fails to sufficiently allege any of the three essential elements of failure to notify the last registering sheriff of a change of address and the trial court therefore lacked jurisdiction to enter the judgment. The State responds that the Defendant is employing a hyper-technical reading of the indictment and that a plain reading reveals the essential elements are laid out, even if not in the most explicit terms.

> It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony. Lack of jurisdiction in the trial court due to a fatally defective indictment requires the appellate court to arrest judgment or vacate any order entered without authority. The issue of subject matter jurisdiction may be raised at any time, even for the first time on appeal. The subject matter jurisdiction of the trial court is a question of law, which this Court reviews *de novo* on appeal.

State v. Barnett, 223 N.C. App. 65, 68, 733 S.E.2d 95, 97-98 (2012) (marks and citations omitted).

¶ 15 "The North Carolina Constitution guarantees that, 'in all criminal prosecutions, every person charged with [a] crime has the right to be informed of the accusation.' " *State v. Williams*, 368 N.C. 620, 623, 781 S.E.2d 268, 270 (2016) (quoting N.C. Const. art. I, § 23). For felonies, this often occurs by indictments, which must contain

> [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C.G.S. § 15A-924(a)(5) (2021). Our Supreme Court has interpreted this statute, holding "that it is not the function of an indictment to bind the hands of the State with technical rules of pleading, and that we are no longer bound by the ancient strict pleading requirements of the common law." *Williams*, 368 N.C. at 623, 781 S.E.2d at 270-71. "Instead, contemporary criminal pleading requirements have been designed to remove from our law unnecessary technicalities which tend to obstruct

justice." *Id.* at 623, 781 S.E.2d at 271 (marks omitted). Our statutes reflect this, providing:

> Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express[es] the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.

N.C.G.S. § 15-153 (2021).

¶ 16 Our caselaw has elaborated on what indictments must contain based on contemporary standards:

> In order to be valid and thus confer jurisdiction upon the trial court, an indictment charging a statutory offense must allege all of the essential elements of the offense. The indictment is sufficient if it charges the offense in a plain, intelligible and explicit manner. Indictments need only allege the ultimate facts constituting each element of the criminal offense and an indictment couched in the language of the statute is generally sufficient to charge the statutory offense. While an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form. The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words.

Barnett, 223 N.C. App. at 68-69, 733 S.E.2d at 98 (marks and citations omitted).

¶ 17 Here, Defendant challenges his indictment for failure to notify the last registering sheriff of his change of address. This offense is described in N.C.G.S. § 14-208.11(a)(2), which states, in relevant part, "[a] person required by this Article to register who willfully does . . . the following is guilty of a Class F felony: . . . Fails to notify the last registering sheriff of a change of address as required by this Article." N.C.G.S. § 14-208.11(a)(2) (2021). The obligation to notify the last registering sheriff of a change of address appears in N.C.G.S. § 14-208.9(a), which states, in relevant

part, "[i]f a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered." N.C.G.S. § 14-208.9(a) (2021).

¶ 18 Based on these statutes, we have previously held that the three essential elements of the failure to notify the last registering sheriff of a change of address under N.C.G.S. § 14-208.11(a)(2) are "(1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change." *Barnett*, 223 N.C. App. at 69, 733 S.E.2d at 98.

¶ 19 Here, the indictment reads:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the [4 August] 2015, in Wake County, the defendant named above unlawfully, willfully and feloniously did violate the North Carolina Sex Offender and Public Protection Registration Program, by having been convicted in Wake County Superior Court on 18th day of September 2006 of Second[-]Degree Rape, a reportable offense and failing to notify the Sheriff of Wake County of a change of address as required by [N.C.G.S.] § 14-208.9. This act was done in violation of [N.C.G.S.] § 14-208.11(A)(2)[.]

We analyze each of the essential elements separately below.

1. Required to Register

¶ 20 Defendant first contends that, like in *Barnett*, the indictment does not explicitly state Defendant was required to register. The State responds that, unlike the indictment in *Barnett*, the indictment here instead provides the "facts indicating why it would be a crime for Defendant to 'fail to provide written notice or notify the . . . Sheriff's Department [sic] within three business days after a change of address.' " *Id.* at 69, 733 S.E.2d at 98-99. We hold the first element is sufficiently alleged here.

¶ 21 In *Barnett*, we assessed the validity of an indictment that read:

> The jurors for the State upon their oath present that on or about 8 June 2010 and in Gaston County the defendant named above unlawfully, willfully and feloniously did fail to provide written notice or

> notify the Gaston County Sheriff's Department [sic] within three business days after a change of address as required by the North Carolina General Statute 14–208.9.

Id. at 69, 733 S.E.2d at 98. We stated:

> While the indictment substantially tracks the statutory language set forth in [N.C.G.S.] § 14–208.9(a) with respect to the second and third elements of the offense, it makes no reference to the first essential element of the offense, *i.e.*, that Defendant be "a person required to register." *The indictment does not allege that Defendant is a registered sex offender, nor any facts indicating why it would be a crime for Defendant to "fail to provide written notice or notify the Gaston County Sheriff's Department [sic] within three business days after a change of address.*" Moreover, the State's contention that the indictment language "as required by the North Carolina General Statute 14–208.9" was adequate to "put Defendant on notice of the charge[] and [] inform[] him with reasonable certainty the nature of the crime charged" is unavailing, as "it is well established that ' "[m]erely charging in general terms a breach of [a] statute and referring to it in the indictment is not sufficient" ' to cure the failure to charge 'the essentials of the offense' in a plain, intelligible, and explicit manner."

Id. at 69-70, 733 S.E.2d at 98-99 (emphasis added). We ultimately concluded that the indictment was insufficient to confer subject matter jurisdiction on the trial court and vacated the defendant's conviction without prejudice to re-prosecution. *Id.* at 72, 733 S.E.2d at 100.

¶ 22 Although, like in *Barnett*, the indictment here does not explicitly state that Defendant was required to register, the indictment instead provides the factual basis for the requirement that he register—his conviction of the reportable offense of second-degree rape—and therefore is distinguishable from *Barnett* and complies with N.C.G.S. § 15A-924(a)(5) and N.C.G.S. § 15-153. *See State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995) ("[I]ndictments need only allege the ultimate facts constituting each element of the criminal offense.").

¶ 23 The indictment alleges that Defendant was previously convicted of second-degree rape in 2006 and pleads facts that constitute the

first essential element of failure to notify the last registering sheriff of a change of address—that Defendant was required to register. This satisfies the requirements of our statutes, caselaw, and Constitution.

2. Change of Address

¶ 24 Defendant next contends the indictment must have specifically alleged that Defendant changed his address. The State responds that the indictment necessarily indicates that a change in address occurred. We hold that the indictment here sufficiently alleges the second essential element of failing to register.

¶ 25 In *State v. Reynolds*, we upheld an indictment that did not state the defendant changed his address and instead simply stated:

> [A]s a person required by Article 27A of Chapter 14 of the General Statutes to register as a sex offender, *fail to notify the last registering Sheriff, Graham Atkinson, of an address change* by failing to appear in person and provide written notice of his address after his release from incarceration[.]

State v. Reynolds, 253 N.C. App. 359, 367-68, 800 S.E.2d 702, 708 (2017) (emphasis added), *disc. rev. denied*, 370 N.C. 693, 811 S.E.2d 159 (2018). In *Reynolds*, we upheld the indictment as it "substantially track[ed] the language of . . . the statute under which [the defendant] was charged, thereby providing defendant adequate notice." *Id.* (quoting *Williams*, 368 N.C. at 626, 781 S.E.2d at 273).

¶ 26 Here, like in *Reynolds*, the indictment substantially tracks the language of N.C.G.S. § 14-208.11(a)(2) by stating "the defendant named above unlawfully, willfully and feloniously did violate the North Carolina Sex Offender and Public Protection Registration Program, by . . . *failing to notify the Sheriff of Wake County of a change of address as required by [N.C.G.S.] § 14-208.9*." (Emphasis added). N.C.G.S. § 14-208.11(a)(2) states "[a] person required by this Article to register who willfully does any of the following is guilty of a Class F felony: . . . Fails to notify the last registering sheriff of a change of address as required by this Article." N.C.G.S. § 14-208.11(a)(2) (2021). The indictment sufficiently alleges the second essential element of failure to notify the last registering sheriff of a change of address—that Defendant changed his address—by mirroring the statutory language.

3. Update Address within Three Days

¶ 27 Finally, Defendant contends the indictment fails to indicate that the change in address occurred within three business days. He argues this, in

part, because the change in address is not sufficiently indicted; however, given our holding that the second element is sufficiently alleged, we need not address this portion of Defendant's argument here.

¶ 28 To the extent that Defendant challenges the lack of the inclusion of "three business days" in the indictment, we have previously addressed this issue in *State v. McLamb*, 243 N.C. App. 486, 777 S.E.2d 150 (2015). In *McLamb*, we held:

> [T]he indictment in this case, which alleged "[the] defendant . . . did, as a person required by Article 27A of Chapter 14 of the General Statutes to register, fail[] to notify the last registering sheriff of a change of address in that he moved from 1134 Renfrow Road in Clinton, North Carolina, on or about [18 December] 2012 to 206 Smith Key Lane in Clinton, North Carolina without notifying the Sampson County Sheriff[,]" was couched in the language of the statute and sufficiently alleged the third element of the offense. To hold otherwise would be to subject the indictment to hyper technical scrutiny where in this case, over a period of months, [the] defendant failed to give any notice to the sheriff of his change of address.

Id. at 490, 777 S.E.2d at 152-53. Although Defendant's failure to notify the Wake County Sheriff's Office here did not occur over a period of months, *McLamb's* holding is equally applicable here as Defendant did not update his address for 24 days at the least, which far outlasts the statutory timeframe of three business days. Like the argument in *McLamb*, Defendant's hyper-technical argument fails. Defendant's indictment sufficiently alleged the third essential element of failure to notify the last registering sheriff of a change of address—that Defendant failed to notify the Wake County Sheriff's Office of his change of address within three business days of the change.

¶ 29 As a result, the indictment sufficiently alleged all three essential elements, and the trial court had jurisdiction over the case. While the indictment could have been more explicit as a best practice, the indictment here was sufficient to provide Defendant notice of the charge against him, and we will not subject it to hyper-technical scrutiny. *See Barnett*, 223 N.C. App. at 68, 733 S.E.2d at 98 (marks and citations omitted) ("While an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.").

B. Plain Error in Jury Instruction

¶ 30 **[2]** Defendant contends the trial court committed plain error in improperly instructing the jury on the elements of failing to update an address when,

> [e]arly in the instruction for the offense of violating the sex offender and public protection registry, the trial court did not instruct the jury that the prosecution had to prove beyond a reasonable doubt that [Defendant] changed his address.

Defendant also contends the trial court erroneously instructed that Defendant must have willfully changed his address rather than willfully failed to report his change of address, when

> [i]n the final mandate, the trial court instructed the jury that if it found beyond a reasonable doubt that "the defendant willfully changed the defendant's address and failed to provide written notice of the defendant's new address in person at the Sheriff's Office no later than three business days after the change of address to the Sheriff's Office in the county with whom the defendant had last registered, it would be [their] duty to return a verdict of guilty."

¶ 31 "Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29, *disc. rev. denied*, 364 N.C. 327, 700 S.E.2d 926 (2010). "This Court reviews jury instructions contextually and in its entirety." *See State v. Glynn*, 178 N.C. App. 689, 693, 632 S.E.2d 551, 554 (marks omitted), *appeal dismissed*, 360 N.C. 651, 637 S.E.2d 180 (2006). "When reviewed as a whole, isolated portions of a charge will not be held prejudicial when the charge as a whole is correct. The fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal." *Id.* (marks omitted). Generally, "an error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C.G.S. § 15A-1443(a) (2007)). However, we employ a more demanding standard of prejudice when we review an unpreserved issue for plain error:

> [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); *see also* N.C. R. App. P. 10(a)(4) (2022). Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)). "Under the plain error rule, [a] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

1. Burden of Proof

¶ 32 Here, the first error alleged by Defendant—that the trial court erred in failing to instruct the jury that the prosecution had to prove that Defendant changed his address beyond a reasonable doubt—is undermined by the transcript. The instructional language that Defendant refers to is:

> [D]efendant has been charged with willfully failing to comply with the Sex Offender Registration law. For you to find [] [D]efendant guilty of this offense, *the State must prove three things beyond a reasonable doubt*. First, that [] [D]efendant was a resident of North Carolina. Second, that [] [D]efendant had previously been convicted of a reportable offense for which [] [D]efendant must register. If you find beyond a reasonable doubt that on [18 September 2006], in Wake County Superior Court, [] [D]efendant was convicted of second-degree rape, then this would constitute a reportable offense for which [] [D]efendant must register. And, third, [] [D]efendant willfully failed to provide written notice of a change of address in person at the Sheriff's Office no later than three business days after the change of address

> to the Sheriff's Office in the county with whom the defendant had last registered.

(Emphasis added).

¶ 33 As an initial matter, the instruction provided indicates that all of the elements listed must be proven beyond a reasonable doubt. Additionally, the paragraphs before and after the instruction make abundantly clear that the elements must be proven beyond a reasonable doubt:

> [D]efendant has entered a plea of not guilty. The fact that [] [D]efendant has been indicted and charged is no evidence of guilt. Under our system of justice, when a defendant pleads not guilty, the defendant is not required to prove the defendant's innocence. [] [D]efendant is presumed to be innocent. *The State must prove to you that [] [D]efendant is guilty beyond a reasonable doubt.* A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of [D]efendant's guilt.
>
> . . . .
>
> If you find from the evidence *beyond a reasonable doubt* that on or about the alleged date, [] [D]efendant was a resident of North Carolina, that [] [D]efendant had previously been convicted of a reportable offense for which [] [D]efendant must register, and that [] *[D]efendant willfully changed [] [D]efendant's address* and failed to provide written notice of [] [D]efendant's new address in person at the Sheriff's Office no later than three business days after the change of address to the Sheriff's Office in the county with whom [] [D]efendant had last registered, it would be your duty to return a verdict of guilty. *If you do not so find or have a reasonable doubt* as to one or more of these things, it would be your duty to return a verdict of not guilty.

(Emphases added). In light of the explicit and repeated instructions that the jury must be convinced beyond a reasonable doubt, we find no error,

much less plain error, under Defendant's first argument regarding jury instructions. *See*, *e.g.*, *Glynn*, 178 N.C. App. at 694, 632 S.E.2d at 555 ("Taken as a whole, the trial court's clarifying instructions properly set out the elements of the crime and did not lessen the State's burden of proof. [The] [d]efendant's assignment of error is overruled.").

2. Mens Rea

¶ 34 Defendant's second plain error argument—that the trial court erroneously instructed that Defendant must have willfully changed his address rather than willfully failed to report his change of address—is based on the following instruction[2]:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, [] [D]efendant was a resident of North Carolina, that [] [D]efendant had previously been convicted of a reportable offense for which [] [D]efendant must register, and [] [D]efendant *willfully changed [] [D]efendant's address and failed to provide written notice* of [] [D]efendant's new address in person at the Sheriff's Office no later than three business days after the change of address to the Sheriff's Office in the county with whom [] [D]efendant had last registered, it would be [your] duty to return a verdict of guilty.

(Emphasis added). Defendant contends:

> The final mandate erroneously instructed the jury that [it] must find that [Defendant] willfully changed his address, not that he willfully failed to report his change of address. There is a significant difference between willfully changing an address and failing to report the change, as opposed to changing an address and willfully failing to report the change. The trial court's instruction misstated the *mens rea* requirement that the [General Assembly] has imposed on the offense. The erroneous instructions

2. We note that this portion of the jury instruction verbatim tracks the pattern jury instruction for failure to notify the last registering sheriff of a change of address. *See* N.C.P.I.—Crim. 207.75 (2021). Although pattern jury instructions "have neither the force nor the effect of law, [our Supreme Court has] often approved of jury instructions that are consistent with the pattern instructions." *State v. Walston*, 367 N.C. 721, 731, 766 S.E.2d 312, 318-19 (2014) (marks and citations omitted).

> were confusing and they lowered the State's burden of proof.

¶ 35 If the jury interpreted the instruction in the manner suggested by Defendant,[3] assuming this was an error, such an erroneous instruction did not constitute plain error because it was not sufficiently prejudicial. The immediately preceding portion of the jury instructions provided:

> [D]efendant has been charged with willfully failing to comply with the Sex Offender Registration law. For you to find [] [D]efendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that [] [D]efendant was a resident of North Carolina. Second, that [] [D]efendant had previously been convicted of a reportable offense for which [] [D]efendant must register. If you find beyond a reasonable doubt that on [18 September 2006], in Wake County Superior Court, [] [D]efendant was convicted of second-degree rape, then this would constitute a reportable offense for which the defendant must register. *And, third, [] [D]efendant willfully failed to provide written notice* of a change of address in person at the Sheriff's Office no later than three business days after the change of address to the Sheriff's Office in the county with whom [] [D]efendant had last registered.

(Emphasis added). Considering this prior instruction, the jury was informed that the Defendant must have willfully failed to provide written notice of the change of address. *See, e.g.*, *State v. Harris*, 222 N.C. App. 585, 590, 730 S.E.2d 834, 838 ("Both instructions reiterated multiple times that the State must prove that [the] *defendant* was the perpetrator of each of the crimes. Given in connection with the entire jury instruction, the trial court's jury instruction substantively included an instruction regarding identity. [The] [d]efendants cannot show that the trial court's failure to give a separate instruction on identity beyond

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3. We believe that another logical interpretation of this instruction would be for "willfully" to modify both the change of address *and* failure to provide written notice of the new address. If this were how the jury interpreted this language, there would be no prejudicial error as such an interpretation would increase the showing required by the State to attain a conviction. *See State v. Farrar*, 361 N.C. 675, 679, 651 S.E.2d 865, 867 (2007) ("[T]he trial court's charge to the jury in this case [benefited] [the] defendant, because the instructions required the State to prove more elements than those alleged in the indictment. Therefore, there was no prejudicial error in the instructions.").

that included in the armed robbery instruction caused the jury to reach a verdict convicting [the] defendants that it probably would not have reached had a separate instruction been given."), *disc. rev. denied sub nom. State v. Whitaker*, 366 N.C. 413, 736 S.E.2d 175 (2012), *cert. denied*, 569 U.S. 952, 185 L. Ed. 2d 876 (2013). Additionally, we "presume[] that jurors follow the trial court's instructions." *State v. Steen*, 352 N.C. 227, 249, 536 S.E.2d 1, 14 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). Thus, we presume the jury interpreted the allegedly unclear instruction in conjunction with the instruction clearly indicating that Defendant must have willfully failed to provide written notice. When these two portions are read together, the jury instructions required the jury to find a willful failure to provide written notice of a change in address. Even assuming this instruction was erroneous, it was not prejudicial as it was not probable that any lack of clarity as to what "willfully" modified impacted this jury's verdict. Instead, it was resolved by the prior jury instructions.

¶ 36 The trial court did not commit plain error when instructing the jury.

C. Motion to Dismiss for Insufficient Evidence

¶ 37 Defendant contends the trial court also improperly denied his motion to dismiss the charge of failure to notify the last registering sheriff of a change of address because there was insufficient evidence that Defendant willfully failed to notify the Wake County Sheriff's Office of the change in address. Defendant also argues the trial court erred as there was insufficient evidence that Defendant committed two of the underlying felonies used to establish that he attained habitual felon status.

¶ 38 "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon [a] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any

contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of [the] defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (marks and citation omitted).

1. Sufficient Evidence of Defendant's Failure to Notify the Last Registering Sheriff of a Change of Address

¶ 39 **[3]** Defendant argues the evidence of his willful failure to notify the Wake County Sheriff's Office of his change of address was insufficient because he was involuntarily moved to another county for his drug treatment and had previously willingly complied with the registration requirements. However, the evidence shows, at a minimum, that Defendant willfully failed to update his address following his departure from the drug treatment program within the time provided by the statute.

¶ 40 We have held:

> "Willful" as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law.
>
> The word wil[l]ful, used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing [of] the act purposely and deliberately, indicating a purpose to do it without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent without which one cannot be brought within the meaning of a criminal statute.

State v. Moore, 240 N.C. App. 465, 478, 770 S.E.2d 131, 141 (citation omitted), *disc. rev. denied*, 368 N.C. 353, 776 S.E.2d 854 (2015).

¶ 41 The evidence, in the light most favorable to the State, shows that Defendant was aware of his obligation to update his address,[4] and was capable of updating his address, but did not. In the light most favorable to the State, the evidence indicates that Defendant left the treatment program in Wayne County on 11 July 2019. Defendant was not found at his former address at the men's shelter, and the shelter records reflect that he did not stay there from 11 July 2019 until his arrest on 4 August 2019. Instead, based on the testimony of Defendant's then-girlfriend, it appears Defendant stayed at her home in Wake County starting on 13 July 2019 until the time of his arrest. As a whole, the evidence, when viewed in the light most favorable to the State, makes clear that Defendant did not update the Wake County Sheriff's Office of his change of address from the men's shelter within three business days of his change of address.[5] Furthermore, when viewed in the light most favorable to the State, the evidence shows Defendant understood his obligation to notify his last registered sheriff's office when he moved. Based on these showings, we conclude that Defendant's failure to notify the Wake County Sheriff's Office of his change of address was done "purposely and deliberately, indicating a purpose to do it without authority—careless whether he has the right or not—in violation of law," and was thus willful. *Id.* Accordingly, the trial court did not err.

2. Sufficient Evidence of the Felonies Underlying Defendant Having Attained Habitual Felon Status

¶ 42 **[4]** In terms of the sufficiency of the underlying convictions for Defendant having attained habitual felon status, Defendant argues there was no evidence indicating the date that the first and second prior felonies were committed. Defendant contends this is problematic because it thwarts efforts to determine if there was an overlap between when the felonies occurred or if Defendant was of age. *See* N.C.G.S. § 14-7.1(c) (2021) ("For the purposes of this Article, felonies committed before a person attains the age of 18 years shall not constitute more than one felony. The commission of a second felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the first felony."). The parties dispute whether our caselaw requires this evidence to survive a motion to dismiss. However, assuming—without

4. This is supported by Defendant's testimony acknowledging his knowledge of this obligation, his signature on forms indicating his obligations to register, and his past conduct in updating his address when he has moved.

5. We note there the relevant time period here is from 13 July 2019 until 4 August 2019.

deciding—the evidence is required, there was evidence, when viewed in the light most favorable to the State, that reflects the date the first and second prior felonies were committed.

¶ 43 The trial court admitted State's Exhibit 7-H, which is a criminal record for Defendant developed from the Division of Criminal Information. This exhibit contains an incident date for each offense included, information regarding the disposition of the case, and information regarding sentencing in the case.[6] For the first two offenses constituting the underlying felonies here—first-degree attempted robbery and fifth-degree attempted criminal sale of a controlled substance—the incident date is represented to be the same as the arrest date. For Defendant's conviction for first-degree attempted robbery, the exhibit shows, in the light most favorable to the State, that Defendant committed the offense on the incident date of 18 December 1995 and pleaded guilty to the offense on 16 October 1997. For Defendant's conviction for fifth-degree attempted criminal sale of a controlled substance, the exhibit shows, in the light most favorable to the State, that Defendant committed the offense on the incident date of 7 April 2000 and pleaded guilty to the offense on 5 July 2001. Finally, for Defendant's conviction for second-degree rape, the exhibit shows, in the light most favorable to the State, that Defendant committed the offense on 3 September 2005[7] and pleaded guilty to the offense on 18 September 2006. State's Exhibit 7-H also contains Defendant's date of birth, 24 May 1975.

¶ 44 Using this information from State's Exhibit 7-H, in the light most favorable to the State, we hold that each underlying felony conviction used to conclude that Defendant attained habitual felon status was committed after Defendant pleaded guilty to the previous offense used. Additionally, we hold that all of the underlying offenses occurred after Defendant had attained the age of eighteen, with the earliest occurring when Defendant was 20 years old.

¶ 45 As a result, when viewed in the light most favorable to the State, there was sufficient evidence of the dates of offenses of these felonies to determine that there was no overlap between the date of the commission of the felonies and the date of the preceding felony's conviction. Also, it appears Defendant had attained the age of 18 years old for all of the

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6. Defendant contends that we do not know what the "incident date" means; however, in the light most favorable to the State, we can reasonably infer that the "incident date" refers to the date the offense was committed.

7. Defendant acknowledges that the State presented sufficient evidence regarding the dates concerning the second-degree rape charge.

underlying offenses. As a result, the evidence underlying the first and second prior felonies was sufficient to survive Defendant's motion to dismiss.

D. Right to Allocution

¶ 46 **[5]** Defendant contends that the trial court improperly deprived him of the right to allocution when the following exchange occurred at sentencing:

> THE COURT: All right. Stand up, [Defendant]. Anything you want to say?
>
> DEFENDANT: Yes. I need -- to say what I want to say, I need to get my paperwork.
>
> THE COURT: Well, we're not going to do that. Anything you want to say to me right now before you're sentenced?
>
> DEFENDANT: Yes. I asked to get it before I even came out here, and they rushed me and said, "Come on now." Please. I mean, this is my chance to speak to you.
>
> THE COURT: Anything you want to say to me before you're sentenced?
>
> DEFENDANT: Yes, I do. I have it right there in --
>
> THE COURT: All right. Your papers aren't relevant right now. All right. Moving to sentencing, Madam Clerk, it is a class C on the habitual felon status, record level two. The sentence will be in the presumptive range. He's sentenced to a minimum term of 83 months, maximum terms of 112 months active time. He's to receive credit for all pretrial confinement. All right. Good luck to you, [Defendant] . . . .
>
> [DEFENSE COUNSEL]: Sorry, Judge. I didn't mean to interrupt. I would like to enter notice of appeal in open court.
>
> THE COURT: All right. Enter notice of appeal.
>
> DEFENDANT: I don't just -- I don't get to say anything now to you, Judge?

THE COURT: No.

¶ 47 N.C.G.S. § 15A-1334(b) reads "[t]he defendant at the hearing may make a statement in his own behalf." N.C.G.S. § 15A-1334(b) (2021). In a past case involving the right to allocution, we have stated:

> [A]llocution, or a defendant's right to make a statement in his own behalf before the pronouncement of a sentence, was a right granted a defendant at common law. The United States Supreme Court has also emphasized the significance of this right, observing that "the most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."
>
> Our appellate cases have held that where defense counsel speaks on the defendant's behalf and the record does not indicate that the defendant asked to be heard, the statute does not require the court to address the defendant and personally invite him or her to make a statement. [N.C. G.S.] § 15A-1334, while permitting a defendant to speak at the sentencing hearing, does not require the trial court to personally address the defendant and ask him if he wishes to make a statement in his own behalf.
>
> However, a trial court's denial of a defendant's request to make a statement prior to being sentenced is reversible error that requires the reviewing court to vacate the defendant's sentence and remand for a new sentencing hearing.

State v. Jones, 253 N.C. App. 789, 797, 802 S.E.2d 518, 523-24 (2017) (quoting *Green v. United States*, 365 U.S. 301, 304, 5 L. Ed. 2d 670, 673 (1961)) (marks and citations omitted); *see also State v. Miller*, 137 N.C. App. 450, 461, 528 S.E.2d 626, 632 (2000) (marks and citations omitted) ("[N.C.G.S.] § 15A-1334(b) expressly gives a non-capital defendant the right to make a statement in his own behalf at his sentencing hearing if the defendant requests to do so prior to the pronouncement of sentence. Because the trial court failed to do so, we must remand these cases for a new sentencing hearing.").

¶ 48 Here, we conclude Defendant's right to allocution was violated. Once the trial court asked Defendant if he had anything to say, Defendant made an unambiguous request to make a statement. Defendant proceeded to

request that he receive his papers, which the trial court refused to allow.[8] In the exchange with the trial court, Defendant had three opportunities to make a statement without the papers; however, each opportunity he spent discussing his desire for his papers.

¶ 49 On this Record, we hold the trial court committed reversible error by denying Defendant his statutory right to allocution. N.C.G.S. § 15A-1334(b) states "[t]he defendant at the hearing may make a statement in his own behalf." N.C.G.S. § 15A-1334(b) (2021). Further, our caselaw unambiguously holds "a trial court's denial of a defendant's request to make a statement prior to being sentenced is reversible error that requires the reviewing court to vacate the defendant's sentence and remand for a new sentencing hearing." *Jones*, 253 N.C. App. at 797, 802 S.E.2d at 524. We have applied the rule to broader circumstances and "have held that a trial court effectively denied a defendant the right to be heard prior to sentencing even when the court did not explicitly forbid the defendant to speak." *Id.* at 798, 802 S.E.2d at 524. In *Jones*, we held:

> Our review of the transcript shows that the trial court was informed that [the] defendant wished to address the court and that the trial court acknowledged this request. However, during [the] defense counsel's presentation, the court indicated that it had already decided how to sentence [the] defendant. After hearing from a detective who had investigated the case, the trial court became impatient, asking if those present expected the court to give [the] defendant 'a merit badge' and accusing them of portraying [the] defendant as 'a choir boy.' Immediately thereafter, the trial court pronounced judgment. We conclude that, on the facts of this case, [the] defendant was denied the opportunity to be heard prior to entry of judgment.

Id. at 802, 802 S.E.2d at 526. Similarly, in *State v. Griffin*, we held:

> [the] defense counsel could have reasonably interpreted the trial judge's statement [that it 'would be a big mistake' to permit the defendant to speak at sentencing] to mean that the defendant would

8. We are unaware of any statute or caselaw that obligates the trial court to permit a defendant to receive papers to aid in a statement to the trial court, and we make no ruling regarding this request.

> receive a longer sentence if he testified. Accordingly, we find that the defendant's right to testify under [N.C.G.S.] § 15A-1334(b) was effectively chilled by the trial judge's comment.

State v. Griffin, 109 N.C. App. 131, 133, 425 S.E.2d 722, 723 (1993).

¶ 50 Like in *Jones* and *Griffin*, we believe this case presents a circumstance justifying remand for a new sentencing hearing, despite the facts here being less egregious. Due to the clear invocation of Defendant's right to allocution, the trial court should have indicated that Defendant was not going to be permitted to receive his papers and clarify whether Defendant was still interested in making a statement without his papers before it proceeded to sentencing. Instead, the trial court summarily indicated "we're not going to do that. Anything you want to say to me right now before you're sentenced?"[9]

¶ 51 We acknowledge that there is caselaw indicating that "[N.C.G.S.] § 15A-1334, while permitting a defendant to speak at the sentencing hearing, does not require the trial court to personally address the defendant and ask him if he wishes to make a statement in his own behalf." *State v. McRae*, 70 N.C. App. 779, 781, 320 S.E.2d 914, 915 (1984), *disc. rev. denied*, 313 N.C. 175, 526 S.E.2d 35 (1985). To some extent, this suggests that if a defendant fails to take advantage of his opportunity to exercise his right to allocution, he waives it. *See also State v. Rankins*, 133 N.C. App. 607, 613, 515 S.E.2d 748, 752 (1999) ("The purpose of allocution is to afford [a] defendant an opportunity to state any further information which the trial court might consider when determining the sentence to be imposed."). However, there is no binding caselaw that holds a defendant waives his right to allocution where there is a clear invocation of the right to allocution and an attempt to make a statement.[10]

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9. The Record does not indicate how much time passed between the trial court's question and pronouncement of Defendant's sentence.

10. The closest our caselaw comes is in *State v. Moseley* and in *State v. Pearson*, an unpublished case. In *Moseley*, the trial court granted the defendant's motion for allocution; but, "when given the opportunity at the appropriate stage of the proceedings, [the] defendant failed to remind the trial court of his wish to allocute." *State v. Moseley*, 338 N.C. 1, 53-54, 449 S.E.2d 412, 444 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995). Our Supreme Court reasoned that "[s]ince [the] defendant does not have a constitutional, statutory, or common law right to allocution [at the conclusion of a capital sentencing proceeding] and since [the] defendant failed to remind the court of his desire to speak to the jury at the appropriate stage of the case, we conclude that there was no error." *Id.* at 54, 449 S.E.2d at 444. This case is distinct from *Moseley* in that Defendant *does* have a

¶ 52 We find *Griffin* and *Jones* to present similar factual scenarios. Ultimately, like in *Griffin* and *Jones*, we conclude the trial court effectively denied Defendant the opportunity to allocute by foreclosing his opportunity without clearly indicating Defendant would only be allowed to make a statement without his papers and inquiring into Defendant's interest in doing so. We vacate Defendant's sentence and remand for a new sentencing hearing. *See Jones*, 253 N.C. App. at 797, 802 S.E.2d at 524.

E. Attorney Fees

¶ 53 **[6]** Defendant argues the trial court improperly entered a civil judgment for attorney fees without notice or opportunity to be heard regarding the fees. However, Defendant did not properly appeal this issue[11] and instead filed a petition for writ of certiorari to seek our review.

¶ 54 We may issue a writ of certiorari "in appropriate circumstances." N.C. R. App. P. 21(a)(1) (2022). A writ of certiorari is discretionary, "to be issued only for good and sufficient cause shown." *State v. Rouson*, 226 N.C. App. 562, 564, 741 S.E.2d 470, 471 (citation omitted), *disc. rev. denied*, 367 N.C. 220, 747 S.E.2d 538 (2013). "A petition for the writ must show merit or that error was probably committed below." *Id.* at 563-64, 741 S.E.2d at 471.

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statutory right to allocution upon invoking it in a non-capital case and Defendant did not fail to assert his right at the appropriate time.

In *Pearson*, we held:

> [The] defendant was given the opportunity to make a statement.
>
> However, rather than address issues related to sentencing, [the] defendant complained about the performance of his attorney. Thus, we conclude that the trial court did not abuse its discretion by refusing to allow [the] defendant to continue his statement.

State v. Pearson, No. COA04-585, 168 N.C. App. 409, 2005 WL 221503, at *3 (2005) (unpublished). In addition to being unpublished, and therefore non-binding, *Pearson* is also distinct from the facts *sub judice*. Defendant did not use his opportunity to complain about something unrelated to his right to allocution; instead, Defendant attempted to gain access to papers that he intended to use to exercise his right to allocution. Indeed, each time Defendant spoke, he indicated his intent to exercise his right to allocution.

In light of the factual differences in *Moseley* and *Pearson*, in addition to *Pearson* being unpublished, we do not find them controlling or persuasive on this issue.

11. On 18 September 2019, Defendant was sentenced and entered oral notice of appeal, with written notice of appeal being entered on 20 September 2019. However, subsequently, the order for attorney fees was entered on 25 October 2019. As a result, Defendant's original notice of appeal did not include the order as it was entered prior to the attorney fees order.

¶ 55 Here, because there are no civil judgments *entered* against him for attorney fees in the Record, we deny Defendant's petition for writ of certiorari and do not reach the underlying issue. "[A] judgment is entered when it is reduced to writing, signed by the judge, and *filed* with the clerk of court[.]" N.C.G.S. § 1A-1, Rule 58 (2017) (emphasis added); *see also In re Thompson*, 232 N.C. App. 224, 228, 754 S.E.2d 168, 171 (2014) ("Because the order was not filed, it was not entered."). Although there is a civil judgment order for attorney fees in the Record, there is no indication it has been filed with the Wake County Clerk of Court. As a result, "[w]e lack subject matter jurisdiction to review an appeal from an order for attorney[] fees not entered as a civil judgment. [A] [d]efendant will not be prejudiced unless and until a civil judgment is entered." *State v. Hutchens*, 272 N.C. App. 156, 160, 846 S.E.2d 306, 310 (2020).

¶ 56 We deny Defendant's petition for writ of certiorari as it is without merit due to the lack of evidence that a judgment was entered against Defendant that he may appeal from. We dismiss the portion of Defendant's appeal regarding the civil judgment for attorney fees.

CONCLUSION

¶ 57 Defendant's indictment sufficiently alleged the essential elements of failure to notify the last registering sheriff of a change of address under N.C.G.S. § 14-208.11(a)(2), bestowing the trial court jurisdiction over the case. Additionally, the trial court did not plainly err in its jury instructions and properly denied Defendant's motions to dismiss. However, the trial court denied Defendant his statutory right to allocution, requiring us to vacate Defendant's sentence and remand for a new sentencing hearing. Finally, we deny Defendant's petition for writ of certiorari and dismiss his argument regarding attorney fees.

NO ERROR IN PART; NO PLAIN ERROR IN PART; VACATED AND REMANDED FOR NEW SENTENCING HEARING IN PART; DISMISSED IN PART.

Judges INMAN and WOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 JUNE 2022)

BROOKLINE HOMES, LLC v. CITY OF MOUNT HOLLY 2022-NCCOA-419 No. 21-514	Gaston (19CVS1163)	Affirmed.
GLEASON v. CHARLOTTE-MECKLENBURG HOSP. AUTH. 2022-NCCOA-420 No. 21-501	Mecklenburg (19CVS2575)	Dismissed in part, affirmed.
IN RE A.M. 2022-NCCOA-421 No. 21-657	Watauga (19JT2)	Affirmed
IN RE K.L. 2022-NCCOA-422 No. 21-798	Wake (20JA174) (20JA175)	Affirmed
IN RE K.E.M. 2022-NCCOA-423 No. 21-594	Wilkes (16JT168) (16JT169)	Affirmed
IN RE N.C.-L.L.S. 2022-NCCOA-424 No. 21-625	Surry (17JT102)	Affirmed
IN RE EST. OF RANDOLPH 2022-NCCOA-425 No. 21-803	McDowell (20E265)	Dismissed
IN RE T.H. 2022-NCCOA-426 No. 21-659	Lincoln (18JT100) (18JT101)	Affirmed
IN RE V.S.D. 2022-NCCOA-427 No. 21-782	Henderson (20JT176)	Affirmed
IN RE G.M.A. 2022-NCCOA-428 No. 21-686	Burke (21JA26) (21JA27) (21JA28)	Affirmed
RUSSE v. YOUNGBLOOD 2022-NCCOA-429 No. 21-799	Henderson (19CVS375)	Affirmed

STATE v. COLE 2022-NCCOA-430 No. 21-522	Brunswick (19CRS52832-33) (19CRS55710)	Reversed
STATE v. COOPER 2022-NCCOA-431 No. 21-598	Pitt (18CRS55893)	No Error in Part; Dismissed without Prejudice in Part
STATE v. FREEMAN 2022-NCCOA-432 No. 22-17	Cabarrus (19CRS50671)	Affirmed.
STATE v. GARCIA 2022-NCCOA-433 No. 21-331	Forsyth (20CRS55284-86)	Affirmed.
STATE v. HARVEY 2022-NCCOA-434 No. 21-203	Alamance (16CRS52715) (16CRS52716) (16CRS52723) (16CRS52724)	No Error
STATE v. LEE 2022-NCCOA-435 No. 21-13	Wake (15CRS227741-42)	No Error
STATE v. O'KELLY 2022-NCCOA-436 No. 20-693-2	Durham (15CRS59450)	Affirmed
STATE v. PRICE 2022-NCCOA-437 No. 22-113	Rutherford (20CRS550)	Other - REMAND FOR CORRECTION OF CLERICAL ERROR
STATE v. ROACH 2022-NCCOA-438 No. 21-517	Greene (16CRS50236-37)	No Error
STATE v. SHADE 2022-NCCOA-439 No. 21-538	Rutherford (18CRS53659) (18CRS702746) (19CRS51585) (19CRS51671) (19CRS701436-37)	Dismissed
STATE v. STACKS 2022-NCCOA-440 No. 21-167	Forsyth (15CRS58026) (19CRS436)	No Error

STEWART v. GOULSTON TECHS., INC. 2022-NCCOA-441 No. 21-642	N.C. Industrial Commission (18-052746)	Affirmed
WRIGHT v. JACKSON 2022-NCCOA-442 No. 21-614	Cumberland (19CVS6776)	Affirmed

BOSSIAN v. BOSSIAN

[284 N.C. App. 208, 2022-NCCOA-443]

KIMBERLY BOSSIAN, Plaintiff
v.
DENNIS BOSSIAN, Defendant

No. COA21-483

Filed 5 July 2022

1. Contempt—notice—prior order—effectuated by arrest order—child custody and support

Where an order had been issued in a child custody and support matter holding defendant in contempt for failure to make required payments to plaintiff, in a subsequent hearing on defendant's Rule 59 and plaintiff's Rule 60 motions pertaining to the contempt order the trial court did not err by issuing an arrest order for defendant's failure to purge his contempt. The prior order gave defendant notice that he would be arrested if he failed to meet the purge conditions by a specified date (which had since passed), and the arrest order, which lowered the purge amount, did not constitute a new contempt order but rather effectuated the prior contempt order.

2. Contempt—pending motions—Rule 59 and Rule 60—compliance with contempt order required

In a child custody and support matter, where defendant had been found in civil contempt for failure to make required payments to plaintiff, the pending Rule 59 and Rule 60 motions filed, respectively, by defendant and plaintiff after issuance of the contempt order did not relieve defendant of his obligation to comply with the order.

3. Child Custody and Support—modification—out-of-court agreement—contempt—willfulness

In a child custody and support matter, where defendant had been found in civil contempt for failure to make required payments to plaintiff, the trial court did not err by denying defendant's Rule 59 motion seeking relief from the contempt order because the parties' out-of-court agreement could not modify the child support order. The appellate court also rejected defendant's argument regarding his purported lack of willfulness because defendant was an experienced civil trial lawyer and there was no ambiguity concerning whether he was required to make the child support payments.

4. Child Custody and Support—contempt order—failure to make payments—clerical errors—Rule 60 motion

The trial court did not abuse its discretion in a child custody and support matter by granting plaintiff's Rule 60(a) motion to correct clerical errors in an order holding defendant in contempt for failure to make required payments to plaintiff. The intent of the contempt order was clear, and the correction of the calculation of the purge amount was faithful to that intent.

5. Child Custody and Support—contempt order—Rule 59 motion —payments to other parent

In a child custody and support matter, where defendant had been found in civil contempt for failure to make required payments to plaintiff, the trial court did not err by denying defendant's Rule 59 motion for relief from the contempt order where the parties' out-of-court agreement could not modify the child support order, there was sufficient evidence about defendant's ability to pay, there was no abuse of discretion in the trial court's award of attorney fees to plaintiff, and the dental work for which defendant was required to reimburse plaintiff was reasonable and medically necessary.

Appeal by Defendant from orders entered 29 April 2021 and 24 May 2021 by Judge Mark Stevens in Wake County District Court. Heard in the Court of Appeals 9 March 2022.

Tharrington Smith, LLP, by Jeffrey R. Russell, Alice C. Stubbs, and Casey C. Fidler, for Plaintiff-Appellee.

John M. Kirby, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Defendant Dennis Bossian ("Defendant") appeals from Orders finding him in civil contempt, ordering his arrest, denying his Rule 59 motion, and granting Kimberly Bossian's ("Plaintiff") Rule 60 motion. After careful review of the record and applicable law, we affirm the Orders of the trial court.

I. Factual and Procedural Background

¶ 2 Plaintiff and Defendant married on August 22, 1998, separated on February 3, 2013, and are now divorced. The parties have two children born April 9, 2000, and August 28, 2002. On February 12, 2015, Wake County District Court Judge Christian entered an Order for Permanent Child Custody and Child Support ("Custody and Support Order"). The

Custody and Support Order granted primary custody of the two minor children to Plaintiff and secondary physical custody with visitation during the children's spring break and two weeks during the summer to Defendant, who resided in Rhode Island. The Custody and Support Order required Defendant to pay $1,225.87 in child support each month until the order was modified or terminated pursuant to the North Carolina Child Support Guidelines. On March 5, 2015, the trial court entered an Order for Equitable Distribution ("Equitable Distribution Order"), requiring Defendant to pay $1,800.00 to Plaintiff as a distributive award following the sale of the marital home.

¶ 3 Both the Custody and Support Order and the Equitable Distribution Order have remained in effect without modification since February 12, 2015, and March 5, 2015, respectively. In January 2016, Plaintiff and Defendant mutually agreed their younger son would move to Rhode Island with his father and Defendant would assume primary custody of him. The younger son resided in Rhode Island with Defendant from January 2016 until July 2018, at which time he returned to North Carolina to live with Plaintiff. Neither parent sought permission from the trial court to modify the Custody and Support Order.

¶ 4 On March 11, 2020, Plaintiff filed a Motion for Order to Show Cause and, in the alternative, a Motion for Contempt for Defendant's failure to pay child support in the amount of $62,519.37; unreimbursed medical expenses in the amount of $5,871.50; and a distributive award payment owed to Plaintiff from the sale of the former marital home in the amount of $1,800.00. On May 1, 2020, the trial court entered an Order to Appear and Show Cause against Defendant; calendared Defendant's advisement hearing for July 23, 2020; and set the show cause hearing for August 25, 2020. At the July 23, 2020 hearing, Defendant signed a Waiver of Counsel, waiving his right to a court-appointed attorney. On August 11, 2020, Defendant, through counsel on a limited appearance, filed a Motion to Continue the show cause hearing, as well as a "Motion to Dismiss or Discontinue Plaintiff's Complaint."

¶ 5 On August 25, 2020, at calendar call held via WebEx, the Honorable Anna Worley denied Defendant's Motion to Continue and set the case for in-person hearing that afternoon in front of the Honorable Ashleigh Dunston "with the understanding that Defendant would be physically present for the live hearing." When the matter was called for hearing, Plaintiff and her attorney were present in the courtroom and Defendant appeared remotely via WebEx. At the afternoon hearing before Judge Dunston, Defendant objected to the WebEx hearing and requested a continuance to have his younger son serve as his witness. Defendant

admitted that while he had booked a flight to North Carolina for the contempt hearing on August 24, 2020, to return to Rhode Island on August 26, 2020, he "would have been not only prejudiced by not having [his son] testify, but also, upon his return to Rhode Island, . . . would have been subject to a 14-day quarantine." The trial court found that Defendant "intentionally chose not to appear in-person for the hearing; although he continuously stated that he wanted an in-person hearing" and that Defendant's request for an in-person hearing "was waived when he elected not to appear in court on August 25, 2020."

¶ 6 At the contempt hearing, Plaintiff testified Defendant possessed the ability to pay child supports as he is a licensed civil trial lawyer and is the head of civil litigation in Orabona Law Offices in Providence, Rhode Island. Plaintiff also testified Defendant is advertised on Orabona Law Offices' website as having tried more than a hundred jury trials and possessing an 85% success rate. Plaintiff testified Defendant told her he makes more than $100,000.00 per year and that "he took the new job with Orabona for a substantial pay increase." Additionally, Plaintiff testified Defendant previously worked for Rob Levine Law Offices; was a former equity partner in the law firm of Anderson, Zangari & Bossian; and was previously employed at CVS's corporate office. Plaintiff testified Defendant possesses income and assets in an amount sufficient to purge all amounts currently owed to her. Plaintiff's counsel presented evidence to show that Defendant last paid child support in the amount of $141.00 to Plaintiff in January 2016; offered evidence of the debt she had incurred to meet her reasonable expenses and pay legal fees; and requested Defendant be ordered to pay her attorney's fees.

¶ 7 Defendant, appearing pro se, cross-examined Plaintiff regarding a "Consent modification of custody agreement," which he purported to be a part of the court file. However, Judge Dunston found that this "Consent modification of custody agreement" was not in the court file and would not permit it to be read into evidence. Defendant did not 1) dispute his income amount; 2) offer witnesses on his behalf; 3) testify that he paid Plaintiff any amount of money since the Custody and Support Order was entered; or 4) provide evidence of any payment made to Plaintiff since entry of the Custody and Support Order.

¶ 8 On September 18, 2020, Judge Dunston entered an Order for Civil Contempt and Attorney's Fees ("Contempt Order") finding Defendant in contempt for willfully violating prior orders of the Court. The trial court held Defendant's failure to comply with its Orders had been willful and without just cause or excuse. While the order did not make detailed findings regarding Defendant's income or expenses, it stated

Defendant is a civil trial lawyer who earns more than $100,000.00 per year, which gives him the ability to pay child support owed pursuant to the entry of the Custody and Support Order and the ability to comply with this Contempt Order. Further, the trial court found that at the time of the Equitable Distribution Order, and at all relevant times thereafter, Defendant had the requisite means and ability to comply with the terms of that Order. The court also found that Plaintiff acted in good faith in bringing this contempt proceeding, possessed insufficient means to defray the expenses of this action, and was entitled to an award of attorney's fees from Defendant.

¶ 9 In the Contempt Order, Judge Dunston took into consideration the terms of the parties' mutual agreement concerning the period their younger son resided with Defendant in Rhode Island and its impact upon Defendant's child support obligation. Recognizing that the child support terms of the Custody and Support Order could not be retroactively modified, the trial court set a lower purge amount for Defendant than what was otherwise owed to Plaintiff.

¶ 10 The trial court determined a modified child support arrearage based on its equitable calculation of (1) the number of months the younger son resided with his father in Rhode Island, and (2) the amount of child support Defendant owed to Plaintiff once the elder son reached the age of majority. The court set Defendant's child support purge amount at $25,527.02. Defendant was ordered to pay $5,871.50 for his portion of unreimbursed medical expenses, and $1,800.00 owed from the sale of their marital residence. The trial court ordered Defendant to pay a total purge amount of $31,398.52 by October 30, 2020. The court awarded Plaintiff $11,590.42 in attorney's fees, payable in installments beginning October 2020. The Contempt Order concluded "[t]he purposes of the Court's Orders can still be served by finding Defendant in civil contempt and ordering the purge conditions set forth herein" and "Defendant has the ability to meet the purge conditions set forth herein and the ability to comply with this Order" and ordered:

> [i]f Defendant fails to meet the purge conditions by compliance . . . , he shall be taken into custody at 12:00 p.m. on November 2, 2020 and shall remain there until he purges himself of contempt by paying $33,198.52 . . . , and if he has not met his purge conditions by that date, an order for arrest shall be issued. No further notice will be provided as Defendant was advised in open court that he is in contempt."

¶ 11 On September 25, 2020, Plaintiff filed a Rule 60 Motion for Relief to correct alleged clerical errors in the Contempt Order. Plaintiff argued the Court miscalculated the equitable credits attributed to Defendant's purge amount. Specifically, the Contempt Order found that Defendant "owes [m]onthly child support . . . for one child for the period of January 2019 through August of 2020, of $971.29 for eight (8) months, in the total amount of $1,942.58"[1] in error when the order should have found Defendant owes monthly child support for one child for the period of January 2019 through August 2020, in the amount of $971.29 for twenty (20) months, in the amount of $19,425.80, because the number of months between January 2019 and August 2020 is twenty (20) months, not eight (8). As a result, Defendant's child support arrearages increased to $43,010.24. Thereafter, Defendant filed a Rule 59 Motion for Relief from the Civil Contempt and Attorney's Fees alleging, *inter alia*, the trial court erred because no evidence was presented to the Court of Defendant's present ability to pay, and Plaintiff was permitted to recover attorney's fees.

¶ 12 On April 29, 2021, the Honorable Mark Stevens presided over the hearing on the parties' respective Rule 59 and Rule 60 Motions. At the hearing, Defendant testified that if Judge Dunston made a clerical error in the Contempt Order, he would not contest it. Subsequently, Judge Stevens granted Plaintiff's Rule 60 motion. Next, Defendant contended there should be no finding of willful contempt because he had been unemployed since November 25, 2020, possessed no assets or retirement fund, and was currently unable to pay a purge amount. Judge Stevens denied Defendant's Rule 59 motion. At the conclusion of the hearing, the court inquired whether Defendant had purged his contempt as required by the Contempt Order. After Plaintiff and Defendant indicated no money had been paid towards the purge amount and Defendant testified as to his financial difficulty, Judge Stevens found he continued to be in contempt. After finding Defendant had the present ability to purge his contempt, Judge Stevens ordered Defendant to pay $9,300.00. ("Arrest Order"). Thereafter, Defendant was taken into custody.

¶ 13 On May 24, 2021, Judge Stevens entered two written Orders denying Defendant's Rule 59 motion and granting Plaintiff's Rule 60 motion, respectively. The court modified the amount payable to purge contempt for child support, equitable distribution, and unreimbursed medical expenses to $50,681.74, payable by July 20, 2021; and in its Order

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1. It is apparent that the Contempt Order's finding is a miscalculation of the amount Defendant would have owed for payment of eight months of child support at a monthly amount of $971.29. This calculation equals $7,770.32, not $1,942.58.

granting Plaintiff's Rule 60 motion stated, "[e]xcept as modified herein, the remaining terms of the Contempt Order entered September 18, 2020, remain in full force and effect." Defendant now timely appeals from the trial court's "Arrest Order", "Order granting Plaintiff's Rule 60 motion," and "Order denying Defendant's Rule 59 motion."

II. Discussion

¶ 14 Defendant raises several issues on appeal. We address each in turn.

A. Defendant's Violation of the Contempt Order and His Subsequent Arrest

¶ 15 **[1]** Defendant first argues that the only motions at the April 29, 2021 hearing before Judge Stevens were the Rule 59 and 60 motions and that the trial court erred in holding him in contempt for violating the Contempt Order when he was provided no notice of this potential proceeding and of his arrest. Defendant contends the lack of notice deprived him of the opportunity to present a defense in violation of his due process rights. We disagree.

¶ 16 "The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. 'Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment.' " *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citation omitted).

¶ 17 Civil contempt is employed to coerce contumacious defendants into compliance with the orders of the court. "[T]he length of time that a defendant can be imprisoned in a *proper* case is not limited by law, since the defendant can obtain his release immediately upon complying with the court's order." *Brower v. Brower*, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984) (citing *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980)). Pursuant to N.C. Gen. Stat. § 5A-21(a), "[f]ailure to comply with a court order is a continuing civil contempt as long as:

> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and

> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2021). Additionally, civil contempt proceedings can be initiated:

> by motion pursuant to G.S. 5A-23(a1), by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt, or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt. The order or notice must be given at least five days in advance of the hearing unless good cause is shown.

N.C. Gen. Stat. § 5A-23(a) (2021). In the case before us, contempt proceedings were properly initiated against the Defendant with a judicial order to show cause entered May 1, 2020, directing Defendant to appear on August 25, 2020, and show cause why he should not be held in civil contempt for failure to abide by the Custody and Support Order to pay child support and unreimbursed medical expenses, as well as the Equitable Distribution Order for the distributive award payment from the sale of the parties' former marital home.

¶ 18 At the August 25, 2020 hearing, Judge Dunston held Defendant in civil contempt for willfully violating prior orders of the Court by failing to make any child support payments to Plaintiff since January 2016. Defendant's commitment, however, was stayed to give Defendant an opportunity to purge himself of contempt by compliance with the order by 5:00 pm on October 30, 2020. Further, the Contempt Order would be enforced if Defendant failed to meet the purge conditions: "he shall be taken into custody at 12:00 p.m. on November 2, 2020, and shall remain there until he purges himself of contempt by paying $33,198.52," and if he has not met his purge conditions by October 30, 2020, "an order for arrest shall be issued. No further notice will be provided as Defendant was advised in open court that he is in contempt."

¶ 19 It is within a trial court judge's discretion whether to stay the enforcement of a civil contempt order. *See Guerrier v. Guerrier*, 155 N.C. App. 154, 157, 574 S.E.2d 69, 71 (2002). (Defendant's Commitment to custody for being found in contempt for failure to pay child support and

equitable distribution was stayed by the trial court to give Defendant an opportunity to purge himself of contempt by compliance with the order).

¶ 20 Both Rule 59 and Rule 60 Motions were heard by Judge Stevens on April 29, 2021, and Defendant remained in contempt of the Custody and Support Order because he had not paid any amount towards his child support arrears as required by the Contempt Order. Judge Steven's Arrest Order only effectuated the Contempt Order.

¶ 21 The record reflects that Judge Stevens utilized an "Order for Civil Contempt" form to effectuate the enforcement of the Contempt Order. Defendant contends that this action constituted a "new contempt order." We disagree.

¶ 22 We note that after Defendant testified that he was unemployed and had only $9,326.26 to his name, Judge Stevens changed the purge amount under the Arrest Order to $9,300.00. However, this modification does not constitute a new contempt order. *See Cumberland Cty. ex rel. Mitchell v. Manning*, 262 N.C. App. 383, 386, 822 S.E.2d 305, 307 (2018). Judge Stevens' Arrest Order served to enforce Judge Dunston's Contempt Order. In effectuating the Contempt Order, Judge Stevens determined Defendant's present ability to pay and comply, then entered an order reducing the purge amount to afford Defendant the opportunity to comply so he would not be held in custody indeterminately.

¶ 23 Judge Stevens did not err by finding Defendant continued to be in civil contempt or by issuing an Arrest Order because (1) Defendant was given proper notice of his commitment for failure to comply with the Contempt Order by the terms of that order, and (2) Judge Stevens' order served as an enforcement order effectuating the consequences of Defendant's continued contempt.

B. Willful Violation of the Amended Contempt Order

¶ 24 **[2]** Next, Defendant argues since the parties contended the Contempt Order contained errors, his failure to make payments pursuant to the Contempt Order was not willful. We disagree.

¶ 25 "Because civil contempt is based on a willful violation of a lawful court order, a person does not act willfully if compliance is out of his or her power." *Watson*, 187 N.C. App. at 66, 652 S.E.2d at 318 (citations and quotation marks omitted). This Court has explained "[w]illfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so. Ability to comply has been interpreted as not only the present means to comply, but also the ability

to take reasonable measures to comply." *Id.* (citations and quotation marks omitted). Therefore, "[a] failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is wilful [sic], which imports knowledge and a stubborn resistance." *Cox v. Cox*, 10 N.C. App. 476, 477,179 S.E.2d 194, 195 (1971) (citation omitted).

¶ 26 While both parties filed motions to amend the Contempt Order, this fact does not give Defendant legal justification for failing to comply with the Order. As noted by Plaintiff, Rule 60 of the North Carolina Rules of Civil Procedure states that "[a] motion under this section does not affect the finality of a judgment or suspend its operation." N.C. Gen. Stat. § 1A-1, R. 60. Although Plaintiff brought a Rule 60 motion, the operation of the Contempt Order was not suspended. As to Defendant's Rule 59 motion, Rule 62 of the North Carolina Rules of Civil Procedure states,

> "[i]n its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60 . . . ."

N.C. Gen. Stat. § 1A-1, R. 62(b).

¶ 27 However, the record before us does not show Defendant filed a motion to stay the Contempt Order pending a hearing on his Rule 59 motion. Defendant's compliance with the Contempt Order was mandatory, not optional, and pending motions to modify it did not relieve Defendant of his obligation to comply with it. Defendant chose not to pay anything towards the arrears he owed to Plaintiff, including payment of the $1,800.00 distributive award under the Equitable Distribution Order. Defendant's refusal to pay any amount of arrears owed to Plaintiff is a clear indication of his "stubborn resistance" to the Orders of the trial court.

C. Defendant's Willful Conduct in Light of Parties' Modification of Custody Agreement

¶ 28 **[3]** Next, Defendant contends the trial court erred in denying his Rule 59 motion, as the evidence demonstrated that Defendant's non-payment of child support was not willful because the parties had modified their child custody agreement. We disagree.

¶ 29 We first note that a child support order may only be modified by the court following a motion in the pending child support action and a showing of changed circumstances. N.C. Gen. Stat. § 50-13.7(a) (2021). A party seeking to modify the child support order carries the burden of showing a substantial change of circumstances affecting the welfare of the child has occurred since the entry of the previous order. *Ebron v. Ebron*, 40 N.C. App. 270,252 S.E.2d 235 (1979).

¶ 30 Additionally, a supporting parent possesses "no authority to unilaterally modify the amount of the [court ordered] child support payment. The supporting parent must [first] apply to the trial court for modification." *Chused v. Chused*, 131 N.C. App. 668, 672-73, 508 S.E.2d 559, 562 (1998) (quoting *Craig v. Craig*, 103 N.C. App. 615, 618, 406 S.E.2d 656, 658 (1991)). "If a person unilaterally reduces his court ordered child support payments, he subjects himself to contempt." *Id.*

¶ 31 When one of several children reaches the age of eighteen, we look to our determinations in *Craig v. Craig*. In *Craig*, we held a parent has no authority to unilaterally modify the amount of the child support payment "when one of two or more minor children for whom support is ordered reaches age eighteen, and when the support ordered to be paid is not allocated as to each individual child[] . . . ." 103 N.C. App. 615, 618, 406 S.E.2d 656, 658 (1991).

¶ 32 Here, the record reflects Defendant never requested a modification of the Custody and Support Order. While Defendant testified that he attempted to file a modification to child support in July 2016 and a court hearing was scheduled, his motion, ultimately, was never adjudicated. According to Defendant, the scheduled modification hearing "became moot" once his son moved to Rhode Island to live with him. Defendant made no further effort to modify the child support order. Further, the Custody and Support Order did not allocate the support payment by child or indicate Defendant's child support obligations would recalculate once the elder child reached the age of majority. To the contrary, the order required Defendant to pay monthly child support in the amount of $1,225.87 to Plaintiff until the order was modified or child support automatically terminated because the younger child reached the age of majority. It was incumbent on Defendant to file a motion to modify child support. *See id.*, 103 N.C. App. at 617-20, 406 S.E.2d at 657-59. In *Massey v. Massey*, this court held "[t]he defendant could easily have taken the question of payments due after his child reached majority to the court for a modification of the order. The defendant had an obligation to observe the order until it was lawfully changed." 71 N.C. App. 753, 757, 323 S.E.2d 451, 454 (1984).

¶ 33 We find Defendant's argument that a modification of child custody indirectly relates to the modification of child support or provides a reasonable excuse for not paying child support unpersuasive. While Defendant contends the parties modified the custody arrangement *on their own*, he offers no evidence in the record before us in support of the parties having agreed to such a modification or of it having been reduced to writing. Notwithstanding the existence of such an agreement, this court has long established, "[i]ndividuals may not modify a court order for child support through extrajudicial written or oral agreements." *Baker v. Showalter*, 151 N.C. App. 546, 551, 566 S.E.2d 172, 175 (2002) (citing *Griffin v. Griffin*, 96 N.C. App. 324, 328, 385 S.E.2d 526, 529 (1989)). Because child support obligations may only be modified by court order, Defendant's argument fails.

¶ 34 However, "[a] failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is wilful [sic], which imports knowledge and a stubborn resistance." *Cox*, 10 N.C. App. at 477, 179 S.E.2d at 195 (1971). Here, Defendant would have this court believe his actions were not willful because he ceased making child support payments only after the parties agreed the younger son would reside with him, while overlooking his continued refusal to make his court ordered child support payments once his younger son returned to North Carolina to live with Plaintiff. We do not. Defendant is a seasoned, practicing attorney whose defiance of a court order and failure to follow the proper legal procedures to modify the order from which he seeks relief epitomizes disobedience that is willful, knowing, and stubbornly resistant. *See id.*

¶ 35 Next, Defendant argues his "obligation to make support payments during the two-year period that the younger son resided with him was at least questionable," so his behavior cannot be willful. Defendant cites to *Holden v. Holden*, 214 N.C. App. 100, 715 S.E.2d 201 (2011), for the proposition that a potential contemnor cannot willfully refuse to comply with an ambiguous term in an consent order the contemnor does not understand. We are unpersuaded.

¶ 36 Looking to the plain language of the Custody and Support Order, there is no ambiguity concerning Defendant's payment of child support. The Order is clear that "Defendant shall pay the Plaintiff the sum of one thousand two hundred twenty-five dollars and eighty-seven cents ($1,225.87) in child support" for their two minor children every month. We hold that absent a court ordered modification of the Custody and Support Order, Defendant's failure to pay constituted willful non-compliance. *See Craig*, 103 N.C. App. at 617–20, 406 S.E.2d at 657–59; *see also Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 290–91 (1997).

D. Plaintiff's Rule 60 motion

¶ 37 **[4]** Next, Defendant argues Plaintiff's Rule 60 motion should have been denied because the trial court's miscalculations as to the Contempt Order purge amount constituted more than a mere "clerical error." We disagree.

¶ 38 Pursuant to N.C. Gen. Stat. § 1A-1, R. 60, a judge is permitted to correct "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission . . . on his own initiative or on the motion of any party and after such notice, if any, as the judge orders." N.C. Gen. Stat. § 1A-1, R. 60. Relief under Rule 60(a) is limited to the "correction of clerical errors, [and] . . . it does not permit the correction of serious or substantial errors." *Buncombe Cty. By and Through Child Support Enf't Agency ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784 (1993) (citation omitted). "A trial court's order correcting a clerical error under Rule 60(a) is subject to the abuse of discretion standard." *In re Estate of Meetze*, 272 N.C. App. 475, 479, 847 S.E.2d 220, 224 (2020). Accordingly, a trial court abuses its discretion and enters an order that is substantive and outside the scope of Rule 60(a) when it "alter[s] the effect of the [original] order." *Howard Schultz & Assocs. v. Ingram*, 38 N.C. App. 422, 427, 248 S.E.2d 345, 349 (1978).

¶ 39 In the present case, the clear intent of the Contempt Order was to hold Defendant in civil contempt for failure to pay child support, unreimbursed medical expenses, and the distributive award payment owed to Plaintiff. The record reflects that Judge Dunston, in determining the purge amount for the Contempt Order, determined it would be equitable for child support to be calculated based upon the actual custody schedule the parties followed during the respective time periods. The Contempt Order detailed that the calculation of the purge amount would be based upon the "[m]onthly child support pursuant to Worksheet A of the 2019 North Carolina Child Support Guidelines for one child for the period of January 2019 through August of 2020, of $971.29 for eight (8) months, in the total amount of $1,942.58.[2]

¶ 40 Based on the language in the Contempt Order, the clear intent of the Order was for Defendant to receive a credit towards his purge amount based upon the specified twenty-month period from January

2. Again, we note that this formula is a miscalculation of the amount Defendant would have owed for payment of eight months of child support at a monthly amount of $971.29. This calculation comes to $7,770.32, not $1,942.58.

2019 to August of 2020, the result of which is a reduction in his purge amount. However, the Contempt Order contained clear typographical errors, as the duration of the period identified by the trial court was a twenty-month period, not an eight-month period as stated in the Order. Additionally, the modified child support payment of $971.29 per month for twenty months should have been written as "$19,425.80" rather than "$1,942.58." In other words, the calculation was off by one decimal place.

¶ 41 Notwithstanding, Judge Dunston articulated her reasoning and logic for the recalculation. In *Gordon v. Gordon*, this Court affirmed the trial court's correction to an alimony order which originally required plaintiff ex-husband to continue making monthly payments to defendant ex-wife through and including March 1994, at which time she would have turned 62. 119 N.C. App. 316, 317-19, 458 S.E.2d 505, 505-06 (1995). The wife would not have turned 62, however, until March 1995. *Id.* This court held a date miscalculation notwithstanding, the clear intent of the order was that plaintiff would play alimony to defendant until she reached age sixty-two. *Id.* at 317-18, 458 S.E.2d at 506.

¶ 42 Here, it is clear Judge Dunston intended to calculate the purge amount based on the parties' custody schedule between the period of January 2019 to August 2020, so as to reflect the period of time before the younger son turned eighteen years old. Judge Stevens' Order granting Plaintiff's Rule 60 motion notes the corrected amounts, which increased Defendant's purge amount to $48,881.74. Based upon the clear intent of the order for Defendant to be given in equity a certain amount of "credit", we do not believe that Judge Stevens' later clerical correction altered the effect of the original Contempt Order: regardless of the amount of purge "credit" to which Defendant was entitled, he was required to pay the total amount of child support arrearages accrued since January 2016. We hold there was no abuse of discretion by Judge Stevens' granting Plaintiff's Rule 60(a) motion to correct the clerical errors in the Contempt Order.

E. Denial of Defendant's Rule 59 motion

¶ 43 **[5]** Next, Defendant contends Judge Stevens erred in denying his Rule 59 motion. Under a Rule 59 motion, "an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion . . . ." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982).

1. Modification of child support

¶ 44 First, Defendant contends the trial court should have granted his Rule 59 motion because the parties modified child support based on an alleged split custody agreement between the parties. Defendant argues that when the parties "agreed to change the custody arrangement, they implicitly agreed to modify the support obligation." Defendant argues that Judge Stevens erred in dismissing the Rule 59 motion because the Contempt Order should have modified the child support obligations based upon this alleged mutual child custody agreement. We disagree.

¶ 45 Again, we note that this alleged custody agreement does not appear anywhere in the record. It is well settled that our review is limited to those items contained in the record. N.C. R. App. P. Art. II, Rule 9(a). We reiterate: to modify a child support order or a child custody order, a judicial modification by *a court* is required and "[i]ndividuals may not modify a court order for child support through extrajudicial written or oral agreements." *Baker*, 151 N.C. App. at 551, 566 S.E.2d at 175 (citing *Griffin*, 96 N.C. App. at 328, 385 S.E.2d at 529); N.C. Gen. Stat. § 50-13.7(a). It is well settled,

> [N]o agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as their statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by a separation agreement or by a consent judgment, but they cannot thus withdraw children of the marriage from the protective custody of the court.

Griffin, 96 N.C. App. at 328, 385 S.E.2d at 529 (citation omitted). Any extrajudicial written agreement between the parties intended to modify the court ordered custody arrangement is invalid and does not implicitly or otherwise modify the parties' court ordered child support obligations. Simply put, the parties do not possess the authority to modify a child custody and support order without court intervention.

¶ 46 Additionally, our statute generally prohibits a North Carolina court from modifying, reducing, or vacating vested child support arrearages that have accrued under a valid child support order issued by a North Carolina court or any other court. N.C. Gen. Stat. § 50-13.10(a) (2021). Our State Supreme Court has held that this general rule prohibits a retroactive modification to past due child support; that is, any modification that affects payments due before the motion for modification was filed in a court. *See Hill v. Hill*, 335 N.C. 140, 145, 435 S.E.2d 766, 768 (1993).

¶ 47 Here, the trial court did not possess the authority to retroactively modify Defendant's vested child support arrearages in the Custody and Support Order. Therefore, Judge Stevens did not err in denying Defendant's Rule 59 motion.

2. Evidence of Defendant's inability to pay

¶ 48 Next, Defendant contends his Rule 59 motion should have been granted by Judge Stevens because there was insufficient evidence of his ability to pay child support during the relevant period and to pay the purge amounts. Defendant argues he should not have been found in contempt and should not have been arrested pursuant to Judge Stevens' Arrest Order. We disagree.

¶ 49 As discussed *supra*, a defendant's failure to comply with a court order is a continuing civil contempt as long as the trial court finds that: (1) the order remains in force; (2) the order's purpose may still be served by compliance; (3) the noncompliance was willful; and (4) the noncomplying party is able to comply with the order or is able to take reasonable measures to comply. N.C. Gen. Stat. § 5A-21(a). "[I]f a judicial official enters an order to show cause or a notice of contempt, the burden shifts to the alleged contemnor to prove that he or she was not in wilful [sic] contempt of the court's prior order." *Trivette v. Trivette*, 162 N.C. App. 55, 60, 590 S.E.2d 298, 303 (2004) (citing *Plott v. Plott*, 74 N.C. App. 82, 85, 327 S.E.2d 273, 275 (1985)). In a civil contempt hearing, "the defendant has the burden of presenting evidence to show that he was not in contempt and the defendant refuses to present such evidence at his own peril." *Hartsell v. Hartsell*, 99 N.C. App. 380, 387, 393 S.E.2d 570, 575 (1991). While explicit findings are preferable in a civil contempt proceeding to enforce an order for child support, "they are not absolutely essential where the findings otherwise clearly indicate that a contempt order is warranted." *Plott*, 74 N.C. App. at 85, 327 S.E.2d at 275. "[T]his Court has held that a general finding of present ability to comply is sufficient basis for the conclusion of wilfulness [sic] necessary to support a judgment of civil contempt." *Hartsell*, 99 N.C. App. at 385, 393 S.E.2d at 574 (citation omitted).

¶ 50 In the present case, because a judicial official found probable cause existed to issue a show cause order to Defendant, Defendant bore the burden to demonstrate why he should not have been held in willful contempt. *State v. Coleman*, 188 N.C. App. 144, 149–50, 655 S.E.2d 450, 453 (2008). Defendant did not proffer evidence during the contempt hearing to show why he should not have been held in contempt.

¶ 51 Plaintiff testified at the contempt hearing before Judge Dunston that Defendant possessed the ability to pay child support, as he is "the head of civil litigation as a trial attorney with Orabona Law Offices in Providence, Rhode Island" and that his picture appears on the law firm's website as having tried over a hundred jury trials to verdict with a documented 85% success rate. Plaintiff testified that Defendant took this job with Orabona Law "for a substantial pay increase," and that his income exceeded $100,000.00 per year. Plaintiff also testified that Defendant possesses income and assets in an amount sufficient to pay all arrearage amounts owed to her. The evidence in the record tends to show that as of the date of the contempt hearing, Defendant had last made a partial child support payment to Plaintiff in the amount of $141.00 in January 2016.

¶ 52 Defendant offered no rebuttal evidence, chose not to call witnesses to testify on his behalf, and did not proffer alternative explanations for his income or deny his ability to pay the full amounts of arrearages owed. Defendant did not testify that he paid Plaintiff any amount of money since the Custody and Support Order was entered and did not provide any receipts or documentation of payments made to Plaintiff since the Custody and Support Order. In short, Defendant did not dispute Plaintiff's testimony about his ability to pay.

¶ 53 Although the Contempt Order did not contain detailed findings regarding Defendant's expenses or a detailed inventory of his financial condition, his testimony provided sufficient evidence of his present ability to comply with the Order and the purge condition. Therefore, the trial court did not abuse its discretion when it denied Defendant's Rule 59 motion. The court's general finding of Defendant's present ability to comply served as a sufficient basis for the conclusion of willfulness.

3. Imposition of legal fees

¶ 54 Defendant argues the trial court erred in denying his Rule 59 motion as to the imposition of legal fees, and in his brief asserts "attorney [sic] fees may not be taxed in a contempt action." Defendant's argument is without merit. The case cited by Defendant for his claim explains: "The Court acknowledged that attorneys' fees had been awarded in limited types of civil contempt actions; specifically, those involving child support and equitable distribution." *Baxley v. Jackson*, 179 N.C. App. 635, 640, 634 S.E.2d 905, 908 (2006) (citations omitted). Pursuant to N.C. Gen. Stat. § 50-13.6, in an action or proceeding for child support, "the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit." N.C. Gen. Stat. § 50-13.6. (2021). Attorneys' fees may be awarded, without the finding required by N.C. Gen. Stat.

§ 50-13.6, when the contempt is to enforce an equitable distribution order. *Hartsell*, 99 N.C. App. at 389–90, 393 S.E.2d at 576–77.

¶ 55 Here, the trial court did not abuse its discretion in awarding Plaintiff's attorney's fees in the contempt matter for the non-payment of child support *and* for the non-payment of the amounts due under the Equitable Distribution Order. The trial court found Plaintiff acted in good faith in bringing this contempt action, would not have had to bring forth a motion for contempt but for Defendant's conduct, possessed insufficient means to defray the expenses of this action, and was entitled to an award of attorney's fees from Defendant. As such, we conclude the trial court did not err by denying Defendant's Rule 59 motion regarding the award of Plaintiff's attorney's fees.

4. Medical Expenses

¶ 56 Lastly, Defendant argues the trial court erred in ordering he reimburse Plaintiff $5,871.50 for his share of unreimbursed medical expenses. Defendant argues the unreimbursed expenses mainly consisted of cosmetic dental work, which was neither reasonable nor medically necessary. We disagree.

¶ 57 Defendant cites *Billings v. Billings*, in which we held that defendant parent presented substantial evidence that her child's orthodontic treatment for braces was reasonable and medically necessary, and thereby, fell under the medical expenses category in a child support order. 164 N.C. App. 598, 596 S.E.2d 474, 2004 N.C. App. LEXIS 1093 (2004) (unpublished). Before we address the merits of Defendant's argument, we note his reliance on an unpublished opinion. "Citation to unpublished authority is expressly disfavored by our appellate rules but permitted if a party, in pertinent part, 'believes . . . there is no published opinion that would serve as well' as the unpublished opinion." *State ex rel. Moore Cty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005) (quoting N.C. R. App. 30(e)(3)). Unpublished opinions are not controlling authority. Nonetheless, we find its reasoning persuasive, and we adopt it hereby.

¶ 58 Here, the record contains substantial evidence that the children's orthodontic treatments were reasonable and medically necessary and not merely cosmetic procedures. The evidence tends to show Dr. Khara, of Khara Orthodontics, determined the elder son had a significantly deep overbite and severe overjet with palatal impingement that could cause the child to "loose [sic] upper teeth sooner." Additionally, Dr. Khara expressed significant concerns about the child's airway. Medical notes in the record detailed that the elder son's airway is so

narrow, it is "off the chart 'black in color' . . . [and] this may effect [sic] [the child] medically in [the] future." Dr. Khara's treatment plan recommended a Herbst appliance followed by braces to address these concerns, because it would help the child's airway, as well as improve his profile by bringing his lower jaw forward. Such medical treatments, particularly orthodontic appointments and treatment plans, constitute medically necessary procedures. *Billings*, 2004 N.C. App. LEXIS 1093 at *5. Treatments related to the prevention of tooth loss, or the expansion of the airway are undertaken for the good of the child's health, rather than merely cosmetic purposes. Based on the evidence in the record, these medical appointments and procedures were reasonable, medically necessary, and qualify as medical expenses Defendant is obligated to pay. We hold that the trial court did not abuse its discretion in denying Defendant's Rule 59 motion as to the medical expenses.

III. Conclusion

¶ 59 For the foregoing reasons, we hold the trial court properly effectuated a prior Contempt Order by issuing an Arrest Order for Defendant. We also hold the trial court did not abuse its discretion by denying Defendant's Rule 59 motion and affirming Plaintiff's Rule 60 motion. Accordingly, we affirm.

AFFIRMED.

Judges DILLON and HAMPSON concur.

CABRERA v. HARVEST ST. HOLDINGS, INC.

[284 N.C. App. 227, 2022-NCCOA-444]

JOSE CABRERA AND JOSE CABRERA JR., PLAINTIFFS
v.
HARVEST STREET HOLDINGS, INC.; SHOP & GO, LLC; WALTER CABRERA; LUCIANO CABRERA; AND GREGORIO PAZ, DEFENDANTS

No. COA21-328

Filed 5 July 2022

1. Real Property—quiet title action—option contract—right to purchase property not exercised—no ownership interest created

Where plaintiffs (a father and son) had no ownership or other property interest in a piece of real property, but had at most the right to purchase the property pursuant to an option contract, which does not itself create an ownership interest, and where they never exercised their option to purchase, their action to quiet title was properly resolved in favor of defendants (who included the original owner and the purchasers of the property) by summary judgment.

2. Real Property—quantum meruit action—money paid pursuant to option to purchase—no implied contract where express contract exists

Where plaintiffs (a father and son) sought to recover amounts paid pursuant to an option contract—under which they were designated lessees of a piece of real property, were required to pay monthly rent, and had the option to purchase the property—their claim for quantum meruit was properly resolved in favor of defendants (who included the original owner and the purchasers of the property) by summary judgment. The equitable action of quantum meruit rests on a theory of implied contract, and there can be no implied contract when an express contract exists between the parties.

3. Injunctions—preliminary injunction—denied—quiet title action—no likelihood of success on the merits

In an action to quiet title, the trial court properly denied plaintiffs' claim for a preliminary injunction because there was no likelihood that plaintiffs would prevail where they had no ownership or other property interest in the real property at issue.

Appeal by Plaintiffs from orders entered 25 July 2019 and 24 February 2021 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 12 January 2022.

Austin Law Firm, PLLC, by John S. Austin, for Plaintiff-Appellants.

Roberti, Wicker, Lauffer & Cinski, P.A., by Samuel Roberti, for Harvest Street Holdings, Inc., Walter Cabrera, and Gregorio Paz, Defendant-Appellees.

WOOD, Judge.

¶ 1 Jose Cabrera ("Plaintiff Cabrera") and Jose Cabrera Jr. ("Plaintiff Cabrera Jr.") (collectively, "Plaintiffs") appeal from an order granting summary judgment to Defendants. Plaintiffs also appeal a separate order denying their motion for a temporary restraining order and a preliminary injunction. On appeal, Plaintiffs argue 1) a genuine issue of material fact exists concerning the validity of a purported transfer of the property in dispute (the "Property"), and 2) the trial court erred in denying their motion for a temporary restraining order and preliminary injunction. After a careful review of the record and applicable laws, we affirm the orders of the trial court.

I. Factual and Procedural Background

¶ 2 In 2004, Plaintiff Cabrera rented a portion of the Property from Nelson Banegas. Six years later, Plaintiff Cabrera also began renting a portion of the Property from Shop & Go, LLC ("Defendant Shop & Go"). Plaintiff Cabrera began operating his auto mechanic shop, CGM Cabrera, there.

¶ 3 At some point thereafter, Defendant Shop & Go's owner, Grady "Buddy" Harris, became interested in selling the Property to Plaintiff Cabrera. Plaintiff Cabrera discussed this opportunity with his family members, Luciano Cabrera ("Defendant Luciano") and Walter Cabrera ("Defendant Walter"), and ultimately asked them to join him in the purchase of the Property.

¶ 4 After negotiations, Defendant Shop & Go entered into an option to purchase contract for the Property with Plaintiff Cabrera, Defendant Luciano, and Defendant Walter on April 15, 2013 (the "Option Contract"). The Option Contract terms provided Plaintiff Cabrera and Defendants Luciano and Walter "accept as lessees" the Property from May 1, 2013 to December 1, 2024 and pay a total of $2,400.00 per month. Further terms provided,

> that if any monthly installment of rental [sic] as herein called[,] . . . be and remain overdue and unpaid for ten (10) days at any time during such default,

> party to the first part [Defendant Shop & Go] may at its option terminate this Lease and Option Contract and demand and receive possession of said property.
>
> . . .
>
> [I]t is further agreed that provided all rentals theretofore due have been paid, parties of the second party may at any time during the term of this lease elect to purchase said property for the price of $150,000.00 . . . . In absence of earlier purchase, title to real property shall be delivered unto said parties . . . upon payment in full of the above . . . referenced sales price according to the terms specified above. At that time or earlier delivery upon prepayment of rental to be applied on said purchase price, [Defendant Shop & Go] . . . shall deliver title to parties of the second part free from incumbrances at time of closing.

At no point did any party record the Option Contract in the Register of Deeds.

¶ 5 After Plaintiff Cabrera signed the Option Contract, he began subletting portions of the Property and managing rental payments. A few years later, Defendant Luciano decided he no longer wanted to be a party to the Option Contract. In May 2017, he assigned his one-third undivided interest in the Property to Plaintiff Cabrera's son, Plaintiff Cabrera Jr. Under the terms of the assignment, Plaintiff Cabrera Jr. "accepts and assumes from Luciano Bangas Cabrera . . . all of the Assignor's rights and obligations under the provisions of that Lease Option Contract dated April 15, 2013 referred to hereinabove." This assignment was then recorded in the Durham County Register of Deeds.

¶ 6 Following this assignment, Plaintiff Cabrera intended to enter into a contract to sell his and Plaintiff Cabrera Jr.'s respective interests in the Property to Gregorio Paz ("Defendant Paz") and Defendant Walter. At the time, Defendant Walter's wife, Eliana A. Agudelo-Cabrera, was a Notary Public for North Carolina. Because of Eliana's position, Plaintiff Cabrera and Defendants Walter and Paz all agreed Eliana would prepare the contract of sale. Eliana then, in turn, prepared a contract of sale in both English and Spanish for the parties to sign.

¶ 7 On February 1, 2019, Plaintiffs Cabrera and Cabrera Jr. purportedly entered into the prepared contract of sale with Defendants Paz and Walker (the "2019 Contract."). The 2019 Contract provided,

> Jose Luis Cabrera and son Jose Luis Cabrera Jr. agree to sell their part of ownership of . . . [the Property] for the amount of $140,000.00. Jose Luis Cabrera is receiving the total amount of $77,000.00 as a down payment, that leaves a balance of $63,000.00 which will be pay [sic] in amounts of $2,000.00 every 15th of every month until [sic] balance is paid in full.

However, at the time the parties entered into the 2019 Contract, Plaintiff Cabrera Jr., lived in Houston, Texas and did not personally sign his name. Plaintiff Cabrera signed his own name on behalf of Plaintiff Cabrera Jr. Eliana then notarized the contract after all parties signed it.

¶ 8 When Jose Cabrera Jr. became aware of the 2019 Contract, he told his father that he did not consent to the sale and asked his father to void the 2019 Contract. Thereafter, Plaintiff Cabrera informed Defendants Walter and Paz that he and Plaintiff Cabrera Jr. wanted to void the 2019 Contract, but they refused to void the contract.

¶ 9 A few months later, on May 23, 2019, Defendants Walter and Paz decided to exercise the option to purchase the Property under the Option Contract. At the same time, Defendant Paz's attorney formed Harvest Street Holdings, LLC ("Defendant Harvest Street Holdings"), listing Defendants Paz and Walter as the company's owners. Acting as Defendant Harvest Street Holdings, Defendants Paz and Walter exercised the option to buy under the Option Contract with Shop & Go and purchased the Property in May 2019. The same day, Defendant Shop & Go conveyed its interest in the Property to Defendant Harvest Street Holdings. This deed was promptly recorded in the Durham County Register of Deeds. Prior to Defendant Harvest Street Holdings' purchasing the Property, Jose Cabrera had paid a total of $168,000.00 under the terms of the Option Contract. However, he stopped paying all rent due on the Property after February 2019 but continued to remain in possession of the Property.

¶ 10 On June 20, 2019, Plaintiffs filed a complaint with the trial court seeking declaratory judgment, quiet title, and *quantum meruit*, and they filed a motion for a temporary restraining order and preliminary injunction. On July 10, 2019, a hearing was held concerning Plaintiffs' motion for a temporary restraining order and preliminary injunction. The trial court subsequently entered an order denying Plaintiffs' motion on July 25, 2019. On December 22, 2020, Defendant Harvest Street Holdings notified Plaintiffs it was terminating their lease because they had failed to pay rent since May 22, 2019. The following month, Defendants Harvest

Street Holdings, Walter, and Paz moved for summary judgment, arguing there was no genuine issue of material fact.

¶ 11 On February 24, 2021, the trial court entered an order granting Defendants' motion for summary judgment. Plaintiffs filed a timely notice of appeal of both the July 25, 2019 and February 24, 2021 orders.

II. Discussion

¶ 12 Plaintiffs raise several arguments on appeal. Each will be addressed in turn.

A. Summary Judgment

¶ 13 We review a trial court's order for summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). "Under a *de novo* review, the . . . court considers the matter anew and freely substitutes its own judgment for" that of the trial court. *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (cleaned up) (citing *Sutton v. North Carolina DOL*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999)). 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, R. 56(c).

¶ 14 "The party moving for summary judgment has the burden of establishing the lack of any triable issue." *Cater v. Barker*, 172 N.C. App. 441, 444, 617 S.E.2d 113, 116 (2005) (quoting *Collingwood v. General Electric Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)), *aff'd*, 360 N.C. 357, 625 S.E.2d 778 (2006). When reviewing a summary judgment order, we view the evidence "in the light most favorable to the non-movant." *Baum v. John R. Poore Builder, Inc.*, 183 N.C. App. 75, 80, 643 S.E.2d 607, 610 (2007) (citing *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 26, 588 S.E.2d 20, 25 (2003)); *see Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

1. Quiet Title

¶ 15 **[1]** Plaintiffs first allege the trial court erred by granting summary judgment to Defendants as to their claim to quiet title. We disagree.

¶ 16 An action to quiet title "may be brought by any person against another who claims an estate or interest in real property adverse to such person for the purpose of determining such adverse claims[] . . . ." N.C. Gen. Stat. § 41-10 (2021); *see also Resort Development Co. v. Phillips*,

278 N.C. 69, 77 178 S.E.2d 813, 818 (1971) ("The beneficial purpose of the Statute (G. S. 41-10) is to free the land of the cloud resting upon it and make its title clear and indisputable[] . . . ."); *Plotkin v. Merchants' Bank & Trust Co.*, 188 N.C. 711, 714, 125 S.E. 541, 542 (1924) (holding in a suit to quiet title, the Plaintiff "is not demanding possession of the land nor are his rights put in issue. He demands judgment that the defendant has no right, title or interest in the land adverse or superior to him[]"). In order to prevail on a claim to quiet title, first "the plaintiff must own the land in controversy, or have some estate or interest in it and . . . second is that the defendant must assert some claim to such land adverse to the plaintiff's title, estate or interest." *Wells v. Clayton*, 236 N.C. 102, 107, 72 S.E.2d 16, 20 (1952) (citations omitted); *see Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 461, 490 S.E.2d 593, 597 (1997).

¶ 17 In the present case, Plaintiffs contend the 2019 Contract failed to convey their contractual interest under the Option Contract to Defendants Paz and Walter, and as such, they have retained an interest in the 2019 Contract and the Property. Generally, option contracts "do not of themselves create any interest in the property, but only amount to an offer to create or convey such an interest when the conditions are performed, and working a forfeiture when not strictly complied with." *Mizell v. Dennis Simmons Lumber Co.*, 174 N.C. 68, 71, 93 S.E. 436, 438 (1917) (citations omitted); *see also Winders v. Kenan*, 161 N.C. 628, 633, 77 S.E. 687, 689 (1913) ("Contracts of this character, being unilateral in their inception, are construed strictly in favor of the maker, because the other party is not bound to performance, and is under no obligation to buy, and it is generally held that time is of the essence of such a contract, and that the conditions imposed must be performed in order to convert the right to buy into a contract of sale."); *Sharpe v. Sharpe*, 150 N.C. App. 421, 423, 563 S.E.2d 285, 287 (2002) ("The exercise of an option is merely the election of the optionee to purchase the property." (internal quotation marks omitted)).

¶ 18 In order to receive conveyance of a property subject to an option contract, the optionee must "not only accept the offer[,] but pay or tender the price within the prescribed time, but payment or tender is not essential unless it is a condition precedent." *Kottler v. Martin*, 241 N.C. 369, 372, 85 S.E.2d 314, 317 (1955) (quotation omitted); *see Winders*, 161 N.C. at 633-34, 77 S.E. at 689. A "mere notice of an intention to buy or that the party will take the property" in an option contract "does not change the relations of the parties." *Kottler*, 241 N.C. at 372, 85 S.E.2d at 317 (quoting *Winders*, 161 N.C. at 634, 77 S.E. at 689). In other words,

until the option is exercised, the optionee does not hold any property interest to the property in question.

¶ 19 Concerning the interests held by Plaintiffs in this case, Plaintiffs' interests that were purportedly transferred under the 2019 Contract were their rights under the Option Contract. The Option Contract only designates Plaintiffs as lessees of the Property. We note that prior to Defendant Harvest Street Holdings' purchasing the Property, Jose Cabrera had paid a total of $168,000.00 in rent under the terms of the Option Contract; however, title to the Property would only be conveyed should the lessees "elect to purchase said property for the price of $150,000.00 . . . ." At no time, either prior to or after signing the 2019 Contract, did Plaintiffs exercise their option to purchase. As such, because our Supreme Court has held option contracts do not convey an interest in real property until the option is exercised, we hold Plaintiffs did not yet have an interest in the Property pursuant to the Option Contract. *See Winders v. Kenan*, 161 N.C. 628, 77 S.E. 689 (1913); *Mizell v. Dennis Simmons Lumber Co.*, 174 N.C. 68, 93 S.E. 436 (1917).

¶ 20 In their brief, Plaintiffs spend a considerable amount of time arguing why the 2019 Contract is invalid. However, such an argument is immaterial in this case. First, because we conclude the Option Contract did not give any party thereto an interest in the Property, the interests Plaintiffs purportedly transferred in the 2019 Contract, if any, would only be the right to purchase the Property under the Option Contract. Thus, even if the 2019 Contract was invalid, Plaintiffs would only possess an option to purchase the Property under the Option contract. Because it is firmly established that an option contract does not create an interest in real property, Plaintiffs would not have had an interest in the Property regardless of whether they transferred their interest per the 2019 Contract. Furthermore, notwithstanding whether the 2019 Contract is valid, Defendant Walter at all times had a right to purchase the Property per the terms of the Option Contract; as such, Defendant Walter's subsequent purchase of the Property with Defendant Paz, acting as Defendant Harvest Street Holdings, was permissible.

¶ 21 Because Plaintiffs did not have an interest in the Property under the Option Contract, a suit to quiet title fails as to the first element: the person "own[s] the land in controversy or . . . [has] some estate or interest in it." *Wells*, 236 N.C. at 107, 72 S.E.2d at 20. Plaintiffs neither owned the Property nor had any real property interest in it under the terms of the Option Contract. Therefore, we hold the trial court did not err by granting summary judgment to Defendants as to Plaintiffs' action to quiet title.

2. Quantum Meruit

¶ 22 **[2]** Plaintiffs next argue the trial court erred by granting summary judgment to Defendants on their claim for *quantum meruit*. We disagree.

¶ 23 "In order to prevent unjust enrichment, a plaintiff may recover in *quantum meruit* on an implied contract theory for the reasonable value of services rendered to and accepted by a . . . [defendant]." *Waters Edge Builders, LLC v. Longa*, 214 N.C. App. 350, 353, 715 S.E.2d 193, 196 (2011) (quoting *Horack v. S. Real Estate Co. of Charlotte, Inc.*, 150 N.C. App. 305, 311, 563 S.E.2d 47, 52 (2002)). A claim in *quantum meruit* "operates as an equitable remedy based upon a quasi contract or a contract implied in law." *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 415 (1998) (citing *Potter v. Homestead Preservation Ass'n*, 330 N.C. 569, 578, 412 S.E.2d 1, 7 (1992)). A contract implied in law or a quasi contract is "not a contract." *Paul L. Whitfield, P.A.*, 348 N.C. at 42, 497 S.E.2d at 415 (quoting *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988)); *see Waters Edge Builders, LLC v. Longa*, 214 N.C. App. 350, 353, 715 S.E.2d 193, 196 (2011).

¶ 24 If an express contract exists between the parties, then "the contract governs the claim and the law will not imply a contract." *Booe*, 322 N.C. at 570, 369 S.E.2d at 556 (citing *Ranlo Supply Co. v. Clark*, 247 N.C. 762, 765, 102 S.E.2d 257, 259 (1958)); *see Morganton Mfg. & Trading Co. v. Crews*, 165 N.C. 285, 290, 81 S.E. 418, 420 (1914). As such, "*quantum meruit* is not an appropriate remedy when there is an actual agreement between the parties." *Paul L. Whitfield, P.A.*, 348 N.C. at, 42, 497 S.E.2d at 415 (citing *Booe*, 322 N.C. at 570, 369 S.E.2d at 556). "Only in the absence of an express agreement of the parties will courts impose a quasi contract or a contract implied in law in order to prevent an unjust enrichment." *Id.* (citing *Booe*, 322 N.C. at 570, 369 S.E.2d at 556).

¶ 25 Therefore, the focus "in the *quantum meruit* context[] is on whether there is an express contract on the subject matter at issue and not on whether there was a contract between the parties." *Ron Medlin Constr. v. Harris*, 199 N.C. App. 491, 495, 681 S.E.2d 807, 810 (2009) (emphasis omitted); *see Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713-14, 124 S.E.2d 905, 908 (1962) ("There cannot be an express and an implied contract for the same thing existing at the same time. It is only when parties do not expressly agree that the law interposes and raises a promise. No agreement can be implied where there is an express one existing[] . . . .").

¶ 26 We find *Vetco Concrete Co. v. Troy Lumber Co.* to be similar to the case before us. There, plaintiff entered into an express agreement with

a third party to furnish materials necessary to construct residences on lots owned by defendant. *Id.* at 713, 618 S.E.2d at 907. Although plaintiff and defendant never entered a contract requiring defendant to pay for its materials, it brought suit against defendant for outstanding payments under the theory of implied contract. *Id.* Our Supreme Court held since there was an express contract with a third party for the purchase of the materials, the trial court erred by submitting the case to the jury "on the theory of an implied contract on the part of the defendant to pay for materials sold and delivered to another under an express contract." *Id.* at 715, 124 S.E.2d at 909.

¶ 27 Our Supreme Court's decision in *Vetco Concrete Co. v. Troy Lumber Co.* is binding on the case *sub judice*. In the present case, Plaintiffs showed the existence of an express contract between Defendant Shop & Go and Defendant Walter, one of the founders of Defendant Harvest Street Holdings. The Option Contract specifically provided Plaintiffs and Defendant Walter were to pay Defendant Shop & Go a security deposit and approximately $2,400.00 in monthly rent. Because an express contract existed between Plaintiffs and Defendant Shop & Go, Plaintiffs may not now sue on the theory of an implied contract for amounts paid subject to this express contract. *Id.* Accordingly, since *quantum meruit* requires the existence of an implied contract, the trial court did not err by granting summary judgment to Defendants on Plaintiffs' *quantum meruit* action.

B. Temporary Restraining Order and Preliminary Injunction

¶ 28 **[3]** Finally, Plaintiffs contend the trial court erred by denying their motion for a temporary restraining order and preliminary injunction. We disagree.

¶ 29 At the outset, we note Plaintiffs' brief fails to argue their claim pertaining to a temporary restraining order. N.C. R. App. P. 28 ("The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs."). Thus, Plaintiffs' claim as to a temporary restraining order is deemed abandoned.

¶ 30 As to Plaintiffs' claim for a preliminary injunction, we review a preliminary injunction "essentially *de novo*." *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 507, 606 S.E.2d 359, 362 (2004) (quoting *Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696 (1984)).

Since a preliminary injunction is an "extraordinary measure" it will only be issued

> (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (citing *Waff Bros., Inc. v. Bank of North Carolina, N.A.*, 289 N.C. 198, 204-05, 221 S.E.2d 273, 277 (1976); then citing *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975); and then citing *Western Conference of Original Free Will Baptists v. Creech*, 256 N.C. 128, 139, 123 S.E.2d 619, 626 (1962)).

¶ 31 Here, Plaintiffs' claim for a preliminary injunction fails as to the first prong. As discussed *supra*, Plaintiffs were unable to show a likelihood of success on the merits. Therefore, the trial court did not err by denying Plaintiffs' motion for a preliminary injunction.

III. Conclusion

¶ 32 Viewing the evidence in the light most favorable to Plaintiffs, we hold no triable issue exists as to their claims to quiet title and for *quantum meruit*. We hold the trial court properly granted summary judgment to Defendants. Likewise, since the Plaintiffs were unable to show a likelihood of success on the merits, we conclude the trial court properly denied Plaintiffs' motion for a preliminary injunction. As such, we affirm the order and judgment of the trial court.

AFFIRMED.

Judge DILLON and JACKSON concur.

CAPE HOMEOWNERS ASS'N, INC. v. S. DESTINY, LLC

[284 N.C. App. 237, 2022-NCCOA-445]

CAPE HOMEOWNERS ASSOCIATION, INC., DESMOND P. McHUGH AND WIFE, GERALDINE McHUGH, MICHAEL L. BODNAR AND WIFE, PATRICIA L. BODNAR, BRUCE ANDERSON AND WIFE, ARLENE ANDERSON, DONNA J. MARTIN AND SPOUSE, PETER MARTIN, PLAINTIFFS

v.

SOUTHERN DESTINY, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, DEFENDANT

No. COA21-366

Filed 5 July 2022

1. Easements—appurtenant—expressly granted by deed—exhibit to deed containing description absent from record—patently ambiguous

In a dispute between the owner of a former golf course (defendant) and individual lot owners of an adjacent residential subdivision (plaintiffs), the trial court's determination that defendant had an easement appurtenant for "vehicular, golf cart and pedestrian use across all streets and roads" in the subdivision—granted in a deed to a previous owner—was in error where the grant of the easement was patently ambiguous because an exhibit referenced in the deed as describing the boundaries of the easement was missing from the record and there was no language in the deed from which the scope of the easement could be determined. Therefore, the trial court erred by entering summary judgment for defendant regarding the existence of an easement appurtenant and by dismissing defendant's alternative bases for an easement.

2. Easements—implied by plat—access to adjacent golf course—sufficiency of plat maps to create easement

In a dispute between the owner of a former golf course (defendant) and individual lot owners of an adjacent residential subdivision (plaintiffs), plaintiffs failed to establish the existence of an appurtenant easement implied by plat, which they argued entitled them to have access to defendant's property ("Subject Property") for their reasonable use and enjoyment. The lots of the subdivision were conveyed by plat maps that showed individual sections of the subdivision and only portions of the Subject Property, but none of the maps depicted the entire Subject Property being used as a golf course, and in some instances, the maps did not clearly distinguish between areas labeled as a golf course and other areas labeled for future development. Thus, the plat maps relied on by plaintiffs when they purchased their lots were insufficient to show a clear intention

by the subdivision's developer to restrict the Subject Property for the benefit of the lot owners in the manner asserted by plaintiffs.

Appeal by Plaintiffs from orders entered 3 December 2020 and 8 February 2021 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 15 December 2021.

Shipman & Wright, L.L.P., by Gary K. Shipman, for Plaintiffs-Appellants.

Ward & Smith, P.A., by Ryal W. Tayloe, Christopher S. Edwards, and Luke C. Tompkins, for Defendant-Appellee.

COLLINS, Judge.

¶ 1 Plaintiffs appeal from orders on cross-motions for summary judgment and Plaintiffs' motion for amended and additional findings of fact. Plaintiffs argue that the trial court erred by entering summary judgment in Defendant's favor based upon its conclusions that Defendant has an express easement permitting it to use the streets and roads of Plaintiffs' residential subdivision and that Plaintiffs lack an easement implied by plat requiring certain property adjacent to the subdivision to be kept open for their reasonable use. Because the trial court erred by concluding that Defendant has an express easement permitting it to use the streets and roads of Plaintiffs' residential subdivision, we reverse the trial court's entry of summary judgment on that claim. We remand to the trial court to enter summary judgment in Plaintiffs' favor regarding Defendant's claim for an express easement and for further proceedings to address Defendant's alternative claims for an implied easement. We affirm the trial court's entry of summary judgment based on its conclusion that Plaintiffs lacked an easement over the property adjacent to the subdivision.

I. Background

¶ 2 This case concerns property rights in the Cape Subdivision, a residential development, and an adjacent property which has historically been used as a golf course ("Subject Property"). Plaintiffs are the Cape Homeowner's Association, Inc. ("Cape HOA"), and owners of individual lots within the Cape Subdivision.[1] The Cape HOA is responsible for

1. Upon Plaintiffs' motion, the trial court certified a class of individual property owners within the Cape Subdivision.

maintaining the "common areas, streets, and entrances to and in" the Cape Subdivision.

¶ 3 Defendant Southern Destiny, LLC, is the current owner of the Subject Property. Defendant ceased operating a golf course on the Subject Property in 2018 and wishes to develop portions of it into residential subdivisions.

¶ 4 In January 1983, Carolina Resorts acquired the Subject Property and the property on which the Cape Subdivision now sits. Carolina Resorts conveyed this property to Suggs & Harrelson, Inc., in November 1983. Between 1983 and 1986, Carolina Resorts and Suggs & Harrelson, Inc., recorded a series of plat maps depicting residential lots in sections of the Cape Subdivision. Several of the maps show portions of roads, the Cape Fear River, areas labeled for "future development" and "future construction," lakes, and areas labeled "the Cape Golf Course" adjacent to the sections of the Cape Subdivision. No single map depicts an entire golf course. Taken together, the maps either label or illustrate the locations of holes 1, 5-15, and 18 of the Cape Golf Course adjacent to the sections of the Cape Subdivision.

¶ 5 In August 1986, The Cape Joint Venture, of which Suggs & Harrelson, Inc. was an owner, deeded the Subject Property to Midway Partners. Simultaneously, Suggs & Harrelson, Inc., conveyed two tracts, with certain exceptions, to Midway Partners. Defendant alleged, and Plaintiffs admitted, that as a result of these conveyances Midway Partners owned the unsold lots in the Cape Subdivision, all the roads in the subdivision, and the Subject Property.

¶ 6 In September 1986, Midway Partners deeded the Subject Property to Michael and Gwen Mattie (the "Matties"). Midway Partners granted several easements in the deed, including an easement for

> vehicular, golf cart, and pedestrian use by the Grantee, the Grantee's successors and assigns, the Grantee's employees, Grantee's guests, members of the Grantee's golf club and their guests, and members of the public playing golf at the golf course described above as Tracts 1, 2, 3, 4, and 5, The Cape Golf Course, over and across all streets and roads in the Cape Subdivision, whether dedicated to public use or reserved for private use, as shown on present or future recorded maps of sections of the Cape Subdivision, including but not limited to the recorded maps to which reference is made in the foregoing

> descriptions of Tracts 1, 2, 3, 4, and 5, The Cape Golf Course, and including all maps of future subdivision sections and future phases of development of The Cape, whether named as such or otherwise, provided that this easement is limited to present and future streets and roads lying within the boundaries of that parcel or parcels, tract or tracts of land described in Exhibit I of this conveyance.

(the "Streets and Roads Easement"). The same day, the Matties conveyed the property and accompanying easements to Thomas Wright.

¶ 7 Wright deeded the Subject Property to Defendant approximately 20 years later, in November 2006. Defendant's deed describes the Subject Property as depicted in a 29 November 2006 Boundary Survey of the Cape Golf and Racquet Club. Defendant continued to operate a golf course and country club on the Subject Property, open only to members and the paying public. Defendant ceased operation of the golf course in late 2018, following damage from Hurricane Florence. Since the closure of the course, Defendant has pursued plans to build residential developments on portions of the Subject Property.

¶ 8 Plaintiffs filed their complaint on 6 May 2019. Plaintiffs sought declaratory judgment on whether (1) Defendant had any right to use the streets of the Cape Subdivision to develop the Subject Property, 2) the Cape HOA had any right to prohibit Defendant from using the streets of the Cape Subdivision to develop the Subject Property, (3) the individual plaintiffs "acquired a right to have the [Subject Property] or any portion thereof kept open for their reasonable use," (4) the individual plaintiffs acquired an easement appurtenant in the Subject Property, (5) there was a dedication of the Subject Property, (6) Defendant may subdivide and develop the Subject Property for another use, and (7) Defendant may use or connect to the drainage system of the Cape Subdivision. Plaintiffs also brought claims for interference with an easement and nuisance; the Cape HOA alone brought a claim for trespass. Plaintiffs sought injunctive relief. Defendant answered, raised counterclaims, and sought a declaratory judgment that it held an express easement, implied easement by prior use, prescriptive easement, easement by necessity, or easement by estoppel in the roads of the Cape Subdivision.

¶ 9 Plaintiffs and Defendant filed cross-motions for summary judgment. On 3 December 2020, the trial court entered an Order on Cross-Motions for Summary Judgment ("Summary Judgment Order"). The trial court

concluded that (1) Plaintiffs had no easement by implication or estoppel over the Subject Property, (2) Defendant had an "easement appurtenant for vehicular, golf cart and pedestrian use across all streets and roads" in the Cape Subdivision, (3) Defendant "is entitled to make reasonable use of [the Subject Property] even though the flow of surface water is altered thereby," and (4) genuine issues of material fact precluded summary judgment on Plaintiffs' nuisance claim. The trial court concluded that the scope of the Streets and Roads Easement

> includes use by the grantee, the grantees successors and assigns and their guests. The grant is more expansive in that it refers to members of the golf course and members of the public who are playing golf but in the absence of an operational golf course on the property, those expansive provisions would no longer apply. The lack of continued use as a golf course does not, however, nullify the grant of easement to the grantee, its successors and assigns, its employees and its guests.

The trial court certified, pursuant to N.C. Gen. Stat. § 1A-1, Rule 54, that there was no just reason for delay of an appeal from the Summary Judgment Order.

¶ 10 Plaintiffs moved the trial court to amend its findings, make additional findings, and amend its Summary Judgment Order pursuant to N.C. Gen. Stat. § 1A-1, Rule 52. On 8 February 2021, the trial court entered an order denying Plaintiffs' motion for additional findings ("Rule 52 Order"). The trial court explained that it considered the resolution of certain issues implicit in its Summary Judgment Order, but "for the sake of clarity" entered a "supplemental order" expressly stating its ruling on each portion of Plaintiffs' request for declaratory judgment and each of Defendants' counterclaims.

¶ 11 As to Plaintiffs' request for Declaratory Judgment, the Rule 52 Order stated:

> b. Having determined in the [Summary Judgment Order] that Defendant has an easement appurtenant for vehicular, golf cart and pedestrian use across all streets and roads in The Cape subdivision, the [Cape] HOA does not have the right to prohibit [Defendant] from using the private streets and roads of The Cape for the subdivision and development of the [Subject Property.]

c. On the issue of whether [Defendant] has any right to use or connect to the private system of drainage of The Cape, owned and maintained by the [Cape] HOA, there is insufficient evidence of the extent of any private system of drainage within The Cape Subdivision to determine whether any such right exists beyond the natural flow of surface water in swells and ditches. The [Summary Judgment Order] addresses that issue and the Court will make no amendment to or further clarification of that portion of the order.

d. The lots and units within The Cape were sold in sections by reference to plat maps for each individual section. Those maps did not graphically depict the precise location of the [g]olf [c]ourse [on the Subject Property]. Therefore the Cape Developers did not sell or convey lots/units by reference to a map or plat that represented a division of The Cape into streets and lots and which graphically depicted the precise location of the [g]olf [c]ourse [on the Subject Property].

e. Neither the [Subject Property], nor any portion thereof, were dedicated by the Cape Developers and/or [Defendant] for the use and benefit of purchasers of lots/units within The Cape.

f. The individual Plaintiffs and other Class Members, as purchasers of lots/units did not acquire a right to have the [Subject Property] or any portion thereof kept open for their reasonable use.

g. Whether the individual Plaintiffs and other Class Members' rights are subject to revocation except by agreement is moot having determined that no right exists to have the [Subject Property] or any portion thereof kept open for their reasonable use.

h. The individual Plaintiffs and other Class Members did not acquire a right in the nature of an easement appurtenant in and to the [Subject Property] or any portion thereof.

i. Plaintiff seeks a declaratory judgment whether the existence of any such right was an inducement to and part of the consideration for the purchase by

> the individual Plaintiffs and other Class Members. However, the court has determined that no such right exists. In addition, inducement by the developer is not sufficient standing alone to create an easement by implication. There must be a recorded instrument that exists to clearly demonstrate the intent to encumber and restrict the land which does not exist in this case. . . .
>
> j. The [Subject Property] is not subject to any implied easement on the part of the plaintiffs that would restrict its use therefore the [Subject Property] or any portion thereof may be subdivided, reduced in size and/or put to some use other than a golf course.
>
> k. [Defendant] has the right to subdivide the [Subject Property], or any portion thereof, and develop the same, thereby excluding the individual Plaintiffs and other Class Members[.]
>
> l. There has not been a valid dedication of the [Subject Property.]

¶ 12 As to Defendant's counterclaims, the Rule 52 Order stated:

> a. The existence of an easement appurtenant for vehicular, golf cart and pedestrian use across all streets and roads in the Cape Subdivision, was described and ordered in the [Summary Judgment Order].
>
> b. The existence of an easement appurtenant for installation and maintenance of utilities is set forth in that certain deed from Midway Partners to Michael and Gwen Mattie . . . . The Defendant has an easement appurtenant for the installation and maintenance of utilities as set forth in the above described deed. The issue before the court was the existence of the easement, not its location.
>
> c. The express granting of an easement negatives the finding of an implied easement of similar character. . . . Therefore, Defendant's second counterclaim for easement implied by prior use, fifth counterclaim for easement by necessity, and sixth counterclaim for easement by estoppel are all dismissed.

> d. Defendant's third and fourth counterclaims for easement by prescription are dismissed.

¶ 13 Plaintiffs gave notice of appeal from the Summary Judgment Order and Rule 52 Order on 10 March 2021. The parties subsequently stipulated to the dismissal of Plaintiffs' nuisance claim without prejudice on 19 July 2021.

II. Discussion

A. Streets and Roads Easement

¶ 14 **[1]** Plaintiffs argue that Defendant does not enjoy an express easement appurtenant over the streets and roads of the Cape Subdivision. Defendant argues that its chain of title to the Subject Property establishes that it has such an easement.

¶ 15 Generally, an "easement is a right to make some use of land owned by another." *Tanglewood Prop. Owners' Ass'n v. Isenhour*, 254 N.C. App. 823, 830, 803 S.E.2d 453, 458 (2017) (quotation marks, ellipsis, and citation omitted). "An appurtenant easement is an easement created for the purpose of benefiting particular land . . . [and] attaches to, passes with[,] and is an incident of ownership of the particular land." *Id.* at 830, 803 S.E.2d at 459 (citation omitted). "This distinguishes an easement appurtenant from an easement in gross, which is a personal license to the grantee and does not run with the land itself." *Town of Carrboro v. Slack*, 261 N.C. App. 525, 529, 820 S.E.2d 527, 531 (2018) (citation omitted).

¶ 16 An easement may be created by an express grant. *Tanglewood*, 254 N.C. App. at 830, 803 S.E.2d at 459. No "particular words are necessary for the grant of an easement," but "the instrument must identify with reasonable certainty the easement created and the dominant and servient tenements." *Oliver v. Ernul*, 277 N.C. 591, 597, 178 S.E.2d 393, 396 (1971).

> When an easement is created by deed . . . the description thereof must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers. There must be language in the deed sufficient to serve as a pointer or a guide to the ascertainment of the location of the land.

Allen v. Duvall, 311 N.C. 245, 249, 316 S.E.2d 267, 270 (1984) (quotation marks, ellipsis, emphasis, and citations omitted).

¶ 17 A description of an interest in land is patently ambiguous "[w]hen it is apparent upon the face of the deed, itself, that there is uncertainty

as to the land intended to be conveyed and the deed, itself, refers to nothing extrinsic by which such uncertainty can be resolved." *Overton v. Boyce*, 289 N.C. 291, 294, 221 S.E.2d 347, 349 (1976) (citations omitted). "Parol evidence may not be introduced to remove a patent ambiguity since to do so would not be a use of such evidence to fit the description to the land but a use of such evidence to create a description by adding to the words of the instrument." *Id.* (citations omitted).

¶ 18 In this case, Midway deeded the Subject Property and several easements to the Matties. Among those easements was the Streets and Roads Easement, which provided:

> an easement for vehicular, golf cart, and pedestrian use by the Grantee, the Grantee's successors and assigns, the Grantee's employees, Grantee's guests, members of the Grantee's golf club and their guests, and members of the public playing golf at the golf course described above as Tracts 1, 2, 3, 4, and 5, The Cape Golf Course, over and across all streets and roads in the Cape Subdivision, whether dedicated to public use or reserved for private use, as shown on present or future recorded maps of sections of the Cape Subdivision, including but not limited to the recorded maps to which reference is made in the foregoing descriptions of Tracts 1, 2, 3, 4, and 5, The Cape Golf Course, and including all maps of future subdivision sections and future phases of development of The Cape, whether named as such or otherwise, *provided that this easement is limited to present and future streets and roads lying within the boundaries of that parcel or parcels, tract or tracts of land described in Exhibit I of this conveyance.*

(Emphasis added). The Matties deeded the Subject Property and easements to Wright, who later deeded the Subject Property to Defendant. Plaintiffs admitted in their Reply to Defendant's Counterclaim that Wright's deed conveyed the Streets and Roads Easement to Defendant.

¶ 19 Plaintiffs argue that the grant of the Streets and Roads Easement is void because the "Exhibit I" to which it refers is missing from the record. Plaintiffs contend that the absence of Exhibit I is fatal because it leaves the Court unable to determine the scope of the easement.[2] We agree.

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2. Contrary to Defendant's assertion, this argument is preserved for appellate review. Before the trial court, Plaintiffs argued that Defendant had failed to identify the easement with reasonable certainty and raised the absence of Exhibit I.

¶ 20 The deed expressly limits the Streets and Roads Easement to the "present and future streets and roads lying within the boundaries of that parcel or parcels, tract or tracts of land described in Exhibit I of this conveyance." Exhibit I was made a part of the description of the Streets and Roads Easement, and without it, "there is uncertainty as to the [interest in] land intended to be conveyed and the deed, itself, refers to nothing extrinsic by which such uncertainty can be resolved[.]" *Overton*, 289 N.C. at 294, 221 S.E.2d at 349.

¶ 21 Defendant does not dispute that there is no Exhibit I attached to the deed but argues that even absent Exhibit I, the deed "is sufficient to point to the location of the easement and the roads of the Cape can be easily identified by reviewing the plats of the sections of the Cape in the public record[s] that Plaintiffs have provided to the Court." Defendant seeks to substitute the known boundaries of the Cape Subdivision for the unknown boundaries described in the missing Exhibit I. Doing so would be impermissible conjecture because no language in the deed demonstrates that the two boundaries are the same. Defendant generally asserts that the text surrounding the easement in the deed confirms that the boundaries are coextensive. However, examination of this text reveals multiple other references to already-recorded plat maps of the Cape Subdivision, suggesting that the boundaries of the land in the missing Exhibit I might have been distinct from the boundaries in the then-recorded maps of the subdivision.

¶ 22 Because the grant of the Streets and Roads Easement "refers to nothing extrinsic by which" the uncertainty about the scope of the easement may be resolved, it is patently ambiguous. *See id.*; *see also Brooks v. Hackney*, 329 N.C. 166, 172, 404 S.E.2d 854, 858 (1991) (holding an agreement that described the boundaries of a parcel of land was patently ambiguous where "[t]he last boundary line [was] subject to a number of constructions, each with significant variations" and the instruments did not "refer to anything extrinsic from which the description can be made more certain").

¶ 23 Defendant maintains that the absence of Exhibit I is of no consequence because "there is no genuine dispute that [Defendant] and its predecessors in title have always used the roads of the Cape Subdivision" to access the Subject Property since the conveyance of the Streets and Roads Easement. This argument is unavailing because such evidence "may not be introduced to remove a patent ambiguity" such as the one present in the grant of the Streets and Roads Easement. *See Overton*, 289 N.C. at 294, 221 S.E.2d at 349.

¶ 24 Because the grant of the Streets and Roads Easement was patently ambiguous, the trial court erred by granting summary judgment to Defendant concluding that Defendant had an express "easement appurtenant for vehicular, golf cart and pedestrian use across all streets and roads" in the Cape Subdivision. Accordingly, the trial court also erred by concluding that the existence of this express easement appurtenant required the dismissal of Defendant's alternative claims for an easement in the streets and roads of the Cape Subdivision.

B. Easement Over the Subject Property

¶ 25 **[2]** Plaintiffs also argue that they have an "appurtenant easement by plat" over the Subject Property. They contend that this easement confers a right to have the Subject Property "kept open for their 'reasonable' use and enjoyment," and this right "is not subject to revocation without their agreement."

¶ 26 "Appurtenant easements implied by plat are recognized in North Carolina." *Tanglewood*, 254 N.C. App. at 830, 803 S.E.2d at 459 (citation omitted). "Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement." *Cleveland Realty Co. v. Hobbs*, 261 N.C. 414, 421, 135 S.E.2d 30, 35-36 (1964) (citations omitted).

> It is said that such streets, parks and playgrounds are dedicated to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished, altered or diminished except by agreement or estoppel. This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots. Thus, a street, park or playground may not be reduced in size or put to any use which conflicts with the purpose for which it was dedicated.

Id. at 421, 135 S.E.2d at 36 (emphasis and citations omitted).

¶ 27 For an appurtenant easement implied by plat "to be recognized, the plat must show the developer clearly intended to restrict the use of the land at the time of recording for the benefit of all lot owners." *Friends of Crooked Creek, L.L.C. v. C.C. Partners, Inc.*, 254 N.C. App. 384, 392, 802 S.E.2d 908, 914 (2017) (citation omitted). Additionally, "[t]he easement areas must be sufficiently identified on the plat in order to establish an easement, although an express grant is not required." *Tanglewood*, 254 N.C. App. at 830, 803 S.E.2d at 459 (citations omitted). "The free use of property is favored in our State," and "[w]hen there are doubts about the use to which property may be put, those doubts should be resolved in favor of such free use." *Harry v. Crescent Res.*, 136 N.C. App. 71, 80, 523 S.E.2d 118, 124 (1999).

¶ 28 This Court considered whether property owners held appurtenant easements implied by plats in adjacent properties used as golf courses in two recent cases, *Crooked Creek* and *Home Realty Co. & Insurance Agency v. Red Fox Country Club Owners Ass'n*, 274 N.C. App. 258, 852 S.E.2d 413 (2020). In *Crooked Creek*, residential lot owners argued that an appurtenant easement implied by plat required an adjacent property to be "perpetually used only for golf." 254 N.C. App. at 391, 802 S.E.2d at 913. Plat maps recorded by a developer in 1992, 1993, and 1994 showed the residential lots within a subdivision, reserved limited access to the lots from the adjacent golf course, but did not depict the golf course. *Id.* at 385, 802 S.E.2d at 910. In 1995, the developer recorded a survey plat depicting "a dash-lined sketch of an 18-hole golf course, tee boxes, fairways and greens, a driving range, the clubhouse, and other golf features," along with a depiction of "five bold or hard-lined boundary acreage tracts." *Id.* at 386, 802 S.E.2d at 910. This Court held that the lot owners failed to establish an easement implied by plat for two reasons. First, the lot owners' deeds referenced the 1992-1994 plat maps with no depiction of the golf course, not the 1995 survey plat depicting the golf course. *Id.* at 392-93, 802 S.E.2d at 914. Second, even if the lot owners' deeds had referenced the 1995 survey plat, that document did "not show an intent to restrict the uses of the golf course property" because it contained only a "dotted line location of the golf course greens and fairways[.]" *Id.* at 392, 802 S.E.2d at 914.

¶ 29 More recently, in *Red Fox Country Club*, recorded plats of the subdivision depicted solid lines around residential lots, accompanied by metes and bounds descriptions. 274 N.C. App. at 279, 852 S.E.2d at 427. The plats also depicted golf course holes adjacent to some of the residential lots but did not include metes and bounds descriptions of the outer boundaries of the golf course. *Id.* The boundaries of the golf

course were "either not marked at all or [were] depicted with dotted lines." *Id.* We held that the plats were insufficient to create an appurtenant easement implied by plat because they omitted portions of the golf course's boundaries and left the quantity of land undetermined. *Id.*

¶ 30 Here, the lot owners were conveyed their lots by plat maps showing individual sections of the Cape Subdivision. These plat maps also depict portions of adjacent properties, including the Subject Property. But none of the maps depict the entire Subject Property, complete with a metes and bounds description, being used as a golf course adjacent to the subdivision. Taken together, the maps only label or illustrate the locations of holes 1, 5-15, and 18 of a golf course. Moreover, in multiple instances the maps do not demarcate between areas labeled as a golf course and areas labeled "FUTURE DEVELOPMENT" or "FUTURE CONSTRUCTION." The plat maps Plaintiffs rely upon therefore fail to show that the "developer clearly intended to restrict the use of the land at the time of recording for the benefit of all lot owners." *Crooked Creek*, 254 N.C. App. at 392, 802 S.E.2d at 914 (citation omitted).

¶ 31 Additionally, the plat maps Plaintiffs rely upon are "not capable of describing or reducing an easement in the golf course to a certainty." *Red Fox Country Club*, 274 N.C. App. at 279, 852 S.E.2d at 427. Before the trial court and in their brief, Plaintiffs emphasize that there is now no dispute about the precise boundaries of the Subject Property. But where a party claims an appurtenant easement implied by plat, the relevant plat maps are those that the owners relied upon at the time of purchase. *Cleveland Realty Co.*, 261 N.C. at 421, 135 S.E.2d at 35-36. Again, no single map by which the individual lots were sold shows the entire boundary of the Subject Property, and even taken together, the maps do not show a complete golf course. Moreover, these maps fail to distinguish between areas depicted as golf course and areas labeled for future development or construction.

¶ 32 The trial court therefore did not err in concluding that Plaintiffs had no implied easement by plat in the Subject Property.

III. Conclusion

¶ 33 The trial court erred by concluding that Defendant has an express easement appurtenant in the streets and roads of the Cape Subdivision and by dismissing Defendant's alternative claims for implied easements. We thus reverse the trial court's entry of summary judgment on Defendant's claim of an express easement. We remand to the trial court to enter summary judgment in Plaintiffs' favor on the express easement claim and to address Defendant's alternative claims for an implied

easement by prior use, prescriptive easement, easement by necessity, and easement by estoppel in the roads of the Cape Subdivision. The trial court did not err by concluding that Plaintiffs lacked an easement implied by plat in the Subject Property and we affirm the trial court's entry of summary judgment in Defendant's favor on that claim.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges DIETZ and JACKSON concur.

COUNTY OF MOORE, PLAINTIFF
v.
RANDY ACRES AND SOEK YIE PHAN, DEFENDANTS

No. COA21-552

Filed 5 July 2022

Utilities—easements—operation of water lines—inverse condemnation—limitations period expired

In a dispute arising from defendants' erection of a spite fence along their property line that restricted access to the public underground water and sewer infrastructure operated by the county, the county held title to the water and sewer lines as a matter of law, including an easement for their maintenance and repair, where the county had been continuously operating the lines on the property for a public purpose for more than two decades. The limitations period for an inverse condemnation action had long expired, and the county did not need to show a recorded deed to prove its ownership.

Appeal by plaintiff from order entered 14 May 2021 by Judge Michael A. Stone in Moore County Superior Court. Heard in the Court of Appeals 22 February 2022.

Womble Bond Dickinson (US) LLP, by H. Stephen Robinson and Mary Craven Adams, and Moore County, by Misty Randall Leland, for Plaintiff-Appellant.

McGuireWoods LLP, by Robert Muckenfuss and R. Locke Beatty, for Defendants-Appellees.

INMAN, Judge.

¶ 1 Plaintiff County of Moore ("the County") appeals the trial court's summary judgment order dismissing its complaint seeking declaratory and injunctive relief requiring Defendants Randy Acres and Soek Yie Phan ("Defendants") to remove an alleged "spite fence" erected along their rear property line. The complaint alleges Defendants built the new fence and planted invasive holly trees that restrict access to the public underground water and sewer infrastructure operated by the County.

¶ 2 The trial court entered summary judgment in favor of Defendants and dismissed the County's complaint on the ground that the County had not shown it holds title to the water and sewer pipes or a utility easement. The County appeals. For the reasons explained below, we reverse and remand for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 3 The record tends to show the following:

¶ 4 The Village of Pinehurst ("Pinehurst") was built at the turn of the 20th century. The founding developers installed water and sewer lines to provide services to the residents. The County took ownership of the water and sewer system in 1999 and has provided service to the residents of Pinehurst through that same system ever since.[1]

¶ 5 Among the mains within the County's infrastructure are a cast iron water line and a clay sewer line that run along the rear of Defendants' property located on Palmetto Road in Pinehurst (the "Property"). The water main provides fire-fighting service to the Property and surrounding parcels and further functions to prevent stagnation and offers a redundancy in the event another water line is out of service. The sewer line services only the Property.

¶ 6 The utility mains were installed on the Property prior to when Defendants' home was built; however, the record contains conflicting evidence as to exactly when the lines were installed and by whom. A 1956 map found in the County's archives shows the sewer main dated to 1900. A fire plug installed on the water main is imprinted with the year

1. The record discloses the water and sewer system came under the ownership and operation of the Pinehurst Water and Sanitary Company, Inc. by the 1900s. Roughly a century later, in 1993, Pinehurst Water and Sanitary Company deeded the system to Moore Water and Sewer Authority ("MOWASA"), a regional public water and sewer authority created pursuant to statute. *See* N.C. Gen. Stat. §§ 162A-3, *et seq*. (2021). In 1999, MOWASA ceased operation and deeded the water and sewer system to the County.

1914. Neither of the lines, nor any recorded easement for either of them, appears in the chain of title to the Property.

¶ 7 When Defendants purchased the Property in 2004, an existing fence and foliage were located several feet inside their property line. In 2012, the County contacted Defendants to schedule maintenance on the sewer and water lines, which would require removing and replacing a portion of that fence. Defendants expressly permitted the contractor to do so, and the County serviced the lines.[2]

¶ 8 In 2018, Defendants' neighboring property owners constructed an addition to their home that resulted in a dispute among those neighbors and Defendants. On 28 October 2018, Defendants applied to Pinehurst for a permit to construct a new fence extending closer to their property line. Pinehurst responded by advising Defendants that they "must contact Moore County Public Works . . . to determine water line placement and recommended location of fencing." Defendants never contacted Moore County about the location of the fence. They called a local 811 service for public utility markings. Defendants then dug installation holes for the new fence, exposing but not rupturing the underground mains.

¶ 9 On 18 March 2019, after learning of Defendants' installation and exposure of the utility lines, Pinehurst notified the Engineering Division of Moore County Public Works. Moore County staff visited the site the same day and attempted to order them to stop the work. The next day, the County sent Defendants an e-mail stating the fence was required to be installed outside the Moore County easement.

¶ 10 Defendants allegedly did not respond to the County's e-mail and constructed the new fence the following month, running above the utility mains operated by the County and blocking their neighbors' access to their new garage. The County alleges the new fence blocks public access to a gravel alleyway that neighbors and community members have used for decades. The County also alleges Defendants' new fence closes in "the water main, sewer main and manhole, thus preventing adequate access to the utilities . . . ."

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2. Mr. Gould, the County Public Works Director, testified in deposition that the contractor sought permission from Defendants rather than claim an easement because the repair was part of scheduled maintenance and not an emergency that required immediate rehabilitation. Mr. Gould further testified that the County does not and would not seek permission from a landowner in the event of an emergency that required immediate repair, relying instead on its easement rights to effectuate any repair without pursuing or receiving prior authorization from the landowner.

¶ 11 The following map, included for illustrative purposes only,[3] shows the approximate location of Defendants' new fence:

¶ 12 On 24 May 2019, the County sent Defendants two letters demanding the fence be removed within 14 days. Defendants did not remove the fence and, several weeks later, allegedly planted holly trees "all along the inside of the fence directly above the water main . . . ."

¶ 13 On 25 June 2019, the County initiated this action by filing a complaint in Moore County Superior Court. On 2 August 2021, the County filed an Amended Complaint seeking preliminary and permanent injunctive relief. The County further sought a declaration that it "enjoys the rights of ownership, pursuant to its power of eminent domain, of the manhole, water and sewer mains and the easements, measuring 10 feet on each side of the water main and sewer main . . . ."

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3. This map should not be considered evidentiary or determinative of any fact at issue between the parties and is simply included to aid the reader in visualizing the physical improvements at the center of this dispute.

¶ 14 The matter was removed to and subsequently remanded from the United States District Court for the Middle District of North Carolina. On 5 April 2021, Defendants moved for summary judgment. The County filed a cross-motion for partial summary judgment on the issue of the County's ownership of the lines and easement, leaving the size and scope of any such easement for determination at trial.

¶ 15 The parties' motions for summary judgment came on for hearing on 29 April 2021, with the trial court noting that "there's no evidence even in the record that Moore County even owns the pipe." Following the hearing, the trial court entered summary judgment in favor of Defendants and dismissed the County's claims for injunctive and declaratory relief. The County appeals.

II. ANALYSIS

¶ 16 The record evidence reveals Defendant Randy Acres purchased the Property in late 2004 with the abutting gravel throughway and water and sewer mains already constructed and in operation.[4] The trial court nevertheless agreed with Defendants that the County failed to show it took title to a utility easement and therefore could not restrict Defendants' use of the Property. We conclude the trial court erred and reverse the summary judgment order.

A. Standard of Review

¶ 17 Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file 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). "The party who moves for summary judgment bears the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). In reviewing the evidence anew and in the light most favorable to the nonmoving party, the court must ultimately determine "whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Griggs v. Shamrock Bldg. Servs., Inc.*, 179 N.C. App. 543, 546, 634 S.E.2d 635, 637 (2006) (citation omitted). "The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an

4. A non-warranty deed was made on 1 September 2015 by and between Randy Acres and his spouse Soek Yie Phan.

essential element of his claim . . . ." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

¶ 18 A trial court's order on summary judgment is reviewed *de novo*. *Wilkerson v. Duke Univ.*, 229 N.C. App. 670, 673, 748 S.E.2d 154, 157 (2013). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

B. County's Power to Exercise Eminent Domain

¶ 19 "Private property can be taken by the exercise of the power of eminent domain only where the taking is for a public use." *Highway Comm. v. Equipment Co.*, 281 N.C. 459, 468, 189 S.E.2d 272, 278 (1972) (citation omitted). North Carolina General Statutes Chapter 40A, Article I, Section 3 authorizes counties to exercise the power of eminent domain for the construction of public water supplies and public sewage systems. N.C. Gen. Stat. § 40A-3(b)(4) (2021). "When land is appropriated under this power of eminent domain . . . , the [county] acquires an easement . . . in the land so taken, and the fee to the property remains in the landowner, who may subject the land to any use which is not inconsistent with its use for the purpose for which it is taken." *Proctor v. Highway Commission*, 230 N.C. 687, 691, 55 S.E.2d 479, 481 (1949).

¶ 20 A "taking" for purposes of the power of eminent domain occurs upon "entering upon private property for more than a momentary period, and, under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to . . . deprive [the owner] of all beneficial enjoyment thereof." *Penn v. Coastal Corp.*, 231 N.C. 481, 484, 57 S.E.2d 817, 819 (1950) (citation omitted); *see also City of Charlotte v. Combs*, 216 N.C. App. 258, 261, 719 S.E.2d 59, 62 (2011).

> Moreover, what is a taking of property within the due process clause of the Federal and State constitutions, . . . is not always clear, but so far as general rules are permissible of declaration on the subject, it may be said that there is a taking when the act involves an actual interference with, or disturbance of property rights, resulting in injuries which are not merely consequential or incidental.

Penn, 231 N.C. at 484-85, 57 S.E.2d at 819-20 (citation and quotation marks omitted); *see also Town of Apex v. Whitehurst*, 213 N.C. App. 579, 584, 712 S.E.2d 898, 902 (2011).

¶ 21 Black's Law Dictionary defines a "taking" as "[t]he government's actual or effective acquisition of private property . . . by . . . severely impairing its utility." *Taking*, Black's Law Dictionary (11th ed. 2019). "There is a taking of property when government action directly interferes with or substantially disturbs the owner's use and enjoyment of the property." *Id.* An entity with the power of eminent domain that takes possession of pre-existing infrastructure on private property always holds title to that portion taken and is never a trespasser. *Cf. Durham v. Wright*, 190 N.C. 568, 571-572, 130 S.E. 161, 163 (1925) ("[I]n the absence of any contract or contracts with [the] city in relation to the lands used or occupied by it for the purpose of . . . public works . . . , it shall be presumed that the said land has been granted to said city by the owner or owners thereof, and [the] city shall have good right and title thereto . . . ." (citation omitted)).

¶ 22 When the government takes private property for public use, just compensation must be paid. *Fisher v. Town of Nags Head*, 220 N.C. App. 478, 481, 725 S.E.2d 99, 103 (2012) (citation and quotation marks omitted). In the event a governing body effectuates a taking without first initiating a formal condemnation proceeding, an aggrieved property owner's only means of obtaining just compensation is through an action in inverse condemnation. N.C. Gen. Stat. § 40A-51(a) (2021). Inverse condemnation is "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Town of Apex v. Rubin*, 277 N.C. App. 328, 2021-NCCOA-187, ¶ 18 (emphasis omitted) (quoting *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 552, 809 S.E.2d 853, 861 (2018)).

¶ 23 Inverse condemnation is an aggrieved landowner's sole remedy for a government taking regardless of whether the government initiated the taking by a condemnation action. *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 573, 372 S.E.2d 742, 744 (1988) ("Summary judgment for defendant was appropriate not because of the statute of limitations but because defendant as a city had the power of eminent domain, and such power insulates it from trespass actions regardless of whether compensation was paid or proper procedures were used. The exclusive remedy for failure to compensate for a 'taking' is inverse condemnation under G.S. 40A-51.").

> Once the cause of action has occurred by the infliction of damage to the property, the taking is a *fait accompli*. This is true because the government *had the authority to invade the property rights of the*

> *landowner and to appropriate them to public use in the first instance*, and the owner had no right to abate the nuisance. *His only remedy is a single action for permanent damage to his property by reason of the taking.* The government has an easement to continue the obstruction permanently, and whether it will continue to maintain the obstruction, alter it, or remove it altogether is optional with the government.

Midgett v. N.C. State Highway Comm'n, 260 N.C. 241, 249, 132 S.E.2d 599, 607 (1963), *overruled in part on other grounds by Lea Co. v. North Carolina Bd. of Transp.*, 308 N.C. 603, 304 S.E.2d 164 (1983) (emphases added).

¶ 24 Section 40A-51(a) imposes a two-year limitations period for bringing an inverse condemnation action, running from the date of the alleged taking or the completion of construction of the taking, whichever is later. N.C. Gen. Stat. § 40A-51(a). Our Courts have likewise held that unless landowners "shall, at the time of the occupation of the said land, . . . apply for an assessment of said land, as provided . . . , within two years next after said land was taken, . . . they shall be forever barred from recovering said land, or having any assessment or compensation therefor[.]" *Wright*, 190 N.C. at 572, 130 S.E. at 163.

¶ 25 Here, the record shows the utility mains were installed along Defendants' Property more than a century ago and that the County began operating them more than two decades ago. Most recently, the County exercised its easement rights in 2012, when Defendants permitted the County to access the sewer and water lines for maintenance, which required the County to temporarily remove Defendants' original fence. By any of these measures, the time for Defendants to file an inverse condemnation action has expired.

¶ 26 This Court has previously decided a case determining the County's condemnation interest in the same sewer infrastructure at issue in this case. In *Central Carolina Developers, Inc. v. Moore Water & Sewer Auth.*, 148 N.C. App. 564, 559 S.E.2d 230 (2001), the County was using a pipe without any direct condemnation action having been filed or the recording of an easement on the property. *Id.* at 565-67, 559 S.E.2d at 231-32. A developer, who purchased the lot but was unable to build on it in 1998 due to the presence of the pipe, filed suit against its predecessor in interest and the County for trespass or alternatively inverse condemnation. *Id.* at 565, 559 S.E.2d at 231. The predecessor moved to dismiss

the complaint on the theory that the taking occurred when the pipe was installed prior to 1989, so the plaintiff's 1998 lawsuit was barred by the two-year limitations period for inverse condemnation. *Id.* at 565-66, 559 S.E.2d at 231. The trial court dismissed the plaintiff's complaint and this Court affirmed, holding the taking of the utility easement occurred sometime prior to 1989, when the sewer line was installed. *Id.* at 566-67, 559 S.E.2d at 231-32. The developer's suit, filed at least seven years after the limitations period had run, was therefore untimely. *Id.* at 567, 559 S.E.2d at 232.

¶ 27 Applicable case law supports the County's contention that it acquired title by taking the lines and utility easement when its predecessor in interest deeded the system to the County and the County began operating it in 1999.[5] *See Huntley v. Potter*, 255 N.C. 619, 631, 122 S.E.2d 681, 689 (1961) (holding a taking of sewer and water lines requiring compensation occurs when "the municipality . . . appropriates them and controls them as proprietor"); *Styers v. Gastonia*, 252 N.C. 572, 574, 114 S.E.2d 348, 350 (1960) (holding water lines installed by a developer were taken when they were incorporated into a city water system and "the city appropriated plaintiffs' property to its own use"); *Jackson v. City of Gastonia*, 246 N.C. 404, 408, 98 S.E.2d 444, 447 (1957) (taking of sewer and water line occurs when "the city has taken over, used and controlled said lines as if installed by it originally" (quotation marks omitted)); *Central Carolina Developers, Inc.*, 148 N.C. App. at 567, 559 S.E.2d at 232 ("Therefore, any 'taking' would have occurred when the sewer pipe was installed across Lot 253.").

¶ 28 Defendants contend the existence of a city sewer line on private property does not confer an easement, citing *Juhan v. Cozart*, 102 N.C. App. 666, 403 S.E.2d 589 (1991). In *Juhan*, the defendants sold a home to the plaintiffs with a warranty against encumbrances, not realizing an unplatted sewer line ran beneath the house. *Id.* at 668-69, 403 S.E.2d at 590-91. This Court affirmed the trial court's order dismissing the plaintiffs' complaint, reasoning that the sewer line was not, by itself, evidence

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5. Defendants' contention that the County waived this argument is contrary to the record before us. The County's complaint specifically requested a judgment:

> declaring that the County enjoys the rights of ownership, pursuant to its power of eminent domain, of the manhole, water and sewer mains and the easements. . . . [and] that the exclusive remedy of Defendants to any claims for compensation for the taking . . . is an action in inverse condemnation, which is time-barred[.]

The County argued the same in its brief submitted to the trial court.

of an easement encumbering the property. *Id.* at 672, 403 S.E.2d at 592-93. The holding in *Juhan* was limited in that the parties presented no evidence concerning whether the Town of Fuquay-Varina used the pipes or claimed any interest in an easement over the land. *Id.* at 670, 403 S.E.2d at 591.

¶ 29 The record here unequivocally reveals the County has continuously used and operated the lines on the Property for a public purpose since 1999, and the County asserts it maintains ownership of the lines and an attendant easement. *Juhan*'s limited holding is thus inapposite. To the contrary, the taking of the lines beneath the Property has necessarily vested in the County title to an easement along the surface of the Property to service, maintain, and repair the lines. *See Central Carolina Developers, Inc.*, 148 N.C. App. at 567-68, 559 S.E.2d at 232; *Sanitary District v. Canoy*, 252 N.C. 749, 752, 114 S.E.2d 577, 580 (1960) ("[R]espondents retained the fee and have a right to use the property so long as such use does not interfere with the proper use by the petitioner for the maintenance and operation of its sewer lines.").

¶ 30 So, even in the absence of a recorded deed, as a matter of law the County holds title to the utility mains under the Property, which includes title to the easement for their maintenance and repair. We conclude the County has established it holds title to the lines and easement at issue and that the trial court erred in awarding summary judgment to Defendants.

¶ 31 The County sought from the trial court partial summary judgment on the issue of the easement and asked "to have a trial as to the reasonable commercial use and enjoyment to establish the width of the easement." The necessary scope of the easement, having been reserved for trial, is therefore not before us.

III. CONCLUSION

¶ 32 For the foregoing reasons, we reverse the trial court's grant of summary judgment in favor of Defendants and remand the matter for: (1) entry of a partial summary judgment order declaring the County owns title to the lines and easement extending along Defendants' property; and (2) a proceeding on the size and scope of the easement and any remaining issues raised by the pleadings.

REVERSED AND REMANDED.

Judges ARROWOOD and JACKSON concur.

MELCHOR ZAPATA DOMINGUEZ, EMPLOYEE, PLAINTIFF
v.
FRANCISCO DOMINGUEZ MASONRY, INC., EMPLOYER, BUILDERS MUTUAL INSURANCE CO., CARRIER, DEFENDANTS

No. COA21-641

Filed 5 July 2022

Workers' Compensation—jurisdiction—timeliness of filing—last payment of medical compensation—reissue of six-year-old missing check

An employee's claim for additional medical compensation for chronic knee conditions that arose from his work as a brick mason was not time-barred under N.C.G.S. § 97-25.1 where he filed the claim within the statute of limitations period after receiving a replacement indemnity check, which was reissued six years after the original check because the employee stated that he had never received it. Under the plain meaning of the statute, "last payment" is not limited to timely payments only, and includes subsequent corrective payments such as the reissued check in this case.

Judge TYSON dissenting.

Appeal by defendants from opinion and award entered 10 June 2021 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 April 2022.

The Bricio Law Firm, P.L.L.C., by Francisco J. Bricio, for plaintiff-appellee.

Lewis & Roberts, PLLC, by Jeffrey A. Misenheimer and Brian R. Taylor, for defendants-appellants.

ZACHARY, Judge.

¶ 1 Francisco Dominguez Masonry, Inc., and Builders Mutual Insurance Co. ("Builders Mutual" and collectively, "Defendants") appeal from an Opinion and Award of the North Carolina Industrial Commission granting Plaintiff Melchor Zapata Dominguez's claim for additional medical compensation for his right knee conditions. After careful review, we affirm the Commission's Opinion and Award.

Background

¶ 2 Plaintiff began his employment as a brick mason with Francisco Dominguez Masonry, Inc., in 2004. His job required him to regularly "bend his knees, squat, kneel and do heavy lifting." On 20 December 2004, Plaintiff began experiencing pain and swelling in his right knee, and on 22 February 2005, he was diagnosed with two occupational diseases of his right knee.

¶ 3 On 31 January 2005, Defendants began providing medical compensation to Plaintiff. By Opinion and Award entered 14 May 2007, the Full Commission awarded Plaintiff treatment for his right knee conditions and indemnity compensation for his medical expenses. Defendants issued indemnity compensation for Plaintiff's right knee conditions through 13 December 2013 and medical compensation for Plaintiff's right knee conditions through 5 June 2015.

¶ 4 Upon determining that an indemnity check for $329.24 payable to Plaintiff and dated 14 July 2011 remained uncashed and outstanding, Builders Mutual contacted Plaintiff by letter dated 18 August 2017 to inquire whether "these funds [were] still due." Builders Mutual further informed Plaintiff that if he did not reply by 18 October 2017, the unclaimed funds would be escheated to the State of North Carolina. On or about 28 August 2017, Plaintiff requested via the enclosed response form that Builders Mutual issue a replacement check because he never received the original; Builders Mutual issued a replacement check dated 19 September 2017.

¶ 5 On 12 February 2018, Plaintiff filed a Form 33 requesting a hearing on the issue of additional medical compensation for his right knee conditions. Defendants denied treatment and moved to dismiss the claim, asserting that Plaintiff's request was time-barred by N.C. Gen. Stat. §§ 97-25.1 and 97-47. In an interlocutory Opinion and Award entered 26 September 2018, the deputy commissioner denied Defendants' motion to dismiss, concluding that the 19 September 2017 replacement check constituted a payment pursuant to § 97-25.1, which rendered Plaintiff's claim for additional medical compensation timely.

¶ 6 On 17 December 2019, the deputy commissioner issued an Opinion and Award ordering Defendants to authorize and pay for the ongoing medical treatment of Plaintiff's compensable right knee conditions. Defendants appealed to the Full Commission, which affirmed the deputy commissioner's decision by Opinion and Award entered 10 June 2021. Defendants timely appealed from the Full Commission's Opinion and Award.

Discussion

¶ 7 On appeal, Defendants argue that the Full Commission erred by concluding that Plaintiff's claim for additional medical compensation was not time-barred pursuant to N.C. Gen. Stat. § 97-25.1 (2021).

I. Standard of Review

¶ 8 "The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this 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). "[O]n 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.*

¶ 9 The Commission's findings of fact "are conclusive upon appeal when supported by competent evidence, even when there is evidence to support a finding to the contrary. . . . Where no exception is taken to a finding of fact, the finding is presumed to be supported by competent evidence and is binding on appeal." *Workman v. Rutherford Elec. Membership Corp.*, 170 N.C. App. 481, 485–86, 613 S.E.2d 243, 247 (2005) (citation omitted). The Commission's conclusions of law, however, are reviewed de novo. W*alker v. K&W Cafeterias*, 375 N.C. 254, 258, 846 S.E.2d 679, 682 (2020).

II. Analysis

¶ 10 Defendants maintain that the Full Commission erred by determining that N.C. Gen. Stat. § 97-25.1 did not bar Plaintiff's claim for additional medical compensation, in that "the replacement check d[id] not constitute payment of compensation" pursuant to N.C. Gen. Stat. § 97-25.1, and therefore its issuance "did not 'restart' the limitations period[.]" We disagree.

¶ 11 Section 97-25.1 provides, in relevant part:

> *The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation* unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation.

N.C. Gen. Stat. § 97-25.1 (emphasis added).

¶ 12 In the present case, the Commission made the following unchallenged findings of fact:

> 4. The most recent payment that [Builders Mutual] has made for medical treatment for Plaintiff's compensable right knee conditions was on June 5, 2015. Defendants also paid weekly temporary total disability ("TTD") compensation to Plaintiff in this claim, beginning with his right knee surgery on February 1, 2010.
>
> . . . .
>
> 6. The latest period for which Defendants paid Plaintiff TTD compensation was for November 28, 2013 through December 4, 2013, via a check dated December 3, 2013.
>
> 7. On August 18, 2017, [Builders Mutual] sent Plaintiff a letter stating that [Builders Mutual]'s review of its records revealed that a TTD check dated July 14, 2011 had never been cashed and was still outstanding. The letter asked Plaintiff to review his records and determine "if these funds are still due." On or about August 28, 2017, Plaintiff returned the letter to [Builders Mutual], checking the box for "The original check was never received; please reissue."
>
> 8. On September 19, 2017, [Builders Mutual] voided the July 14, 2011 TTD check and issued a new check to Plaintiff in the amount of $329.24, covering TTD compensation for the period from July 11 through July 17, 2011.
>
> . . . .
>
> 11. On February 12, 2018, Plaintiff filed the instant Form 33 *Request that Claim Be Assigned for Hearing*, seeking additional medical treatment for his right knee conditions.

¶ 13 Plaintiff contends that Defendants' last payment of medical or indemnity compensation was 19 September 2017—less than two years before Plaintiff submitted his 12 February 2018 claim for additional medical compensation—and that his claim was thus timely. By contrast, Defendants maintain that the last payment of medical or indemnity compensation was 5 June 2015, and that Plaintiff's 12 February

2018 application for additional medical compensation was therefore time-barred, in that the two-year limitations period ended in 2017. Accordingly, the question before us is whether a corrective payment constitutes a "last payment" for purposes of the N.C. Gen. Stat. § 97-25.1 limitations period.

¶ 14 When appellate courts engage in statutory interpretation, our primary task is "to ensure that the legislative intent is accomplished. The best indicia of legislative purpose are the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 88–89, 484 S.E.2d 566, 569 (1997) (citations and internal quotation marks omitted). "[T]he workers' compensation statutes should be liberally construed whenever possible to avoid denying benefits based on narrow interpretations of its provisions . . . ." *Robertson v. Hagood Homes, Inc.*, 160 N.C. App. 137, 142, 584 S.E.2d 871, 874 (2003) (citation and internal quotation marks omitted).

¶ 15 "Statutory interpretation begins by examining the plain and ordinary meanings of words in the statute. 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." *Key Risk Ins. Co. v. Peck*, 252 N.C. App. 127, 130, 797 S.E.2d 354, 356 (2017) (citations and internal quotation marks omitted). An appellate court "should avoid adding a provision to a statute that has been omitted, which it believes ought to have been embraced[.]" *Robertson*, 160 N.C. App. at 142, 584 S.E.2d at 874 (citation and internal quotation marks omitted).

¶ 16 Here, using the "plain and ordinary meaning" of the statute's terms, *Key Risk Ins. Co.*, 252 N.C. App. at 130, 797 S.E.2d at 356, Plaintiff's right to additional medical compensation had not yet terminated when he filed his Form 33. Plaintiff filed his claim for additional medical compensation on 12 February 2018, less than a year after he received the last payment of compensation from Defendants, via check dated 19 September 2017. In that N.C. Gen. Stat. § 97-25.1 provides that an employee's "right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation" and Plaintiff sought compensation less than a year after Defendants' last indemnity payment, the statute did not bar Plaintiff from seeking additional medical compensation. N.C. Gen. Stat. § 97-25.1.

¶ 17 Moreover, while "appellate courts may not expand upon the ordinary meaning of the terms used by the legislature" in a statute, "the workers' compensation statutes should be liberally construed whenever possible to avoid denying benefits based on narrow interpretations of its

provisions[.]" *Robertson*, 160 N.C. App. at 142, 584 S.E.2d at 874 (citation and internal quotation marks omitted). To interpret "last payment" as including only timely payments, as Defendants contend, would in effect "add[ ] a provision to a statute that has been omitted[.]" *Id.* (citation and internal quotation marks omitted). Furthermore, such an interpretation runs contrary to the plain meaning of the statute. Thus, construing N.C. Gen. Stat. § 97-25.1 liberally, the two-year limitation period begins when an employer provides (1) indemnity or medical compensation (2) for the last time. N.C. Gen. Stat. § 97-25.1. Accordingly, Plaintiff had up to two years from Defendants' last indemnity payment on 19 September 2017 to seek additional medical compensation.

¶ 18 The parties cite no North Carolina case that directly addresses the issue of whether an employer's subsequent corrective payment qualifies as an "employer's last payment" for the purposes of N.C. Gen. Stat. § 97-25.1. However, this Court touched on this issue in dicta in *Lewis v. Transit Management of Charlotte*, 250 N.C. App. 619, 792 S.E.2d 890 (2016), *petitions for disc. review withdrawn*, 369 N.C. 750, 799 S.E.2d 623 (2017). As our dissenting colleague acknowledges, the facts of *Lewis* differ from those of the present case. In *Lewis*, the plaintiff argued that the statute of limitations would begin to run upon his hypothetical *future* receipt of compensation from the defendant. 250 N.C. App. at 627, 792 S.E.2d at 896. The *Lewis* Court disagreed, concluding that the defendant's *actual* last payment dictated when the statute of limitations began to run. *Id.* The Court also noted that N.C. Gen. Stat. § 97-25.1 provides no "distinction between medical and indemnity payments in the normal course of a workers' compensation case and subsequent corrective payments[,]" and left the matter of whether a subsequent corrective payment constitutes a "last payment" for purposes of the limitations period for the legislature to address. *Id.* at 628, 792 S.E.2d at 896.

¶ 19 However, in the six years following *Lewis*'s invitation for clarification of this issue, the General Assembly has neither modified the statutory language, nor otherwise addressed the effect of a subsequent corrective payment on the two-year limitations period. *See* N.C. Gen. Stat. § 97-25.1. It follows, then, that the General Assembly is satisfied with the existing language of § 97-25.1, which provides no "distinction between medical and indemnity payments in the normal course of a workers' compensation case and subsequent corrective payments[.]" *Lewis*, 250 N.C. App. at 628, 792 S.E.2d at 896. Absent evidence to the contrary, we presume this is consonant with the intent of the General Assembly. As it currently stands, N.C. Gen. Stat. § 97-25.1 plainly requires that the two-year limitations period begin upon the actual last payment

by the employer—regardless of whether it was timely submitted or sent as a subsequent corrective payment. N.C. Gen. Stat. § 97-25.1.

¶ 20 Finally, to conclude that Defendants' last indemnity payment to Plaintiff did not constitute a "last payment" pursuant to N.C. Gen. Stat. § 97-25.1 would be tantamount to "adding a provision to a statute that has been omitted" by the General Assembly. *Robertson*, 160 N.C. App. at 142, 584 S.E.2d at 874 (citation and internal quotation marks omitted). Indeed, to construe "last payment" as the final payment of medical or indemnity compensation—*except* when the payment is corrective—would create a statutory exception that the General Assembly declined to provide. Paradoxically, this interpretation presents a textbook example of the very judicial "usurpation" of legislative prerogative feared by our dissenting colleague. *Dissent* ¶ 38. And as our dissenting colleague aptly notes: "It is for the legislature, and not the courts, to establish statutes of limitations, statutes of repose, and any exceptions to those rules." *Id.* (citation omitted).

Conclusion

¶ 21 "[T]he language of [N.C. Gen. Stat. § 97-25.1] is clear and unambiguous," and must be given "its plain and definite meaning." *Key Risk Ins. Co.*, 252 N.C. App. at 130, 797 S.E.2d at 356 (citation omitted). Consequently, because Defendants' reissued indemnity check constitutes the "last payment of . . . indemnity compensation[,]" N.C. Gen. Stat. § 97-25.1, the Full Commission did not err by concluding that Plaintiff's claim was not time-barred by N.C. Gen. Stat. § 97-25.1, or by granting Plaintiff's claim for additional medical compensation for his right knee conditions.

¶ 22 For the foregoing reasons, the Full Commission's Opinion and Award is affirmed.

AFFIRMED.

Chief Judge STROUD concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

¶ 23 The majority's opinion fails to apply the intent and plain language of N.C. Gen. Stat. § 97-25.1 (2021). Their improper and deferential standard of review and overreach is contrary to our rules of statutory

construction, binding precedents, and the stated purpose of the Workers' Compensation Act. I vote to reverse the Commission's order and to remand with instructions to enter an order dismissing Plaintiff's claim. I respectfully dissent.

I. Standard of Review

¶ 24 "[W]hen reviewing findings of fact by the Commission on which the scope of its jurisdiction depends, we apply a de novo standard of review." *Cunningham v. Goodyear Tire & Rubber Co.*, 381 N.C. 10, 16, 871 S.E.2d 724, 729, 2022-NCSC-46, ¶ 19 (2022) (citation omitted).

¶ 25 The majority opinion's deference to the unsupported conclusions of law by the Commission is erroneous. Our Supreme Court has long held:

> When a defendant-employer challenges the jurisdiction of the Industrial Commission, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the [reviewing court], but the [reviewing court] has the power, and *it is its duty, on appeal, to consider all the evidence in the record, and to make therefrom independent findings of jurisdictional facts.* This is necessary to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment.

Richards v. Nationwide Homes, 263 N.C. 295, 303-04, 139 S.E.2d 645, 651 (1965) (citations and internal quotation marks omitted) (emphasis supplied).

II. N.C. Gen. Stat. § 97-25.1

¶ 26 Defendants argue the previously paid and re-issued 19 September 2017 check constituted payment pursuant to N.C. Gen. Stat. § 97-25.1. They assert the check was not new compensation, but rather to correct a prior timely issued, but uncashed, payment.

¶ 27 When interpreting the parties' arguments, we must first determine the meaning of the "last payment of medical or indemnity compensation" in N.C. Gen. Stat. § 97-25.1. In reviewing the statutory definition and application of "last payment" several well-established principles of statutory construction apply.

A. Canons of Statutory Construction

¶ 28 North Carolina Appellate Courts have previously articulated standards and precedents to guide our analysis. "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) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). "The best indicia of that intent are the [plain] language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted).

¶ 29 "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). Illogical and strained "[i]nterpretations 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) (internal quotation marks, citations, and ellipses omitted).

¶ 30 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)).

B. "Last Payment"

¶ 31 Plaintiff argues the plain meaning of "last payment" in the statute constitutes the actual date of his receipt of last payment. Defendants argue this assertion is contrary to the clear intent of N.C. Gen. Stat. § 97-25.1, and cite *Lewis v. Transit Mgmt. of Charlotte*, 250 N.C. App. 619, 792 S.E.2d 890 (2016) and *Harrison v. Gemma Power Sys., LLC*, 234 N.C. App. 664, 763 S.E.2d 17, 2014 WL 2993853 (2014) (unpublished).

¶ 32 While not binding precedent, this Court can consider *Harrison*, an unpublished opinion as persuasive authority. *Zurosky v. Shaffer*, 236 N.C. App. 219, 234, 763 S.E.2d 755, 764 (2014) ("[A]n unpublished opinion may be used as persuasive authority at the appellate level if the case is properly submitted and discussed and there is no published case on point.").

¶ 33 In *Harrison*, this Court examined the issue of whether "the two-year statute of limitations period found in N.C. Gen. Stat. § 97-25.1 has not yet begun and will not begin until [the p]laintiff receives a payment from [the d]efendant for indemnity benefits." *Harrison*, 2014 WL 2993853, at *4. This Court unanimously rejected this argument, holding:

> First, [the p]laintiff's argument ignores the plain language of the statute. . . . In context, the word "last" does not refer to a hypothetical future payment that [the p]laintiff may be entitled to receive after presenting a claim to the Industrial Commission. On its face, the "last" payment refers to the most recent payment of medical or indemnity benefits that has actually been paid. Second, [the p]laintiff's argument assumes the certainty of a future indemnity payment before the right to such payment has been decided by the Industrial Commission. Third, accepting Plaintiff's interpretation of the statute would allow claimants seeking additional medical compensation *to obviate the statute of limitations* in any case by asserting a valid claim for indemnity benefits alongside a claim for additional medical compensation. *Such an expansive interpretation ignores the clear intent of our legislature to limit claims for additional medical compensation to a specified time period.*

Id. (citation omitted) (emphasis supplied).

¶ 34 In *Lewis*, a binding precedent, our Court found the analysis in *Harrison* was persuasive and adopted it. *Lewis*, 250 N.C. App. at 626, 792 S.E.2d at 895. The plaintiffs in *Lewis* brought claims for underpayment of temporary total disability during the period they were temporarily totally disabled and also for additional medical treatment. *Id.* at 622, 792 S.E.2d at 893.

¶ 35 This Court held, while the plaintiff was owed a payment of $714.90, this claim was time-barred by the two-year statute of limitations in N.C. Gen. Stat. § 97-25.1. *Id.* at 628, 792 S.E.2d at 896. Unlike the facts here, the payment at issue in *Lewis* had not been made. *Id.* This Court raised the issue of "whether a payment to correct an earlier error in medical or indemnity payments to make an employee whole restarts the limitations period in N.C. Gen. Stat. § 97-25.1." *Id.* at 627, 792 S.E.2d at 896.

¶ 36 Applying *Harrison*, this Court in *Lewis* portrayed the obvious and obnoxious consequences of Plaintiff's argument, but found it unnecessary to anticipate and resolve this issue because the "last payment" at issue there had not been previously and actually paid:

> We further agree with the Commission that *plaintiff's interpretation could result in increased litigation in cases where honest miscalculations resulting in*

> *indemnity benefits could lead to a reset of the two-year limitations period and additional liability in cases where the last medical or indemnity payment was otherwise made years earlier*. Yet, there is no such distinction between medical and indemnity payments in the normal course of a workers' compensation case and subsequent corrective payments in the statute. Since we need not decide the issue in the present case because the corrective payment had not yet been paid to restart the limitations period, we simply note that N.C. Gen. Stat. § 97-25.1 is not entirely clear as to how such corrective payments are to be treated and leave the matter for the legislature to address.

Id. at 628, 792 S.E.2d at 896 (emphasis supplied).

¶ 37 Unlike the facts in *Lewis*, the *sole* issue before this Court is whether a subsequent remedial or reissued payment previously made restarts the statute of limitations in N.C. Gen. Stat. § 97-25.1. Plaintiff does not challenge the evidence the prior payment was actually made by Defendants. Our Supreme Court has stated the legislative intent and purpose of adopting the Workers Compensation Act, "is not only to provide a swift and certain remedy to an injured workman, but also to *insure a limited and determinate liability for employers*." *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966) (citation omitted) (emphasis supplied).

¶ 38 The majority's opinion criticizes the General Assembly for "not answering a call" in a prior opinion for an amendment to N.C. Gen. Stat. § 97-25.1. This assertion is a usurpation and wholly without merit:

> [I]t is for the legislature, and not the courts, to establish statutes of limitations, statutes of repose, and any exceptions to those rules. It is not the role of the courts to create exceptions to the laws established by the legislature where the intent of the legislature is made manifestly clear on the face of the statute.

Goodman v. Holmes & McLaurin Attorneys at Law, 192 N.C. App. 467, 475-76, 665 S.E.2d 526, 532 (2008) (citation omitted). Contrary to *Goodman*, the majority's opinion purports to add a judicially-created, but unlawful, exception to the clear legislatively established statute of limitations to now revive a claim originating seventeen years ago in 2005. As written, the majority's opinion's clear effect is *to obliterate any*

statute of limitations delineated in N.C. Gen. Stat. § 97-25.1 by a tendered and undisputed prior payment. This purported attempt is outside of this Court's authority to modify or impose. *Goodman*, 192 N.C. App. at 475, 665 S.E.2d at 532. ("[I]t is for the legislature, and *not the courts*, to establish statutes of limitations, statutes of repose, and any exceptions to those rules.") (emphasis supplied). This burden rests upon the plaintiff to assert a timely claim.

III. Conclusion

¶ 39 The re-issuance of previously paid funds to remedy those not cashed by Plaintiff during the period of disability does not toll or restart the statute of limitations in N.C. Gen. Stat. § 97-25.1. Any notion otherwise is contrary to the stated intent and purpose of the Workers Compensation Act. *See* N.C. Gen. Stat. §97-25.

¶ 40 The majority's opinion also ignores the purpose of the Workers Compensation Act "to insure a limited and determinate liability for employers." *Barnhardt*, 266 N.C. at 427, 146 S.E.2d at 484. The majority's opinion allows a Plaintiff to re-open a seventeen-year-old claim, after undisputed evidence shows Defendants audited and merely re-issued a previously paid check. The order of the Full Commission is properly reversed, and the cause remanded with instructions for the Commission to enter an order dismissing Plaintiff's claim. I respectfully dissent.

DRUM v. DRUM

[284 N.C. App. 272, 2022-NCCOA-448]

IRENE DRUM, PLAINTIFF
v.
STEPHANIE DRUM AND BILLY JOE HINSON, DEFENDANTS

No. COA22-78

Filed 5 July 2022

1. Child Custody and Support—grandparent—standing to seek custody

A grandmother had standing under N.C.G.S. § 50-13.1(a) to file an action seeking custody of her minor granddaughter, whom she had raised for eight years since the child was a baby, where she intended to show that the child's father was either unfit or had acted inconsistently with his constitutionally protected status as a parent.

2. Child Custody and Support—custody—constitutionally protected parental status—voluntarily ceding custody to nonparent

In a custody dispute between a child's maternal grandmother (plaintiff) and father (defendant), the trial court properly awarded primary physical custody to plaintiff where the court's findings—supported by clear and convincing evidence—showed that defendant acted inconsistently with his constitutionally protected status as a parent. Specifically, the court found that, because the child's mother frequently stayed away for extended periods due to substance abuse, plaintiff had been the child's primary caretaker for most of the child's life; defendant knew his child was in plaintiff's care because of the mother's drug use and criminal issues, but took no steps to obtain custody of the child; defendant consistently failed to pay his child support obligation in full; and defendant rarely visited the child or otherwise made any effort to exercise his parental rights until plaintiff filed the custody action.

Appeal by defendant from judgment entered 7 July 2021 by Judge Robert A. Mullinax, Jr. in Catawba County District Court. Heard in the Court of Appeals 8 June 2022.

King Law Offices, PLLC, by Patrick W. Keeley, for plaintiff-appellee.

LeCroy Law Firm, PLLC, by M. Alan LeCroy, for defendant-appellant Billy Joe Hinson.

TYSON, Judge.

¶ 1 Billy Joe Hinson ("Defendant") appeals from a final judgment awarding Irene Drum ("Plaintiff") primary physical custody of the minor child, A.V.D, entered 7 July 2021. *See* N.C. R. App. P. 42 (Initials used to protect the identity of minor child). We affirm.

I. Background

¶ 2 Defendant is the biological father of A.V.D. born 20 January 2014. Stephanie Drum ("Stephanie") is the biological mother of A.V.D. but is not a party in this appeal. Defendant and Stephanie never married. Plaintiff is A.V.D.'s maternal grandmother. A.V.D. has lived with Plaintiff since she was between six and eight months old.

¶ 3 Defendant was present at A.V.D.'s birth. A.V.D.'s birth certificate is not included in the record on appeal. Defendant often visited with Stephanie and A.V.D. during the first six to eight months of A.V.D.'s life. Those visits became less frequent when A.V.D. and Stephanie moved in with Plaintiff.

¶ 4 Stephanie abuses illegal substances and has been absent for extended periods of A.V.D.'s life. Plaintiff has served as A.V.D.'s primary caretaker and parental figure for most of her life. Along with Plaintiff's ex-husband, they have fed A.V.D., kept her on schedule, taken her to and picked her up from school, helped her with homework, and taken her on vacations. Plaintiff's ex-husband provides $800.00 per month to help Plaintiff support A.V.D.

¶ 5 Defendant is a truck driver who travels the road most days during the week and has driven for most of A.V.D.'s life. Defendant has seen A.V.D. sporadically throughout her life. Defendant has never sought overnight visits with her. He accumulated over $10,000.00 in arrears of ordered child support. Defendant was incarcerated on one occasion related to those arrears and lives with his parents to help ensure his ability to provide support. Defendant provides Plaintiff $660.00 per month in A.V.D.'s child support.

¶ 6 Child Protective Services ("CPS") contacted Defendant in 2018 about issues with and concerns about A.V.D. relating to Stephanie's substance abuse. Defendant testified he did "stay back and see what happened" during CPS' involvement, because he knew A.V.D. was being "taken care of." Defendant testified and admitted he did not ask the court for overnight visitation with or custody of A.V.D. until these proceedings commenced.

¶ 7 Plaintiff filed a Complaint for Child Custody on 13 August 2019. An *ex parte* order for immediate temporary custody of A.V.D. was granted that day. Plaintiff was granted temporary legal and physical custody of A.V.D. on 22 October 2019, and Defendant was allowed visitation. An additional order granting Plaintiff temporary legal and physical custody, with Defendant again allowed visitation, was entered 27 January 2020.

¶ 8 On 7 July 2021, the trial court entered its Order of Child Custody. The trial court found Stephanie is not a fit or proper person for the care, custody, or control of A.V.D., and the trial court prohibited visitation. Since these proceedings have commenced, Defendant has exercised his visitation and brought A.V.D. gifts. The trial court granted joint legal custody between Plaintiff and Defendant, and primary physical custody to the Plaintiff, again allowing Defendant visitation. Defendant appeals.

II. Jurisdiction

¶ 9 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2021).

III. Issues

¶ 10 The issues before this Court are: (1) did the Plaintiff have standing to obtain custody of the minor child; and, (2) whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence to support the conclusions of law that Defendant has acted inconsistently with his constitutionally-protected status and rights as a parent.

IV. Analysis

¶ 11 The Supreme Court has stated the parental rights axiom: "The rights to conceive and to raise one's children have been deemed essential, basic civil rights of man, and [r]ights far more precious . . . than property rights. It is cardinal . . . the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Stanley v. Illinois*, 405 U.S. 645, 651, 31 L. Ed. 2d 551, 558-559 (1972) (citations and internal quotation marks omitted).

¶ 12 "North Carolina's recognition of the paramount right of parents to custody, care, and nurture of their children antedates the constitutional protections set forth in *Stanley*." *Petersen v. Rogers*, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994).

A. Standing

¶ 13 **[1]** Defendant argues the trial court did not have subject matter jurisdiction to hear the case because Plaintiff lacked standing to seek custody of A.V.D.

1. Standard of Review

¶ 14 Standing is required in order to maintain subject matter jurisdiction. *Wellons v. White*, 229 N.C. App. 164, 176, 748 S.E.2d 709, 718 (2013). The Court reviews a plaintiff's standing to bring a claim *de novo*. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).

2. N.C. Gen. Stat. § 50-13.1(a)

¶ 15 Under N.C. Gen. Stat. § 50-13.1(a), "[a]ny parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child[.]" N.C. Gen. Stat. § 50-13.1(a) (2021). "To receive custody under N.C. Gen. Stat. § 50-13.1(a), grandparents must prove parental unfitness." *Wellons*, 229 N.C. App. at 174, 748 S.E.2d at 717 (citation omitted).

¶ 16 Plaintiff is the maternal grandmother of A.V.D. and clearly has standing to institute an action for custody of her. N.C. Gen. Stat. § 50-13.1(a). Plaintiff has raised A.V.D. for the past eight years since she was between six and eight months old. Defendant asserts Plaintiff must show unfitness, or the Defendant acted inconsistently with his constitutionally-protected status in order to gain custody. The Plaintiff has standing to bring the action for custody of A.V.D., yet must still show Defendant's violation of his constitutionally-protected status. *Id.*

B. Constitutionally-Protected Parental Status

¶ 17 **[2]** Defendant argues the trial court's determination he had acted inconsistently with his constitutionally-protected parental status is not supported by clear and convincing evidence. Defendant also argues the trial court's findings of fact and conclusions of law do not support its determination Plaintiff should be awarded primary physical custody.

1. Standard of Review

¶ 18 "[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citation omitted). "[T]he trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Owenby*

v. Young, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003). "Whether those findings of fact support the trial court's conclusions of law is reviewable *de novo*." *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008) (citation omitted).

2. Conduct Inconsistent with Protected Parental Status

¶ 19 "The Supreme Court of North Carolina has held, 'a natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status.' " *In re A.W.*, 280 N.C. App. 162, 165-66, 2021-NCCOA-586, ¶16, 867 S.E.2d 235, 239 (2021) (quoting *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005)).

¶ 20 "[G]randparents have standing to intervene for custody when they allege acts that would constitute [parental] unfitness, neglect [or] abandonment, or any other type of conduct so egregious as to result in [the parent's] forfeiture of his [or her] constitutionally protected status as a parent." *Wellons*, 229 N.C. App. at 176, 748 S.E.2d at 718-19 (citation and internal quotation marks omitted).

¶ 21 "[Grandparents] must allege specific facts showing parental unfitness, such as: (i) the parents have not provided safe and suitable housing for their children; (ii) the parents have not contributed to child support; (iii) the parents have not been involved in the children's upbringing; and (iv) the children are at substantial risk of harm from the parents." *Id.*, 748 S.E.2d at 719 (citation and internal quotation marks omitted). Plaintiff has already made that required showing of parental unfitness in relation to Stephanie, A.V.D.'s mother, who did not appeal.

¶ 22 Defendant contends the following Findings of Fact that he ceded care of A.V.D. to Plaintiff are erroneous and unsupported by clear and convincing evidence:

> 10. That the minor child resided with [Stephanie] at a Mayberry Lane address, located adjacent to Lake Norman, for the first 6-8 months of her life. During that first 6 to 8 months of the minor child's life, the Plaintiff resided in the Balls Creek community but did assist [Stephanie] in feeding and bathing the minor child as well as insuring she was current on immunizations and received appropriate medical care.
>
> 11. That after some 6 to 8 months, the Plaintiff moved into the Mayberry Lane residence with the minor

child and [Stephanie]. She observed [Stephanie] abusing [X]anax and medication for ADHD.

. . .

13. That beginning from the time she moved into the Mayberry Lane residence, the Plaintiff has served as the primary caretaker for the minor child. She served in that capacity in spite of the fact that for the overwhelming majority of the minor child's life, [Stephanie] has been unemployed.

. . .

43. That for the first 6 to 8 months of the minor child's life, [Defendant] visited the child's residence located on Mayberry Lane. His visits ceased when the Plaintiff moved into that residence. He did visit with the child some at his home which has a bouncy contraption, as well as [at] Concord Mills Mall. Those visits were coordinated between the Plaintiff and . . . Defendant's mother on an almost monthly basis.

44. That . . . Defendant acknowledged in lieu of providing constant provision and care for his daughter that he had "been a truck driver most of her life."

. . .

61. That . . . Defendant has failed to provide sufficient explanation for his absence in parenting his daughter.

. . .

62. That the Court finds, by clear, cogent and convincing evidence that that absence of . . . Defendant represents a relinquishment to the Plaintiff of the duties and responsibilities of parenthood such that . . . Defendant has waived his constitutionally protected status as biological father to the minor child.

. . .

64. That the evidence has been overwhelming that the Plaintiff has, without exception, underwent the heavy lifting of parenting the minor child, including providing her with food, clothing and ensuring her physical, spiritual and mental development for the great majority of the child's life.

¶ 23 Defendant argues he did not abandon or cede custody, care, and control of A.V.D. to Plaintiff. He contends he reasonably believed the biological mother was providing primary care. He argues he was never made aware that Plaintiff, and not Stephanie, was providing A.V.D.'s primary care.

¶ 24 Our Supreme Court stated, "if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (citations omitted). That Court later stated, "a period of voluntary nonparent custody, may constitute conduct inconsistent with the protected status of natural parents." *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 535 (1997). "[T]here must be some conduct on [the natural parents] part which evinces a settled purpose to forego all parental duties. But merely permitting the child to remain for a time undisturbed in the care of others is not such an abandonment." *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608 (internal quotation marks and citations omitted).

¶ 25 Defendant has acted inconsistently with his constitutionally-protected status as a parent. His contact with A.V.D. was sporadic and minimal between the time she went to live with Plaintiff until these proceedings began. Defendant offers little to no evidence to controvert the trial court's findings on this issue. The fact he did not know or was ignorant that Plaintiff was the primary caregiver and raising A.V.D. is a clear withholding of his "presence, his love, his care, the opportunity to display filial affection, and wilfully neglect[ed] to lend support and maintenance." *Id.* Plaintiff performed the daily and brunt work of raising A.V.D., while Stephanie absented herself and abused illegal substances. Defendant lived his life on the road without continuous regard for or checking in on A.V.D.'s wellbeing.

¶ 26 Defendant voluntarily left A.V.D. in the care of her biological mother and Plaintiff, he never showed any interest in extended visitation or gaining custody of her for nearly five years until 2019 when Plaintiff began formal proceedings to obtain custody.

¶ 27 Our Supreme Court in *Price* concluded this voluntary and continuous period of custody with Plaintiff with no specified end, is conduct that is inconsistent with the constitutionally-protected status of natural parents. Clear and convincing evidence shows Defendant knowingly ceded daily care and support of A.V.D. to the biological mother, and in reality, to Plaintiff. Defendant failed to check on A.V.D. and took few affirmative

steps as a parent to ensure her upbringing and welfare until commencement of these proceedings. The trial court's findings and conclusions that Defendant has acted inconsistently with his constitutionally-protected status as a parent is supported by clear and convincing evidence.

¶ 28 Defendant contests the following Findings of Fact that he was willfully absent following knowledge of Plaintiff's care of A.V.D. and commencement of custody proceedings.

> 53. That in late 2018, Child Protective Services contacted . . . Defendant about problems with the minor child. At that time, he hadn't [sic] seen the child for a period of several months.
>
> 54. That . . . Defendant also did not see the minor child for a period of several months prior to the Plaintiff filing a complaint in August, 2019.
>
> 55. That in spite of these significant absences, . . . Defendant made no affirmative efforts to assert any rights he may or may not have as the father of the minor child. In fact, only did so in response to the Plaintiff's Complaint.
>
> 56. That . . . Defendant acknowledged, by Answer and Counterclaim of August 30, 2019 being aware of [Stephanie]'s criminal issues as well as her substance abuse . . . .
>
> . . .
>
> 59. That . . . Defendant acknowledges staying back and seeing what happens after receiving the late 2018 CPS report. He acknowledges knowing that his daughter was under the appropriate care of the Plaintiff. That knowledge significantly eased any sense of urgency he might have had to act.

¶ 29 Our Supreme Court has held "if a parent cedes paramount decision-making authority, then, so long as he or she creates no expectation that the arrangement is for only a temporary period, that parent has acted inconsistently with his or her paramount parental status." *Boseman v. Jarrell*, 364 N.C. 537, 552, 704 S.E.2d 494, 504 (2010).

¶ 30 While Defendant challenges these findings, his testimony shows he was made aware of A.V.D.'s care by Plaintiff and admits failing to take action then to assert or exercise his parental rights. In *Price*, the

court explicitly stated "failure to resume custody when able" could be conduct inconsistent with a parent's constitutionally-protected status. Here, Defendant knew his child was in Plaintiff's primary custody, was made aware he should seek custody, and he refused. His actions are inconsistent with his constitutionally-protected status as a parent. *Id.* He has withheld his love and affection, and did not take affirmative steps to obtain custody of A.V.D. when he could have or knew of Stephanie's drug use and criminal issues. Plaintiff has raised A.V.D. for the past eight years since she was six to eight months old. Plaintiff has taken her to school, sheltered, fed, and clothed her, and provided a safe, comfortable, and structured life for A.V.D.

¶ 31 Defendant proffered no evidence tending to show the trial court's findings were not based on clear and convincing evidence. Defendant showed no real interest in A.V.D. until Plaintiff began these proceedings. Since these proceedings began, Defendant has kept up with support payments, alleviating prior arrearages. He has visited A.V.D. regularly and has taken more of an interest in her life. While these changes are positive and laudable, they do not make up for the years of safe and responsible child-rearing Plaintiff has provided for A.V.D. in Defendant's absence.

¶ 32 Defendant has failed to show the findings of fact he challenged are unsupported by clear and convincing evidence. Defendant has acted inconsistently with his constitutionally-protected status by ceding care to Plaintiff for years, all while making no affirmative efforts to visit or gain custody of A.V.D. The conclusions of law are supported by the findings of fact. Defendant's arguments are without merit.

3. Failure to Support

¶ 33 A parent may forfeit his constitutionally–protected status as a parent if "[t]he juvenile has been placed in . . . a foster home, and the parent has . . . willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so." N.C. Gen. Stat. § 7B-1111(a)(3) (2021). "[T]here is no requirement that the trial court make a finding as to what specific amount of support would have constituted a 'reasonable portion' under the circumstances." *In re Huff*, 140 N.C. App. 288, 293, 536 S.E.2d 838, 842 (2000).

¶ 34 Here, Defendant willfully failed to pay court-ordered support to Plaintiff for A.V.D.'s care. Defendant sought to pay less in support because he was making less money, the request was denied. Defendant decided voluntarily to pay nearly half of the ordered amount. This willful neglect of support, when Defendant had the physical and financial ability to, is

grounds for finding he acted contrary to his constitutionally-protected status as a parent. Defendant since has kept up with support payments, but for nearly a year voluntarily and willfully withheld support from A.V.D. which further supports the trial court's findings and conclusion Defendant acted inconsistent with his constitutionally-protected status as a parent.

V. Conclusion

¶ 35 "[G]randparents have standing to intervene for custody when they allege acts that would constitute [parental] unfitness, neglect [or] abandonment, or any other type of conduct so egregious as to result in [the parent's] forfeiture of his [or her] constitutionally protected status as a parent." *Wellons*, 229 N.C. App. at 176, 748 S.E.2d at 718-19 (citation and internal quotation marks omitted).

¶ 36 Plaintiff is the maternal grandmother of A.V.D. and has been the primary caretaker of her since she was six to eight months old. A.V.D.'s mother abandoned her to Plaintiff. Plaintiff has raised A.V.D. and provided a stable and structured life neither of her biological parents would. It is clear Plaintiff has standing under N.C. Gen. Stat. § 50-13.1(a) to seek and obtain custody.

¶ 37 Defendant has acted inconsistently with his constitutionally-protected status as a natural parent. He has been absent from her life during her upbringing for nearly five years. Defendant voluntarily ceded care to Plaintiff, failed to pay court-ordered support, and made no affirmative efforts to exercise parental rights, visit, or to obtain custody until this proceeding began. As such, the trial court's findings of fact are supported by clear and convincing evidence, and those findings support the court's conclusions. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges DILLON and JACKSON concur.

LESLIE DUKE, EMPLOYEE, PLAINTIFF
v.
XYLEM, INC., EMPLOYER, BERKSHIRE HATHAWAY HOMESTATE INS. CO., CARRIER, DEFENDANTS

No. COA21-450

Filed 5 July 2022

Workers' Compensation—subject matter jurisdiction—contract of employment—last act necessary—drug test

The Industrial Commission properly dismissed the workers' compensation claim filed by a North Carolina resident (plaintiff) against his employer, whose principal place of business was in Virginia, for lack of subject matter jurisdiction where, pursuant to its de novo examination of the entire record, the appellate court found that the last act necessary to create a binding employment contract occurred in Virginia when plaintiff successfully completed a drug test and other onboarding tasks that were conditions precedent to employment.

Appeal by plaintiff from opinion and award entered 15 March 2021 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 February 2022.

Bryant Duke Paris III PLLC, by Bryant Duke Paris III, for plaintiff-appellant.

Teague Campbell Dennis & Gorham, L.L.P., by Heather T. Baker and Lindsay A. Underwood, for defendants-appellees.

DIETZ, Judge.

¶ 1 Plaintiff Leslie Duke was injured in Virginia while working as a driver for Xylem, Inc.

¶ 2 Xylem's principal place of business is Virginia and Duke's principal place of employment was Virginia. Duke accepted an offer of employment with Xylem by phone from his home in North Carolina and later traveled to Virginia to complete a driver's test, drug screening, and background check as part of an "onboarding" process.

¶ 3 Duke initially filed his workers' compensation claims in Virginia, but the Virginia Workers' Compensation Commission dismissed some of the

claims for failure to respond to discovery requests and dismissed the remaining claims after Duke withdrew them. Duke then filed a workers' compensation claim in the North Carolina Industrial Commission. The Commission dismissed the claim for lack of subject matter jurisdiction.

¶ 4 On appeal, Duke argues that the Commission erred in its jurisdictional analysis because his contract of employment was formed in North Carolina when he accepted Xylem's offer of employment on the phone.

¶ 5 We reject this argument. As explained below, in a strange quirk of our jurisprudence, we are not bound by the Commission's jurisdictional fact finding and must make our own findings based on an independent review of the record. Nevertheless, we agree with the Commission and find that the last act necessary to create a binding employment contract occurred in Virginia, when Duke underwent an "onboarding" process that included a mandatory drug screening and background check that, under company policy, were prerequisites to hiring any prospective employee as a commercial driver. Accordingly, we affirm the Commission's opinion and award.

Facts and Procedural History

¶ 6 Xylem, Inc. is a Virginia company that manages and clears vegetation and trees for utility companies and municipalities. Xylem is incorporated in Virginia, headquartered in Norfolk, Virginia, and maintains its fleet operation facility in Wakefield, Virginia. Xylem does not have an office in North Carolina.

¶ 7 Leslie Duke worked as a commercial truck driver for many years. Duke lives in Hertford, North Carolina.

¶ 8 On 6 October 2017, Xylem's vice president, William Hoover, called Duke and invited him to come to the company's Wakefield fleet facility to discuss possible employment. Duke agreed and traveled to Wakefield where the parties discussed Duke's driving experience, and Duke inspected Xylem's trucks and other equipment.

¶ 9 The following week, Hoover called Duke at his home in North Carolina and offered Duke a position with Xylem. The particulars of this job offer are disputed. Duke contends that he accepted the job offer and was immediately hired.

¶ 10 Xylem contends that Duke's employment offer, as with any employee of the company, was contingent on Duke first completing a series of pre-hiring conditions including a driver's test, drug test, and driver's license background check. Both Xylem's president and chief executive

officer, Randolph Hoover, and Xylem's operations manager, Matthias Breyer, testified that Xylem's hiring process requires a prospective employee to complete an onboarding process that includes a driver's test, drug test, and background check before formally becoming an employee of the company.

¶ 11 On 17 October 2017, Duke arrived at Xylem's Wakefield facility and completed the employee onboarding requirements, including authorizing and submitting to drug screening and a background check. The authorization form for the drug screening indicated that it was directed at a "prospective employee." Duke acknowledges that he completed and electronically signed the hiring documentation, including the drug screening authorization, on an electronic device while at the Wakefield facility on 17 October 2017. But Duke maintains that his signature on his written employment documentation is a forgery.

¶ 12 Duke began working as a fleet support employee, driving a truck from the Wakefield, Virginia fleet facility to various job sites, primarily in Virginia. In April 2018, Duke sustained a rotator cuff tear or cervical spine herniation while working in Virginia.

¶ 13 Duke initially filed multiple claims for workers' compensation with the Virginia Workers' Compensation Commission. Duke alleged five different dates of injury in these filings and acknowledged Virginia's jurisdiction as a Virginia employee.

¶ 14 Ultimately, the Virginia Workers' Compensation Commission dismissed portions of Duke's claims for failure to respond to discovery requests and dismissed the remaining claims after Duke informed the commission that he was withdrawing them.

¶ 15 Duke later filed a workers' compensation claim with the North Carolina Industrial Commission. The Commission dismissed Duke's claim in an opinion and award finding that Duke's contract of employment was formed in Virginia; Xylem's principal place of business was in Virginia; and Duke's principal place of employment was Virginia. Thus, the Commission concluded that it lacked subject matter jurisdiction over Duke's claim. Duke timely appealed.

Analysis

¶ 16 Duke argues that the Commission erred by dismissing his workers' compensation claim for lack of subject matter jurisdiction. Specifically, he contends that the Commission erred by finding that the last act necessary to create a contract of employment between Duke and Xylem occurred in Virginia.

¶ 17 When an employee sustains a workplace injury outside the State, the Industrial Commission has subject matter jurisdiction only if one of three statutory criteria apply: (1) the contract of employment was made in this State; (2) the employer's principal place of business is in this State; or (3) the employee's principal place of employment is in this State. N.C. Gen. Stat. § 97-36; *Davis v. Great Coastal Express*, 169 N.C. App. 607, 610 S.E.2d 276 (2005).

¶ 18 On appeal, Duke does not challenge the Commission's findings on the second and third criteria—that Xylem's principal place of business is Virginia and that Duke's principal place of employment was Virginia. Duke's argument focuses entirely on the first criteria and the Commission's finding that Duke's contract of employment was made in Virginia.

¶ 19 "To determine where a contract for employment was made, the Commission and courts of this state apply the 'last act' test. For a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here." *Murray v. Ahlstrom Indus. Holdings, Inc.*, 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998) (citation omitted). The last act of the employment contract is generally the employee's acceptance of employment, but it can also be the completion of other conditions of employment that come after an employee accepts the offer of employment, such as an "orientation, road test, drug test, and physical exam." *Holmes v. Associated Pipe Line Contrs., Inc.*, 251 N.C. App. 742, 750, 795 S.E.2d 671, 676 (2017). The key factor in determining whether these sorts of employment requirements constitute the "last act" is whether there is a possibility that the prospective employee could fail to meet the criteria, thus becoming ineligible for employment. *Id.*

¶ 20 So, for example, in *Holmes*, this Court distinguished a requirement to submit to a mandatory drug screening (a necessary last act) from filling out "routine" employment paperwork (not a necessary last act) because "a prospective employee's demonstrated willingness to submit to a drug test is more than simply an administrative formality given that—unlike the completion of garden-variety personnel forms—the taking of a drug test carries the risk of failing the test." *Id.* at 751, 795 S.E.2d at 676–77. Because passing that drug test was a precondition for employment at the company, "taking of the drug test was the last act necessary to form a binding employment relationship." *Id.* at 751, 795 S.E.2d at 677.

¶ 21 Here, the Commission found that Duke's "successful completion of the drug test and other onboarding tasks" was a condition precedent to

employment. The Commission further found, given that "the successful tests and other processes that took place on 16 and 17 October 2017 were conditions precedent to Plaintiff's employment, the Full Commission finds that the 'last act' necessary to render Plaintiff's employment a binding contract occurred in Virginia."

¶ 22 Ordinarily, this Court's review of fact finding by the Commission is "limited to consideration of whether competent evidence supports the Commission's findings of fact." *Id.* at 747, 795 S.E.2d at 674. Under this standard, when there is competing evidence and the Commission assesses what evidence is more credible or deserves greater weight, this Court must accept the Commission's findings if there is any competent evidence supporting them, even if there is substantial contrary evidence. *Hedrick v. PPG Indus.*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856 (1997).

¶ 23 But in a strange quirk of our jurisprudence, this rule does not apply to "jurisdictional facts" found by the Commission. Our Supreme Court recently reaffirmed that "the finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record." *Cunningham v. Goodyear Tire & Rubber Co.*, 2022-NCSC-46, ¶ 19.

¶ 24 To be sure, in a case like this one, the rule does not make much sense. It is a long-standing principle of appellate law that appellate courts "cannot find facts." *Pharr v. Atlanta & Charlotte Air Line Ry. Co.*, 132 N.C. 418, 423, 44 S.E. 37, 38 (1903). The Commission, unlike this Court, has the power to hear witness testimony if it chooses, and thus can "observe the witnesses or their demeanor" and make key credibility assessments when they are needed. *Calloway v. Mem'l Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000). In tracing the history of this jurisdictional rule, it is not clear that it was intended to yield the scenario here—where this Court is forced to review transcripts of witness testimony, assess credibility on a cold appellate record, and make our own fact findings that could contradict the findings of a tribunal capable of calling witnesses and observing their live testimony.

¶ 25 Nevertheless, this is the law and we must follow it. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Examining the entire record in this case, we conclude that the Commission properly found that the last act necessary to create a binding employment contract occurred in Virginia. Randolph Hoover, Xylem's president and chief executive officer, testified in a deposition that he designed the company's

hiring policies and wrote the employee handbook. Under these employment policies, Xylem will not hire a commercial driver until the driver first completes an orientation process that includes a mandatory drug screening and driver's license background check. Hoover testified that, under company policy, prospective employees who have been offered a position cannot be hired until they pass these initial screenings. Another company official, Matthias Breyer, confirmed this testimony.

¶ 26 This testimony also is supported by the Xylem employee handbook, which states that prospective employees must complete the required orientation process before they are fully employed. Finally, when Duke completed and signed the drug screening authorization form in Wakefield, Virginia on 17 October 2017, it indicated that he was a "prospective employee" on the form.

¶ 27 We cannot identify any basis in the record to discredit this testimony and supporting documentation. Moreover, Xylem's employment practice—requiring the drug screening and background check as a prerequisite to employment as a commercial driver—is consistent with the practice at other, similar businesses examined in our case law. *See*, *e.g.*, *Taylor v. Howard Transp., Inc.*, 241 N.C. App. 165, 171, 771 S.E.2d 835, 839 (2015); *Holmes*, 251 N.C. App. at 751, 795 S.E.2d at 676. Accordingly, in our *de novo* examination of the entire record, we find that the last act necessary to create a binding employment contract occurred in Virginia and, as a result, the Commission properly concluded that it lacked subject matter jurisdiction over Duke's workers' compensation claim. We therefore affirm the Commission's opinion and award.

Conclusion

¶ 28 We affirm the Industrial Commission's opinion and award.

AFFIRMED.

Judges MURPHY and JACKSON concur.

JERRY HINTON, III, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. COA21-480

Filed 5 July 2022

1. Administrative Law—amended decision—correction of clerical errors—no change to effect of original order—wrongful termination case

In a wrongful termination case filed by a correctional officer who alleged he was fired without just cause, the administrative law judge's entry of an amended decision three days after entry of the original final decision did not violate Civil Procedure Rule 60(a) where the amended decision merely removed references to incidents not involving petitioner and did not alter the effect of the original order, as both orders affirmed petitioner's dismissal for just cause.

2. Public Officers and Employees—dismissal—just cause—violation of department policy—use of force—sufficiency of findings

In a wrongful termination case filed by a correctional officer who alleged he was fired without just cause, although there was substantial evidence in the record that petitioner violated the Department of Public Safety's policy regarding use of force, the administrative law judge's order upholding petitioner's dismissal lacked sufficient findings to support its conclusion that petitioner's conduct constituted excessive force. The matter was remanded for further findings.

3. Public Officers and Employees—dismissal—just cause—propriety of discipline—legal analysis

In a wrongful termination case filed by a correctional officer who alleged he was fired without just cause, the appellate court rejected petitioner's argument that the administrative law judge (ALJ) failed to conduct the proper legal analysis regarding whether his alleged misconduct amounted to just cause for dismissal and whether the discipline imposed was proper. The ALJ determined that the preponderance of the evidence justified dismissal, and the ALJ clearly applied the appropriate appellate decisions, *Warren* and *Wetherington*, in its legal analysis.

Appeal by Petitioner from amended final decision entered 22 February 2021 by Administrative Law Judge J. Randolph Ward in

the Office of Administrative Hearings. Heard in the Court of Appeals 8 February 2022.

Jennifer J. Knox for Petitioner-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Bettina J. Roberts, for Respondent-Appellee.

INMAN, Judge.

¶ 1 Petitioner-Appellant Jerry Hinton, III, ("Mr. Hinton") appeals from an amended final decision from the Office of Administrative Hearings upholding his dismissal from employment as a correctional officer after he assaulted an inmate at a supermax prison facility. Mr. Hinton contends the Administrative Law Judge: (1) violated Rule 60(a) of North Carolina's Rules of Civil Procedure by entering two amended decisions that substantively modified the original decision; (2) failed to make sufficient findings based in substantial evidence that Mr. Hinton's conduct constituted excessive force; and (3) erred by failing to consider whether Mr. Hinton's alleged misconduct was just cause to dismiss him from employment and whether the discipline imposed was proper, as required by our caselaw. After careful review of the record and our precedent, we remand the decision for further findings.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 2 The record tends to show the following:

¶ 3 Mr. Hinton worked for the North Carolina Department of Public Safety ("NCDPS") as a correctional officer at Polk Correctional Institution. On 20 July 2019, Mr. Hinton, along with other officers, was instructed to conduct random searches of inmates after a weapon had not been recovered from a potential stabbing the previous night. Mr. Hinton selected five to six inmates, including Johansy M. Santos-Guerra ("Mr. Santos-Guerra"),[1] to search. As Mr. Hinton searched the other inmates, Mr. Santos-Guerra walked away into the dining hall and joined the lunch line. Mr. Hinton asked another officer where the inmate had gone, saying "he was going to get that curly head mother fucker."

¶ 4 About one minute later, Mr. Hinton entered the dining hall at a brisk pace and approached the line where Mr. Santos-Guerra was standing.

1. The record and briefs contain various spellings of the inmate's name. For purposes of this opinion, we defer to the spelling used by the Administrative Law Judge in the final decision.

Mr. Hinton escorted the inmate out of the line. Mr. Santos-Guerra's hands were on his head per prison policy. When Mr. Santos-Guerra turned to Mr. Hinton, seemingly to speak to him, Mr. Hinton punched him in the face and tackled him to the floor. Mr. Hinton then kneeled over Mr. Santos-Guerra and struck him three more times in the face and head. Mr. Santos-Guerra suffered bruising and swelling to his left eye, cheek, and back of his head and was sent to the hospital for treatment.

¶ 5 Sergeant Jean Thomas ("Sergeant Thomas") was in the dining hall during the altercation and directed Mr. Hinton to release Mr. Santos-Guerra and leave the dining hall. Sergeant Thomas and another officer, Officer Glean Henderson ("Officer Henderson"), assisted Mr. Santos-Guerra to his feet. When the inmate saw Mr. Hinton, he attempted to pull away from the officers and hit Officer Henderson in the eye with his elbow. Officer Henderson injured his left knee and right shoulder as he regained control of Mr. Santos-Guerra, wrestling him to the ground. Officer Henderson had to take three months of medical leave for his injuries.

¶ 6 Following the incident, Kim Heffney ("Mr. Heffney"), an investigator with NCDPS's Office of Special Investigations and a former employee at the North Carolina State Bureau of Investigations with at least 30 years of experience, conducted an internal investigation of Mr. Hinton's conduct by reviewing video evidence and collecting witness statements. He determined Mr. Santos-Guerra "in no way threatened [Mr.] Hinton to warrant [Mr.] Hinton's use of force" because the inmate had his hands in the air, above his head, in a known non-aggressive posture within the facility. Mr. Hinton's conduct was inconsistent with two policies implemented at the facility to assist with inmate and prison official safety—that inmates have their hands on their heads or above their shoulders when outside their cells and that officers maintain a six-foot reactive radius from inmates. The prison warden testified that Mr. Hinton's conduct placed prison staff at risk and that the situation could have escalated into a riot or large-scale assault.

¶ 7 On 8 April 2020, Mr. Hinton was dismissed for unacceptable personal conduct by excessive use of force in violation of the following policies: "The State Human Resources Manual, Disciplinary Action Policy [R]egarding Unacceptable Personal Conduct" and "The Department of Public Safety, Prisons Policy and Procedures Manual, Chapter F .1500, Use of Force .1501." He appealed his dismissal to NCDPS's Employee Advisory Hearing. After a hearing, the Chief Deputy Secretary considered the severity of the incident, the subject matter, the resulting harm, discipline applied in similar situations, and Mr. Hinton's work

history. Following the Hearing Officer's recommendation, the Chief Deputy Secretary upheld Mr. Hinton's dismissal.

¶ 8 After exhausting his internal appeals, Mr. Hinton filed a contested case petition in the Office of Administrative Hearings alleging he had been dismissed without just cause. Following a hearing, on 19 February 2021, the Administrative Law Judge issued a final decision upholding Mr. Hinton's dismissal. Three days later, at 4:10 p.m. on 22 February, the Administrative Law Judge entered an amended final decision "to correct scrivener's errors in a name and date, and to remove extraneous matter" pursuant to Rule 60(a). At 4:30 p.m. on the same day, the Administrative Law Judge entered a second amended final decision for the same purpose. The Administrative Law Judge then struck the first amended decision from the record. Mr. Hinton timely appealed to this Court.

II. ANALYSIS

A. Amended Decisions

¶ 9 **[1]** Mr. Hinton argues the Administrative Law Judge's amendments to the final decision affected his substantive rights and violated our Rules of Civil Procedure. We disagree.

¶ 10 Rule 60(a) confers upon our courts the power to correct defective orders:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders.

N.C. Gen. Stat. § 1A-1, Rule 60(a) (2021). However, "[c]ourts do not have the power under Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions." *Hinson v. Hinson*, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985) (citations omitted). "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*." *Pratt v. Staton*, 147 N.C. App. 771, 774, 556 S.E.2d 621, 624 (2001) (quotation marks and citation omitted) (emphasis added).

¶ 11 Here, the original decision affirmed NCDPS's dismissal of Mr. Hinton for just cause. The effect of the amended decision entered by the court three days later was the same. [2] *See id.* The original order inadvertently

2. Because the trial court struck the first amended decision from the record, we only consider the second amended decision in our discussion.

included references to insubordination as unacceptable personal conduct, incidents, and disciplinary actions which clearly did not involve Mr. Hinton. Because the altered portions did not pertain to Mr. Hinton, it is clear to this Court that these were merely clerical or typographical errors, not substantive changes altering the effect of the original order. *See id. Cf. H & B Co. v. Hammond*, 17 N.C. App. 534, 538-39, 195 S.E.2d 58, 60-61 (1973) (holding a money judgment was improperly changed to a real property lien). Thus, the amended decision supersedes the original decision and is operative.

B. Insufficient Findings about Excessive Use of Force

¶ 12 **[2]** Mr. Hinton argues there is neither substantial evidence in the record nor sufficient findings in the Administrative Law Judge's order to support the conclusion that he violated NCDPS's use of force policy. We agree, in part, and remand for additional findings.

1. Standard of Review

¶ 13 Our standard of review for just cause decisions is governed by statute. *See Harris v. N.C. Dep't of Pub. Safety*, 252 N.C. App. 94, 98-99, 798 S.E.2d 127, 132 (2017). Our General Statutes provide that an agency's final decision may be reversed or modified if the reviewing court determines that the petitioner's substantial rights may have been prejudiced because the agency's findings or conclusions 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). Our standard of review is dictated by the substantive nature of each assignment of error. § 150B-51(c); *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004).

¶ 14 We review questions of law, the first four grounds set forth in the statute, *de novo*, whereas fact-intensive issues, the remaining two grounds,

are reviewed under the "whole record test." *N.C. Dep't of Env't & Nat. Res.*, 358 N.C. at 659, 599 S.E.2d at 894. Under *de novo* review, we consider the matter anew and freely substitute our own judgment for that of the agency. *Mann Media, Inc. v. Randolph Cnty. Plan. Bd.*, 356 N.C. 1, 13-14, 565 S.E.2d 9, 17 (2002). Applying the whole record test, on the other hand, we "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." *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004). Substantial evidence is "[r]elevant evidence a reasonable mind might accept as adequate to support a conclusion." § 150B-2(8c).

2. Discussion

¶ 15 We consider whether the record contains substantial evidence that Mr. Hinton violated NCDPS's use of force policy. The use of force policy provides:

> The use of force shall be permissible only to the extent reasonably necessary for a proper correctional objective. This prohibition shall not be construed to mean that staff must suffer an assault upon their person before taking appropriate defensive action or that the use of force by another must be met with strictly equal force on the part of the staff.

N.C. Dep't of Pub. Safety: Prisons, *Policy & Procedures: Use of Force*, Chapter F, § .1503(a) (Aug. 30, 2018). The policy further required officers to give a verbal command and then attempt to deploy pepper spray before physically engaging with the inmate. Mr. Hinton testified he was aware of the policies.

¶ 16 Examining all record evidence, including a video recording of the incident, first-hand testimony from witnesses, expert testimony, and the use of force policy, we conclude there was substantial, if not ample, evidence that Mr. Hinton violated NCDPS's policy by using excessive force. The video recording shows Mr. Hinton struck Mr. Santos-Guerra in the face and head at least four times, three while on top of him on the ground. Mr. Santos-Guerra's hands were raised above his head in a non-offensive posture at the time Mr. Hinton first struck him, demonstrating a lack of resistance. Mr. Heffney testified consistent with the video evidence. Additionally, though Mr. Hinton instructed Mr. Santos-Guerra to leave the lunch line and he complied, at no point did Mr. Hinton attempt to use pepper spray before engaging the inmate with physical violence.

¶ 17 The warden testified about the number of correctional staff present and that Mr. Hinton's conduct placed prison staff and the inmates at risk of a riot or large-scale assault. He also explained the facility had two policies to ensure inmate and prison official safety: (1) that inmates have their hands on their heads or above their shoulders when outside their cells, and (2) that officers maintain a "reactionary distance" of six feet from the inmates. An officer in the dining hall had to brandish his baton to keep onlooking inmates away from the assault. Upon review of the whole record, *N.C. Dep't of Env't & Nat. Res.*, 358 N.C. at 659, 599 S.E.2d at 894, we hold there was substantial evidence Mr. Hinton used excessive force, violating NCDPS's policy.

¶ 18 However, the Administrative Law Judge's findings are insufficient to support its conclusion that Mr. Hinton's conduct constituted excessive force. The Administrative Law Judge's findings refer to the evidence only in a conclusory manner and address only the events giving rise to Mr. Hinton's assault on Mr. Santos-Guerra, specifically that officers were searching for a shank used in a stabbing the previous evening. Citing the video exhibit of the incident and the "Final Agency Decision" generally, the Administrative Law Judge then found, "The preponderance of the credible evidence received at the hearing supported the accounts of [Mr. Hinton's] conduct relied on by [NCDPS] in its decision to discipline [Mr. Hinton]." The Administrative Law Judge further determined:

> Investigator Kim Heffney of the Department's Office of Special Investigations ("OSI") prepared internal investigations report submitted September 5, 2019. He investigated whether Petitioner "used unauthorized force" during the incident "purported [to have] occurred because the offender entered the dining hall prior to being searched by CO Hinton." Mr. Heffney concluded that the Petitioner used excessive force to subdue offender Santos-Guerra.

¶ 19 Although our appellate review requires us to consider the evidence of record and determine whether it supports Mr. Hinton's dismissal, *see Watkins*, 358 N.C. at 199, 593 S.E.2d at 769, this Court has no authority to make findings of fact, even those facts which may be derived from a video of the conduct at issue. Those must be made by the Administrative Law Judge. We remand to the Administrative Law Judge for further findings explaining how and why Mr. Hinton's conduct constituted excessive force and violated NCDPS's policy.

C. Just Cause & Proper Discipline

¶ 20 **[3]** In his final assignment of error, Mr. Hinton asserts the Administrative Law Judge neglected to consider whether Mr. Hinton's alleged misconduct amounted to just cause to dismiss him from employment and whether the discipline imposed was proper. We disagree.

¶ 21 This Court has summarized the three-part approach to determining whether just cause exists to discipline a career State employee for unacceptable personal conduct:

> First, determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based upon an examination of the *facts and circumstances of each individual case*.

Warren v. N.C. Dep't of Crime Control & Pub. Safety, 221 N.C. App. 376, 383, 726 S.E.2d 920, 925 (2012) (cleaned up) (emphasis added). Our Supreme Court articulated certain factors to be considered in the just cause analysis: "the severity of the violation, the subject matter involved, the resulting harm, the [employee's] work history, or discipline imposed in other cases involving similar violations." *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 592, 780 S.E.2d 543, 548 (2015).

¶ 22 Here, the Administrative Law Judge determined the preponderance of the evidence justified Mr. Hinton's dismissal. The Administrative Law Judge then directly quoted and cited our decision in *Warren* in one of its conclusions of law. Conclusion of Law 5 summarizes the North Carolina Administrative Code provision that Mr. Hinton violated. The Administrative Law Judge echoed *Warren*'s language in Conclusion of Law 8: "Considering the specific facts and circumstances of this case, [Mr. Hinton's] actions on July 20, 2019 constituted just cause for his dismissal."

¶ 23 Though the Administrative Law Judge did not cite *Wetherington*, its findings reveal it weighed at least some of the factors delineated by

that decision. For example, Finding of Fact 8 addresses "the resulting harm" of the incident, *id.*, and Mr. Hinton's conduct, describing Officer Henderson's injuries and medical leave. The Administrative Law Judge also considered "the subject matter involved," *id.*, describing what gave rise to the events the day.

¶ 24 Even if, as Mr. Hinton argues, the Administrative Law Judge's factual analysis fell short, it is clear from the decision that it applied *Warren* and considered the *Wetherington* factors. *See Belcher v. N.C. Dep't of Pub. Safety*, 278 N.C. App. 148, 2021-NCCOA-277, 2021 WL 2425899 (unpublished) ("[A]lthough the ALJ's factual analysis fell short, the ALJ analyzed certain facts of Petitioner's case through an application of the *Warren* three-pronged approach and consideration of the *Wetherington* factors. The ALJ concluded (1) the preponderance of the evidence proved Petitioner engaged in the conduct Respondent alleged, (2) the preponderance of the evidence proved Petitioner's acts and omissions constituted grossly unacceptable personal conduct; and (3) the misconduct amounted to just cause for dismissal.").

III. CONCLUSION

¶ 25 For the reasons outlined above, we conclude that substantial evidence supported the Administrative Law Judge's determination that Mr. Hinton's conduct violated the NCDPS use of force policy, but we remand the decision for further findings not inconsistent with this opinion.

REMANDED.

Chief Judge STROUD and Judge ARROWOOD concur.

IN RE A.H.G.

[284 N.C. App. 297, 2022-NCCOA-451]

IN THE MATTERS OF A.H.G., O.H.G., J.D.H.G.

No. COA21-745

Filed 5 July 2022

1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of findings and evidence

The termination of a mother's parental rights in her three sons was affirmed where clear, cogent, and convincing evidence supported the trial court's findings of fact, which in turn supported the court's conclusion that the mother had failed to make reasonable progress in correcting the conditions leading to the children's removal. Specifically, the court found that although the mother had made some progress in her family services case plan, she inconsistently engaged in individual therapy, failed to acknowledge her sons' previous sexual abuse by a renter in the home or to properly manage their inappropriate sexual behaviors (which the two older brothers began exhibiting after the abuse), showed little progress in learning to properly discipline her children, and had no plan for maintaining safe boundaries between the children at home given the inappropriate behaviors occurring between them.

2. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—willful failure to complete case plan

The trial court properly terminated a mother's parental rights in her three sons on the ground of neglect where the evidence showed that, after the children had been removed from the mother's care and adjudicated neglected or dependent on three separate occasions, the mother willfully failed to complete her family services case plan (particularly the components centering on disciplining her children and managing inappropriate sexual behaviors the children began exhibiting as a result of past sexual abuse), which supported the court's conclusion that there was a high probability of future neglect if the children were returned to the mother's care.

3. Termination of Parental Rights—best interests of the children—catchall dispositional factor—limited Spanish-language services—children's potential loss of language and culture

The trial court did not abuse its discretion in determining that termination of a mother's parental rights in her three sons was

in the children's best interest, where the court properly considered all the statutory dispositional factors, including—under the "catchall" factor listed in N.C.G.S. § 7B-1110(a)(6)—the limited availability of Spanish-language services available to the mother (who only spoke Spanish, her native language) throughout the case and how terminating her rights could cause the children to lose exposure to their mother's language and culture. The court made sufficient factual findings regarding the catchall factor and was not required to reach the opposite best interests determination that it did based on this factor alone.

Appeal by Respondent-Mother from order entered 14 September 2021 by Judge J.H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 24 May 2022.

Garron T. Michael for Petitioner-Appellee New Hanover County Department of Social Services.

Nelson Mullins Riley & Scarborough, LLP, by Carrie A. Hanger, for Guardian ad Litem.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky Brammer, for Respondent-Appellant Mother.

INMAN, Judge.

¶ 1 Respondent-Mother ("Mother") appeals from an order terminating her parental rights after her children had been removed from her care and adjudicated neglected or neglected and dependent on three separate occasions between 6 July 2015 and 25 November 2019. She challenges the trial court's grounds for termination, arguing that (1) she had made reasonable progress in correcting the conditions of neglect which led to her children's removal, and (2) the record lacked clear, cogent, and convincing evidence of a likelihood of future neglect. In addition, Mother asserts the trial court abused its discretion in determining termination was in the best interests of the children because it failed to make certain relevant findings. After careful review of the record, we affirm the order of the trial court.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 2 The record below discloses the following:

¶ 3 On 6 July 2015, the New Hanover County Department of Social Services ("DSS") filed petitions alleging Jorge and Oscar,[1] then ages three and one, respectively, were neglected and dependent based, in large part, upon Mother's inability to care for her children because of her abuse of alcohol. The trial court placed the children in nonsecure custody of DSS. On 11 September 2015, the trial court adjudicated Oscar and Jorge neglected and dependent and determined it was in their best interest to remain in DSS custody. After conducting a review hearing, on 28 April 2016, the trial court returned legal custody of the children to Mother because she had demonstrated her ability to provide a safe and stable home, maintained employment, consistently completed negative drug and alcohol screens, and participated in weekly individual therapy and Alcoholics Anonymous ("AA") meetings.

¶ 4 On 20 November 2017, DSS filed a second petition alleging Oscar and Jorge were neglected because of Mother's inappropriate discipline and continued substance abuse. The children were again placed in the nonsecure custody of DSS. On 14 February 2018, the trial court adjudicated the children neglected and ordered that DSS maintain legal custody and placement responsibility for the children. After the review hearing, on 28 March 2018, the trial court ordered the children to remain in the custody of DSS.

¶ 5 Mother's third child, Angel,[2] was born in January 2019. In June 2019, Oscar and Jorge returned to Mother's care in a trial home placement. Jorge, who had previously engaged in sexually inappropriate behavior with Oscar, was no longer displaying such behavior. Both boys had successfully completed therapy. After a permanency planning hearing in October 2019 and with the agreement of all parties, the trial court determined Mother had "demonstrated her ability to provide a safe and stable home," "maintained independent housing and verifiable employment," was "participating in individual therapy and family therapy," was "attending Alcoholic Anonymous meetings," "maintained her sobriety," and "all of [the boys] needs are being met." As a result, the trial court granted Mother custody of Oscar and Jorge.

¶ 6 One month later, Mother was present in the room when Oscar and Jorge again engaged in sexually inappropriate behavior. In response, she beat both children with a belt, leaving significant marks and bruises. On 25 November 2019, DSS filed a third petition alleging all three children,

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1. We use pseudonyms to protect the identities of the minor children.

2. Also a pseudonym.

Oscar, Jorge, and Angel, were abused, neglected, and dependent. An order for nonsecure custody was entered the same day. On 11 February 2020, the children were adjudicated neglected and dependent. Oscar and Angel were placed in a foster home together, while Jorge was placed in a separate foster home because of his sexually inappropriate behavior.[3]

¶ 7 Mother entered into a case plan with DSS and agreed to maintain housing and employment, engage in parent education, submit to random drug and alcohol screens, and complete a "Comprehensive Clinical Assessment." She attended 14 out of 20 therapy sessions in 2020, completed the clinical assessment, and participated in AA meetings. Mother had housing and a job. She remained sober and submitted to random drug screens. During this time, Mother consistently participated in supervised visits with her children, "the quality of the visits [] improved," "the children [were] respectful towards one another and [Mother]," and Mother "engage[d] in age and developmentally appropriate play."

¶ 8 On 15 March 2021, DSS petitioned to terminate Mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1)-(2) (2021). The petition alleged: (1) the children had been neglected and there was a likelihood of repetition of neglect, and (2) the children had been in placement outside the home for more than twelve months and Mother had not made reasonable progress, under the circumstances, to correct the conditions which led to removal. The matter came before the juvenile court in New Hanover County on 12 July, 16 August, and 20 August 2021. Mother, her therapist, Ana Blaney ("Ms. Blaney"), and a DSS social worker, Samantha Muse ("Ms. Muse"), testified. Considering the best interests of the children, the trial court terminated Mother's parental rights on 14 September 2021. Mother appealed.

II. ANALYSIS

A. Standard of Review

¶ 9 We review a trial court's adjudication of abuse, neglect, or dependency to determine whether there is clear, cogent, and convincing evidence to support the findings of fact and whether the findings of fact support the conclusions of law. *See In re Z.J.W.*, 376 N.C. 760, 2021-NCSC-13, ¶14. The clear, cogent, and convincing evidence standard is "greater than the preponderance of the evidence standard required in

3. The children's fathers did not make themselves available to the trial court, DSS, or the *guardian ad litem*, enter into a "Family Services Agreement" with DSS, or provide care or financial support for the children. DSS could not locate an appropriate maternal or paternal relative willing and able to provide a safe home for the children either.

most civil cases." *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984). "Unchallenged findings are deemed to be supported by the evidence and are binding on appeal." *In re S.C.L.R.*, 378 N.C. 484, 2021-NCSC-101, ¶ 9 (citation omitted). We review the trial court's decision to terminate parental rights, however, solely for abuse of discretion. *In re S.D.C.*, 2022-NCSC-55, ¶ 11. A trial court abuses its discretion when its "ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re A.A.*, 2022-NCSC-66, ¶ 26 (quotation marks and citations omitted).

B. Discussion

1. Evidence supports the trial court's findings of fact and conclusion that Mother failed to make reasonable progress to correct the conditions which led to her children's removal.

¶ 10 **[1]** Mother asserts the trial court erred in determining she had not made reasonable progress on her case plan as a ground for terminating her parental rights. We disagree.

¶ 11 Pursuant to our General Statutes, the trial court terminated Mother's parental rights based on findings that:

> (1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.
>
> (2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

§ 7B-1111(a)(1)-(2). For termination under Subsection 7B-1111(a)(1), a neglected juvenile is one whose parent, caretaker, or guardian does any of the following:

> a. Does not provide proper care, supervision, or discipline.

> b. Has abandoned the juvenile.
>
> c. Has not provided or arranged for the provision of necessary medical or remedial care.
>
> . . . .
>
> e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.

Id. § 7B-101(15).

¶ 12 To adjudicate termination of parental rights pursuant to Subsection 7B-1111(a)(2), a parent must willfully fail to make reasonable progress under the circumstances. *See In re Z.A.M.*, 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020). "[P]erfection is not required." *In re S.D.*, 243 N.C. App. 65, 73, 776 S.E.2d 862, 867 (2015). Instead,"[w]illfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001). We evaluate the "nature and extent" of the parent's reasonable progress "for the duration leading up to the hearing on the motion or petition to terminate parental rights." *In re A.C.F.*, 176 N.C. App. 520, 528, 626 S.E.2d 729, 735 (2006).

¶ 13 Here, in a disposition order from February 2020, the trial court ordered Mother to comply with her case plan and complete a clinical assessment, follow the corresponding recommendations, submit to random drug screens, engage in parenting classes, and maintain housing and employment. Mother argues she completed or made progress on each element and she challenges several findings of fact related to her case plan progress as unsupported by clear, cogent, and convincing evidence. We address them, categorically, in turn.

a. Therapy and Parenting Education

¶ 14 First, Mother challenges several findings about her participation in therapy and parenting education classes:

> 15. In January 2020, weekly individual counseling for [Mother] was recommended in order to address depression and anxiety symptoms.
>
> 16. [Mother] failed to consistently participate in weekly therapy with Ana Blaney at Clinica Latina as recommended. Due to the COVID-19 pandemic, [Mother] attended some therapy sessions in person and some via telephone or virtually, but she lacked

> consistency. [Mother] cited sickness, employment and transportation as barriers to allowing her to attend sessions. She attended eleven telephonic sessions, five in-person sessions and two telehealth visits. Sessions typically lasted fifty to sixty minutes.
>
> 17. [DSS] contracted with Sheryl Ewing of Family Support Network to evaluate [Mother]'s parenting abilities and attempt to address issues in one-on-one sessions. Ms. Ewing's evaluation recommended that a higher level of parenting education was necessary for [Mother]. Ms. Ewing uses Triple P Positive Parenting training techniques in group and individual sessions which focuses more on basic parenting skills. The training and education she typically provides does not reach the level required to assist [Mother].
>
> 18. There are no parenting courses available in New Hanover County or the surrounding counties that would be able to meet the intensive needs of [Mother]. She requires significant individual therapy in order to identify child sexual abuse and learn to accept her children's prior sexual abuse and trauma and how to address it.
>
> . . . .
>
> 27. Ana Blaney's last appointment with [Mother] occurred on April 19, 2021. [Mother] communicated plans to seek an alternate provider, however, she never scheduled sessions with another provider.

¶ 15 We agree with Mother that a portion of Finding 15 is unsupported by the evidence because Mother and Ms. Blaney did not discuss weekly therapy appointments until November 2020 as opposed to January 2020. We thus disregard that portion of the finding. *See In re R.G.L.*, 379 N.C. 452, 2021-NCSC-155, ¶ 25 (citations omitted). The remainder of the finding is supported by Ms. Blaney's testimony about Mother's mental health diagnosis.

¶ 16 Similarly, Mother challenges Finding of Fact 16, that Mother failed to consistently participate in weekly therapy. Ms. Blaney's testimony indicates Mother made same-day cancellations for an appointment in December 2020 and January 2021, and she cancelled or failed to attend two appointments in February 2021. At the date of the termination hearing on 12 July 2021, Mother had not attended therapy, virtual or otherwise,

since 19 April 2021, in part because she was sick with COVID-19. Ms. Blaney also testified that Mother participated in 18 sessions total. This finding is supported by clear, cogent, and convincing evidence.

¶ 17 Finding of Fact 17, regarding the lack of parental education resources for Mother in her native language, is entirely supported by testimony from the DSS social worker. Mother contends this finding cannot support a willful failure to make reasonable progress because she was without adequate parenting classes and had no opportunity to learn. Yet, the record also reveals Mother's therapist, Ms. Blaney, attempted to address Mother's parenting needs in her individual therapy sessions.

¶ 18 Finding of Fact 18 is also supported by the evidence. Ms. Blaney testified Mother never disclosed or acknowledged that Jorge and Oscar had been sexually abused, despite their discussions about her sons' sexually inappropriate behaviors. Ms. Blaney testified acknowledging the abuse was "absolutely" important to Mother's treatment. Ms. Muse testified that before Mother went to Ms. Blaney for individual therapy, DSS engaged Sheryl Ewing with Family Support Network to evaluate Mother, and she determined the "Triple P" parenting program was not "intensive enough" for Mother. Ms. Muse further testified that during a supervised visitation in April 2021, Oscar pulled down his pants close to Jorge's face to show him his underwear while Mother was in the room. Mother did not notice because she was preoccupied with Angel, so Ms. Muse had to intervene. Ms. Muse attempted to educate Mother that those behaviors are indicators of child abuse, but Mother "continuously denie[d] that anything happened to her children or that these issues are of concern."

¶ 19 Finally, Mother asserts, contrary to Finding of Fact 27, that she had a therapy appointment scheduled with a different therapist in April 2021. Ms. Blaney's testimony reveals Mother had scheduled an appointment with another provider at their office but had not yet "seen anyone else." Even if Mother had scheduled an appointment with another provider, she had not attended any therapy sessions in the months leading up to the termination hearing. There is clear and convincing evidence Mother's last therapy appointment was in April 2021.

b. Visits with Children

¶ 20 Next, Mother challenges several findings about her visits with her children while they were in DSS custody:

> 20. In the summer of 2020, visits between the children and [Mother] became increasingly problematic.

[Mother] repeatedly reported to Ana Blaney that her visits with the boys went well and occurred without incident. She failed to share completely accurate information with Ms. Blaney, and [DSS] had to intervene. [Mother] frequently struggled to command any respect from the children, struggled with discipline and redirection and exhibited difficulty with supervising all three children at one time. On August 13, 2020, Social Worker Samantha Muse started contacting Ms. Blaney consistently to report issues in the visits so that Ms. Blaney could process with [Mother] during her sessions and work on techniques to improve visits. [Mother] appeared to understand the issues during her sessions with Ms. Blaney, however, her visits failed to improve.

. . . .

32. [Mother] is offered weekly supervised visits with the children. A Spanish interpreter is provided as [Mother] speaks Spanish, and the children have lost their ability to speak Spanish and only speak English. Initially, [Mother] was consistent with visits. Since the primary plan changed to adoption in February 2021, she has not been consistent with visits and does not participate weekly. During most visits, she spends the majority of her time with [Angel], while [Jorge] and [Oscar] play amongst themselves. She is not able to appropriately supervise all three children in the visitation room. Her attempts at discipline are not effective as the children ignore her. The social worker frequently has to intervene in visits to ensure safety and to discourage inappropriate behavior from the children.

33. During a visit in April 2021, Social Worker Samantha Muse had to intervene during a visit when [Oscar] pulled down his pants to show [Jorge] his underwear. [Mother] did not see [Oscar] pull his pants down in front of [Jorge]'s face, and she failed to react until Ms. Muse entered the visitation room. She verbally addressed [Oscar] to instruct him to stop, however, she did not follow through to ensure that he stopped. When Ms. Muse tried to address the

> issue with [Mother] afterwards, [Mother] refused to address the issue and continually denied her children have suffered any sexual abuse.
>
> 34. [Mother] does have basic parenting skills such as diaper changing and bottle feeding. When asked to stop bringing sugary drinks and food to the visits because it adversely affects the boys' behaviors and contributes to [Oscar]'s significant tooth decay, she failed to grasp the issue and continued providing the same snacks.
>
> 35. [Jorge], [Oscar], and [Angel] are very rough with one another during play and need to be supervised well to avoid one harming another. They do not take direction from their mother when she verbally redirects them. The social worker intervenes frequently to redirect the children, and they are responsive to her instruction.
>
> 36. [Mother] cannot effectively and safely parent the Juveniles without direct and consistent intervention by the Department. [Jorge] and [Oscar] have been in foster care three times. [Angel] has been involved in an ongoing treatment case and one foster care case in his life. [DSS] has been a constant in their lives for many years and has provided services outside of foster care involvement through investigations and ongoing treatment services.

¶ 21 Mother concedes, as the trial court determined in Finding of Fact 20, that her visits with the children were "not going well in the summer of 2020" and the "DSS court report from the time corroborates this." The DSS social worker's testimony supports the trial court's remaining findings of fact about visitation. Regarding Oscar's dental health, Ms. Muse testified, during one visit, Mother ignored her instruction not to give Oscar a Coca-Cola at 8:30 a.m. because he previously had significant tooth decay. Ms. Muse detailed the visitation in which Oscar pulled his pants down in Jorge's face to show him his underwear. She further testified Mother had "extreme difficulty in visitations" and that she had to intervene "due to the children playing very rough with one another and not taking direction from Mom. Each visitation that the children have with [Mother], I do end up entering the visitation room[.]"

¶ 22 The challenged findings are supported by clear and convincing evidence and support the trial court's determination that Mother did not make willful progress on her case plan while the children were in DSS custody.

c. Mother's Housing

¶ 23 Mother asserts Finding of Fact 31 cannot serve as a basis for termination by willful failure to make progress. That finding provides:

> 31. [Mother] has maintained a home consistently throughout this case. She currently resides in a two-bedroom, one-bathroom home in Wilmington, North Carolina. Her home is always clean and tidy. She does not have adequate sleeping space for the children to have their own private space. Separate and distinct space is needed for each child to ensure appropriate boundaries given the history of sexual contact between the children. [Mother] has no realistic plan of how she would provide appropriate space and supervision in the home to prevent further sexual contact between the children.

¶ 24 Our General Assembly has made clear "[n]o parental rights . . . shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty." § 7B-1111(a)(2). We recognize the immense challenge Mother faces in securing appropriate housing for her three children as a single mother even under ideal circumstances. Although Mother faced financial difficulties, the trial court's order reveals poverty did not serve as the "sole reason" for the termination of her parental rights. *Id.*; *see also In re N.K.*, 375 N.C. 805, 816, 851 S.E.2d 321, 330 (2020) ("[A] careful analysis of the record shows that respondent-mother's inability to care for [her child] did not stem solely from her poverty."). The trial court's determination that Mother failed to make willful progress on her case plan "resulted from a combination of factors," *N.K.*, 375 N.C. at 816, 851 S.E.2d at 330, including Mother's failure to properly discipline her children, her inability to manage their sexual behaviors, and her inconsistent participation in therapy. Thus, we leave the trial court's finding undisturbed.

d. Drug and Alcohol Screens

¶ 25 Mother concedes Finding of Fact 14 "is supported by the [social worker's] testimony," but she claims the trial court's finding "omits

important information" that she provided negative drug screens on 6 November and 4 December 2020. The trial court found:

> 14. On May 19, 2020, June 10, 2020, and June 17, 2020, [Mother] failed to submit to random drug screens as requested by the Department. On November 5, 2020, she failed to show for a random drug screen as requested, but she did offer to go on November 6, 2020 if she could arrange transportation. No screen was requested on November 6, 2020 as it would not be random. She failed to submit to a random drug screen as requested on December 3, 2020, but she offered to submit on December 4, 2020 if she could arrange transportation. No screen was requested on December 4, 2020 as it would not be random. On May 21, 2021, [Mother] failed to submit to a screen as requested. [Mother] did submit to some random drug screens as requested, and the results were always negative. She submitted to a urine and hair drug screen in June 2021 with negative results. Social Worker Samantha Muse never witnessed [Mother] under the influence and never saw evidence of alcohol use in the home. Additionally, Ana Blaney never reported any concerns about [Mother] relapsing.

¶ 26 The "trial court need not make a finding as to every fact which arises from the evidence; rather, the [trial] court need only find those facts which are material to the resolution of the dispute." *In re M.S.E.*, 378 N.C. 40, 2021-NCSC-76, ¶ 31 (quotation marks and citation omitted). The trial court made material findings necessary to its termination decision—that Mother always tested negative on drug screens she submitted, that she failed to submit some screens, and that neither Ms. Muse nor Ms. Blaney had concerns about her sobriety. Despite Mother's contention, the trial court was not required to further detail the results of every rescheduled test. *See id.*

e. Children's Sexually Inappropriate Behavior

¶ 27 Mother argues the following findings about her children's sexually inappropriate behavior are also unsupported by clear, cogent, and convincing evidence:

> 21. Several years ago, a man named Jonathan touched [Oscar]'s privates over his clothes. [Mother] rented a room in the same house where Jonathan

> resided. [Mother] reported that Jonathan was just curious about little children, but she told him to stop [sic] [Oscar]. She failed to report the incident to law enforcement or [DSS].
>
> 22. Subsequently, Jonathan touched [Oscar]'s privates again, and it was witnessed by Jonathan's wife. Again, [Mother] failed to report to law enforcement or [DSS]. She threatened to sue Jonathan if he touched her child again. Prior to this date, she has consistently maintained that none of her children were sexually abused, and her testimony in this hearing is the first time she has admitted any child sexual abuse. She was unable or unwilling to provide further details about Jonathan.
>
> 23. [Mother] has always been reluctant to discuss the allegations of child sexual abuse of [Jorge] and [Oscar]. Sexual abuse symptoms were exhibited in the last foster care case when [Jorge] sexually perpetrated against [Oscar]. [Mother] was aware of the issues and did not ensure adequate supervision which is what ultimately led to the children's removal in November 2019. It has been difficult to address the sexual trauma the boys suffered because [Mother] consistently denies any inappropriate contact between adults and the Juveniles and any inappropriate contact between the Juveniles other than the incident in November 2019. [Ms.] Blaney spent many sessions addressing [Mother's] cultural beliefs about sexuality, discipline and parenting. [Mother] never admitted to Ms. Blaney that the boys had been sexually abused. Her failure to acknowledge the abuse prevents her ability to effectuate positive change in parenting techniques. Safety cannot be ensured when the proposed protective parent does not believe child sexual abuse occurred.

¶ 28 Specifically, Mother argues these findings "indicate [Mother] never mentioned a man attempting to perpetrate on her children before [the hearing] or [Mother]'s unwillingness to discuss it[.]" She misinterprets the trial court's findings. It is undisputed that the children's sexual behavior was reported to DSS as early as December 2017 and that Mother disclosed to DSS in early 2018 that a male roommate had touched Oscar's

and Jorge's penises. Instead, the trial court determined that, prior to the termination hearing, Mother "consistently maintained that none of her children were sexually abused, and her testimony in this hearing is the first time she has admitted any child sexual abuse." Mother does not otherwise challenge the substance of these findings and all three findings are supported by the collective testimony of Ms. Blaney, Ms. Muse, and Mother. As we have discussed, Mother's failure to acknowledge her children's sexual abuse supports the trial court's conclusion that Mother failed to make reasonable progress in the therapy and parenting components of her case plan.

f. Reasonable Progress

¶ 29 Our Supreme Court has not clearly defined what constitutes "reasonable progress," but, for purposes of ceasing reunification efforts, it has held it to be something more than "some progress." *In re J.H.*, 373 N.C. 264, 268-70, 837 S.E.2d 847, 850-52 (2020). "A [parent]'s prolonged inability to improve her situation, *despite some efforts in that direction*, will support a finding of willfulness regardless of her good intentions, and will support a finding of lack of progress sufficient to warrant termination of parental rights under [Sub]section 7B-1111(a)(2)." *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (cleaned up) (emphasis added).

¶ 30 Disregarding any finding made in error, *see R.G.L.*, ¶ 25, we hold there is clear, cogent, and convincing evidence to support the findings Mother challenges. *See Z.J.W.*, ¶ 14. Mother has made some effort to improve her situation and has made some progress on her case plan. Yet, in the months immediately before the termination hearing, *A.C.F.*, 176 N.C. App. at 528, 626 S.E.2d at 735, Mother inconsistently engaged in individual therapy, failed to acknowledge her children's sexual abuse, demonstrated little growth in effectively disciplining her children, and had no plan to maintain safe boundaries at home to manage her children's inappropriate sexual behavior. We affirm the trial court's conclusion that Mother willfully failed to make reasonable progress, given the circumstances, to correct the conditions which led to her children's removal to warrant termination of her parental rights under Subsection 7B-1111(a)(2).

2. The trial court appropriately concluded there was a likelihood of future neglect of the children.

¶ 31 **[2]** Mother contends the trial court erred in concluding there was a likelihood of future neglect of the children because she "substantially complied with her case plan, remedied removal conditions within her

control, and DSS did not present clear and convincing evidence of a likelihood of future neglect." We are unpersuaded.

¶ 32 The likelihood of future neglect may be based on a parent's history of neglect and willful failure to complete a case plan. *In re M.J.S.M.*, 257 N.C. App. 633, 637-39, 810 S.E.2d 370, 373-74 (2018). In terminations based on neglect, pursuant to Subsection 7B-1111(a)(1), where the children have been removed from the parent's custody, the trial court must consider any evidence of changed conditions since the prior neglect and the probability of a repetition of neglect. *In re C.N.*, 266 N.C. App. 463, 466-67, 831 S.E.2d 878, 881 (2019). "[P]arental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to her parents." *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citation omitted). "Failure to make progress must be viewed by the actions and attempts of parents within their abilities and means, considering their resources or lack thereof and the priority for their securing their basic necessities of life." *C.N.*, 266 N.C. App. at 469, 831 S.E.2d at 882 (citation omitted).

¶ 33 Here, the trial court concluded "there is a high probability that the neglect will continue in the foreseeable future." After the children were removed from Mother's care and adjudicated dependent and/or neglected on three separate occasions, at the time of the termination of parental rights hearing, Mother: (1) participated in therapy inconsistently; (2) was unable to appropriately discipline her children; and (3) failed to develop and implement a plan to properly supervise her children in her home given their inappropriate sexual behavior. Following our caselaw and our holding above, Mother's willful failure to complete her case plan supports the trial court's conclusion of a likelihood of future neglect. *See M.J.S.M.*, 257 N.C. App. at 637-39, 810 S.E.2d at 373-74. We hold the trial court did not err in concluding there was a "probability of repetition of neglect if the [children] were returned to [Mother]." *Reyes*, 136 N.C. App. at 815, 526 S.E.2d at 501 (citation omitted).

3. The trial court did not abuse its discretion in concluding termination of Mother's parental rights was in the best interest of the children.

¶ 34 **[3]** Lastly, Mother argues the trial court abused its discretion in concluding termination was in the best interest of the children because it failed to make relevant findings. In particular, Mother contends the trial court was required to make findings about the lack of Spanish-language services available to her and her children as well as the termination's

impact on the children's loss of culture. The trial court did not abuse its discretion.

¶ 35 We review a trial court's decision to terminate parental rights for abuse of discretion. *In re Z.L.W.*, 372 N.C. 432, 435, 831 S.E.2d 62, 64 (2019) (citations omitted).

¶ 36 After adjudicating at least one ground for terminating a parent's rights, the trial court

> *shall consider the following criteria and make written findings regarding the following that are relevant*:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) *Any relevant consideration.*

N.C. Gen. Stat. § 7B-1110(a)(1)-(6) (2021) (emphasis added). While a trial court must *consider* each factor in Subsection 7B-1110(a), the "statute does not, however, explicitly require written findings as to each factor." *In re A.U.D.*, 373 N.C. 3, 10, 832 S.E.2d 698, 702-03 (2019).

¶ 37 Assuming language and culture are included in the catchall "any relevant consideration" of Subsection 7B-1110(a)(6), we are satisfied the trial court considered these factors in concluding terminating Mother's parental rights was in the best interest of the children. In fact, the trial court made written findings about the language and cultural challenges: (1) "[Oscar] is frequently frustrated by the language barrier and his inability to easily communicate with his mother;" (2) DSS conducted a home study with a Spanish-speaking family friend in hopes of placing the children with them; and (3) "[Dr.] Blaney provided parenting education for [Mother] to allow for one-on-one instruction in Spanish."

¶ 38 Mother compares this case to *In re A.H.*, No. COA15-1177, 2016 WL 2865063, at *3 (N.C. Ct. App. May 17, 2016) (unpublished), in which this Court remanded the trial court's best interest decision for additional

findings about how the children's placement with their father, who had been recently deported to Mexico, would affect their welfare because they did not know the language or culture. That case is factually inapposite and not binding on our decision today. *See* N.C. R. App. P. 30(e) (2022) ("An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority.").

¶ 39 Mother has failed to demonstrate the trial court abused its discretion in its best interest determination.

III. CONCLUSION

¶ 40 Based on the foregoing reasons, we affirm the order of the trial court.

AFFIRMED.

Judges ZACHARY and JACKSON concur.

IN THE MATTER OF G.C., JUVENILE

No. COA22-38

Filed 5 July 2022

Child Abuse, Dependency, and Neglect—neglect—injurious environment—DSS cases with older siblings—death of sibling via suspected neglect—presence of other factors required

An adjudication of a minor daughter as neglected was vacated and remanded where the court based its ruling solely on findings regarding the department of social services' prior involvement with the daughter's siblings and the circumstances surrounding the death of the child's infant brother, including a finding that the brother's autopsy could not rule out accidental asphyxiation as a cause of death where his parents had left him in an unsafe sleeping environment. Crucially, the court made no finding that the daughter suffered or faced a substantial risk of suffering any physical, mental, or emotional impairment, and the court did not otherwise enter findings showing the presence of other factors indicating a present or future risk to the daughter of being neglected.

Judge GRIFFIN dissenting.

IN RE G.C.

[284 N.C. App. 313, 2022-NCCOA-452]

Appeal by Respondent from order entered 19 October 2021 by Judge Cheri Siler Mack in Cumberland County District Court. Heard in the Court of Appeals 7 June 2022.

Patrick A. Kuchyt for Petitioner-Appellee Cumberland County Department of Social Services.

Vitrano Law Offices, by Sean P. Vitrano, for Respondent-Appellant Father.

McGuireWoods LLP, by Anita M. Foss, for guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Respondent-Father appeals from the trial court's Adjudication and Disposition Order adjudicating his child, G.C. ("Glenda"),[1] a neglected juvenile. The Record reflects the following:

¶ 2 On 13 March 2020, Cumberland County Department of Social Services (DSS) filed a Petition alleging that Glenda was a neglected and dependent juvenile. The trial court held adjudication and disposition hearings on 27 August 2021. As part of the adjudication hearing, the parties submitted a written stipulation of facts focused primarily on the underlying facts of Respondent-Mother's previous cases with her two older children[2] and the death of Respondent-Parents' infant child Gary[3], Glenda's younger sibling.

¶ 3 On 19 October 2021, the trial court entered its Adjudication and Disposition Order adjudicating Glenda a "neglected juvenile within the meaning of N.C. Gen. Stat. § 7B-101(15), inasmuch as the juvenile did not receive proper care, supervision, or discipline from their parent, guardian, custodian, or caretaker, and the juvenile lived in an environment injurious to [her] welfare."[4] In this Order, the trial court made findings, based on the facts stipulated to by the parties, detailing Mother's previous DSS cases with the older children and her conviction of misdemeanor child abuse.

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1. A pseudonym stipulated to by the parties used for protection of the minor child and for ease of reading. *See* N.C. R. App. P. 42(b).

2. Mother is not a party to this appeal.

3. A pseudonym. *See* N.C. R. App. P. 42(b).

4. The Order also noted DSS was dismissing the allegation G.C. was a dependent juvenile.

¶ 4 In particular, the trial court found: Glenda was approximately 1 ½ years old at the time of the filing of the Petition.[5] Mother has two older children who were previously adjudicated abused, neglected, and dependent and have been in DSS custody since 28 December 2017.[6] On 6 November 2019, Mother was convicted of misdemeanor child abuse and placed on probation because of her actions with the two older children.

¶ 5 Gary was born in December 2019 to Respondent-Parents. On 12 March 2020, Mother was caring for Gary while Father was at work. Mother placed Gary in a " 'Pack n Play' and propped a bottle for him to feed[.]" Mother came in at one point to burp Gary, then placed him back in the "Pack n Play" on his side with several blankets. Approximately three hours later, Mother checked on Gary and found him unresponsive. Mother ran to the paternal grandmother's house who lived nearby, and the grandmother instructed Mother to call 911. Gary was pronounced dead at the scene. That day, Parents agreed to allow Glenda to temporarily live with her paternal grandmother.

¶ 6 In addition to these findings, the trial court also included as findings of fact:

> 29. Respondent Father and Respondent Mother have been instructed about proper sleeping arrangements for children.
>
> . . .
>
> 32. That when the EMS arrived on the scene, they noticed the juvenile foaming from the nose and the mouth, indicative of asphyxiation.
>
> 33. That the Fayetteville Police Department incident report dated 3/12/20 stated, they noticed two used baby bottles and several blankets in the Pack 'n Play.
>
> 34. That the medical examiner's autopsy report on [Gary] dated 3/13/20, stated that ". . . *sleeping in an environment with blankets while less than one year of age is a risk factor for an accidental asphyxial event. An asphyxial event cannot be ruled out based on the autopsy findings*." (Emphasis in original).
>
> . . .

5. Finding of Fact 16 contains an apparent typographical error as to G.C.'s birth date.

6. Father is not the father of Mother's two older children.

> 36. The evidence presented rises to the level of neglect pursuant to N.C. Gen. Stat. § 7B-101(15) in that the juvenile lived in an environment injurious to the juvenile's welfare; and that the juvenile does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian. Therefore, the juvenile is a neglected juvenile pursuant to N.C. Gen. Stat. § 7B-101(15).

¶ 7 The trial court concluded as a matter of law that Glenda was a neglected juvenile. In the Disposition portion of the Order, the trial court ordered Glenda remain in DSS custody and provided for visitation with Respondent-Parents. Father timely filed Notice of Appeal on 28 October 2021.

Issue

¶ 8 The dispositive issue on appeal is whether the trial court's adjudicatory Findings of Fact support its Conclusion of Law that Glenda is a neglected juvenile.

Analysis

¶ 9 Our review of an adjudication of neglect is constrained to whether the trial court's conclusions of law are supported by its findings of fact. *See In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citation omitted). "[I]n a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re J.A.M.*, 372 N.C. 1, 8, 822 S.E.2d 693, 698 (2019) (citations omitted). "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." *In re K.S.*, 380 N.C. 60, 2022-NCSC-7, ¶ 8. A trial court's adjudication of neglect is a conclusion of law that this Court reviews *de novo*. *Id.* at ¶ 8 (citation omitted); *In re W.C.T.*, 280 N.C. App. 17, 2021-NCCOA-559, ¶ 27 (citations omitted).

¶ 10 As an initial matter, as part of his broader challenge to the trial court's neglect adjudication, Respondent-Father challenges two of the trial court's findings: Findings of Fact 34 and 36. In Finding of Fact 34, the trial court recited[7] a portion of the Report of Autopsy Examination performed on Gary:

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7. *See In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (findings simply reciting the evidence presented at trial are not the required ultimate findings of fact). However, "[t]here is nothing impermissible about describing testimony, so long as

> 34. That the medical examiner's autopsy report on [Gary] dated 3/13/20, stated that ". . . *sleeping in an environment with blankets while less than one year of age is a risk factor for an accidental asphyxial event. An asphyxial event cannot be ruled out based on the autopsy findings.*" (Emphasis in original).

Specifically, Respondent-Father asserts this Finding "omits the Medical Examiner's conclusion that it was possible that Gary's death was caused by sudden infant death syndrome." Respondent-Father is correct the Medical Examiner's report also noted the findings "could be consistent with a diagnosis of sudden infant death syndrome." Indeed, the report concludes "the cause and manner of death are best classified as undetermined." However, we do not read Finding 34 as the trial court making any final determination of Gary's cause of death. We read it in context with the other findings that: Respondent-Parents had been instructed on proper sleeping arrangements for children; later, Gary was found unresponsive in the Pack 'n' Play with blankets; first-responders observed signs consistent with asphyxiation; and the Medical Examiner noted such a sleeping environment at less than one year old was a risk factor for asphyxiation and thus could not be ruled out as a cause of death. Taken together, these Findings tend to show Respondent-Parents caused Gary to be in an injurious environment at the time of his death.

¶ 11 Finding 36 states:

> 36. The evidence presented rises to the level of neglect pursuant to N.C. Gen. Stat. § 7B-101(15) in that the juvenile lived in an environment injurious to the juvenile's welfare; and that the juvenile does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian. Therefore, the juvenile is a neglected juvenile pursuant to N.C. Gen. Stat. § 7B-101(15).

Although denominated as a Finding of Fact by the trial court, "[t]he determination of neglect requires the application of the legal principles set forth in [the neglect statute] and is therefore a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675-76 (1997). Because this Finding is more properly designated a Conclusion of Law, we treat

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the court ultimately makes its own findings, resolving any material disputes[.]" *In re A.E.*, 2021-NCSC-130, ¶ 18 (quoting *In re T.N.H.*, 372 N.C. at 408, 831 S.E.2d at 59).

it as such for the purposes of this appeal. *Id.* In so doing, we review it in connection with the trial court's denominated Conclusion of Law 2 that Glenda "is a neglected juvenile" and its decree Glenda "is hereby adjudicated a neglected juvenile[.]"

¶ 12 Respondent-Father argues the trial court erred in making these legal conclusions and adjudicating Glenda as neglected because "Mother's previous cases and convictions of misdemeanor child abuse involving her other children do not support an adjudication of current or future neglect as to Glenda." DSS, for its part, "does not take a position" on whether the trial court's Findings support its neglect adjudication. The Guardian ad Litem, however, contends the Findings of Fact do support an adjudication of neglect.

¶ 13 A "[n]eglected juvenile" is defined, in relevant part, as "[a]ny juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker . . . [d]oes not provide proper care, supervision, or discipline . . . [or] [c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15) (2021). Relevant to the determination of a neglected juvenile is "whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." *Id.*

¶ 14 "The neglect statute 'neither dictates how much weight should be given to a prior neglect adjudication, nor suggests that a prior adjudication is determinative.' " *In re J.A.M.*, 372 N.C. at 9, 822 S.E.2d at 698 (quoting *In re A.K.*, 360 N.C. 449, 456, 628 S.E.2d 753, 757 (2006)). " 'Rather, the statute affords the trial judge some discretion in determining the weight to be given such evidence.' " *Id.* (quoting *In re Nicholson*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994). However, "[a] court may not adjudicate a juvenile neglected solely based upon previous Department of Social Services involvement relating to other children." *Id.*

¶ 15 "Rather, in concluding that a juvenile 'lives in an environment injurious to the juvenile's welfare,' N.C.G.S. § 7B-101(15), the clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile." *Id.* Indeed, our Courts have "additionally 'required that there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide "proper care, supervision, or discipline" ' in order to adjudicate a juvenile neglected." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (quoting *In re Safriet*, 112

N.C. App. 747, 752, 436 S.E.2d 898, 901–02 (1993)) (emphasis in original). "[A] prior and closed case with other children . . . *standing alone*, cannot support an adjudication of current or future neglect." *In re J.A.M.*, 372 N.C. at 9, 822 S.E.2d at 699 (internal quotations omitted) (citation omitted) (emphasis in original). "Instead, we 'require[ ] the presence of other factors to suggest that the neglect or abuse will be repeated.' " *Id.* at 9–10, 822 S.E.2d at 699 (quoting *In re J.C.B.*, 233 N.C. App. 641, 644, 757 S.E.2d 487, 489 (2014)).

¶ 16 Likewise, this Court has recognized that in determining whether a juvenile is neglected based on prior abuse or neglect of other children by an adult who regularly lives in the home: "The decision of the trial court regarding whether the other children in the home are neglected, 'must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.' " *In re S.M.L.*, 272 N.C. App. 499, 515, 846 S.E.2d 790, 801 (2020) (quoting *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999)). "If the trial court relies on instances of past abuse or neglect of other children in adjudicating a child neglected, the court is required to find 'the presence of other factors to suggest that the neglect or abuse will be repeated.' " *Id.* at 516, 846 S.E.2d at 801 (quoting *In re J.C.B.*, 233 N.C. App. 641, 644, 757 S.E.2d 487, 489 (2014)).

¶ 17 In this case, the trial court made no finding or determination Glenda suffered any physical, mental, or emotional impairment or that Glenda was at a substantial risk of such impairment as a consequence of any failure to provide proper care, supervision, or discipline to support the adjudication of Glenda as a neglected juvenile. *See In re J.A.M.*, 372 N.C. at 9, 822 S.E.2d at 698. Instead, the existing Findings show the trial court adjudicated Glenda neglected solely based on its findings of the prior DSS involvement with Respondent-Mother's older children and the circumstances surrounding the death of Respondent-Parent's infant son Gary. Crucially, as in *In re S.M.L.* and *In re J.C.B.* and unlike in *J.A.M.*, the trial court failed to find "the presence of other factors" indicating a present risk *to Glenda* when it reached its conclusion that *Glenda* was neglected as a matter of law. *See id.* at 10, 822 S.E.2d at 698. Thus, the trial court's Findings do not support its Conclusion adjudicating Glenda as a neglected juvenile. Therefore, the trial court erred in adjudicating Glenda as a neglected juvenile. Consequently, the trial court's Adjudication and Disposition Order must be vacated and this matter remanded to the trial court to determine whether facts supporting an adjudication of neglect may be found by clear and convincing

evidence on the existing record.[8] If so, the trial court should enter a new adjudication of neglect supported by such Findings of Fact and then proceed to a new disposition hearing. If not, the trial court should dismiss the Petition.

Conclusion

¶ 18 Accordingly, for the foregoing reasons, we vacate the trial court's Adjudication and Disposition Order and remand this matter to the trial court for a determination of whether additional adjudicatory findings may be made on the existing record as set forth above.

VACATED AND REMANDED.

Judge INMAN concurs.

Judge GRIFFIN dissents.

GRIFFIN, Judge, dissenting.

¶ 19 It is clear from our precedent that previous DSS involvement with other children is not by itself a sufficient basis to adjudicate a juvenile neglected and that, "[i]nstead, we require [] the presence of other factors to suggest that the neglect . . . will be repeated." *Matter of J.A.M.*, 372 N.C. at 9–10, 822 S.E.2d at 699 (citation and internal quotation marks omitted). Contrary to the majority's position, while the trial court made findings relating to Mother's older children's adjudications of abuse, neglect, and dependent "based on one of the children [being] severely malnourished because [Mother] and those children's father failed to feed the child[,] [and] [t]hat child also had bruises on him[,]" this was not the sole basis of its determination of neglect. Rather, the "other factors" that the court relied on were the specific findings relating to the circumstances of Gary's death, a child who DSS had no previous involvement with, under Mother's supervision, in the home that Glenda also resided in. In relation to Gary' death, the trial court found:

> 29. Respondent Father and Respondent Mother have been instructed about proper sleeping arrangements for children.

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8. We acknowledge the majority of the trial court's key evidentiary findings at adjudication are grounded in the stipulated facts and, as a result, there is a limited evidentiary record for the trial court to draw upon in making additional findings.

. . .

> 32. That when the EMS arrived on the scene, they noticed the juvenile foaming from the nose and the mouth, indicative of asphyxiation.
>
> 33. That the Fayetteville Police Department incident report dated 3/12/20 stated, they noticed two used baby bottles and several blankets in the Pack 'n Play.
>
> 34. That the medical examiner's autopsy report on [Gary] dated 3/13/20 stated that ". . . *sleeping in an environment with blankets while less than one year of age is a risk factor for an accidental asphyxial event. An asphyxial event cannot be ruled out based on the autopsy findings*."

(Emphasis in original). The trial court's findings reflect that Mother has not only had previous issues with neglecting her older children, but now, under the current circumstances that Glenda resided in, a child died under Mother's supervision. These findings taken together "suggest that the neglect . . . will be repeated." *Matter of J.A.M.*, 372 N.C. at 9–10, 822 S.E.2d at 699 (citation and internal quotation marks omitted).

¶ 20 Additionally, while the trial court did not make a specific finding that Glenda was at a substantial risk of harm due to a failure to provide proper care, supervision, or discipline, this Court has concluded that such a finding is unnecessary where it is clear from the evidence. *Matter of K.S.*, 380 N.C. 60, 2022-NCSC-7, ¶ 9; *Matter of Safriet*, 112 N.C. App. 747, 753, 436 S.E.2d 898, 902 (1993) ("Although the trial court failed to make any findings of fact concerning the detrimental effect of [the mother]'s improper care on [the juvenile]'s physical, mental, or emotional well-being, all the evidence supports such a finding." (citation omitted)). Consistent with the analysis above, the evidence is clear that Glenda is at a substantial risk of harm in the Parents' home based upon the trial court's findings about Mother's older children, showing a history of neglecting children, and the findings detailing the circumstances around Gary's death, evidencing current issues with supervision and care in Parents' home.

¶ 21 For these reasons, I respectfully dissent.

ITG BRANDS, LLC v. FUNDERS LINK, LLC

[284 N.C. App. 322, 2022-NCCOA-454]

ITG BRANDS, LLC, PLAINTIFF
v.
FUNDERS LINK, LLC AND WORLD GLOBAL CAPITAL, LLC, DEFENDANTS

FUNDERS LINK, LLC
v.
ZOOM INSIGHTS INC. AND TIMOTHY MATTHEWS, THIRD PARTY DEFENDANTS

No. COA22-32

Filed 5 July 2022

1. Appeal and Error—interlocutory order—denying motion to dismiss—lack of personal jurisdiction—substantial right

In an action alleging violations of the Unfair and Deceptive Trade Practices Act and the Uniform Voidable Transactions Act, defendant's appeal from an interlocutory order denying its motion to dismiss for lack of personal jurisdiction affected a substantial right and therefore was immediately appealable.

2. Jurisdiction—personal—long-arm statute—due process—minimum contacts—withdrawals from in-state bank account by servicing agent for another company

The trial court properly declined to dismiss for lack of personal jurisdiction an action brought by a North Carolina tobacco company (plaintiff) alleging that an out-of-state finance company (defendant) violated the Unfair and Deceptive Trade Practices Act and the Uniform Voidable Transactions Act (UVTA) where, after plaintiff obtained a monetary judgment against a marketing firm that breached its services contract with plaintiff due to financial collapse, plaintiff discovered that defendant—acting as a servicing agent for another financing company—had been collecting plaintiff's prepayments under the contract from the marketing firm's North Carolina bank account. As the "first transferee" of the funds for purposes of the UVTA, defendant was the proper party to sue under North Carolina's long-arm statute. Further, defendant had sufficient minimum contacts with North Carolina—including its daily withdrawal of funds from a North Carolina bank account—to satisfy the due process requirements for personal jurisdiction.

Appeal by defendant from order entered 1 June 2021 by Judge William A. Wood in Guilford County Superior Court. Heard in the Court of Appeals 8 June 2022.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP by Clint S. Morse and James M. Lowdermilk for plaintiff-appellee.

Smith, Debnam, Narron, Drake, Saintsing & Myers, LLP by Byron L. Saintsing and Joseph Alan Davies for defendant-appellant.

TYSON, Judge.

¶ 1 Funders Link, LLC ("Funders Link") appeals from order entered denying their motion to dismiss for lack of personal jurisdiction. We affirm.

I. Background

¶ 2 ITG Brands, LLC ("Plaintiff") is a limited liability company chartered in Texas, with a principal place of business situated in North Carolina. Plaintiff manufactures tobacco products.

¶ 3 Funders Link is a limited liability company chartered in and with a principal place of business situated in Florida. World Global Capital, LLC is a limited liability company chartered in and with a principal place of business situated in New York. Both Funders Link and World Global are finance companies.

¶ 4 In 2018, Plaintiff entered into a contract with Zoom Insights, Inc. ("Zoom") for it to provide marketing services. The contracts were negotiated and entered into in North Carolina. Zoom was both chartered and headquartered in North Carolina. ITG prepaid approximately $4 million to Zoom as consideration for the contracts. Zoom failed to perform the marketing services for Plaintiff as contracted and collapsed in July 2019. Plaintiff sued Zoom on 16 August 2019 to recover damages for breach of contract and obtained a judgment for $3.3 million.

¶ 5 During the litigation, Plaintiff gained access to Zoom's bank records, which showed financial distress. Zoom was heavily leveraged and resorted to merchant cash advances to meet its ongoing finance requirements. After servicing debt, Zoom's cash flow was virtually non-existent.

¶ 6 In August 2018, Zoom entered into a financing agreement with Kabbage, Inc. to provide funding to Zoom in exchange for its pledge and a security interest in Zoom's accounts receivable. Also during August 2018, World Global entered into an agreement to provide cash advances to Zoom. Zoom assigned its receipts to World Global. Between August 2018 and May 2019, World Global provided $547,000.00 in loans to Zoom. Zoom paid World Global approximately $957,000.00.

¶ 7 In December 2018, Funders Link entered into an agreement with Zoom to provide cash advances. As a part of the agreement, Zoom also assigned its receipts to Funders Link. HOP Capital, an entity alleged to be owned by Funders Link, filed a UCC-1 financing statement in North Carolina to perfect its security interest in Zoom's collateral and loaned $1,715,000.00 to Zoom.

¶ 8 Zoom agreed to pay "10% of daily deposits equal to $17,000 a day until fully paid." Between 19 February 2019 and July 2019, Zoom paid HOP Capital almost $1 million. On 1 August 2019, HOP Capital asserted Zoom still owed it $1.9 million.

¶ 9 Funders Link asserts it does not contract with merchants and only collects payments from merchants. Funderz.net, LLC ("Funderz.net") contracts to purchase Funders Link's accounts receivable. Funderz.net is a limited liability company chartered in New York with principal places of business located in both New York and Florida. Funders Link asserts they are the servicing agent for Funderz.net.

¶ 10 After Plaintiff obtained the $3.3 million judgment against Zoom, it filed a complaint against Defendants on 25 September 2020, for violating North Carolina's Unfair and Deceptive Trade Practices Act and the Uniform Voidable Transactions Act. *See* N.C. Gen. Stat. §§ 39-23.4 *et seq.*, 75-1.1 *et seq.* (2021). Funders Link filed an answer, motion to dismiss, affirmative defenses, and a third-party complaint. Following a hearing, the trial court denied Funders Link's motion to dismiss by order entered 1 June 2021. Funders Link appeals.

II. Jurisdiction

A. Interlocutory Appeal

¶ 11 **[1]** Funders Link correctly concedes this appeal is interlocutory, but asserts its substantial rights will be impacted without immediate review. *See* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2021). "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).

¶ 12 Our Supreme Court has held:

> 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. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves

> it for further action by the trial court in order to settle and determine the entire controversy.

Veazey v. City of Durham, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted).

¶ 13 "This general prohibition against immediate [interlocutory] appeal exists because [t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 568 (2007) (citations and internal quotations omitted).

B. Lack of Personal Jurisdiction

¶ 14 Our General Statutes recognize a limited right to immediate appeal from an interlocutory order denying a motion to dismiss for lack of personal jurisdiction. *See* N.C. Gen. Stat. § 1-277(b) (2021) ("Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[.]").

¶ 15 The denial of a "motion[] to dismiss for lack of personal jurisdiction affect[s] a substantial right and [is] immediately appealable." *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 257-58, 625 S.E.2d 894, 898 (2006) (citations omitted). This exception is narrow: "the right of immediate appeal of an adverse ruling as to jurisdiction over the person, under [N.C. Gen. Stat. § 1-277(b)], is limited to rulings on 'minimum contacts' questions, the subject matter of Rule 12(b)(2)." *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982).

III. Issue

¶ 16 **[2]** Funders Link argues the trial court erred in denying their motion to dismiss for lack of personal jurisdiction.

IV. Rule 12(b)(2) Motion

¶ 17 North Carolina applies a two-step analysis to determine whether a non-resident defendant is subject to personal jurisdiction in North Carolina: "First, jurisdiction must be authorized by our 'long-arm' statute, N.C. Gen. Stat. § 1-75.4. Second, if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Cambridge Homes of N.C. Ltd. P'ship v. Hyundai Constr., Inc.*, 194 N.C. App. 407, 411, 670 S.E.2d 290, 295 (2008) (citations and internal quotation marks omitted).

A. Standard of Review

¶ 18 "The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record[.]" *Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011) (citations and quotation marks omitted). "When jurisdiction is challenged, plaintiff has the burden of proving that jurisdiction exists." *Stetser v. TAP Pharm. Prods., Inc.*, 162 N.C. App. 518, 520, 591 S.E.2d 572, 574 (2004) (citation omitted).

¶ 19 "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 542 (1985) (citation omitted).

¶ 20 "We review *de novo* the issue of whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over a defendant." *Bell*, 216 N.C. App. at 543, 716 S.E.2d at 871 (citation omitted).

B. Competent Evidence

¶ 21 Funders Link argues Plaintiff's unverified allegations are not competent evidence and should not have been considered by the trial court. Funderz.net, Plaintiff and Funders Link submitted dueling affidavits. The trial court ruled upon the motion based on the affidavits presented by the parties.

¶ 22 "[W]hen a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." N.C. Gen. Stat. § 1A-1, Rule 43(e) (2021). In this instance, "the trial judge must determine the weight and sufficiency of the evidence [presented in the affidavits as] much as a juror." *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524 (1981).

¶ 23 The trial court did not make findings of fact in either the oral rendition or the filed order. When the record contains no findings of fact, "it is presumed . . . that the court on proper evidence found facts to support its judgment." *Id.* (citation and internal quotation marks omitted).

¶ 24 After reviewing the affidavits, the trial court decided to accept Plaintiff's contentions, as contained in the affidavits. *See id.* On appeal, this Court is not "free to revisit questions of credibility or weight that have already been decided by the trial court." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 695, 611 S.E.2d 179,

183 (2005). Neither party requested the trial court to articulate and enter findings of fact. Funders Link's argument is overruled.

C. Morse Affirmation

¶ 25 Plaintiff presented an affidavit from Clint S. Morse, Esq. During the pleadings and hearing on Funders Link's motion to dismiss, Funders Link never objected nor moved to strike Morse's affidavit. Rule of Appellate Procedure 10(a)(1) provides: "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[.]" N.C. R. App. P. 10(a)(1). Funders Link's argument is overruled.

D. N.C. Gen. Stat. § 1-75.4

¶ 26 N.C. Gen. Stat. § 1-75.4, North Carolina's long-arm statute, provides *inter alia*:

> (3) Local Act or Omission. — In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.
>
> (4) Local Injury; Foreign Act. — In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:
>
> a. Solicitation or services activities were carried on within this State by or on behalf of the defendant;
>
> b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade; or
>
> c. Unsolicited bulk commercial electronic mail was sent into or within this State by the defendant using a computer, computer network, or the computer services of an electronic mail service provider in contravention of the authority granted by or in violation of the policies set by the electronic mail service provider. Transmission of commercial electronic mail from an organization to its members shall not be deemed to be unsolicited bulk commercial electronic mail.

. . .

(6) Local Property. — In any action which arises out of:

a. A promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this State; or

b. A claim to recover for any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this State either at the time of the first use, ownership, control or possession or at the time the action is commenced; or

c. A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this State at the time the defendant acquired possession or control over it;

N.C. Gen. Stat. § 1-75.4 (2021).

¶ 27 Funders Link asserts it is the improper party to be sued in North Carolina. It argues Funderz.net is the proper party with sufficient contacts within North Carolina. Funders Link admits to being the merchant servicer for Funderz.net. Under our General Statutes, "judgment [under the North Carolina Voidable Transactions Act] may be entered against any of the following: (a) the first transferee of the asset or the person for whose benefit the transfer was made[.]" N.C. Gen. Stat. § 39-23.8(b)(1) (2021). As the admitted servicing arm, Funders Link is the "first transferee" of the disputed funds taken from Zoom's North Carolina bank account and satisfies the North Carolina long-arm statute. *Id.*; *see* N.C. Gen. Stat. § 1-75.4 (2021).

E. Reasonable Expectation to be Haled into North Carolina

¶ 28 For a forum to exercise specific personal jurisdiction over a non-resident, "there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum state and is therefore subject to the State's regulation." *Ford Motor Co. v. Mont. Eighth Judicial Dist Ct.*, __ U.S. __, __, 209 L. Ed. 2d 225, 234 (2021) (slip of at *6) (citation omitted). The Supreme Court of the United States has held the basis of the suit

must "arise out of or relate to the defendant's contacts with the forum." *Bristol-Myers Squib Co. v. Superior Court of Cal.*, 582 U.S. __, __, 198 L. Ed. 2d 395, 403 (2017).

¶ 29 "In determining whether the exercise of personal jurisdiction comports with due process, the crucial inquiry is whether the defendant has 'certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Tejal Vyas, LLC v. Carriage Park, Ltd. P'ship*, 166 N.C. App. 34, 38, 600 S.E.2d 881, 885 (2004) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945)).

¶ 30 This Court has articulated factors to consider whether a defendant's activities are sufficient to establish minimum contacts: "(1) the quality of the contacts; (2) the quality and nature of the contacts; (3) the source and connection of the cause of action to the contracts; (4) the interests of the forum state, and (5) the convenience to the parties." *Cooper v. Shealy*, 140 N.C. App. 729, 734, 537 S.E.2d 854, 857-58 (2000) (citation and internal quotation marks omitted).

¶ 31 Funders Link serviced accounts for Funderz.net and HOP Capital. HOP Capital filed a UCC-1 in North Carolina to perfect their security interest. Funders Link withdrew monies from an account based in North Carolina from a North Carolina-based company daily from February 2019 until July 2019. This evidence supports a finding and conclusion Funders Link's activities within North Carolina included a reasonable expectation it could be haled into North Carolina's courts under the factors above. *Id.* Funders Link's minimum contacts support being haled into North Carolina's courts and does not "offend traditional notions of fair play and substantial justice." *Tejal Vyas, LLC*, 166 N.C. App. at 38, 600 S.E.2d at 885. Funders Link's argument is overruled.

V. Conclusion

¶ 32 Plaintiff carried their burden to prove jurisdiction. Plaintiff has shown a causal connection, purposeful availment, and personal jurisdiction under the statute between Plaintiff and Funders Link. Our review is expressly limited to the jurisdictional issues presented and we express no opinion on the relative merits, if any, of the parties' claims and defenses. The trial court's order denying Funders Link's Rule 12(b)(2) motion to dismiss is affirmed. *It is so ordered.*

AFFIRMED.

Judges DILLON and JACKSON concur.

N. STATE DELI, LLC v. CINCINNATI INS. CO.

[284 N.C. App. 330, 2022-NCCOA-455]

NORTH STATE DELI, LLC D/B/A LUCKY'S DELICATESSEN, MOTHERS & SONS, LLC D/B/A MOTHERS & SONS TRATTORIA, MATEO TAPAS, L.L.C. D/B/A MATEO BAR DE TAPAS, SAINT JAMES SHELLFISH LLC D/B/A SAINT JAMES SEAFOOD, CALAMARI ENTERPRISES, INC. D/B/A PARIZADE, BIN 54, LLC D/B/A BIN 54, ARYA, INC. D/B/A CITY KITCHEN AND VILLAGE BURGER, GRASSHOPPER LLC D/B/A NASHER CAFE, VERDE CAFE INCORPORATED D/B/A LOCAL 22, FLOGA, INC. D/B/A KIPOS GREEK TAVERNA, KUZINA, LLC D/B/A GOLDEN FLEECE, VIN ROUGE, INC. D/B/A VIN ROUGE, KIPOS ROSE GARDEN CLUB, LLC D/B/A ROSEWATER, AND GIRA SOLE, INC. D/B/A FARM TABLE AND GATEHOUSE TAVERN, PLAINTIFFS

v.

THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; MORRIS INSURANCE AGENCY INC.; AND DOES 1 THROUGH 20, INCLUSIVE, DEFENDANTS

No. COA21-293

Filed 5 July 2022

Insurance—commercial—government-ordered pandemic-related restrictions—loss of business—no physical loss or property damage

The trial court erred by granting summary judgment to restaurants that sought coverage from their insurance carriers for business income lost as a result of mandatory restrictions ordered by state and local governments in response to a pandemic. Under the unambiguous policy provisions defining "loss" as "accidental physical loss or accidental physical damage," where the mandatory restrictions limited restaurants to providing take-out and delivery services only, there was no direct physical loss or damage to property and therefore no coverage for loss of use.

Appeal by Defendants from order entered 9 October 2020 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 9 March 2022.

The Paynter Law Firm, PLLC, by Gagan Gupta and Stuart M. Paynter, for Plaintiffs-Appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Kimberly M. Marston, Jim W. Phillips, Jr., and Gary S. Parsons, for Defendants-Appellants.

Robinson & Cole LLP, by Roger A. Peters, II, for amici curiae American Property Casualty Insurance Association and National Association of Mutual Insurance Companies.

Deputy Solicitor General Sarah G. Boyce for amicus curiae The State of North Carolina.

Kimberly M. Rehberg for amici curiae City of Charlotte, City of Durham, and Former State Commissioner of Insurance George Wayne Goodwin.

Robinson, Bradshaw & Hinson, P.A., by Richard C. Worf, Jr., and Covington & Burling LLP, by Allison Hawkins, for amicus curiae United Policyholders and National Independent Venue Association.

Crabtree Carpenter, PLLC, by Guy W. Crabtree, and Thompson Hammerman Davis LLP, by Gary S. Thompson and Kristin C. Davis, for amicus curiae North Carolina Restaurant & Lodging Association and Restaurant Law Center.

DILLON, Judge.

¶ 1 Defendants appeal from an Order Granting Plaintiffs' Rule 56 Motion for Partial Summary Judgment. In this case, we must interpret provisions of Plaintiffs' commercial insurance policies (the "Policies"). Because we conclude the unambiguous terms of the Policies did not provide the coverage Plaintiffs sought, we reverse the ruling below.

I. Background

¶ 2 Plaintiffs are sixteen (16) North Carolina restaurants insured by Defendants under the Policies.[1] The issue in this case is whether Plaintiffs are entitled to insurance coverage under their Policies for the business losses they incurred due to the COVID-related shutdowns.

¶ 3 The Policies each contain a provision providing for the loss of the restaurants' business income ("Business Income Provision"):

> We will pay for the actual loss of "Business Income" . . . you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss.

1. Each Plaintiff's policy has identical relevant provisions.

¶ 4 The Policies provide that "Loss" means "accidental physical loss or accidental physical damage."

¶ 5 In March of 2020, state and local government orders were issued in response to the COVID-19 pandemic (the "Governmental Orders"). The Governmental Orders restricted restaurant operations to carry-out/take-out and delivery operations only.[2] Following these orders, fourteen (14) of sixteen (16) Plaintiffs closed their restaurants completely. Two restaurants continued to operate under the Governmental Orders' limitations until fully closing in May 2020. Plaintiffs decided to close their restaurants due to the financial repercussions of the Governmental Orders.

¶ 6 In May 2020, Plaintiffs sought coverage from Defendants under their Policies for loss of income and expenses from their reduced or stopped business operations, filing a motion for partial summary judgment. Defendants disputed coverage and filed a Rule 12(b)(6) motion to dismiss.

¶ 7 After hearing argument on the motions, the trial court entered judgment for Plaintiffs on their First Claim for Relief, which sought a declaratory judgment that "the Policies cover Business Income and Extra Expense . . . resulting from governmental action that forced Plaintiffs to suspend operations." Plaintiffs' First Claim for Relief did not seek damages or other relief. The trial court concluded that "the Policies provide coverage for Business Income and Extra Expenses for Plaintiffs' loss of use and access to covered property mandated by the Governmental Orders as a matter of law." Defendants appealed from the trial court's Order Granting Plaintiffs' Rule 56 Motion for Partial Summary Judgment (the "Order").

II. Standard of Review

¶ 8 "In North Carolina, determining the meaning of language in an insurance policy presents a question of law for the Court." *Accardi v. Hartford Ins. Co.*, 373 N.C. 292, 295, 838 S.E.2d 454, 456 (2020). We review these questions of law *de novo* on appeal. *Register v. White*, 358 N.C. 691, 693, 599 S.E.2d 549, 552 (2004).

III. Analysis

¶ 9 "When interpreting an insurance policy, courts apply general contract interpretation rules. As in other contracts, the objective of

2. *See* North Carolina Executive Orders No. 116-18, 120-21, 131; *see also* Second Amendment to Declaration of State of Emergency in the City of Durham (Mar. 25, 2020).

construction of terms in an insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued." *Accardi*, 373 N.C. at 295, 838 S.E.2d at 456 (internal quotation marks and citation omitted). A court should construe a policy in accordance with its terms, but ambiguous terms are construed against the insurer and in favor of the policyholder. *Id.* at 295, 838 S.E.2d at 456. Ambiguity exists when a provision is "fairly and reasonably susceptible to either of the constructions for which the parties contend." *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970).

¶ 10 A term should be given its defined meaning if provided in the policy. *Id.* at 354, 172 S.E.2d at 522. If a term is not defined within the policy, the court "must define the term in a manner that is consistent with the context in which the term is used, and the meaning accorded to it in ordinary speech." *Accardi*, 373 N.C. at 295, 838 S.E.2d at 457. "Care will be taken to give the various clauses of the policy an interpretation consistent with the main purpose of the contract[.]" *Woodell v. Aetna Ins. Co.*, 214 N.C. 496, 499, 199 S.E. 719, 721 (1938).

¶ 11 Here, Defendants argue that the trial court erred in concluding that the Governmental Orders temporarily restricting the scope of their restaurant operations constituted direct physical loss or damage to the property. We agree for the reasoning below. Because this issue is dispositive in this case, we decline to address Defendants' alternative argument.

¶ 12 We considered a similar issue in *Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Co.*, 126 N.C. App. 698, 486 S.E.2d 249 (1997). That case involved potential customers who were unable to access the insured location due to a snowstorm blocking the entrance. *Id.* at 699, 486 S.E.2d at 250. Our Court concluded there to be no coverage under a business interruption clause when the insured property was not "caused by direct physical loss of or damage to property at the premises" as required by the policy. *Id.* at 700, 486 S.E.2d at 251.

¶ 13 Further, recent cases from the Fourth Circuit have agreed that similar or identical policy provisions do not provide coverage for business interruption losses due to COVID-19 governmental orders because there is no direct physical loss or damage to the insured property. *See*, *e.g.*, *Fs Food Group LLC v. Cincinnati Ins. Co.*, 2022 US Dist. LEXIS 22598 (Feb. 8, 2022); *Summit Hosp. Grp., Ltd. v. Cincinnati Ins. Co.*, 2021 U.S. Dist. LEXIS 40613 (E.D.N.C. Mar. 4, 2021). These cases involve the application of North Carolina law, and we find them persuasive.

¶ 14 We agree with these courts that the relevant provisions of the Policies are unambiguous. Plaintiffs did not allege that their loss resulted

from physical harm to their property, but that the Governmental Orders resulted in loss of business. Plaintiffs' desired definition of "physical loss" as a general "loss of use" is not supported by our caselaw or the unambiguous language in the Policies. According to the plain language of the Policies, only *direct*, accidental, *physical* loss or damage to the property is covered. Therefore, the trial court erred in granting partial summary judgment to Plaintiffs on their First Claim for Relief.

III. Conclusion

¶ 15 We reverse the trial court's grant of partial summary judgment to Plaintiffs on their First Claim for Relief and direct the trial court to enter summary judgment in favor of Defendants on this claim.

REVERSED AND REMANDED.

Judges HAMPSON and WOOD concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., Plaintiff
v.
CASSIE HERRING and CURTIS LEE TURMAN and RUTH HERRING, Defendants

No. COA22-85

Filed 5 July 2022

Insurance—coverage under parents' policy—resident of household—sufficiency of evidence

In an action where an insurance company sought a declaratory judgment stating that defendant was not covered under her mother's and stepfather's underinsured motorist policy, the trial court properly granted summary judgment to defendant where the evidence showed that she was a "resident" of her mother's household entitled to coverage under the policy. Defendant had a longstanding arrangement of living in her mother's home for four months every year, she retained a permanent room in the home and kept many personal belongings there, her mother and stepfather included her as a named driver under their policy and intended that she be covered under it, and the insurance company had previously paid defendant $5,000 for medical coverage under the same policy. Importantly, evidence showing that defendant maintained a split residence between her mother's home and her father's home did not disqualify her from coverage under her mother's insurance policy.

Judge DILLON dissenting.

Appeal by Plaintiff from order entered 15 October 2021 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 7 June 2022.

Haywood, Denny & Miller, L.L.P, by Robert E. Levin, for Plaintiff-Appellant.

Martin & Jones, PLLC, by Huntington M. Willis, for Defendant-Appellee.

GRIFFIN, Judge.

¶ 1 Plaintiff North Carolina Farm Bureau Mutual Insurance Company, Inc., appeals from a summary judgment order finding Cassie Herring within the coverage of an underinsured motorist ("UIM") insurance policy issued by Plaintiff. Plaintiff asserts that the trial court erred in granting summary judgment because there is insufficient evidence to establish that Defendant is a "resident" of the household covered under the policy. We affirm the decision of the trial court and hold that there is sufficient evidence to establish that Defendant is a resident of the household and is therefore covered under the UIM policy.

I. Factual and Procedural History

¶ 2 On 19 April 2019, Defendant was the front seat passenger in an automobile accident and was left injured by the crash. Defendant sought recovery under a UIM policy that was issued to Defendant's mother and stepfather by Plaintiff. Defendant's mother and stepfather are both named as insureds under the policy, while Defendant is named as a driver.

¶ 3 The policy issued by Plaintiff provides in part that Plaintiff "will pay compensatory damages which an Insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of . . . [b]odily injury sustained by an insured and caused by an accident." The policy defines "insured" to include "[y]ou or any family member." The term "family member" is defined by the policy as "a person related to you by blood, marriage, or adoption who is a resident of your household." Nowhere in the policy is the term "resident" or "residence" defined.

¶ 4 Plaintiff conducted an examination of Defendant under oath on 23 November 2020. Defendant stated that she lives with her mother

for four months each year and with her father for the remainder of the year, an arrangement that she has "always" maintained. Defendant lists her father's address on her driver's license and vehicle registration, and is registered to vote in the county where her father resides. Although Defendant stated that she does not receive mail at her mother's address, she did receive a $5,000 payment from Plaintiff for medical coverage under the same policy at that location.

¶ 5 On 2 December 2020, Plaintiff filed a complaint requesting declaratory relief to determine the rights of the parties under the UIM policy. Plaintiff asserts that Defendant is not a resident of her mother's home and is thus not covered under the policy. Plaintiff filed a motion for summary judgment on 25 August 2021, and Defendant filed her own motion for summary judgment on 31 August 2021.

¶ 6 In support of her motion for summary judgment, Defendant submitted affidavits from herself, her mother, her father, and her stepfather. These affidavits provide that Defendant maintains a permanent room in her mother's home and keeps personal belongings like toiletries and bedding there. They add that Defendant has been clinically diagnosed with severe depression and anxiety, conditions that she has suffered from for over twenty years, and, as a result, she has not maintained her own private residence in at least fifteen years. Contrary to Defendant's sworn statement, the affidavits claim that she does routinely receive and accept mail at her mother's residence. In addition, the affidavits submitted by Defendant's mother and stepfather indicate that it was their intent to include Defendant under the policy as a member of their household.

¶ 7 On 15 October 2021, the trial court filed an order granting Defendant's motion for summary judgment. Plaintiff timely filed notice of appeal.

II. Analysis

¶ 8 The sole question for review is whether the trial court correctly granted summary judgment in favor of Defendant. Plaintiff maintains that Defendant is not covered under the UIM insurance policy because she is not a "resident" of her mother's household. Because there is sufficient evidence to establish that Defendant maintains residency in her mother's household, we affirm the trial court's decision.

¶ 9 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. R. Civ. P. 56(c). "A ruling on a motion for summary judgment must consider

the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor." *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680, 821 S.E.2d 360, 366 (2018). We review de novo an appeal of a summary judgment order. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

¶ 10 "The meaning of specific language used in an insurance policy is a question of law." *N.C. Farm Bureau Mut. Ins. Co. v. Briley*, 127 N.C. App. 442, 445, 491 S.E.2d 656, 658 (1997). "As with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued." *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978). "Insurance policies must be given a reasonable interpretation and where there is no ambiguity they are to be construed according to their terms." *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 435, 146 S.E.2d 410, 414 (1966). However, "[w]here there is ambiguity and the policy provision is susceptible of two interpretations, of which one imposes liability upon the company and the other does not, the provision will be construed in favor of coverage and against the company." *Id.*

¶ 11 "The words 'resident,' 'residing' and 'residence' are in common usage and are found frequently in statutes, contracts and other documents of a legal or business nature. They have, however, no precise, technical and fixed meaning applicable to all cases." *Id.* The meaning of the word "resident" is thus "flexible, elastic, slippery, and somewhat ambiguous." *Great American Ins. Co. v. Allstate Ins. Co.*, 78 N.C. App. 653, 656, 338 S.E.2d 145, 147 (1986).

¶ 12 Our Supreme Court interpreted a similar insurance policy in *Jamestown*, noting that "[w]hen an insurance company, in drafting its policy of insurance, uses a 'slippery' word to mark out and designate those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the term." *Jamestown*, 266 N.C. at 437, 146 S.E.2d at 416. Instead, "[a]ll who may, by any reasonable construction of the word, be included within the coverage afforded by the policy should be given its protection." *Id.* at 437–38, 146 S.E.2d at 416.

¶ 13 "Determinations of whether a particular person is a resident of the household of a named insured are individualized and fact-specific." *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Paschal*, 231 N.C. App. 558, 565, 752 S.E.2d. 775, 780 (2014). "[O]ne basic prerequisite exists when a party seeks coverage under this type of provision contained within a relative's insurance policy—namely, the party must show that they actually lived

in the same dwelling as the insured relative for a meaningful period of time." *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Martin*, 376 N.C. 280, 291, 851 S.E.2d 891, 898 (2020). However, residence in the insured's dwelling need not be exclusive to merit coverage, as "it is generally recognized that a person may be a resident of more than one household for insurance purposes." *Davis by Davis v. Md. Cas. Co.*, 76 N.C. App. 102, 106, 331 S.E.2d 744, 746 (1985).

¶ 14 Here, we evaluate whether Defendant is properly defined as a resident for the purposes of the UIM policy. We therefore examine the record to determine if, under any reasonable construction of the term, Defendant may be considered a "resident" of her mother's household. If so, our inquiry ends and Defendant should be afforded coverage under the policy. *See Jamestown*, 266 N.C. at 437–38, 146 S.E.2d at 416 ("All who may, by any reasonable construction of the word, be included within the coverage afforded by the policy should be given its protection.").

¶ 15 The record provides ample evidence that Defendant maintains residence in her mother's household. The sworn statement of the Defendant reveals that Defendant lives in her mother's home for "four months out of the year," an arrangement that she has "always" had. Defendant's residence in the home need not be continuous nor must it be without interruption. *See Davis*, 76 N.C. App at 106, 331 S.E.2d at 746. Thus, contrary to Plaintiff's assertion that this constitutes no more than family visits, the "basic prerequisite" that the insured must live in the dwelling for a "meaningful period of time" is surely met here. *See Newcomb v. Great Am. Ins. Co.*, 260 N.C. 402, 403, 133 S.E.2d 3, 5 (1963) (living in the home on and off for three years); *Jamestown*, 266 N.C. at 439, 146 S.E.2d at 417 (living in the home for periodic intervals over most of his adult life).

¶ 16 Defendant added that she retains a permanent room in her mother's home and keeps clothing that she shares with her mother. Affidavits submitted by Defendant's mother and stepfather explain that she keeps personal belongings at the mother's home, including items of daily living like toiletries and bedding. The affidavits show that Defendant is included as a named driver on the UIM policy and that her mother and stepfather intended she would be covered under their policy. Additionally, the trial court noted the irony of Plaintiff having previously sent a $5,000 check to the home.

¶ 17 Taken together, the evidence found in the record could establish at the very least that Defendant maintains a split residence between her father's home and her mother's home. Defendant need not be an exclusive resident of the mother's home in order to be covered under the UIM

policy. Thus, the fact that Defendant lists her father's address on her driver's license and vehicle registration does not contravene the conclusion that she is a resident of the mother's home.

¶ 18 Plaintiff contests that some portions of the affidavits submitted by Defendant contradict prior sworn testimony and thus should not be considered by this Court. Plaintiff specifically points to testimony as to whether Defendant receives mail at her mother's address and to the extent of financial support provided by Defendant's mother. Even assuming arguendo that these sections of the affidavits are not to be considered, sufficient evidence to justify summary judgment has been provided by the sworn statement and the uncontested portions of the affidavits.

¶ 19 The material question of fact in this case is not whether the mother's home is Defendant's *primary* residence; rather, it is whether Defendant maintains *multiple* residences, a conclusion which is uncontroverted based upon the provided evidence.

III. Conclusion

¶ 20 For the reasons stated above, we affirm the decision of the trial court.

AFFIRMED.

Judge HAMPSON concurs.

Judge DILLON dissents.

DILLON, Judge, dissenting.

¶ 21 Defendants argued before the trial court and in their appellate brief that they are entitled to summary judgment for two separate reasons: (1) the evidence *conclusively* shows that Defendant Cassie Herring was a "resident" of her mother's "household" at the time of the accident and, alternatively, (2) Plaintiff waived its right or is otherwise judicially estopped from contesting Ms. Herring's residency. The trial court granted Defendants' summary judgment without articulating its reasoning.

¶ 22 The majority affirms the trial court on the first basis, that the evidence conclusively established that Ms. Herring was a resident of her mother's household at the time of the accident.

¶ 23 I conclude that the evidence, *when taken in the light most favorable to Defendants*, does show that Ms. Herring was a resident of her mother's

household and, therefore, the trial court did not err in denying *Plaintiff* summary judgment. However, I conclude that there is a genuine issue of fact on this factual question. Further, I conclude that it would not be appropriate for us to affirm the trial court based on waiver or judicial estoppel. Therefore, I respectfully dissent.

A. Insufficient Evidence to Establish Residency As a Matter of Law

¶ 24 I conclude the evidence did not *conclusively* establish that Ms. Herring was a "resident of [her mother's] household" at the time of the 2019 accident. *See Newcomb v. Great Am. Ins. Co.*, 260 N.C. 402, 405, 133 S.E.2d 3, 6 (1963) (holding that whether an injured party is a "resident" of an insured's household "is determinable on the basis on conditions existing at the time the casualty occurred").

¶ 25 Our Supreme Court recently grappled with this same "resident of your household" language in the context of a UIM policy. *N.C. Farm Bureau v. Martin*, 376 N.C. 280, 287, 851 S.E.2d 891, 896 (2020). The Court held that the terms "resident" and "household" – when not otherwise defined in the policy - should "be given the meaning which they have for laymen in such daily usage, rather than a restrictive meaning which they have acquired in legal usage." *Id.* (quoting *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 438, 146 S.E.2d 410, 416 (1966)). Significant to this case, the Court quoted its holding in *Jamestown* explaining why the adult son in that case was a resident of his parents' home because:

> [He was] not in the same position as an adult child having a home of his own to which he returns to return and is making a mere visit to his parents. . . . He was there because he was a member of the family and had no other home.

Id. at 291, 851 S.E.2d at 898 (quoting *Jamestown*, 266 N.C. at 439, 146 S.E.2d at 417).

¶ 26 In any event, summary judgment is an especially high bar for Defendants in this case, as the burden rests on them—and not on the insurance company—to prove that Ms. Herring was a resident of her mother's household at the time of the accident. *N.C. Farm Bureau*, 376 N.C. at 285, 851 S.E.2d at 895 ("The party seeking coverage under an insurance policy bears the burden to allege and prove coverage.").

¶ 27 In *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976), our Supreme Court grappled with the question concerning the appropriateness of granting summary judgment for the party with the burden of proof, given

that the movant's credibility should generally be assessed by a jury. In resolving this question, the Court made the following holding:

> We hold that summary judgment may be granted for the party with the burden of proof on the basis of his own affidavits
>
> (1) when there are only latent doubts as to the affiant's credibility,
>
> (2) when the opposing party has failed to introduce any materials supporting his opposition [and] failed to point to specific areas of impeachment and contradiction, . . . and
>
> (3) when summary judgment is otherwise appropriate.

Id. at 370, 222 S.E.2d at 410. The Court emphasized, however, that:

> This is not a holding that the trial court is required to assign credibility to a party's affidavits merely because they are uncontradicted [by the non-movant]. To be entitled to summary judgment the movant must . . . show that there are no genuine issues of fact; that there are no gaps in his proof; that no inferences inconsistent with his recovery arise from his evidence; and that there is no standard that must be applied to the facts by the jury. Further, if the affidavits seem inherently incredible; if the circumstances themselves are suspect; or if the need for cross-examination appears, the court is free to deny the summary judgment motion.

Id. The Court then reminded that summary judgment should not be granted to the individuals with the burden on the strength of their own self-serving affidavits:

> Needless to say, the party with the burden of proof, who moves for summary judgment supported only by his own affidavits, will ordinarily not be able to meet these requirements and thus will not be entitled to summary judgment.

Id. at 370–71, 222 S.E.2d at 410.

¶ 28 I conclude that summary judgment is inappropriate in this case for many reasons. First, Defendants relied primarily on their self-serving

statements in their affidavits. As interested parties, their credibility is an issue for the jury. The only other evidence Defendants cite in support of the trial court's order is the fact that Ms. Herring received a single insurance benefit check sometime *after* the accident at her mother's address and a document showing that Ms. Herring's mother listed her as a resident on her insurance policy. *See Bruton*, 127 N.C. App. at 498-99, 490 S.E.2d at 601 (holding that the fact that an adult son is listed on his father's policy is not dispositive on whether the son is, indeed, a resident of his father's household).

¶ 29 Second, there was other evidence before the trial court which, I believe, creates an issue of fact as to whether Ms. Herring was in fact a resident of her mother's household at the time of the accident. For instance, in a sworn statement, while stating that she stays with her mother a few nights each week, she identified "her current address" to be where her father lived in Wendell, without mentioning her mother's address.[1] When asked, "Where did you live before [Wendell]," she stated that she lived in Knightdale *with her father* for ten years, again without any reference to her mother's home as a place where she also was living.

¶ 30 Also, Ms. Herring admits she used her father's address for her driver's license, her voting registration, her bank statements, her car title, and for all her other mail, conceding that she did not receive mail at her mother's home.

¶ 31 When asked if she kept clothes at her mother's home, she responded, "[S]ometimes," stating that said clothes were those she shared with her mother. She also stated that her father supported her financially. She implied that her mother did not provide for her financially because her "mom is on disability."

¶ 32 And when asked what she did to keep herself busy just prior to the 2019 accident, she stated that she takes her dogs outside and that, "I either *go see my mom* or I'll paint and do artwork." A jury could

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1. This referenced sworn statement is styled as "Examination Under Oath" taken before a notary public. Though the statement *might not* technically be a Rule 26 deposition, as the attorneys present had no right to cross-examine, or an affidavit, the statement was properly before the trial court as the statement would be admissible at trial as an admission of a party opponent. *See Huss v. Huss*, 31 N.C. App. 463, 466, 230 S.E.2d 159, 161 (1976) (stating that "the court may consider "any other materials which would be admissible in evidence at trial"). And the fact that the attorneys present could not cross-examine is not relevant as affidavits (which may be considered at a summary judgment hearing) are also not subject to cross-examination. *See First Gaston v. Hickory*, 203 N.C. App. 195, 199-200, 691 S.E.2d 715, 719-20 (2010) (deposition taken in prior case before different attorneys is functionally equivalent to an affidavit for purposes of a summary judgment hearing).

determine this statement that she goes to see her mom and her other statements referenced above are suggestive that she is part of her father's household and merely visits her mother.

¶ 33 Defendants do not cite a decision from our Supreme Court holding that an adult can be a resident of two separate households at the same time for insurance coverage purposes. They do cite a decision from our Court holding that a *minor child* of divorced parents can be. *See Davis v. Maryland Casualty*, 76 N.C. App. 102, 106, 331 S.E.2d 744, 747 (1985). But our Court has also held that an adult child was *not* a resident of his father's home where he "spent two to three weekends per month [and] stored some toiletries" at his father's home, where the evidence also showed that he "spent a majority of time" at his girlfriend's home and listed his girlfriend's home address as his address for his health insurance policy, his bank account, his utility bills, his taxes; and on the accident report. *Bruton v. N.C. Farm Bureau Mut. Ins. Co.*, 127 N.C. App. 496, 498, 490 S.E.2d 600, 602 (1997).

¶ 34 I conclude that there is an issue of fact concerning whether Ms. Herring was a resident of her mother's household at the time of the accident.

B. Waiver/Judicial Estoppel

¶ 35 Defendants argue that Plaintiff is judicially estopped to challenge whether Ms. Herring's residency under the policy. Specifically, they cite Plaintiff's admission in another action that Plaintiff "issued a policy of automobile insurance *available to [Ms. Herring]*." (Emphasis added.) However, this admission is not that Ms. Herring was covered as a resident of her mother's household *on the date of the accident*. Rather, the admission was simply that the coverage was generally available to Ms. Herring, as she was listed by her mother on the policy, but coverage for an accident was subject to a showing that she qualified as a family member at the time the accident occurred.

¶ 36 But assuming Plaintiff's admission in the other action is somehow equivalent to an admission that Ms. Herring was a resident of her mother's household at the time of the accident, it would not be appropriate for us to affirm the trial court's grant of summary judgment on this basis. First, the trial court did not exercise its discretion on whether to invoke judicial estoppel. *Whitacre v. BioSignia*, 358 N.C. 1, 38, 591 S.E.2d 870, 894 (2004) ("We note that a trial court's application of judicial estoppel is reviewed for abuse of discretion.") And second, it would have been an abuse of discretion for the trial court to grant summary judgment on the

basis of judicial estoppel in this case based on the criteria set forth by our Supreme Court in *Whitacre*, 358 N.C. at 32-34, 591 S.E.2d at 890-92.

¶ 37 Regarding waiver, I conclude that there is at least an issue of fact as to whether Plaintiff waived contesting Ms. Herring's residency. They had no reason to know that there was an issue concerning Ms. Herring's residency status until the statements Ms. Herring made under oath.

STATE OF NORTH CAROLINA
v.
XAVIER MARKEESE LANGLEY, DEFENDANT

No. COA21-395

Filed 5 July 2022

1. Sexual Offenses—taking indecent liberties with a child—jury unanimity—choice of multiple acts—specific act need not be identified

Defendant was not deprived of his right to a unanimous verdict in his trial for taking indecent liberties with a child (N.C.G.S. § 14-202.1) where the State presented evidence that defendant committed multiple acts with the underage victim but the trial court did not require the jury to specify which act or acts constituted the crime, since the commission of any one of a number of acts is sufficient to meet the element of improper sexual conduct and the jury did not have to agree on the qualifying act.

2. Criminal Law—jury instructions—taking indecent liberties with a child—mistake in age—invalid defense

In his trial for taking indecent liberties with a child, defendant was not entitled to a jury instruction on the defense of mistake in age, which is not a valid defense for that crime.

Appeal by Defendant from judgment entered 25 February 2021 by Judge Marvin K. Blount III in Pitt County Superior Court. Heard in the Court of Appeals 12 January 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Ellen A. Newby, for the State.

Mark Montgomery, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Xavier Markeese Langley ("Defendant") appeals from a judgment convicting him of taking indecent liberties with a child. On appeal, Defendant argues the trial court erred by 1) not requiring unanimity amongst the members of the jury as to what acts are considered indecent liberties with a child, and 2) by not *ex mero motu* instructing the jury a reasonable mistake in age is a defense. After a careful review of the record and applicable law, we hold the trial court committed no error.

I. Factual and Procedural Background

¶ 2 In January 2018, Defendant met Lisa[1] on Tagged, an online dating application. Defendant and Lisa began talking through this dating application and then began messaging each other through Facebook Messenger. At the time, Lisa was fifteen and Defendant was twenty-seven. Notwithstanding this, Lisa initially told Defendant she was eighteen. Lisa and Defendant began to discuss when they could meet each other, and then Lisa told Defendant she was sixteen. Lisa gave her address to Defendant so they could meet each other.

¶ 3 On January 31, 2018, Defendant drove to Lisa's house to pick her up at approximately 6:00 p.m. Lisa left her house and got into Defendant's truck. Defendant drove with Lisa to a third party's house. While Lisa was in the vehicle, an individual entered the back seat of Defendant's truck; Defendant retrieved marijuana from the glove compartment, handed it to the individual, and the individual exited the truck. Thereafter, Defendant drove to a gas station, purchased juice for Lisa and gas, and then took Lisa to the townhouse of a woman with whom he had a previous relationship. After they arrived at the townhouse, Defendant began showing Lisa pictures of women on his phone. According to Lisa, these were "[p]ictures of girls that were, like, dressed up and their hair was done, and they had makeup on. He was saying that his ex did that, did their hair and makeup and dressed them up, and she was going to do the same with me." After showing Lisa these pictures, Defendant exited the truck and went into the woman's townhouse while Lisa waited in his truck.

¶ 4 When Defendant returned, he drove Lisa to the side of an apartment where the dumpsters were kept and began asking her sexual questions, including if she had "ever give[n] oral sex." Lisa answered "no[,]" and

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1. A pseudonym is used to protect the identity of the minor child. *See* N.C. R. App. P. 42(b).

Defendant unbuttoned his pants and pushed Lisa's head toward his penis where she then performed oral sex on him. Afterwards, Defendant drove to Walmart, parked in the parking lot, and entered the store to purchase makeup "for whatever his ex was going to do." Defendant and Lisa then returned to the truck. Inside the truck, Defendant pulled out a "blunt" of marijuana and asked Lisa if she had ever smoked marijuana. Lisa denied ever doing so. Defendant asked Lisa to smoke the "blunt" and she acquiesced. Afterwards, she began getting paranoid and "kept seeing my grandmother's car everywhere, and it wasn't."

¶ 5 Meanwhile, Lisa's sister noticed Lisa was gone and notified their Mother. Lisa's sister checked Facebook Messenger and discovered she had been communicating with Defendant. However, the name on the Facebook profile page from which Defendant messaged Lisa was "Sage Minister Prezi."

¶ 6 Lisa's sister showed the messages to their Mother. Mother immediately sent a message to Defendant asking that he bring Lisa back home; called Lisa's Father[2] and sent screenshots of the messages between Defendant and Lisa to him; called other family members; and contacted the police. When Father received the screenshots of these messages, he began to investigate the Facebook profile Defendant used to message Lisa. Father discovered the "Sage Minister Prezi" account was associated with a Facebook account under Defendant's real name because the pictures in each account were identical. Thus, Father "knew they belonged to the same person[]" and began contacting the two profile accounts, requesting Defendant return Lisa to her home. Father told Defendant he "knew he had my daughter" and "she was underage, age of 15." Father then took Defendant's profile picture from Defendant's Facebook account and made a post to his own, personal Facebook account "calling him a pedophile and saying that he had my 15-year-old daughter . . . ."

¶ 7 Sometime after Father's Facebook post, Defendant's mother was alerted about the content of the post. While Defendant was still in the Walmart parking lot with Lisa, his mother called him and told him about Father's Facebook post and that Lisa was only fifteen. According to Lisa, when Defendant heard this news, he became "frustrated[] [and] mad[]" and "told me to call my mom." Defendant asked Lisa how old she was, and Lisa admitted she was fifteen. Lisa then used Defendant's cell phone to call her sister. Mother retrieved the phone and asked Lisa to

2. According to Mother, Father is not Lisa's biological father, but has "been in her life since she was six weeks old. . . . He's been the father figure that she's known."

come home, but Lisa kept saying she was "okay[,]" and was "just going to stay where I am." According to Mother and Lisa, Lisa was merely repeating to her Mother what Defendant instructed her to say.

¶ 8 Lisa then finished the conversation with her Mother and hung up the phone. Lisa explained she was feeling more tired, and Defendant put his hand into her underwear and digitally penetrated her. Defendant told Lisa to take her shirt off, leaned both of their chairs back, and began touching her breasts with his mouth. Lisa was unable to recall what happened next; rather, the next event Lisa remembered was waking up on February 1, 2018 and seeing it was daylight outside. Immediately, Lisa noticed her clothes were loose, her vagina and stomach were hurting, and she had a white discharge in her underwear. Defendant was still in the driver's seat. After Lisa awoke, Defendant took Lisa to a Microtel so she could get a rubber band to put her hair up, and then dropped her off at the Department of Social Services ("DSS"). Once Lisa was at DSS, Defendant immediately left.

¶ 9 DSS sent Lisa to a hospital where Maya Nobles, a sexual assault nurse, performed a sexual assault rape kit on her. While performing an exam of Lisa's vagina and cervix, Nobles noticed "red spots . . . in the canal, as well as white discharge." A subsequent examination of the vaginal swap collected from the sexual assault rape kit performed on Lisa showed the major contributor of DNA was Lisa, and the minor contributor of DNA was Defendant. The examination also revealed the presence of sperm on the vaginal swab sample.

¶ 10 Defendant was arrested on August 14, 2019 and on October 28, 2019 was indicted on charges of delivering a controlled substance to a person under sixteen but older than thirteen; first degree kidnapping; statutory rape of a child fifteen years of age or younger; attempted statutory sex offense with a child aged fifteen years or younger; and taking indecent liberties with a child. A trial was held between February 22 to 25, 2021. On February 24, 2021, the trial court granted Defendant's motion to dismiss the offense of delivering a controlled substance to a person under sixteen but older than thirteen. On February 25, 2021, the jury found Defendant not guilty of first- or second-degree kidnapping, statutory or attempted statutory rape, and attempted statutory sex offense with a child aged fifteen. However, the jury found Defendant guilty of taking indecent liberties with a child pursuant to N.C. Gen. Stat. § 14-202.1. Defendant was sentenced to 16 to 29 months in prison, with credit given for 562 days served prior to trial. Defendant timely filed a notice of appeal.

II. Standard of Review

¶ 11 Defendant's arguments on appeal are premised upon the jury instructions given at trial. We note Defendant failed to object to these jury instructions, and thus failed to preserve these issues. *See State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Our Supreme Court's "precedent demonstrates that unpreserved issues related to jury instructions are reviewed under a plain error standard[] . . . ." *State v. Collington*, 375 N.C. 401, 410, 847 S.E.2d 691, 698 (2020); *see State v. Juarez*, 369 N.C. 351, 357-58, 794 S.E.2d 293, 299 (2016). The plain error standard

> 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. Lawrence, 365 N.C. at 516-17, 723 S.E.2d at 333 (cleaned up) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

¶ 12 It is well established that,

> [t]he adoption of the plain error rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant's failure to object at trial. To hold so would negate Rule 10(b)(2) which is not the intent or purpose of the plain error rule. *See United States v. Ostendorff*, 371 F. 2d 729 (4th Cir.), *cert. denied*, 386 U.S. 982, 18 L.Ed. 2d 229, 87 S.Ct. 1286 (1967). . . . Indeed, even when the plain error rule is applied, "it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L.Ed. 2d 203, 212, 97 S.Ct. 1730, 1736 (1977).

Odom, 307 N.C. at 660-61, 300 S.E.2d at 378 (cleaned up); *see Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333. Review under the standard of plain error "should be used sparingly, only in exceptional circumstances[] . . . ." *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333. Therefore, when "deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79 (citation omitted).

III. Discussion

¶ 13 Defendant raises multiple issues on appeal; each will be addressed in turn.

A. Jury Unanimity

¶ 14 **[1]** Defendant first argues the trial court erred by not requiring the jury to be unanimous as to what act constituted indecent liberties with a child. We disagree.

¶ 15 A defendant is guaranteed an unanimous jury verdict under both the North Carolina Constitution and North Carolina General Statutes. N.C. Const. art. 1, § 24; N.C. Gen. Stat. § 15A-1237(b) (2021). However, with respect to the offense of taking indecent liberties with a minor, "the risk of a nonunanimous verdict does not arise in cases such as the one at bar because the statute proscribing indecent liberties does not list, as elements of the offense, discrete criminal activities in the disjunctive." *State v. Lawrence*, 360 N.C. 368, 375, 627 S.E.2d 609, 613 (2006) (internal brackets omitted) (quoting *State v. Hartness*, 326 N.C. 561, 564, 391 S.E.2d 177, 179 (1990)). Rather, "Defendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial." *Hartness*, 326 N.C. at 567, 391 S.E.2d at 180.

¶ 16 Our Supreme Court addressed this very issue in *State v. Hartness*. In *Hartness*, defendant was indicted for, *inter alia*, three counts of taking indecent liberties with a minor. *Id.* at 562 391 S.E.2d at 178. On appeal, defendant argued the disjunctive phrasing as to what acts constituted indecent liberties with a child rendered the verdict nonunanimous as "the jury could have split in its decision regarding which act constituted the offense[] . . . ." *Id.* at 563, 391 S.E.2d at 178. Justice Louis Meyer, writing for the majority, conducted a thorough analysis of N.C. Gen. Stat. § 14-202.1. and concluded,

> N.C.G.S. § 14-202.1 proscribes simply "any immoral, improper, or indecent liberties." Even if we assume that some jurors found that one type of sexual conduct occurred and others found that another transpired,

> the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of "any immoral, improper, or indecent liberties." Such a finding would be sufficient to establish the first element of the crime charged.

Id. at 565, 391 S.E.2d at 179. In other words, "the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts." *Id.* at 567, 391 S.E.2d at 180.

¶ 17 Applying *Hartness* to the present case, Defendant's argument that the trial court erred by not requiring unanimity as to what acts constitute indecent liberties with a child fails. Testimonies and evidence presented at trial tended to show Defendant had Lisa perform oral sex on him, digitally penetrated her and touched Lisa's breasts, and his sperm was found on Lisa's vaginal swab. Even if each member of the jury considered a different act in reaching the conclusion Defendant committed the offense of taking indecent liberties with a child, this is immaterial to the unanimous finding he committed such offense. *See id.* at 565, 391 S.E.2d at 179. Thus, the trial court did not err by not requiring an unanimous jury as to what acts constituted indecent liberty with a minor, because the offense does not require such a finding.

¶ 18 Defendant requests this Court to reconsider *Hartness* by arguing 1) the facts in *Hartness* differ from those in this case, 2) *Hartness*'s interpretation of N.C. Gen. Stat. § 14-202.1 as applied to Defendant is vague, and 3) *Hartness* conflicts with U.S. Constitutional law. We are unpersuaded by his arguments. Subsequent cases from our appellate courts have affirmed our Supreme Court's holding in *Hartness*. *See State v. Smith*, 362 N.C. 583, 598, 669 S.E.2d 299, 309 (2008) ("Because the jury could have found that defendant's acts during the first or second visit constituted an indecent liberty with a child, it is immaterial that the trial court did not give specific instructions as to which of those acts were at issue."); *Lawrence*, 360 N.C. at 374, 627 S.E.2d at 612 ("Therefore, the jury may have considered a greater number of incidents than the three counts of indecent liberties charged in the indictments. However, this fourth incident had no effect on jury unanimity because according to *Lyons*, *Hartness* holds that while one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred."); *State v. McCarty*, 326 N.C. 782, 784, 392 S.E.2d 359, 360 (1990); *State v. Wallace*, 179 N.C. App. 710, 719-720, 635 S.E.2d 455, 462 (2006).

¶ 19 Based upon our Supreme Court's ruling in *Hartness* and our court's subsequent affirmation of this case, we decline to re-examine *Hartness*

herein. Accordingly, we hold the trial court did not err by not requiring the jury to specify which acts by Defendant constituted indecent liberties with Lisa when determining Defendant was guilty of taking indecent liberties with a minor.

B. *Ex Mero Motu* Jury Instruction

¶ 20 **[2]** We now turn to Defendant's final contention that the trial court erred or plainly erred by failing to instruct the jury *ex mero motu* that mistake in age is a defense. We disagree.

¶ 21 As a general rule, "[i]f a request is made for a jury instruction which is correct in itself and supported by evidence, the trial court must give the instruction at least in substance." *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993). However, our courts have firmly established that mistake of age is not a valid defense to the charge of taking indecent liberties with a child. *State v. Breathette*, 202 N.C. App. 697, 704, 690 S.E.2d 1, 6 (2010); *Cinema I Video, Inc. v. Thornburg*, 83 N.C. App. 544, 569, 351 S.E.2d 305, 320 (1986), *aff'd*, 320 N.C. 485, 358 S.E.2d 383 (1987); *see also State v. Anthony*, 133 N.C. App. 573, 579, 516 S.E.2d 195, 199 (1999) ("[M]istake of age is not a defense. In undertaking to have sex with the victim, defendant assumed the risk that she was under legal age."), *aff'd*, 351 N.C. 611, 528 S.E.2d 321 (2000).

¶ 22 Defendant concedes our Court's precedent, but nonetheless argues mistake of age should be a defense to taking indecent liberties with a child. We disagree. "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." *Respess v. Respess*, 232 N.C. App. 611, 625, 754 S.E.2d 691, 701 (2014) (cleaned up) (quoting *State v. Perry*, 229 N.C. App. 304, 322, 750 S.E.2d 521, 534 (2013)). As such, "we lack the authority to provide Defendant with the further review that he seeks." *Perry*, 229 N.C. App. at 322, 750 S.E.2d at 534. Therefore, since mistake of age is not a viable defense against taking indecent liberties with a child, we hold the trial court did not err by failing to instruct the jury as such.

IV. Conclusion

¶ 23 The trial court did not err by not requiring the jury to specify what acts constituted taking indecent liberties with a child and by not instructing the jury *ex mero motu* that mistake in age is a defense. Accordingly, we hold Defendant received a fair trial free from error.

NO ERROR.

Judges DILLON and JACKSON concur.

SULLIVAN v. PENDER CNTY., INC.

[284 N.C. App. 352, 2022-NCCOA-458]

LT. COL. DONALD SULLIVAN, PLAINTIFF
v.
PENDER COUNTY, INCORPORATED, DEFENDANT

No. COA21-503

Filed 5 July 2022

Appeal and Error—interlocutory orders—setting aside entry of default—Civil Procedure Rule 55(a)—substantial right

In a case arising from plaintiff's complaint seeking reimbursement for property taxes that he alleged defendant county had collected illegally, where the clerk of court had entered a default judgment against defendant pursuant to Civil Procedure Rule 55(a) and the trial court subsequently entered an order setting aside that entry of default, plaintiff's appeal of the order setting aside the entry of default was dismissed as interlocutory because it did not affect a substantial right and lacked merit.

Appeal by Plaintiff from Order entered 21 January 2021 by Judge Phyllis M. Gorham in Pender County Superior Court. Heard in the Court of Appeals 9 March 2022.

Lt. Col. Donald Sullivan, pro se, for plaintiff-appellant.

Carl W. Thurman, III for defendant-appellee.

HAMPSON, Judge.

¶ 1 Lt. Col. Donald Sullivan (Plaintiff) appeals from the trial court's 21 January 2021 Order which granted a Motion to Set Aside Entry of Default entered against Pender County, Incorporated (Defendant). Because an order setting aside an entry of default is an interlocutory order and we conclude Plaintiff has not identified any substantial right that would be lost absent an immediate appeal which might otherwise give rise to a right to appeal the trial court's interlocutory order, we dismiss Plaintiff's appeal. The Record tends to reflect the following:

Factual and Procedural Background

¶ 2 On 28 August 2020, Plaintiff filed a Complaint seeking reimbursement of taxes Plaintiff claimed are illegally collected by Defendant and injunctive relief restraining Defendant from the assessment and collection of property taxes. On 7 October 2020, Defendant filed an Answer

to the Complaint. On 12 October 2020, Plaintiff filed a Motion captioned Motion for Default Judgment. On 13 October 2020, an Assistant Clerk of Superior Court for Pender County entered an Order allowing Plaintiff's Motion pursuant to Rule 55(a) of the North Carolina Rules of Civil Procedure, which governs entry of default. On 8 December 2020, Defendant filed a Motion to Set Aside Default and in the Alternative Motion to Enlarge Time which sought to deem the 7 October 2020 Answer timely filed. Following a 19 January 2021 hearing, the trial court entered its Order Granting Defendant's Motion to Set Aside Entry of Default. The trial court determined good cause had been shown to set aside entry of default in that the clerk did not have authority to enter default after the Answer had been filed and that Defendant had made a mistake as to when the Answer was due. The trial court also ruled Plaintiff would not be prejudiced by setting aside entry of default. On 16 February 2021, Plaintiff filed written Notice of Appeal to this Court from the trial court's Order Granting Defendant's Motion to Set Aside Entry of Default.

Appellate Jurisdiction

¶ 3 Before we can reach the merits of this appeal, we must first examine whether this appeal is properly before this Court such that we have authority to reach the merits. This is so because: "Appeals from the trial division in civil cases are permitted only by statute." *Ford v. Mann*, 201 N.C. App. 714, 716, 690 S.E.2d 281, 283 (2010).

¶ 4 As a general matter, with certain exceptions not applicable here: "appeal 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). Whereas, "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." *Id.*

¶ 5 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, a party may appeal an interlocutory order "where delaying the appeal will irreparably impair a substantial right of the party." *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999) (citation omitted); *see* N.C. Gen. Stat. §§ 1A-1, Rule 54(b), 1-277, 7A-27(d) (2021). "It is the appellant's burden

to present appropriate grounds for . . . acceptance of an interlocutory appeal . . ." *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016).

¶ 6 Here, Plaintiff seeks an immediate appeal of an Order Granting Defendant's Motion to Set Aside Entry of Default. An order setting aside an entry of default previously entered pursuant to Rule 55(a) of the Rules of Civil Procedure is interlocutory. *Pioneer Acoustical Co. v. Cisne & Assocs., Inc.*, 25 N.C. App. 114, 114, 212 S.E.2d 402, 403 (1975).[1] Thus, as a general principle, Plaintiff has no right to an immediate appeal of this interlocutory order.

¶ 7 Plaintiff acknowledges the interlocutory nature of the Order Granting Defendant's Motion to Set Aside Entry of Default. Nevertheless, Plaintiff asserts the Order affects a substantial right justifying his immediate appeal in this case. Plaintiff contends the Order setting aside the entry of default had the effect of overruling a final judgment. Plaintiff, however, confuses the entry of default under Rule 55(a) of the North Carolina Rules of Civil Procedure—what is at issue here—and a final default judgment under Rule 55(b) of the North Carolina Rules of Civil Procedure. "The entry of default, which is the first step, is interlocutory in nature and is not a final judicial action." *State Emps.' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 265, 330 S.E.2d 645, 648 (1985) (citation omitted). Thus, Plaintiff's contention here is unavailing.

¶ 8 Plaintiff further contends the Order setting aside the entry of default impacted his rights as an adverse ruling over the trial court's jurisdiction over Plaintiff's person and property. This contention is without merit as, again, the trial court's decision is interlocutory and not a final judgment on the merits. Moreover, in setting aside the entry of default, the trial court will continue to exercise jurisdiction over this matter pending a final determination on the merits of Plaintiff's case. We, therefore, reject Plaintiff's contention in this regard.

¶ 9 Finally, Plaintiff has failed to show any merit in this interlocutory appeal. Plaintiff obtained entry of default after the filing of Defendant's albeit untimely Answer. However:

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1. A panel of this Court has previously observed: "In fact, an order setting aside an entry of default is the virtual poster child for interlocutory orders given that many additional steps will have to occur before Plaintiffs' claims are resolved at the Superior Court level." *Decker v. Homes, Inc./Constr. Mgmt. & Fin. Grp.*, 197 N.C. App. 628, 680 S.E.2d 270 (2009) (unpublished).

> default may not be entered if an answer has been filed, even if the answer is deficient in some respect. *Peebles v. Moore*, 302 N.C. 351, 275 S.E.2d 833 (1981) (no default judgment could be entered by clerk even though answer not timely filed); *Rich v. Norfolk Southern Railway Co.*, 244 N.C. 175, 92 S.E.2d 768 (1956) (unverified answer precluded entry of default judgment); *Bailey v. Davis*, 231 N.C. 86, 55 S.E.2d 919 (1949) (no default judgment could be entered by clerk even though answer not timely filed).

N. Carolina Nat. Bank v. Virginia Carolina Builders, 307 N.C. 563, 568, 299 S.E.2d 629, 632 (1983).

¶ 10 Thus, Plaintiff's appeal in this case is interlocutory and does not affect a substantial right. Therefore, we are without jurisdiction to review this matter on immediate appeal. Consequently, we must dismiss Plaintiff's appeal.

Conclusion

¶ 11 Accordingly, for the foregoing reasons, Plaintiff's appeal is dismissed.

APPEAL DISMISSED.

Judges DILLON and WOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 JULY 2022)

EASTPOINTE HUM. SERVS. v. N.C. DEP'T OF HEALTH & HUM. SERVS. 2022-NCCOA-459 No. 21-264	Nash (20CVS1555)	Affirmed
ELITE VEHICLES, INC. v. LEE 2022-NCCOA-460 No. 21-730	Iredell (19CVS627)	Affirmed
IN RE C.L.R. 2022-NCCOA-461 No. 21-713	Guilford (18JT292) (18JT293)	Affirmed
IN RE I.B.M. 2022-NCCOA-462 No. 22-51	Davidson (19JA27) (19JA28)	Affirmed
IN RE J.S. 2022-NCCOA-463 No. 21-776	Mecklenburg (19JT277) (19JT278)	Affirmed
IN RE K.A.S. 2022-NCCOA-464 No. 21-757	Cleveland (18JT14)	Affirmed
IN RE K.L. 2022-NCCOA-465 No. 21-763	Cumberland (19JA286)	Vacated and Remanded
IN RE L.L. 2022-NCCOA-466 No. 22-54	Granville (21SPC50,503)	Affirmed
IN RE M.E.W. 2022-NCCOA-467 No. 21-714	Guilford (20JB697)	Appeal Dismissed Without Prejudice
JONNA v. YARAMADA 2022-NCCOA-468 No. 21-314	Wake (17CVD727)	Affirmed
NORTHSTAR BROAD. CORP. v. AROHI MEDIA LLC 2022-NCCOA-469 No. 21-430	Durham (19CVS3668)	Affirmed

PORTEE v. N.C. DEP'T OF HEALTH & HUM. SERVS. 2022-NCCOA-470 No. 21-386	Cumberland (20CVS4304)	Affirmed
PRENTICE v. N.C. DEP'T OF PUB. SAFETY 2022-NCCOA-471 No. 21-805	N.C. Industrial Commission (TA-27576)	Affirmed
SETZER v. MONARCH PROJECTS LLC 2022-NCCOA-472 No. 21-623	Wake (20CVS5749)	Affirmed
SHEARON FARMS TOWNHOME OWNERS ASS'N II, INC. v. SHEARON FARM DEV., LLC 2022-NCCOA-473 No. 21-717	Wake (18CVS3241)	Affirmed
STATE v. ANDERSON 2022-NCCOA-474 No. 21-664	Pitt (19CRS57083) (20CRS498)	No Error
STATE v. CAMERON 2022-NCCOA-475 No. 21-442	Durham (19CRS55571)	Affirmed
STATE v. HOWARD 2022-NCCOA-476 No. 21-294	Cabarrus (19CRS54072)	Affirmed
STATE v. JONES 2022-NCCOA-477 No. 21-741	Iredell (19CRS1918) (19CRS52203)	Affirmed
STATE v. MICHELSON 2022-NCCOA-478 No. 21-500	Buncombe (15CRS88082) (16CRS463)	Dismissed
STATE v. MINGO 2022-NCCOA-479 No. 22-22	Guilford (20CRS71189) (20CRS79918)	No Error
STATE v. PEREZ 2022-NCCOA-480 No. 21-724	Pender (17CRS51360)	No Error
STATE v. PORTILLO-TOBIAS 2022-NCCOA-481 No. 21-511	Johnston (15CRS54366)	Affirmed.

STATE v. ROOK 2022-NCCOA-482 No. 21-587	Johnston (19CRS52508) (19CRS52754) (19CRS742)	No Error in Part, Dismissed in Part
STATE v. SISK 2022-NCCOA-483 No. 21-616	McDowell (18CRS497) (18CRS50965)	Dismissed
STATE v. SPEIGHT 2022-NCCOA-484 No. 22-108	Pitt (19CRS52785)	No Error
STATE v. STOCKER 2022-NCCOA-485 No. 21-742	Jackson (19CRS322) (19CRS50298) (20CRS296)	Dismissed
TRUTH TEMPLE v. WORD PROCLAIMED CHURCH OF GOD IN CHRIST, INC. 2022-NCCOA-486 No. 21-737	Pitt (19CVS947)	Affirmed.

BRITT v. BRITT

[284 N.C. App. 359, 2022-NCCOA-487]

JOAN BRITT, PLAINTIFF, AND WAKE CO. HUMAN SERVICES, CHILD SUPPORT ENF., INTERVENOR PLAINTIFF
v.
ERVIN BRITT, DEFENDANT

No. COA21-595

Filed 19 July 2022

Child Custody and Support—child support—calculation of gross income—ordinary and necessary expenses

The trial court did not abuse its discretion in calculating a father's monthly gross income for purposes of determining his child support obligation where the father argued that the court failed to deduct a pest control expense and various mortgage payments from his business receipts as "ordinary and necessary expenses" of operating his three businesses. The record showed that the father failed to produce any competent evidence of which expenses were truly business expenses; the court found that his testimony on the matter was evasive, misleading, and lacked credibility; and, at any rate, mortgage payments do not constitute "ordinary and necessary expenses" under the Child Support Guidelines. Further, the court was not required to deduct the father's prior temporary child support and equitable distribution payments from his monthly gross income where the Guidelines do not permit such deductions.

Appeal by defendant from order entered 30 April 2021 by Judge David Baker in Wake County District Court. Heard in the Court of Appeals 27 April 2022.

Wake Family Law Group, by Nancy L. Grace and Melanie C. Phillips, for plaintiff-appellee.

No brief filed on behalf of intervenor-plaintiff.

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

ZACHARY, Judge.

¶ 1 Defendant Ervin Britt appeals from an order requiring him to pay child support to Plaintiff Joan Britt for the support of their two minor children, E.B. and R.B.[1] After careful review, we affirm.

Background

¶ 2 Plaintiff and Defendant married in 1999 and separated in 2014. There were two children born of the parties' marriage: E.B., born in 2004, and R.B., born in 2009. On 19 February 2015, Plaintiff filed a complaint seeking, *inter alia*, child support and equitable distribution of the parties' marital assets. On 18 August 2016, Wake County Human Services, Child Support Enforcement filed a motion to intervene on Plaintiff's behalf seeking to sever the child support claim from the collateral claims, which the trial court granted. On 18 August 2017, the trial court entered a temporary child support order, obligating Defendant to pay $375.00 per month in child support, together with $25.00 per month toward Defendant's child support arrears of $7,500.00.

¶ 3 On 1 May 2018, the trial court entered a consent order executed by the parties resolving the equitable distribution claim. The parties agreed that Plaintiff would, *inter alia*, receive a distributive award of $110,000.00, which Defendant would pay to her at the rate of $4,000.00 per month.

¶ 4 The child support claim came on for hearing on 30 April 2021 in Wake County District Court. At trial, Defendant testified regarding his income. Defendant explained that he owned two businesses: Five-O Servicing, LLC, an HVAC company, and D Britt Enterprises, a real estate holding company. He also owned ten rental properties, all of which were encumbered by mortgages at various financial institutions. Defendant estimated that he made "[l]ess than a hundred bucks" per month from Five-O Servicing; he only worked there one to two hours per week because the company was "in the process of being closed down." He also stated that "D Britt [Enterprises wa]s closed." Defendant testified that he received approximately $7,000.00 per month in rent from his properties, and he "guess[ed]" that after expenses, he had a net rental income of approximately $1,050.00 per month from the properties. He further testified that he did not know from which bank accounts he paid the mortgages on the various properties.

¶ 5 Several financial documents that were admitted at trial related to a third company, DER Enterprises, Inc. Defendant testified that DER

1. We use initials to protect the identities of the juveniles.

belonged to his mother, who owned three rental properties, and that he did not control the company. However, he confirmed that he was a signatory on the two DER bank accounts in order to help his elderly mother. When asked why money was repeatedly transferred from the DER bank accounts to Defendant's accounts, Defendant replied, "I'm sure it was to keep one of the properties from going out of foreclosure." In contrast, Plaintiff testified that she and Defendant originally owned DER, but placed it in Defendant's mother's name to avoid creditors during the 2008 housing market crash. She elaborated: "[T]here was just no way for us to keep up with the bills and the debt we were creating, so -- I mean, we had creditors all the time, so we changed it over to her name so they, you know, couldn't get at us directly . . . ."

¶ 6 Defendant testified that in addition to running his own businesses, he also worked as a "contractor" for Raleigh Air, an HVAC business owned and operated by his live-in girlfriend. At the time of trial, Defendant had worked at Raleigh Air for approximately one year for about "eight hours a day every other day, maybe." Although he was merely a "contractor" with Raleigh Air, Defendant transferred his HVAC license from his company, Five-O Servicing, to Raleigh Air to expand Raleigh Air's offered services. Moreover, Defendant contributed to Raleigh Air's advertising campaigns and interviewed candidates for employment with the company. Defendant maintained that he was not paid for this work; rather, his employment with Raleigh Air "started as a loan type of situation," and he worked for the company in an effort "to pay [it] back and make goodwill[.]" While Defendant conceded that money was deposited monthly into his personal bank account from the Raleigh Air bank account, he testified that this was not income to him. Instead, the money was intended to reimburse him for his girlfriend's portion of the mortgage payment on their shared residence. Defendant also stated that he has used a Raleigh Air credit card to cover his personal expenses, such as lunches, without advance authorization from the company. On one occasion, he also used the card to purchase airline tickets to Washington for himself and his children.

¶ 7 At trial, Plaintiff's counsel questioned Defendant regarding the itemized lists that Defendant created purporting to track his business expenses. Defendant conceded that a list of Five-O Servicing's expenses for the year 2020 was inaccurate, in that it listed the salaries for employees who were actually contractors for Raleigh Air; he confirmed that the list contained the salaries "in order to claim th[ose] expenses for Five-O[.]" Regarding another itemized list of his expenses from 1 January through 2 April 2021, Defendant initially asserted that the list solely comprised

expenses "for the apartments." However, the list also contained an expense explicitly related to DER. When he was asked about this expense, Defendant responded that "[i]t could be anything[,]" and suggested that perhaps he had performed HVAC services for DER.

¶ 8 Other items on Defendant's list of business expenses from 1 January through 2 April 2021 included $962.91 from 2020, which Defendant confirmed were personal expenses; the nearly $4,000.00 mortgage payment on Defendant's personal residence, which he contended was a business expense; and over $13,000.00 in "separation" expenses, which Defendant conceded should not have been included as a business expense. Defendant acknowledged that this list contained "some errors" and confirmed that a qualified accounting professional had not reviewed it.

¶ 9 Plaintiff also introduced bank statements for the two DER accounts. These statements evidenced several mortgage payments for various properties, but did not indicate the amount of each payment that was attributable to principal versus the amount attributable to interest. Additionally, despite Defendant's assertion that he was a signatory on the DER accounts simply "to help [his mother] with her bills[,]" Defendant could not describe how he paid the mortgages on his mother's properties, stating only that the mortgage payment process was "automatic." Regarding his ability to pay the mortgages on his own properties, Defendant explained: "The apartments bring me money; the mortgages get paid." Furthermore, Defendant could not articulate which expenses were satisfied with the transfers to the DER accounts. Concerning the January 2020 deposits from the Raleigh Air bank account into a DER account, Defendant testified that he "assum[ed] there's something that went on that [his mother] needed money for the apartments or something."

¶ 10 Before entering its order, the trial court orally rendered its ruling. Addressing Defendant with regard to his testimony concerning his income and expenses, the trial court stated:

> [T]he Court has wrestled with how to calculate your income. . . . [T]he deposits into the accounts, that's the one thing that this Court can be certain of. However, there's no evidence of what the expenses are associated with any of your business enterprises. And I'll just be honest with you, I don't think I've found myself in a situation where I declare a witness just completely not credible, but it appears to the Court that you've gone to great lengths to portray your

> income at an artificial low and that your testimony was largely evasive with the purpose of misleading the Court about your stake, your role and interest particularly in the business of Raleigh Air.
>
> But this Court will find that the bank account . . . for DER Enterprises . . . is an account that [Defendant] has access to, that he utilizes for -- that he has access to and that he utilizes for his personal and business expenses. And although he's testified that it's his mother's account, that in light of the deposits and withdrawals that indicate that [Defendant] is largely in control of this account and that it's appropriate, fair and just for this to be included in the calculation of his income.
>
> I don't really even know where to start with the contentions about your role in Raleigh Air. You're all over the place. And when I sit here in this capacity, representing the Court of Justice, it's really appalling when someone goes to the lengths that you've gone . . . to mislead the Court. I want to be clear about that. You haven't fooled anyone.

In light of Defendant's "evasive" testimony and Plaintiff's testimony that the parties "shifted and diverted their holdings with DER" to "avoid[ ] debt collection and debt collectors," the trial court further found that Defendant "ha[d] done likewise" with his assets in Raleigh Air in an attempt to avoid his child support obligation.

¶ 11 In its order entered 30 April 2021, the trial court found that Defendant was self-employed in "HVAC + Real Estate Rentals[,]" and that he owned multiple businesses. The court determined that Defendant had a monthly income of $24,085.00 based on evidence presented at trial of the monthly deposits into his various bank accounts, and the court imputed income of $3,333.00 per month to Plaintiff. The trial court accordingly ordered, *inter alia*, that Defendant (1) contribute $2,040.23 per month to the support of the parties' minor children beginning 1 May 2021, in accordance with the North Carolina Child Support Guidelines; and (2) pay his child support arrears of $6,059.00 to Plaintiff in full by 30 May 2021. Defendant timely filed notice of appeal.

Discussion

¶ 12 On appeal, Defendant argues that the trial court erred by failing to (1) deduct the "ordinary and necessary expenses" from Defendant's self-employment business receipts in its calculation of his monthly gross income; (2) provide a rationale as to why the court did not deduct the expenses; and (3) deduct Defendant's temporary child support and equitable distribution payments from his monthly gross income in its calculation of his monthly adjusted gross income.

I. Standard of Review

¶ 13 "Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Jonna v. Yaramada*, 273 N.C. App. 93, 100, 848 S.E.2d 33, 41 (2020) (citation omitted). "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985) (citation omitted). Because the North Carolina Child Support Guidelines vest a trial court "with the discretion to disallow the deduction of any business expenses which are inappropriate for the purposes of calculating child support, the trial court's decision to disallow the claimed expenses must be upheld unless it is 'manifestly unsupported by reason' and therefore an abuse of discretion." *Cauble v. Cauble*, 133 N.C. App. 390, 395, 515 S.E.2d 708, 712 (1999) (citation omitted).

¶ 14 "[U]nchallenged findings of fact are binding on appeal." *Kleoudis v. Kleoudis*, 271 N.C. App. 35, 39, 843 S.E.2d 277, 281 (2020) (citation omitted). "Furthermore, evidentiary issues concerning credibility, contradictions, and discrepancies are for the trial court—as the fact-finder—to resolve and, therefore, the trial court's findings of fact are conclusive on appeal if there is competent evidence to support them despite the existence of evidence that might support a contrary finding." *Sergeef v. Sergeef*, 250 N.C. App. 404, 406–07, 792 S.E.2d 192, 194 (2016) (citation and internal quotation marks omitted).

II. Analysis

¶ 15 Defendant first argues that the trial court erred by declining to deduct the "ordinary and necessary expenses" from Defendant's business receipts when calculating his monthly gross income for child support purposes. Specifically, he asserts that the court erroneously failed to deduct the recurring "withdrawals for at least 5 mortgages and a pest and termite service[.]" We disagree.

¶ 16 "The calculation of child support is governed by North Carolina Child Support Guidelines established by the Conference of Chief District Court Judges." *Craven Cty. v. Hageb*, 277 N.C. App. 586, 2021-NCCOA-231, ¶ 12 (citation omitted). The Guidelines define "gross income" as "a parent's actual gross income from any source, including but not limited to income from employment or self-employment . . . , ownership or operation of a business, partnership, or corporation, [or] rental of property[.]" N.C. Child Support Guidelines, at 3 (2019).

¶ 17 The actual gross income derived from self-employment is calculated by subtracting the "ordinary and necessary expenses required for self-employment or business operation" from the gross receipts. *Id.* " 'Ordinary and necessary expenses,' although not specifically defined in the Guidelines, include expenses for repairs, property management and leasing fees, real estate taxes, insurance, and mortgage interest. Mortgage principal payments, however, are not an 'ordinary and necessary expense' within the meaning of the Guidelines." *Lawrence v. Tise*, 107 N.C. App. 140, 149, 419 S.E.2d 176, 182 (1992).

¶ 18 Here, given the proffered evidence of Defendant's business expenses—or lack thereof—the trial court did not err by declining to deduct any expenses from Defendant's business receipts in its calculation of Defendant's gross income for child support purposes. The transcript supports the trial court's finding that there was "no evidence of [which] expenses [were] associated with any of [Defendant's] business enterprises." Defendant did not introduce any documentation of his income and could only provide a rough estimate of the amount that he derived from his apartment rentals and other businesses; he did not provide any recent tax returns, because he had not filed an income tax return since 2017; he testified that he was unsure how the apartment mortgages were paid; and his itemized list of business expenses included some which were clearly illegitimate, such as Defendant's home mortgage payment and Defendant's "separation" expenses, which he conceded were not business expenses.

¶ 19 Moreover, although two exhibits listed the pest control expense, Defendant failed to provide sufficient credible information concerning the expense to permit its consideration by the trial court. The itemized list of expenses from 1 January through 2 April 2021 contained a $140.00 expense for "pest" under "office" expenses, but the trial court, as fact-finder, was not required to accept this bare assertion at face value, in light of its determination regarding Defendant's lack of credibility. *See Sergeef*, 250 N.C. App. at 406–07, 792 S.E.2d at 194.

¶ 20 Indeed, the court found that Defendant was not credible, as he "was largely evasive [in his testimony] with the purpose of misleading" the court. Defendant does not challenge this finding, and thus, it is binding on appeal. *Kleoudis*, 271 N.C. App. at 39, 843 S.E.2d at 281. Further, Defendant conceded at trial that the list of expenses contained errors, and that a qualified accounting professional had not reviewed it. And while the bank statements for one of the DER accounts also listed a monthly pest control expense of $70.00, Defendant failed to indicate whether that expense was incurred for his or his mother's rental properties, or for one of their personal residences. Therefore, because the trial court found that Defendant offered no reliable evidence as to the pest control expense—a determination supported by the court's binding finding concerning the incredibility of Defendant's testimony—the trial court appropriately exercised its discretion by declining to consider pest control expense as an ordinary and necessary business expense. *See Cauble*, 133 N.C. App. at 395, 515 S.E.2d at 712.

¶ 21 Regarding the interest portion of the mortgage payments on Defendant's rental properties, Defendant presented insufficient evidence to warrant its inclusion as a business expense. Although Defendant testified that the monthly mortgage payments on some of his rental properties, his mother's residence, and her rental properties were paid from the DER accounts, he could not identify the specific properties associated with those mortgage payments. With this incomplete picture of Defendant's expenses, the trial court could not adequately distinguish whether the proffered expenses were Defendant's personal expenses or expenses associated with Defendant's business or his mother's business. Furthermore, even if Defendant had identified the mortgage payments which were attributable to his rental properties, full mortgage payments do not constitute "ordinary and necessary expenses" for the purpose of calculating child support. *Lawrence*, 107 N.C. App. at 149, 419 S.E.2d at 182 ("Mortgage principal payments . . . are not an 'ordinary and necessary expense' within the meaning of the Guidelines."). Additionally, Defendant did not provide any evidence regarding the "expenses for repairs, property management and leasing fees, real estate taxes, insurance, and mortgage interest[,]" *id.*, or any other "ordinary and necessary expenses required for self-employment or business operation[,]" N.C. Child Support Guidelines, at 3.

¶ 22 Accordingly, the trial court did not abuse its discretion in finding that there was no competent evidence of Defendant's "ordinary and necessary expenses[,]" *id.*, and appropriately declined to deduct the pest

control expense and the mortgage payments from Defendant's business receipts in its calculation of Defendant's gross income for child support purposes, *see Cauble*, 133 N.C. App. at 395, 515 S.E.2d at 712.

¶ 23 Defendant next asserts that the trial court was "required to make findings *why* the expenses [Defendant] testified about and that were admitted into evidence were not considered in the calculation of his income." In support of this contention, Defendant cites *Thomas v. Burgett*, 265 N.C. App. 364, 852 S.E.2d 353 (2019). However, as explained below, Defendant's reliance on *Thomas* is misplaced.

¶ 24 In *Thomas*, this Court vacated in part and remanded a child support order in which the trial court failed to articulate its reason for excluding particular expenses related to the defendant's rental property. 265 N.C. App. at 368, 852 S.E.2d at 357. The Court explained that "even if the trial court chose not to find [the defendant]'s evidence credible at all and therefore did not factor it into its computation, its findings d[id] not provide its rationale for doing so." *Id.* (citation and internal quotation marks omitted). The Court determined that vacatur and remand were necessary because "[w]ithout any evidence indicating the trial court's contemplation of those expenses, we do not have enough findings to conduct adequate review." *Id.*

¶ 25 In the case at bar, the trial court sufficiently provided a rationale for not factoring Defendant's proffered evidence of pest control expense into its calculation of his gross income: it did not find the evidence to be credible. And, unlike the trial court in *Thomas*, the court here articulated at trial *why* it did not find Defendant's evidence to be credible: namely, that Defendant's testimony "was largely evasive with the purpose of misleading" the court, a sentiment reiterated in the court's written finding that Defendant's "testimony was largely evasive with the purpose of misleading the court as to his income[.]" This finding, unchallenged by Defendant, is binding on appeal. *Kleoudis*, 271 N.C. App. at 39, 843 S.E.2d at 281. Moreover, because Defendant did not offer any evidence of the interest portion of the mortgage payments on his rental properties, the court did not need to provide a rationale for not considering the interest as a business expense, as there was no evidence for the court to consider.

¶ 26 Thus, given that the trial court provided a rationale for not accepting Defendant's evidence of any pest control expense—that Defendant's evasive and misleading testimony undermined the credibility of his proffered evidence—and that the court required no rationale for declining to consider evidence of the mortgage-interest expense where Defendant

offered none, we conclude that the court provided sufficient findings of fact in its order to enable appellate review. *See Thomas*, 265 N.C. App. at 368, 852 S.E.2d at 357. Defendant's argument accordingly fails.

¶ 27 Finally, citing no authority, Defendant contends that the trial court erred in calculating his monthly adjusted gross income by failing to deduct Defendant's temporary child support and equitable distribution payments from his monthly gross income. This argument is manifestly without merit.

¶ 28 The Guidelines prescribe particular instances in which a parent is entitled to receive a deduction from his or her monthly gross income for the purpose of calculating child support: (1) where a parent is responsible for child support payments on behalf of a child other than the child for whom support is sought in the present action; and (2) where a parent is responsible for the financial care of "his or her natural or adopted children who currently reside with the parent (other than children for whom child support is being determined in the pending action)." N.C. Child Support Guidelines, at 4.

¶ 29 In the instant case, the trial court did not abuse its discretion by declining to deduct Defendant's temporary child support and equitable distribution payments from his monthly gross income for child support purposes, in that the Guidelines do not permit deductions from a party's gross income for such payments. *See id.*; *see also Cauble*, 133 N.C. App. at 395, 515 S.E.2d at 712. Defendant's argument to the contrary is overruled.

Conclusion

¶ 30 For the foregoing reasons, we conclude that the trial court did not abuse its discretion in calculating Defendant's monthly gross income and monthly adjusted gross income, and that the trial court provided sufficient findings to support its determinations. Accordingly, we affirm the child support order.

AFFIRMED.

Judges DILLON and CARPENTER concur.

GROOMS PROP. MGMT., INC. v. MUIRFIELD CONDO. ASS'N

[284 N.C. App. 369, 2022-NCCOA-488]

GROOMS PROPERTY MANAGEMENT, INC., DELORES BOWDIDGE, YEVETTE BOWDIDGE-JIMENEZ, PENNY LYNN CARROLL, YING DING, SHUO JIAO, DIANNE R. ESAN, AND BARBARA TONEY, PLAINTIFFS

v.

MUIRFIELD CONDOMINIUM ASSOCIATION AND WILLIAM DOUGLAS MANAGEMENT INC., DEFENDANTS AND THIRD-PARTY PLAINTIFFS

v.

HOLLY MOORE AND TC CORPORATE HOLDINGS, INC. F/K/A TRISURE CORPORATION, THIRD-PARTY DEFENDANTS

JENNIFER HAYES, PLAINTIFF

v.

MUIRFIELD CONDOMINIUM ASSOCIATION, STANAGE ELLING, MICHAEL HOWARD, LINDA KILGO, AND CHARITY GUARD, DEFENDANTS

No. COA22-49

Filed 19 July 2022

Associations—condominium—building destroyed by fire—duty to insure damage—plain language of declaration

In an action for declaratory relief against a condominium association for multiple buildings, where the building in which plaintiff owned a condominium unit was destroyed by fire, the trial court properly granted partial summary judgment to plaintiff after concluding that the association violated its declaration, along with N.C.G.S. § 47A-24 and -25, by failing to procure insurance coverage for the full replacement value of the burned building. The declaration's plain language was unambiguous, and the word "building" clearly referred to a building's interior in addition to its exterior; therefore, the association violated the insurance coverage requirements under its declaration and under Chapter 47A by insuring only the exterior of the burned building.

Appeal by Defendant/Third-Party Plaintiff Muirfield Condominium Association from an Order entered 27 August 2021 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 June 2022.

Cranfill Sumner LLP, by Steven A. Bader and Patrick H. Flanagan, for Defendant/Third-Party Plaintiff-Appellant Muirfield Condominium Association.

Villmer Caudill, PLLC, by Bo Caudill, for Plaintiff-Appellee Jennifer Hayes.

No briefs filed by the remaining parties.

INMAN, Judge.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶ 1 Defendant/Third-Party Plaintiff Muirfield Condominium Association ("Muirfield") is the condominium association for multiple buildings totaling around 50 units. Plaintiff Jennifer Hayes ("Ms. Hayes") owns one of the condominium units in Building 5, which was destroyed by fire on 19 December 2018.[1]

¶ 2 Complete exterior and interior repairs to Building 5 were estimated to cost between $1.36 and $1.46 million. Muirfield, however, received only $933,421.00 in insurance proceeds toward the repairs. On 29 October 2019, Muirfield's board held a special meeting where it voted not to obtain a loan to cover the remaining deficiency, which included the completion of the units' interior upfit.

¶ 3 On 10 January 2020, Ms. Hayes filed suit in Mecklenburg County Superior Court against Muirfield and its directors for (1) declaratory relief, (2) violations of Muirfield's Declaration Creating Unit Ownership and Establishing Restrictions, Covenants, and Conditions for Muirfield (the "Declaration"), (3) violations of Chapter 47A of our General Statutes, (4) breach of fiduciary duties, and (5) negligence. Specifically, she contended Muirfield violated Chapter 47A as well as the Declaration by failing to maintain the requisite insurance coverage on the buildings.

¶ 4 On 24 May 2021, Ms. Hayes filed a motion for partial summary judgment seeking declaratory relief "that the Association must promptly repair and restore the damage to Plaintiff's condominium unit and the building in which Plaintiff's unit is situated," as well as an injunction requiring Muirfield to repair her unit. Muirfield maintained that the Declaration required it to insure only the building's exterior and that it had therefore complied with both the statute and its governing Declaration.

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1. Ms. Hayes's suit was consolidated with a related case brought against Muirfield by the remaining plaintiffs-appellees. Because this appeal concerns only Ms. Hayes's claims for relief, we omit discussion of the other parties' claims except where necessary.

¶ 5 On 27 August 2021, the trial court granted Ms. Hayes's motion for partial summary judgment for declaratory relief but denied injunctive relief. Specifically, the trial court ordered

> [t]hat the Association's failure to purchase insurance sufficient to cover at least 80% of the replacement value of Building 5 constituted a violation of the COA's declarations, covenants, and restrictions and Chapter 47A of the N.C. General Statutes[,]
>
> . . . .
>
> [and] [t]hat the Association must comply with Chapter 47A of the N.C. General Statutes, including but not limited to N.C. Gen. Stat. § 47A-25, which provides that "damage to or destruction of the building shall be promptly repaired and restored by the manager or board of directors . . . using the proceeds of insurance on the building for that purpose, and unit owners shall be liable for assessment for any deficiency," . . . .

¶ 6 The trial court certified its order as a final judgment pursuant to Rule 54(b) of our Rules of Civil Procedure. Muirfield filed notice of appeal 24 September 2021, and Ms. Hayes noticed a cross-appeal four days later. Muirfield also filed a petition for writ of certiorari on 23 March 2022, and Ms. Hayes filed a motion to dismiss Muirfield's appeal for lack of jurisdiction on 4 April 2022.[2]

¶ 7 On appeal, Muirfield argues the applicable provisions of the Declaration are ambiguous regarding its coverage obligations, creating a genuine issue of fact that could not be resolved by summary judgment. We disagree and affirm.

II. ANALYSIS

A. Appellate Jurisdiction

¶ 8 The parties disagree as to whether this Court has jurisdiction to review the trial court's interlocutory order granting partial summary judgment for Ms. Hayes on fewer than all of her claims. An interlocutory order is subject to immediate review if "the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies

2. Muirfield has moved this Court to dismiss Ms. Hayes's cross-appeal. Ms. Hayes did not respond to that motion and did not file a brief in support of her cross-appeal. As a result, we grant Muirfield's motion to dismiss.

the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), . . . [or] if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (citations omitted). If an interlocutory appeal does not fall within these two categories, we may nonetheless exercise our discretion to review the appeal on the merits by writ of certiorari pursuant to Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure. *Midsouth Golf, L.L.C. v. Fairfield Harbourside Condo. Ass'n, Inc.*, 187 N.C. App. 22, 26, 652 S.E.2d 378, 382 (2007).

¶ 9 Assuming, *arguendo*, that the trial court's partial summary judgment order was neither properly certified pursuant to Rule 54(b) nor affecting a substantial right, we allow Muirfield's petition for writ of certiorari in our discretion. *See id.* ("[A]ssuming *arguendo* that Plaintiff appeals from a nonappealable interlocutory order, we elect to consider the appeal by granting Plaintiff's conditional petition for writ of certiorari.").

B. Standard of Review

¶ 10 We review appeals from summary judgment orders *de novo*, meaning we review the matter anew without restriction by the trial court. *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 257, 794 S.E.2d 785, 791 (2016). The moving party bears the burden of showing it was entitled to summary judgment as a matter of law and that there is no genuine dispute as to any material fact. *Jenkins v. Stewart & Everett Theatres, Inc.*, 41 N.C. App. 262, 265, 254 S.E.2d 776, 778 (1979); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). We view the evidence in the light most favorable to the non-moving party, giving them the benefit of all reasonable inferences. *Jenkins v. Lake Montonia Club, Inc.*, 125 N.C. App. 102, 104, 479 S.E.2d 259, 261 (1997).

¶ 11 Furthermore, "[i]nterpretation of the language of a restrictive covenant is a question of law reviewed *de novo*." *Erthal v. May*, 223 N.C. App. 373, 378, 736 S.E.2d 514, 517 (2012). "In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of all the covenants contained in the instrument or instruments creating the restrictions." *Friends of Crooked Creek, L.L.C. v. C.C. Partners, Inc.*, 254 N.C. App. 384, 389, 802 S.E.2d 908, 912 (2017) (citation omitted).

C. Interpreting the Unambiguous Declaration is a Question of Law

¶ 12 Muirfield argues the Declaration provisions are ambiguous and therefore the trial court erred in granting Ms. Hayes partial summary

judgment and concluding Muirfield violated the Declaration and Chapter 47A by failing to procure coverage for 80 percent of the replacement value of Building 5. Specifically, Muirfield contends that the word "building" only refers to the outside structure and not the interior units.[3] We are not persuaded by these arguments because, when considered in the context of the language in the entire Declaration, we conclude the word "building" is not ambiguous.

¶ 13 Section 47A-24, in relevant part, requires condominium associations to, "if required by the declaration, bylaws or by a majority of the unit owners, . . . obtain insurance for the property against loss or damage by fire and such other hazards under such terms and for such amounts as shall be required or requested." N.C. Gen. Stat. § 47A-24 (2021). Section 47A-25, in turn, states that "damage to or destruction of the building shall be promptly repaired and restored by the manager or board of directors, . . . using the proceeds of insurance for that purpose, and unit owners shall be liable for assessment for any deficiency[.]" N.C. Gen. Stat. § 47A-25 (2021).

¶ 14 Thus, whether Muirfield violated Sections 47A-24 and -25 is determined by whether Muirfield violated the terms of its Declaration.

¶ 15 This Court has previously held that the construction of unambiguous contract terms, including the terms of a homeowners' association declaration, presents a question of law. *Dep't. of Transp. v. Idol*, 114 N.C. App. 98, 100, 440 S.E.2d 863, 864 (1994); *see also Shearon Farms Townhome Owners Ass'n. II, Inc. v. Shearon Farms Dev., L.L.C.*, 272 N.C. App. 643, 649-51, 847 S.E.2d 229, 234-36 (2020) (observing that a homeowners' association declaration is interpreted "under ordinary contract principles" and applying a declaration's plain language on *de novo* review). A genuine issue of material fact arises only when an ambiguity in a contract's terms requires the factfinder to discern the parties' intent from the evidence. *See Landover Homeowners Ass'n. v. Sanders*, 244 N.C. App. 429, 430, 781 S.E.2d 488, 489 (2015) ("Where ambiguities exist in the language of a [homeowners association] declaration which

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3. Ms. Hayes argues that Muirfield waived its argument that the Declaration was ambiguous because Muirfield did not use the word "ambiguous" at the hearing on Ms. Hayes's motions. At the hearing, however, counsel for the other plaintiffs in the consolidated case conceded, "I think the parties would acknowledge there's some ambiguity . . . ." Additionally, counsel for Muirfield argued that it was not responsible for interior repairs—exactly what it is arguing on appeal. Therefore, Muirfield "raised that specific issue before the trial court to allow it to make a ruling on that issue," and did not "swap horses between courts in order to get a better mount [on appeal]." *Regions Bank v. Baxley Com. Props., L.L.C.*, 206 N.C. App. 293, 298-99, 697 S.E.2d 417, 421 (2010) (citations omitted).

create an issue of material fact, the trial court erred in granting summary judgment . . . ."). ¶ 16

Whether such an ambiguity exists in the first instance is a question of law for this Court on *de novo* review. *Bicket v. McLean Sec., Inc.*, 124 N.C. App. 548, 553, 478 S.E.2d 518, 521 (1996). For the reasons explained below, we hold that no ambiguity exists here.

¶ 17 Section 20 of the Declaration provides:

> (A) The following insurance coverage shall be maintained in full force and effect by the Association covering the operation and management of the Condominium Units and Common Property:
>
> (1) Casualty insurance covering the building and all improvements upon the land and all personal property subject to this Declaration and any additions added by amendment, except such personal property as may be owned by the Condominium Unit Owners, shall be procured in an amount equal to the maximum insurable replacement value thereof (exclusive of excavation, foundations, streets and parking facilities) as determined annually by the insurance company affording such coverage; and provided that such policies may be written on a co-insurance basis of not less than eighty percent (80%). . . . Such coverage shall afford protection against: (a) loss or damage by fire or other hazards covered by the standard extended coverage endorsement . . . .

¶ 18 Section 21 of the Declaration states who has responsibility for repairs in the event of a casualty, including a total destruction of the building:

> (A) If any part of the Common Areas and Facilities shall be damaged by casualty, the determination of whether or not to reconstruct or repair it shall be made as follows:
>
> . . . .
>
> (2) Total destruction shall be destruction of more than two-thirds (2/3) of the building. In the event of total destruction, the Common Areas and Facilities shall not be reconstructed or

> repaired if . . . Condominium Unit Owners who own three-fourths (3/4) or more of the building vote against reconstruction or repair.
>
> (3) Any such reconstruction or repair shall be substantially in accordance with the plans and specifications contained herein.

(B) If the damage is only to those parts of one or more Condominium Units for which the responsibility for maintenance and repair is that of the Unit Owner, then the Condominium Unit Owner shall be responsible for reconstruction and repair after casualty. In all other instances, the responsibility of reconstruction and repair after casualty shall be that of the Association as follows:

> (1) Immediately after the casualty causing damage to property for which the Association has the responsibility for maintenance and repair, the Association shall obtain reliable and detailed estimates of the cost to place the damaged property in condition as good as that before the casualty. Such costs may include professional fees and premiums for such bonds as the Boards of Directors deem appropriate.
>
> (2) When the damage is to both the Common Areas and Facilities and Condominium Units, the insurance proceeds shall be applied first to the costs of repairing the Common Areas and Facilities and the balance to the Condominium Units.

¶ 19 Section 4 of the Declaration provides the following description of the term "units":

> Each unit shall include all the space within the boundaries thereof. . . . It is the intent that each unit will include all interior drywall, panelling [sic] and molding and any surface finish, or wallpaper, and all finished flooring, such as exposed wooden flooring, vinyl or linoleum floor covering, matting and carpeting, but will not include studs, supports and wall insulation, concrete slabs, floor or ceiling joists. Each unit

> shall be deemed to include the interior and exterior of any and all doors, windows, sliding glass doors and other closures. . . . Included also as part of a unit are the following: (a) the heating and air conditioning systems serving the unit . . . (b) all electrical switches, electrical outlets and light fixtures . . . (c) the electrical wiring and service system . . . (d) the plumbing for water service . . . and (e) the drainage or sewer plumbing . . . .

¶ 20 Section 20(A) of the Declaration provides that the insurance will cover both "*the Condominium Units* and Common Property." (Emphasis added). Moreover, the casualty insurance required by Section 20(A)(1) is to cover the "building" and only excepts "such personal property as may be owned by the Condominium Unit Owners[.]" The word "building" is in a subsection that mandates insurance coverage for "Condominium Units," disclosing that the building includes such units, which aligns with the definition of "building" as "containing" units.[4]

¶ 21 Muirfield does not contest that it failed to procure coverage for 80 percent of the estimated cost of replacing both the interior and exterior of the building. We reject Muirfield's argument that the coverage requirement applied only to the exterior building structures.

¶ 22 As stated above, the Declaration excludes only "personal property" from the coverage requirement. Since the Declaration defines what the "unit" includes in Section 4, the "personal property" of the unit owner referenced in Section 20(A)(1) must refer to everything else in the unit. Therefore, Muirfield is required to maintain insurance to cover those items that the Declaration mentions as being part of the "unit," none of which is excepted by Section 20(A)(1) as "personal property."

¶ 23 Muirfield also argues that Section 21 of the Declaration, which defines who is responsible for repair in the case of a casualty, means that it is not responsible for repairing the interior of Building 5 because unit owners must repair and replace damage to their units. Section 21(B) of the Declaration provides:

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4. We find *Craig v. Sandy Creek Condo. Ass'n, Inc.*, No. COA08-1048, 2009 WL 1663950 (N.C. Ct. App. June 16, 2009) (unpublished), persuasive on this matter. The court in *Craig* reasoned that Section 47A-24's mandate that the board "obtain insurance for the property," combined with the definitions of "property," "building," and "unit" in Chapter 47A, meant "pursuant to Article 1, Chapter 47A, 'property' includes the 'units' which are housed inside the 'buildings.' " *Id.* at *3-4.

> If the damage is only to those parts of one or more Condominium Units for which the responsibility for maintenance and repair is that of the Unit Owner, then the Condominium Unit Owner shall be responsible for reconstruction and repair after casualty. *In all other instances*, *the responsibility of reconstruction and repair after casualty shall be that of the Association as follows*:
>
> . . . .
>
> > (2) When the damage is to both Common Areas and Facilities *and Condominium Units*, the insurance proceeds shall be applied first to the costs of repairing the Common Areas and Facilities *and the balance to the Condominium Units*.

(Emphasis added).

¶ 24 Muirfield contends that, because unit owners typically have the responsibility of repairing and replacing things that are defined as part of the "unit," the unit owners also have the responsibility to replace those things in the event of "total destruction." This argument conflicts with provisions in the Declaration requiring the Association to repair and replace damage to more than just a unit, such as when there is a "total destruction" of the building.

¶ 25 Muirfield next argues that because unit owners can obtain their own insurance, and Section 21 mandates the Association's insurance proceeds be applied first to the common areas, that Muirfield is not responsible for insuring the interior units. This argument also fails.

¶ 26 The Declaration provides that unit owners are responsible in the event of unit-only damage. In the event of "total destruction," however, the coverage responsibility shifts to Muirfield. A unit owner's ability to obtain insurance coverage for the interior does not negate the Association's coverage obligations. The applicable provisions simply specify the priority order for the Association to make repairs: first to the Common Areas and then to the units.

¶ 27 Accordingly, we hold that by the express terms of the Declaration, Muirfield was required to procure insurance sufficient to cover 80 percent of the "building," including the interior upfits of the individual units. And, because the Declaration required said insurance, the plain language of Sections 47A-24 and -25 compelled the Association to insure

and apply insurance proceeds to the building structure and the units. Therefore, the trial court did not err in granting Ms. Hayes's motion for partial summary judgment as to these issues.

III. CONCLUSION

¶ 28 For the foregoing reasons, we affirm the trial court's order.

MOTION TO DISMISS APPEAL GRANTED; MOTION TO DISMISS CROSS-APPEAL GRANTED; PETITION FOR WRIT OF CERTIORARI ALLOWED; AFFIRMED.

Judges HAMPSON and GRIFFIN concur.

JOSHUA HUNDLEY, Plaintiff
v.
AUTOMONEY, INC., Defendant

No. COA21-305

Filed 19 July 2022

1. Appeal and Error—interlocutory order—substantial right—personal jurisdiction—certiorari granted as to additional issue—judicial economy

In an action seeking relief from alleged predatory lending practices, the trial court's order denying defendant's motion to dismiss for lack of personal jurisdiction was immediately appealable for affecting a substantial right. In the interest of judicial economy, a writ of certiorari was granted to review the denial of defendant's motion to dismiss pursuant to Civil Procedure Rule 12(b)(6) regarding the enforceability of a choice of law provision in its loan agreement with plaintiff, which involved a purely legal question that did not require further factual development.

2. Jurisdiction—personal—specific—minimum contacts—nonresident loan company—direct solicitation of borrowers in North Carolina

In an action seeking relief from alleged predatory lending practices, a car title loan business operating in South Carolina had sufficient minimum contacts with North Carolina to satisfy due process requirements to be subject to personal jurisdiction where it posted advertisements for loans on its website specifically targeting North

Carolina residents, ran ads in a local magazine that was only distributed in a select number of counties in North Carolina and South Carolina, mailed solicitation flyers to North Carolinians, placed liens on North Carolina property through the N.C. Department of Motor Vehicles, and used a North Carolina recovery service to repossess vehicles in this state.

3. Consumer Protection—motion to dismiss—predatory lending—unfair and deceptive trade practices—sufficiency of claims

Plaintiff, who obtained a car title loan from defendant, an out-of-state loan company, sufficiently alleged various North Carolina statutory claims—including violations of the Consumer Finance Act, unfair and deceptive trade practices, and usury—to withstand defendant's motion to dismiss pursuant to Civil Procedure Rule 12(b)(6), particularly where defendant did not contest the sufficiency of the allegations before the trial court. Instead, defendant's argument that the loan agreement's choice of law provision prohibited plaintiff from bringing any claims related to his loan under North Carolina law went to the merits of the claim and was therefore beyond the scope of a 12(b)(6) motion.

Appeal by defendant from Order entered 29 January 2021 by Judge Susan E. Bray in Rockingham County Superior Court. Heard in the Court of Appeals 8 February 2022.

Brown, Faucher, Peraldo & Benson, PLLC, by James R. Faucher and Jeffrey K. Peraldo, for plaintiff-appellee.

Womble Bond Dickinson (US) LLP, by Michael Montecalvo and Scott D. Anderson, for defendant-appellant.

GORE, Judge.

¶ 1 Defendant AutoMoney, Inc. appeals from an Order Denying Motions to Dismiss. We affirm.

I. Background

¶ 2 Plaintiff Joshua Hundley is a citizen of Rockingham County, North Carolina. In 2017, Mr. Hundley received a car title loan from AutoMoney. Mr. Hundley first learned about car title loans from a friend. Mr. Hundley specifically learned of AutoMoney's services through a subsequent internet search. AutoMoney is a car title loan provider based out of

South Carolina. AutoMoney does not maintain any physical locations in North Carolina.

¶ 3 Following his initial internet search, Mr. Hundley called AutoMoney from North Carolina. During this telephone conversation, the AutoMoney employee asked Mr. Hundley if he was interested in obtaining a car title loan. The AutoMoney employee asked Mr. Hundley some additional questions to determine his eligibility for a car title loan and then informed him during the initial telephone conversation that AutoMoney could loan him at least $1,000.00. The AutoMoney employee then told Mr. Hundley to drive to South Carolina in order to obtain the car title loan.

¶ 4 On 2 September 2017, Mr. Hundley drove from Rockingham County, North Carolina to Indian Land, South Carolina, where an AutoMoney store is located. In the window of the Indian Land, South Carolina AutoMoney store, there is a sign which reads, "NC Titles Welcomed." While at the Indian Land, South Carolina store, AutoMoney issued Mr. Hundley a car title loan. The loan was in the amount of $1,220.00 at an annual interest rate of 158.000%. AutoMoney then put a lien on Mr. Hundley's vehicle through the North Carolina Department of Motor Vehicles ("NCDMV").

¶ 5 Mr. Hundley made payments on the car title loan over the phone from North Carolina. On multiple occasions, AutoMoney called Mr. Hundley in North Carolina for collection purposes. Eventually, Mr. Hundley fell behind on making payments on the car title loan. AutoMoney then took possession of Mr. Hundley's car from his driveway in North Carolina.

¶ 6 On 20 May 2020, Mr. Hundley filed a Complaint in Rockingham County Superior Court alleging causes of action for violations of the North Carolina Consumer Finance Act, for unfair and deceptive trade practices, usury allegations, and seeking declaratory relief. In response, AutoMoney filed a Motion to Dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(2) and 12(b)(6) on 30 June 2020. Both parties submitted affidavits and evidence pertaining to the Motion to Dismiss. The matter came on for hearing on 25 January 2021. The trial court entered an Order Denying Motions to Dismiss on 29 January 2021. AutoMoney filed Notice of Appeal on 22 February 2021.

II. Appellate Filings

¶ 7 **[1]** As a preliminary matter, multiple appellate motions have been filed. AutoMoney filed a Petition for Writ of Certiorari on 24 June 2021 and Mr. Hundley filed a Motion to Dismiss Interlocutory Appeal on 23 September 2021. We discuss these appellate filings in turn.

A. Petition for Writ of Certiorari

¶ 8 Under N.C. R. App. P. 21(a)(1), "a writ of certiorari will only be issued upon a showing of appropriate circumstances in a civil case where [*inter alia*] no right to appeal from an interlocutory order exists." *Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 12, 598 S.E.2d 570, 578-79 (2004). This Court has determined that it is appropriate to grant writ of certiorari in the interest of justice when the impact of the lawsuit is "significant," the issues involved are "important," and the case presents a need for the writ in the interest of the "efficient administration of justice," or the granting of the writ would "promote judicial economy." *See Stetser*, 165 N.C. App. at 12, 598 S.E.2d at 578-79 (granting review of a class action certification based on the "need for efficient administration of justice," the "significance of the issues in dispute," the "significant impact" of the lawsuit, the effect of the order on "numerous individuals and corporations" and the "substantial amount of potential liability" involved); *see also Hill v. Stubhub, Inc.*, 219 N.C. App. 227, 232, 727 S.E.2d 550, 554 (2012) (granting review in order to "further the interests of justice"). Interlocutory review tends to serve judicial economy when an appeal presents pure questions of law, "not dependent on further factual development." *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 872 (1983).

¶ 9 AutoMoney's appeal from the trial court's denial of their Motion to Dismiss presents two issues for this Court to review: (1) whether the trial court erred by denying defendant's 12(b)(2) motion and determining that it has personal jurisdiction over AutoMoney and (2) whether the trial court erred by denying AutoMoney's 12(b)(6) Motion to Dismiss. A trial court's denial of a motion to dismiss based on personal jurisdiction implicates a substantial right and is immediately appealable, independent of a petition for writ of certiorari. N.C. Gen. Stat. § 1-277(b) ("Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . . ."). AutoMoney asks this Court to exercise our discretion to review the denial of its 12(b)(6) motion, which otherwise would not be immediately appealable. AutoMoney's 12(b)(6) motion is based on the enforceability of a choice of law provision found in the loan agreement entered between AutoMoney and Mr. Hundley. This issue appears to be a pure question of law which does not require further development of the factual record. Thus, in the interest of judicial economy, we grant certiorari and elect to exercise our discretion to review the denial of AutoMoney's 12(b)(6) motion in the instant appeal.

B. Motion to Dismiss Appeal

¶ 10 Mr. Hundley filed a Motion to Dismiss Interlocutory Appeal that requests this Court to dismiss as interlocutory the portion of AutoMoney's appeal which relates to the 12(b)(6) motion. "Ordinarily, a trial court's denial of a motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure is an interlocutory order from which there is no [immediate] right of appeal." *Grant v. Miller*, 170 N.C. App. 184, 186, 611 S.E.2d 477, 478 (2005). However, as discussed above, it is in the interest of judicial economy for this issue to be decided as part of the present appeal. Thus, we deny Mr. Hundley's Motion to Dismiss the appeal.

III. Personal Jurisdiction

¶ 11 **[2]** We first review AutoMoney's argument that the trial court erred in denying its 12(b)(2) motion to dismiss for lack of personal jurisdiction. AutoMoney asserts that minimum contacts to render personal jurisdiction constitutionally permissible do not exist. AutoMoney does not challenge the applicability of the long-arm statute, thus, the sole issue before this Court regarding personal jurisdiction is whether the trial court properly concluded that the exercise of jurisdiction over defendants did not violate due process.

¶ 12 "The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Parker v. Town of Erwin*, 243 N.C. App. 84, 95, 776 S.E.2d 710, 720 (2015) (citations and quotations omitted). "If the parties submit dueling affidavits the court may hear the matter on affidavits presented by the respective parties, or the court may direct that the matter be heard wholly or partly on oral testimony or depositions." *Id.* at 97, 776 S.E.2d at 721 (cleaned up). "If the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Id.* (cleaned up). "When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Id.* at 97-98, 776 S.E.2d at 722 (citation omitted).

¶ 13 "The determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum *is a question of fact*." *Cooper v. Shealy*, 140 N.C. App. 729, 732, 537 S.E.2d 854, 856 (2000) (emphasis added) (citation and quotation marks omitted). "When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by

competent evidence in the record; if so, this Court must affirm the order of the trial court." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005) (cleaned up). If the trial court's findings of fact are supported by competent evidence in the record, then we must affirm the trial court's order, no matter how we might view the evidence. *Ponder v. Been*, 275 N.C. App. 626, 637, 853 S.E.2d 302, 309-10 (Stroud, J., dissenting), *rev'd per curiam per dissent*, 2022-NCSC-24. "Therefore, the question for the appellate court is 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 legal theory, whether properly labeled or not." *Replacements, Ltd. v. Midwesterling*, 133 N.C. App. 139, 141, 515 S.E.2d 46, 48 (1999) (cleaned up) (citing *Miller v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 295, 300, 435 S.E.2d 537, 541 (1993), *disc. rev. denied*, 335 N.C. 770, 442 S.E.2d 519 (1994)).

¶ 14 Personal jurisdiction analysis involves two steps. "First, the court must determine if the North Carolina long-arm statute's (N.C. Gen. Stat. § 1-75.4) requirements are met. If so, the court must then determine whether such an exercise of jurisdiction comports with due process." *Cooper*, 140 N.C. App. at 732, 537 S.E.2d at 856.

¶ 15 "To satisfy the requirements of the due process clause, there must exist 'certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice.' " *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95 (1945)). "When evaluating whether minimum contacts with the forum exists, a court typically evaluates the quantity and nature of the contact, the relationship between the contact and the cause of action, the interest of the forum state, the convenience of the parties, and the location of the witnesses and material evidence." *Berrier v. Carefusion 203, Inc.*, 231 N.C. App. 516, 527, 753 S.E.2d 157, 165 (2014) (cleaned up).

¶ 16 The United States Supreme Court has recognized two types of personal jurisdiction that can exist with regard to non-resident defendants: general jurisdiction and specific jurisdiction. "General jurisdiction is appliable to cases where the defendant's 'affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State.' " *Beem USA Ltd.-Liab. Ltd. P'ship v. Grax Consulting, LLC*, 373 N.C. 297, 303, 838 S.E.2d 158, 162 (2020) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 180 L. Ed. 2d

796, 803 (2011) (internal citation and quotation omitted)). "Specific jurisdiction, conversely, encompasses cases in which the suit arises out of or relates to the defendant's contacts with the forum." *Id.* (cleaned up) (citing *Daimler AG v. Bauman*, 571 U.S. 117, 127, 187 L. Ed. 2d 624, 633-34 (2014) (citation omitted)). Specific jurisdiction, "is, at its core, focused on the relationship among the defendant, the forum, and the litigation." *Id.* (cleaned up). "A defendant's physical presence in the forum state is not a prerequisite to jurisdiction." *Button v. Level Four Orthotics & Prosthetics, Inc.*, 2022-NCSC-19, ¶ 39 (citing *Walden v. Fiore*, 571 U.S. 277, 283, 188 L. Ed. 2d 12 (2014)). "While a contractual relationship between an out-of-state defendant and a North Carolina resident is not dispositive of whether minimum contacts exists, 'a single contract may be a sufficient basis for the exercise of specific personal jurisdiction if it has a substantial connection with this State.' " *Button*, 2022-NCSC-19, ¶ 39 (quoting *Tom Togs*, 318 N.C. at 367, 348 S.E.2d at 786). In the present matter, the trial court only considered whether specific jurisdiction exists, thus our analysis follows suit.

¶ 17 The evidence presented to the trial court indicates that AutoMoney posted advertisements on their website specifically targeted at North Carolina residents and ran advertisements in a local magazine which is only distributed in nine counties in North Carolina and five counties in South Carolina. The affidavit of a former AutoMoney assistant manager and loan officer indicates that AutoMoney employees would routinely receive and return calls to North Carolina borrowers, as part of those calls AutoMoney employees would ask where the caller is located, and that AutoMoney mailed solicitation flyers into North Carolina. The evidence also shows that AutoMoney employs a vehicle recovery service which is located in North Carolina and has recovered four hundred and forty-two vehicles in North Carolina for AutoMoney. Regarding Mr. Hundley specifically, the evidence shows that Mr. Hundley called AutoMoney from North Carolina. During that telephone conversation the AutoMoney employee asked if Mr. Hundley was interested in getting a car title loan, asked questions about his car to determine eligibility for a car title loan, told Mr. Hundley that AutoMoney could loan him at least $1,000, and the AutoMoney employee instructed Mr. Hundley to drive to the AutoMoney store in South Carolina to receive the loan. When Mr. Hundley arrived at the AutoMoney store there was a sign in the window which read "NC Titles Welcomed." Additionally, AutoMoney put a lien on Mr. Hundley's vehicle using the NCDMV, Mr. Hundley made payments on the loan over the telephone from North Carolina, AutoMoney called Mr. Hundley in North Carolina several times for collection purposes, and when Mr. Hundley fell behind on payments, AutoMoney took possession

of his vehicle in North Carolina. The trial court's order made findings of fact in line with this evidence.

¶ 18 The trial court's order stated that, based upon the findings of fact, AutoMoney "has purposefully availed itself of the privilege of conducting business in North Carolina." The trial court went on to state that AutoMoney "has created continuing obligations between itself and borrowers in North Carolina," that Mr. Hundley's claims arise out of AutoMoney's activities in North Carolina, and that the exercise of personal jurisdiction is constitutionally reasonable.

¶ 19 The trial court's findings of fact are supported by competent evidence. As such, they are conclusive on appeal. *Button*, 2022-NCSC-19, ¶ 45. Further, the trial court's findings of fact do support its conclusion that specific personal jurisdiction is proper over AutoMoney.

¶ 20 "There must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 260, 625 S.E.2d 894, 899 (2006) (citing *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 679, 231 S.E.2d 629, 632 (1977)). "In determining minimum contacts, the court looks at several factors, including: (1) the quantity of the contacts; (2) the nature and quality of the contacts; (3) the source and connection of the cause of action with those contacts; (4) the interest of the forum state; and (5) the convenience to the parties." *Id.* (citation omitted). "These factors are not to be applied mechanically; rather, the court must weigh the factors and determine what is fair and reasonable to both parties. No single factor controls; rather, all factors must be weighed in light of fundamental fairness and the circumstances of the case." *Id.* (cleaned up).

¶ 21 Applying the factors from *A.R. Haire*, it is clear AutoMoney's contacts with North Carolina came in the form of contracting with a North Carolina resident despite having the knowledge that Mr. Hundley's performance of the contract (i.e., making payments on the loan) would occur from North Carolina, AutoMoney made collection calls to Mr. Hundley in North Carolina, AutoMoney placed a lien on Mr. Hundley's vehicle in North Carolina, and AutoMoney entered North Carolina to take possession of Mr. Hundley's vehicle. These contacts are directly related to the car title loan which is the subject of the cause of action. Further, North Carolina clearly has an interest in these contacts, exhibited by the laws enacted by the North Carolina General Assembly concerning loans such as the loan at issue here. It is not this Court's responsibility to reweigh these factors. It is sufficient that the factors are supported by

the findings of fact and the findings of fact are supported by competent evidence, as this Court's sole responsibility on appeal is to ensure that the trial court's factual findings regarding personal jurisdiction are supported by competent evidence. *See Ponder*, 275 N.C. App. at 637, 853 S.E.2d at 309-10 (Stroud, J., dissenting); *Evergreen Int'l Aviation*, 169 N.C. App. at 694, 611 S.E.2d at 183.

¶ 22 Compare the matter *sub judice* to *Stallings v. Hahn*, 99 N.C. App. 213, 392 S.E.2d 632 (1990), where this Court concluded that jurisdiction could not constitutionally be exercised. In *Stallings*, the only contacts between the defendant and North Carolina were an advertisement placed in a national magazine, telephone calls between the plaintiff and defendant, and a cashier's check sent by plaintiff to defendant. *Id.* at 216, 392 S.E.2d at 633. In contrast, in the case *sub judice*, defendant placed an advertisement on their website that was targeted at customers in North Carolina and ran an advertisement in a regional publication that is only distributed in North Carolina and South Carolina. AutoMoney also received and returned calls to/from customers in North Carolina and regularly hired a company which is located in and operates in North Carolina to repossess vehicles in North Carolina. Further, AutoMoney placed a lien on Mr. Hundley's vehicle in North Carolina through the NCDMV, called Mr. Hundley in North Carolina regarding his car title loan, and took possession of Mr. Hundley's vehicle in North Carolina.

¶ 23 This Court does not believe that AutoMoney could reasonably and in good faith advertise their car title loan services in North Carolina, enter into a loan agreement with a North Carolina resident, secure that loan with collateral which is registered and located in North Carolina, place a lien on property located in North Carolina through the NCDMV, and enter North Carolina to take possession of the collateral and not expect to be subject to the privileges and protections of North Carolina law merely because the loan paperwork was signed in South Carolina. The trial court did not err by concluding AutoMoney is subject to personal jurisdiction in North Carolina and denying AutoMoney's 12(b)(2) motion.

IV. Rule 12(b)(6) Motion to Dismiss

¶ 24 **[3]** AutoMoney next argues that the trial court erred in denying its Rule 12(b)(6) Motion to Dismiss, because the trial court should have applied the choice-of-law provision found in the parties' loan agreement which calls for the application of South Carolina law.

¶ 25 A Rule 12(b)(6) Motion to Dismiss, is a motion to dismiss the cause of action for "[f]ailure to state a claim upon which relief can be granted." N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2020).

> The Motion to Dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (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." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). "As a general rule, a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Stanback*, 297 N.C. at 185, 254 S.E.2d at 615 (cleaned up).

¶ 26 In analyzing the sufficiency of the complaint, for the purposes of a Rule 12(b)(6) motion, the complaint must be liberally construed. *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987).

> A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant notice of the nature and basis of plaintiff's claim so as to enable him to answer and prepare for trial.

Forbis v. Honeycutt, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981).

¶ 27 In the case *sub judice*, Mr. Hundley's complaint exclusively alleges North Carolina statutory claims. Mr. Hundley's North Carolina statutory claims are supported by sufficient allegations in the complaint to survive a Rule 12(b)(6) motion. In fact, at the hearing on AutoMoney's Motion to Dismiss, AutoMoney's attorney stated, "We're not challenging that [Mr. Hundley] properly stated a claim based on North Carolina statutes . . . ." Instead, at the hearing before the trial court, and again on appeal, AutoMoney argues that the choice-of-law provision in the loan agreement precludes Mr. Hundley from bringing any claim relating to the car title loan he received from AutoMoney under North Carolina law.

¶ 28 We believe AutoMoney's arguments go beyond the scope of a Rule 12(b)(6) motion. As exhibited by AutoMoney's counsel's statements at

the hearing on the motions to dismiss regarding the sufficiency of Mr. Hunleys' North Carolina statutory claims, AutoMoney's arguments go beyond the pleadings and address the merits of Mr. Hundley's claims. However, review of a Rule 12(b)(6) motion should only be concerned with whether the plaintiff properly stated a claim.

> A 12(b)(6) motion for failure to state a claim upon which relief can be granted addresses the claim itself and the moving party is simply asserting that the pleading to which the motion is directed does not sufficiently state a claim for relief. Unless the motion is converted into one for summary judgment, as permitted by the last sentence in Rule 12(b), *it does not challenge the actual existence of a meritorious claim*. By contrast, the summary judgment motion embraces more than the pleadings and the trial court may properly consider affidavits, depositions, and other information designated in the Rule. The Rule 56 motion is an assertion that there is no genuine issue as to any material fact and that the moving party is entitled to judgment on the merits as a matter of law on the basis of the record then existing.

Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co., 42 N.C. App. 259, 262, 257 S.E.2d 50, 53, *disc. rev. denied*, 298 N.C. 296, 259 S.E.2d 301 (1979) (emphasis added). The Rule 12(b)(6) motion is concerned with the contents of the complaint. *Id.* at 262-63, 257 S.E.2d at 50. Instead of challenging the sufficiency of the North Carolina statutory claims alleged, AutoMoney's arguments asks the court to interpret and apply a choice-of-law provision found in an outside document, albeit a document and choice-of-law provision that is likely to be central to determining the merits of the case. Without passing judgment on the merits of the parties' claims and arguments, we believe that AutoMoney's arguments go beyond the scope of a Rule 12(b)(6) motion and are better suited accompanying a Rule 56 motion for summary judgment.

¶ 29 The trial court did not review a motion for summary judgment and the issue before this court is whether the trial court properly denied AutoMoney's Rule 12(b)(6) Motion to Dismiss. Mr. Hundley has sufficiently alleged North Carolina statutory claims, and AutoMoney does not argue otherwise. The issue of whether the choice-of-law provision found in the loan agreement is controlling under a conflict of law analysis and whether that choice-of-law provision precludes Mr. Hundley from bringing North Carolina statutory claims relating to the loan agreement is

beyond the scope of a Rule 12(b)(6) motion and this Court's review in the present appeal. Thus, we conclude that the trial court did not err in denying AutoMoney's 12(b)(6) Motion to Dismiss.

V. Conclusion

¶ 30 For the foregoing reasons, we conclude that defendant-appellant AutoMoney is subject to personal jurisdiction in North Carolina, and thus, the trial court did not err in denying AutoMoney's 12(b)(2) Motion to Dismiss. Additionally, Mr. Hundley's complaint sufficiently alleges North Carolina statutory claims, and the trial court did not err in denying AutoMoney's 12(b)(6) Motion to Dismiss.

AFFIRMED.

Judges HAMPSON and WOOD concur.

JENNIFER LEAKE AND ELIZABETH WAKEMAN, PLAINTIFFS
v.
AUTOMONEY, INC., DEFENDANT

No. COA21-411

Filed 19 July 2022

1. Appeal and Error—interlocutory order—substantial right—personal jurisdiction—certiorari granted as to additional issue—significance of public policy

In an action seeking relief from alleged predatory lending practices, the trial court's order denying defendant's motion to dismiss for lack of personal jurisdiction was immediately appealable for affecting a substantial right. With regard to the denial of defendant's motion to dismiss under Civil Procedure Rule 12(b)(6), given the significance of the issue involved—whether North Carolina law prohibiting predatory title lending constitutes a fundamental public policy—and in the interest of promoting judicial economy given the number of cases pending against defendant, a writ of certiorari was granted to review defendant's substantive arguments on the claims raised.

2. Jurisdiction—personal—specific—minimum contacts—nonresident loan company—direct solicitation of borrowers in North Carolina

In an action seeking relief from alleged predatory lending practices, the trial court's denial of defendant's motion to dismiss for lack of personal jurisdiction was supported by its findings of fact, which in turn were supported by competent evidence regarding the contacts between defendant, a car title loan business operating in South Carolina, and the state of North Carolina and its residents. Further, the trial court properly concluded that defendant had the requisite minimum contacts with North Carolina to satisfy due process requirements for personal jurisdiction, where defendant directly solicited borrowers in North Carolina through phone calls, print and online advertisements, and mail solicitation letters; offered referral bonuses to North Carolina residents to refer new borrowers from North Carolina; received loan payments made from North Carolina; perfected its security interests through the N.C. Department of Motor Vehicles; and repossessed vehicles located in this state.

3. Consumer Protection—predatory lending practices—loan agreement—choice of law provision—violation of fundamental public policy

In an action seeking relief from alleged predatory lending practices against defendant, a car title loan company operating in South Carolina, with whom plaintiff entered into a loan agreement, defendant's 12(b)(6) motion to dismiss was properly denied despite its argument that the agreement's choice of law provision required any claims relating to the agreement to be brought in South Carolina. The protections contained in section 53-190 of the North Carolina Finance Act, which was the basis for one claim against defendant, demonstrates that protection of residents from illicit lending schemes is a fundamental public policy of North Carolina. Therefore, defendant's conduct in directly soliciting and offering high-interest loans to borrowers in North Carolina violated section 53-190 and rendered its choice of law provision void as against public policy.

4. Jurisdiction—personal—nonresident car title loan company—lack of evidence loan made to one plaintiff

In an action seeking relief from alleged predatory lending practices, the trial court erred by denying defendant's motion to dismiss for lack of personal jurisdiction as to claims asserted by one of two plaintiffs because there was insufficient evidence to support the unverified complaint's allegation that that plaintiff had ever obtained a loan from defendant, an out-of-state car title loan company, and because that plaintiff did not file any affidavits or other exhibits in support of the complaint.

LEAKE v. AUTOMONEY, INC.

[284 N.C. App. 389, 2022-NCCOA-490]

Appeal by Defendant from order entered 15 January 2021 by Judge Dawn M. Layton in Richmond County Superior Court. Heard in the Court of Appeals 8 February 2022.

Brown, Faucher, Peraldo & Benson PLLC, by James R. Faucher, for Plaintiffs-Appellees.

Womble Bond Dickinson (US) LLP, by Michael Montecalvo and Scott D. Anderson, for Defendant-Appellant.

WOOD, Judge.

¶ 1 AutoMoney, Inc. ("Defendant") appeals from an order denying its motion to dismiss under N.C. Gen. Stat. § 1A-1 Rules 12(b)(2) and 12(b)(6). On appeal, Defendant argues the trial court erred by 1) not enforcing the choice of law provisions within its loan agreements, and 2) determining minimum contacts existed to render personal jurisdiction over it. Defendant petitions this Court by writ of certiorari to review the trial court's denial of its motion to dismiss under Rule 12(b)(6). In our discretion, we grant Defendant's writ of certiorari and affirm in part the trial court's order and reverse in part with respect to Elizabeth Wakeman's ("Plaintiff Wakeman") claims.

I. Factual and Procedural Background

¶ 2 This dispute arises out of car title loan agreements Defendant made with Jennifer Leake ("Plaintiff Leake") and Elizabeth Wakeman (collectively, "Plaintiffs"). Defendant is a South Carolina corporation with its principal place of business in Charleston, South Carolina who provides car title loans, or loans secured by a motor vehicle, to individuals. Plaintiffs are North Carolina residents.

¶ 3 In 2015, Plaintiff Leake contacted Defendant to inquire about a car title loan. Plaintiff Leake "had heard about AutoMoney car title loans from a friend" and "called AutoMoney from North Carolina." Plaintiff Leake spoke with one of Defendant's employees who asked her "if . . . [she] had a car with a clear title[,] . . . [the] year, make and model" of her car, and "how much money . . . [she] wanted to borrow." Plaintiff Leake was told to drive to Defendant's store in South Carolina and to bring her car, car title, proof of employment, and driver's license to acquire the loan.

¶ 4 On August 7, 2015, Plaintiff Leake drove to Defendant's Cheraw, South Carolina office. There, she finalized and signed the loan agreement, presented her vehicle for an appraisal and inspection, and

received a loan for $815.00 at an interest rate of 158.034%. Plaintiff Leake provided her vehicle as a security interest for the loan. Per the terms of Defendant's loan agreement, a choice of law clause designated South Carolina as the governing forum should a dispute arise:

> This Loan Agreement, Promissory Note[,] and Security Agreement is entered into by and between Lender/Secured Party and Borrower/Debtor in the state of South Carolina as of the above date, subject to the terms and conditions set forth and any and all representations Borrower has made to Lender in connection with this Loan Agreement, Promissory Note and Security Agreement. As Lender is a regulated South Carolina consumer finance company and you, as Borrower, have entered into this Agreement in South Carolina, this Agreement shall be interpreted, construed, and governed by and under the laws of the State of South Carolina, without regard to conflicts of law rules and principles (whether of the State of South Carolina or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of South Carolina.

Thereafter, Defendant utilized a third-party electronic title storage company to record Plaintiff Leake's loan with the North Carolina Department of Motor Vehicles.

¶ 5 Plaintiff Leake proceeded to make loan payments to Defendant over the phone from North Carolina, where she resided. Ultimately, Plaintiff Leake stopped making payments. Defendant thereafter repossessed Plaintiff Leake's car from a location in North Carolina and sold it.

¶ 6 On June 18, 2020, Plaintiffs filed an unverified complaint, arguing Defendant violated N.C. Gen. Stat. §§ 53-165, 75-1.1, and 24-1.1. Plaintiffs then amended their complaint and filed an unverified, amended complaint on June 29, 2020. On August 3, 2020, Defendant filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(2), 12(b)(3), and 12(b)(6). Plaintiffs and Defendant then filed numerous affidavits and exhibits with the trial court.

¶ 7 Linda Derbyshire ("Derbyshire"), Defendant's owner and executive manager, executed an affidavit stating the following: Defendant has no offices within North Carolina, does not make car title loans in North Carolina, is not registered to do business in North Carolina, does not have a representative agent in North Carolina, does not have

a mailing address or telephone number in North Carolina, and does not directly market into North Carolina. Defendant only accepts loan applications in-person at one of its South Carolina locations. Furthermore, Defendant's customers can pay their loans directly to Defendant by mail, by telephone, by debit card, online, and through Western Union. Defendant sends customer service follow-ups, regardless of the customer's state of residency.

¶ 8 Defendant does have an internet site accessible by anyone, regardless of residency. Interested borrowers may contact Defendant through its website to inquire for more information about Defendant's business. At least one of Defendant's advertisements appeals specifically to North Carolina residents, stating, *inter alia*,

> [a]re you a North Carolina resident? We've got you covered! You are just a short drive away from getting the cash you need! Do you live in the Charlotte area? What about . . . or Wilmington? How about Hendersonville, Lumberton, Monroe, or Rockingham? There is a [sic] Auto Money Title Loans right across the border with a professional and courteous staff ready to help you get the cash you need. Is it worth the drive? Our thousands of North Carolina customers would certainly say it is.

¶ 9 Additionally, a representative for Steals & Deals, a North Carolina publication which primarily advertises in North Carolina counties along with four counties in South Carolina, explained by way of affidavit that from February 2013 to May 2019, Defendant ran a weekly advertisement in its publication. Affidavits from North Carolina residents who borrowed money from Defendant further attested to Defendant's involvement in North Carolina, stating Defendant offered referral fees in exchange for referring new North Carolina borrowers.

¶ 10 Notably, Plaintiff Wakeman did not file an affidavit nor any exhibits with the trial court. Derbyshire's affidavit attested she had "reviewed the records of loans made by AutoMoney, Inc. . . . [and] ha[d] not found any evidence that AutoMoney, Inc. made a loan to Elizabeth Wakeman."

¶ 11 On November 30, 2020, Defendant's motion to dismiss came on for hearing before the trial court. By order entered January 15, 2021, the trial court denied Defendant's motion to dismiss. Therein, the trial court found it possessed personal jurisdiction over Defendant and that "[t]he State of North Carolina has a strong interest in the enforcement of its consumer protection law and in protecting its citizens from what under

North Carolina law are usurious loan rates." Defendant gave timely notice of appeal. Defendant also petitions this court by a writ of certiorari to review the trial court's denial of its motion to dismiss under Rule 12(b)(6).[1]

II. Jurisdiction

¶ 12 **[1]** Defendant appeals from the trial court's denial of its motion to dismiss under Rule 12(b)(2) and Rule 12(b)(6). "[T]he denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." *Can Am South, LLC v. State*, 234 N.C. App. 119, 122, 759 S.E.2d 304, 307 (2014) (quoting *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007)). A party may not appeal from "an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974) (citations omitted); *see also* N.C. Gen. Stat. § 1-277 (2021). Therefore, since Defendant's appeal from the trial court's order denying its motion to dismiss is interlocutory, we first determine whether this appeal affects a substantial right.

¶ 13 Turning first to Defendant's Rule 12(b)(2) motion, "motions to dismiss for lack of personal jurisdiction affect a substantial right and are immediately appealable." *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 257-58, 625 S.E.2d 894, 898 (2006) (citations omitted); *see* N.C. Gen. Stat. § 1-277(b) ("Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . . ."); *Can Am South, LLC*, 234 N.C. App. at 122, 759 S.E.2d at 307; *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 188 N.C. App. 302, 304, 655 S.E.2d 446, 448 (2008). Thus, Defendant's appeal from the order denying its Rule 12(b)(2) motion is properly before us on appeal.

¶ 14 Regarding Defendant's Rule 12(b)(6) motion, Defendant petitions us by a writ of certiorari to review the denial of its Rule 12(b)(6) motion. We have held "it 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." *Cryan v. Nat'l Council of YMCA of the United States*, 280 N.C. App. 309,

1. On September 23, 2021, Plaintiffs filed a motion with this Court to dismiss Defendant's appeal pertaining to the trial court's denial of its Rule 12(b)(6) motion. Plaintiff also requested an expedited ruling. This motion was referred to this panel.

2021-NCCOA-612, ¶ 17 (cleaned up) (quoting *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 606, 596 S.E.2d 285, 289 (2004)). Particularly, we have issued a writ of certiorari when the issue in question is significant, important, and will promote judicial economy. *Id.* at ¶ 18. The issue raised by Defendant's motion to dismiss under Rule 12(b)(6) in the present case is significant as it raises the critical question of whether our State legislation prohibiting predatory title lending constitutes a fundamental public policy. Likewise, granting Defendant's petition for writ of certiorari will promote judicial economy as this appeal represents one of thirty-two proceedings against Defendant in North Carolina courts, seven of which are currently before this Court. Therefore, in our discretion, we grant Defendant's petition for writ of certiorari to review its motion to dismiss under Rule 12(b)(6).

III. Discussion

¶ 15 Defendant raises several issues on appeal; each will be addressed in turn.

A. Personal Jurisdiction

¶ 16 **[2]** Defendant first contends the trial court erred by denying its Rule 12(b)(2) motion to dismiss. We disagree.

¶ 17 When reviewing the denial of a motion to dismiss for lack of jurisdiction, we determine whether "the findings of fact by the trial court are supported by competent evidence in the record . . . ." *Lab. Corp. of Am. Holdings v. Caccuro*, 212 N.C. App. 564, 567, 712 S.E.2d 696, 699 (2011) (quoting *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005)). The trial court's conclusions of law are reviewed *de novo*. *Id.*; *see Beroth Oil Co. v. N.C. DOT*, 367 N.C. 333, 338, 757 S.E.2d 466, 471 (2014).

1. Competent Evidence

¶ 18 As an initial matter, Defendant first challenges the trial court's findings of fact as they relate to personal jurisdiction. Specifically, Defendant challenges the trial court's findings regarding 1) pre-lending phone calls, 2) contact initiation with North Carolina residents, 3) receipt of loan payments, 4) perfection of car titles, and 5) contract formation. Looking first to the order's findings of fact regarding the pre-lending phone calls, contact initiation with North Carolina residents, and contract formation, the trial court made the following relevant findings of fact:

> 4. Defendant engages in telephone discussion[s] regarding [t]he details of its loan products with

> potential customers while those customers are in North Carolina.
>
> 5. Defendant calls potential borrowers who are located in North Carolina.
>
> 6. Defendant accepts online inquiries from North Carolina and then makes sales calls to North Carolina to the persons who submitted their contact information to Defendant.
>
> 7. Defendant offers loans over the phone to North Carolinians and Defendant receives acceptances of its loan offers by telephone from North Carolinians.
>
> 8. Defendant provides information about its loans over the phone to North Carolinians and makes inquiries concerning amounts sought to be borrowed.
>
> 9. Defendant directs North Carolina residents to travel out of state to its stores.
>
> 10. Defendant tells North Carolina borrowers what documents to bring to take out loans.
>
> 11. Defendant tells North Carolina borrowers to bring an extra key to the vehicle.
>
> . . .
>
> 15. Defendant sends written solicitations into North Carolina.

¶ 19 A careful review of the affidavits filed by the North Carolina residents reveals competent evidence exists to support the trial court's findings of fact. These affidavits further reveal Defendant discussed the loan amounts and details of their loan security interests over the phone. Moreover, at deposition, Derbyshire admitted Defendant discussed its loan products over the phone. Thus, competent evidence exists to support findings of fact numbers 4 to 11 and 15.

¶ 20 Turning next to the trial court's findings of fact regarding Defendant's receipt of loan payments and payment of car title loans from North Carolina residents, the trial court made the following relevant findings of fact.

> 12. Defendant perfects security interests using the North Carolina Division of Motor Vehicles.

> 13. Defendant accepts payments from North Carolina.
>
> . . .
>
> 16. Defendant sends collection letters into North Carolina.
>
> 17. Defendant makes collections calls into North Carolina.
>
> 18. Defendant directs others to enter North Carolina to take possession of collateral motor vehicles.

¶ 21 After a careful review of the record, we conclude competent evidence exists to support these findings of fact. Derbyshire, in her affidavit, admitted Defendant perfects its security interest in the "appropriate state's department of motor vehicles . . . ." Hayes, owner of Associates Asset Recovery, LLC, attested that his company has "recovered 442 motor vehicles for AutoMoney, Inc. in North Carolina." The North Carolina borrowers, in their affidavits, stated Defendant made collection calls into North Carolina, accepted payments from North Carolina, mailed written solicitation letters into North Carolina, and mailed collection letters into North Carolina. Therefore, we hold competent evidence exists to support findings of fact numbers 12, 13, and 16 to 18.

2. Conclusions of Law

¶ 22 Defendant next argues the trial court erred by concluding minimum contacts existed between it and North Carolina. We disagree.

¶ 23 This Court utilizes a two-step analysis to determine whether personal jurisdiction exists over a non-resident defendant: "First, the transaction must fall within the language of the State's long-arm statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution." *Banc of Am. Sec. LLC*, 169 N.C. App. at 693, 611 S.E.2d at 182 (cleaned up) (citing *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986)); *see Lab. Corp. of Am. Holdings*, 212 N.C. App. at 566, 712 S.E.2d at 699. *But see Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 785 ("We have also held in considering N.C.G.S. § 1-75.4 that the requirements of due process, not the words of the long-arm statute, are the ultimate test of jurisdiction over a non-resident defendant[] . . . ."). Because Defendant does not challenge on appeal the applicability of our long-arm statute, we confine our analysis to whether the trial court's conclusion it had personal jurisdiction over Defendant violated the requirements of due process.

¶ 24 The Due Process Clause of the Fourteenth Amendment to the United States Constitution "prevents states from rendering valid judgments against nonresidents." *In re F.S.T.Y.*, 374 N.C. 532, 534, 843 S.E.2d 160, 162 (2020) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S. Ct. 559, 564, 62 L. Ed. 2d 490, 497 (1980)). A defendant must "be given adequate notice of the suit . . . and be subject to the personal jurisdiction of the court[] . . . ." *World-Wide Volkswagen Corp.*, 444 U.S. at 291, 100 S. Ct. 564, 62 L. Ed. 2d at 497 (citations omitted); *accord In re F.S.T.Y.*, 374 N.C. at 534, 843 S.E.2d at 162.

¶ 25 Under the due process clause, *minimum contacts* must exist between the forum state and nonresident such that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 786 (cleaned up) (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945)). In other words, "there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws[] . . . ." *Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 786; *see also World-Wide Volkswagen Corp.*, 444 U.S. at 297, 100 S. Ct. at 567, 62 L. Ed. 2d at 501 ("[I]t is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."); *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 632, 394 S.E.2d 651, 655 (1990). However, "our minimum contacts analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden v. Fiore*, 571 U.S. 277, 285, 134 S. Ct. 1115, 1122, 188 L. Ed. 2d 12, 20 (2014) (internal quotation marks omitted).

¶ 26 There are two types of personal jurisdiction recognized by our Supreme Court sufficient for establishing minimum contacts: general and specific jurisdiction. *Beem USA Limited-Liability Ltd. P'ship v. Grax Consulting, LLC*, 373 N.C. 297, 303, 838 S.E.2d 158, 162 (2020). "General jurisdiction is applicable in cases where the defendant's affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State." *Id.* (internal quotations marks omitted) (quotation omitted); *see also Lab. Corp. of Am. Holdings*, 212 N.C. App. at 569, 712 S.E.2d at 701 ("General jurisdiction may be asserted over a defendant even if the cause of action is unrelated to defendant's activities in the forum as long as there are sufficient continuous and systematic contacts between defendant and the forum state." (internal quotation marks omitted)). Specific jurisdiction exists when "the controversy arises out of the defendant's contacts with the forum state

. . . ." *Tom Togs, Inc.*, 318 N.C. at 366, 348 S.E.2d at 786; *see Beem USA Limited-Liability Ltd. P'ship*, 373 N.C. at 303-04, 838 S.E.2d at 162.

¶ 27 In the case *sub judice*, Plaintiffs assert Defendant is subject to a suit in North Carolina under specific jurisdiction. As such, we limit our analysis to whether this State has specific jurisdiction over Defendant.

¶ 28 A specific jurisdiction inquiry analyzes "the relationship among the defendant, the forum state, and the cause of action . . . ." *Tom Togs, Inc.*, 318 N.C. at 366, 348 S.E.2d at 786; *see Banc of Am. Sec. LLC*, 169 N.C. App. at 696, 611 S.E.2d at 184. "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden*, 571 U.S. at 284, 134 S. Ct. at 1121, 188 L. Ed. 2d at 20. This Court has established several factors to consider when evaluating whether minimum contacts exist: "(1) the quantity of the contacts; (2) the nature and quality of the contacts; (3) the source and connection of the cause of action with those contacts; (4) the interest of the forum state; and (5) the convenience to the parties." *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 260, 625 S.E.2d 894, 899 (2006) (citation omitted); *see Sherlock v. Sherlock*, 143 N.C. App. 300, 304, 545 S.E.2d 757, 761 (2001); *Bruggerman*, 138 N.C. App. at 617, 532 S.E.2d at 219; *Cherry Bekaert & Holland*, 99 N.C. App. at 632, 394 S.E.2d at 655.

¶ 29 The evidence presented in this present case shows Defendant's conduct created a substantial connection with North Carolina. Defendant contacted North Carolina residents through the following methods: 1) online advertisements; 2) advertisements in Steals & Deals, a local North Carolina publication; 3) telephone calls between Defendant and North Carolina residents while the residents were in North Carolina; 4) perfection of its security interest with North Carolina Department of Motor Vehicles; 5) offers of referral bonuses to North Carolina residents for referring new North Carolina customers; 6) receipt of loan payments from North Carolina residents within North Carolina; and 7) repossession of vehicles located within North Carolina.

¶ 30 Regarding Defendant's online advertisements, the trial court found in finding of fact number 1, "Defendant has advertised its loans in North Carolina." This court in *Havey v. Valentine* outlined the following tests to determine whether an Internet website warrants the exercise of personal jurisdiction:

> [A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into

> the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts.

Havey v. Valentine, 172 N.C. App. 812, 816-17, 616 S.E.2d 642, 647-48 (2005). Notably, at least one of Defendant's internet advertisements directly targeted North Carolina:

> Are you a North Carolina resident? We've got you covered! You are just a short drive away from getting the cash you need! Do you live in the Charlotte area? What about . . . or Wilmington? How about Hendersonville, Lumberton, Monroe, or Rockingham? There is a [sic] Auto Money Title Loans right across the border with a professional and courteous staff ready to help you get the cash you need. Is it worth the drive? Our thousands of North Carolina customers would certainly say it is.

This advertisement is clearly a "manifested intent" to engage in business within North Carolina by recruiting our residents and providing them with information on how to acquire loans. Defendant's high interest car title loans would be void as a matter of public policy if offered by a company within North Carolina. Because Defendant attempts to circumvent North Carolina's predatory lending laws by operating from South Carolina while directly marketing to North Carolina residents, Defendant's internet advertisements satisfy the test for personal jurisdiction over internet communications stated in *Havey*.

¶ 31 Moreover, Defendant ran an advertisement in a North Carolina publication for six consecutive years. Although running an advertisement in a national publication is not sufficient, standing alone, to establish personal jurisdiction, this Court has yet to address whether advertisements in a local publication can give rise to personal jurisdiction. *See Stallings v. Hahn*, 99 N.C. App. 213, 216, 392 S.E.2d 632, 634 (1990); *Marion v. Long*, 72 N.C. App. 585, 587, 325 S.E.2d 300, 303 (1985). Certainly, placing an advertisement in a publication which primarily circulates in a single state is sufficient for a defendant to reasonably anticipate being haled into that State's court. *See World-Wide Volkswagen Corp.*, 444 U.S. at 297, 100 S. Ct. at 567, 62 L. Ed. 2d at 501.

¶ 32 Additionally, Defendant offered North Carolina borrowers a referral bonus if they referred new North Carolina residents for a car title loan.

Likewise, Defendant entered North Carolina through third parties to repossess North Carolina borrowers' vehicles once borrowers fell behind on their payments.

¶ 33 Because Defendant had direct contact with North Carolina through its business operations, internet advertisements, and local publication advertisements, Defendant purposefully "avail[ed] [it]self of the privilege of conducting activities within" North Carolina. *Tom Togs*, *Inc.*, 318 N.C. at 365, 348 S.E.2d at 786 (citation omitted). In other words, the sum and quality of Defendant's contacts with this State, paired with Defendant's obvious intent to recruit North Carolina clients, is sufficient to establish personal jurisdiction. Accordingly, we hold the trial court did not err by denying Defendant's Rule 12(b)(2) motion to dismiss.

B. Rule 12(b)(6) Motion

¶ 34 **[3]** Defendant next asserts the trial court erred by denying its motion to dismiss under Rule 12(b)(6). After a careful review of the record and applicable law, we conclude the trial court committed no error.

¶ 35 We review a trial court's ruling on a motion to dismiss under Rule 12(b)(6) *de novo*. *Leary v. N.C. Forest Prods.*, *Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003), *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673-74 (2003); *see Grich v. Mantelco*, *LLC*, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013). A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency of the complaint." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citing *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970)). When "ruling on . . . [a Rule 12(b)(6)] motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback*, 297 N.C. at 185, 254 S.E.2d at 615 (citing *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976)); *see Sutton*, 277 N.C. at 103, 176 S.E.2d at 166 ("[A] complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." (emphasis omitted)); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80, 84 (1957), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

¶ 36 Here, Defendant argues the trial court should have granted its Rule 12(b)(6) motion because of the South Carolina choice of law provision within its loan agreement mandating the application of South Carolina law and, thus, precluding Plaintiff's claims arising from North Carolina law. As a general rule, a "court interprets a contract

according to the intent of the parties to the contract." *Cable Tel Servs. v. Overland Contr.*, 154 N.C. App. 639, 642, 574 S.E.2d 31, 33 (2002) (citing *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631, 518 S.E.2d 205, 209 (1999)); *see Duke Power Co. v. Blue Ridge Electric Membership Corp.*, 253 N.C. 596, 602, 117 S.E.2d 812, 816 (1961). However, the intent of the parties must not "require the performance of an act prohibited by law." *Duke Power Co.*, 253 N.C. at 602, 117 S.E.2d at 816. When "parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect." *Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980) (first citing *Bundy v. Commercial Credit Co.*, 200 N.C. 511, 516, 157 S.E. 860, 863 (1931); then citing *Fast v. Gulley*, 271 N.C. 208, 155 S.E.2d 507 (1967)); *see Bueltel*, 134 N.C. App. at 631, 518 S.E.2d at 209 ("[I]t is apparent that when a choice of law provision is included in a contract, the parties intend to make an exception to the presumptive rule that the contract is governed by the law of the place where it was made."). A choice of law provision is binding "on the interpreting court as long as they had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental public policy of the state or otherwise applicable law." *Torres v. McClain*, 140 N.C. App. 238, 241, 535 S.E.2d 623, 625 (2000) (quoting *Behr v. Behr*, 46 N.C. App. 694, 696, 266 S.E.2d 393, 395 (1980)); *see also Tanglewood Land Company*, 299 N.C. at 262, 261 S.E.2d at 656.

¶ 37 Here, Plaintiffs assert that regardless of the choice of law provision, Defendant is subject to North Carolina law under N.C. Gen. Stat. § 53-190. As such, we must determine whether N.C. Gen. Stat. § 53-190 constitutes a "fundamental public policy" or "otherwise applicable law" as to invalidate Defendant's choice of law provision. *See Torre*s, 140 N.C. App. at 241, 535 S.E.2d at 625.

1. N.C. Gen. Stat. § 53-190 is a Fundamental Public Policy

¶ 38 N.C. Gen. Stat. § 53-190 states:

> (a) No loan contract made outside this State in the amount or of the value of fifteen thousand dollars ($15,000) or less, for which greater consideration or charges than are authorized by . . . [N.C. Gen. Stat. §§] 53-173 and . . . 53-176 of this Article have been charged, contracted for, or received, shall be enforced in this State. Provided, the foregoing shall not apply to loan contracts in which all contractual activities, including solicitation, discussion, negotiation, offer,

> acceptance, signing of documents, and delivery and receipt of funds, occur entirely outside North Carolina.
>
> (b) If any lender or agent of a lender who makes loan contracts outside this State in the amount or of the value of fifteen thousand dollars ($15,000) or less, comes into this State to solicit or otherwise conduct activities in regard to such loan contracts, then such lender shall be subject to the requirements of this Article.
>
> (c) No lender licensed to do business under this Article may collect, or cause to be collected, any loan made by a lender in another state to a borrower, who was a legal resident of North Carolina at the time the loan was made. The purchase of a loan account shall not alter this prohibition.

N.C. Gen. Stat. § 53-190 (2021). In other words, N.C. Gen. Stat. § 53-190 aims to protect North Carolina residents from predatory lending by nonresident, predatory loan corporations that infiltrate North Carolina through the contractual activities listed above.

¶ 39 This Court has yet to address whether N.C. Gen. Stat. § 53-190 encompasses a fundamental public policy of North Carolina. In making today's determination, we are guided by our case law concerning predatory lending. In *State ex rel. Cooper v. NCCS Loans, Inc.*, defendant offered immediate cash advances under the guise of an internet store wherein the customer was required to sign a year-long contract for "internet access." *State ex rel. Cooper v. NCCS Loans, Inc.*, 174 N.C. App. 630, 635-36, 624 S.E.2d 371, 375 (2005). The customers were charged "100 times more" for internet access compared to legitimate internet providers and a high interest rate on the cash advanced. *Id.* at 637-38, 624 S.E.2d at 376-77. The trial court granted summary judgment against defendants for usury, violation of the North Carolina Consumer Finance act, and unfair and deceptive trade practices. *Id.* at 633, 624 S.E.2d at 373-74. On appeal, defendant challenged, among other things, the trial court's entry of summary judgment on plaintiff's claim of unfair and deceptive trade practices. *Id.*, 174 N.C. App. at 640, 624 S.E.2d at 378. We agreed with the trial court, stating "it is a 'paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws.' " *Id.* at 641, 624 S.E.2d at 378; *see* N.C. Gen. Stat. § 24-2.1(g) (2021); *Odell v. Legal Bucks, LLC*, 192 N.C. App. 298, 319, 665 S.E.2d 767, 780 (2008).

¶ 40 Moreover, a review of North Carolina's General Assembly's legislative action regarding predatory lending within our State further guides our decision. On December 20, 2006, our Supreme Court in *Skinner v. Preferred Credit*, addressed whether North Carolina had personal jurisdiction over the 1997-1 Trust, a nonresident defendant who held high interest loans. *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006). In a 4 to 3 decision, Justice Paul Newby writing for the majority concluded "North Carolina courts lack personal jurisdiction over a nonresident trust that has no connections to this state other than holding mortgage loans secured by deeds of trust on North Carolina property." *Id.* at 127, 638 S.E.2d at 213. Justice Timmons-Goodson strongly dissented, writing the "Court's decision today aids in the exploitation of our state's most vulnerable citizens[,]" and "the majority's decision effectively undermines the right of unwitting victims of predatory lending practices . . . ." *Id.* at 127, 638 S.E.2d at 213 (Timmons-Goodson, J., dissenting).

¶ 41 Less than four months after the decision in *Skinner*, our General Assembly enacted House Bill 1374 overturning the *Skinner* case. The bill was entitled "An Act to Overturn the Shepard Case and Amend the Limitation Regarding Actions to Recover for Usury; *To Overturn The Skinner Case* And Amend The Long-Arm Statute To Allow North Carolina Courts to Exercise Personal Jurisdiction Over Certain Nonresident Defendants; To Require That a Notice of Foreclosure Contain Certain Information; And to Provide for Mortgage Debt Collection and Servicing." 2007 NC Session Laws, House Bill 1374 (emphasis added). In addition to House Bill 1374, our general assembly proceeded to pass four other bills addressing consumer mortgage lending in the summer of 2007. Susan E. Hauser, *Predatory Lending, Passive Judicial Activism, and the Duty to Decide*, 86 N.C.L. Rev. 1501, 1555 (2008).

¶ 42 Based on our General Assembly's legislation prohibiting predatory lending, its swift response to *Skinner*, and our case law governing predatory lending practices within the State of North Carolina, the issue of predatory lending is clearly a question of fundamental public policy for this State. Thus, since N.C. Gen. Stat. § 53-190 protects North Carolina citizens from predatory lending and our conclusion it constitutes a fundamental public policy of this State, we next determine whether Defendant violated this statute.

¶ 43 In pertinent part, N.C. Gen. Stat. § 53-190 prohibits predatory loans made elsewhere unless "all contractual activities, including solicitation, discussion, negotiation, offer, acceptance, signing of documents, and delivery and receipt of funds, occur entirely outside North Carolina."

§ 53-190(a). "Negotiation" is defined as "deliberation, discussion, or conference upon the terms of a proposed agreement, or as the act of settling or arranging the terms of a bargain or sale." *Cooper v. Henderson*, 55 N.C. App. 234, 235, 284 S.E.2d 756, 757 (1981) (citation omitted). "Discussion" is defined as "[t]he act of exchanging views on something; a debate." *Discussion*, Black's Law Dictionary (10th ed. 2014).

¶ 44 Here, Defendant negotiated and discussed the terms of the loan agreement with North Carolina residents while they were in North Carolina. Plaintiff Leake, in her deposition, recounted the following:

> I called AutoMoney from North Carolina. . . . The AutoMoney employee I spoke with asked me if I had a car with a clear title. I told them I did and they asked me for information about my car like year, make[,] and model. . . . The AutoMoney employee next asked me how much money I wanted to borrow. I told them $1000.00.

Per Plaintiff Leake's affidavit, Defendant discussed details of the loan amount and the security interest for the loan with her. Furthermore, Derbyshire, in her deposition, stated Defendant would provide information about its business to potential borrowers who contacted Defendant. Because Defendant's business was providing high interest loans, these details would naturally be included in "information about its business."

¶ 45 By discussing its business and the terms of its contract over the phone with North Carolina residents, Defendant discussed and negotiated loans within North Carolina as defined by N.C. Gen. Stat. § 53-190. Therefore, we conclude Defendant violated N.C. Gen. Stat. § 53-190 and, in turn, violated a fundamental public policy of North Carolina. As such, we hold the choice of law provision within Defendant's loan agreements is void as a matter of public policy and the trial court properly denied Defendant's Rule 12(b)(6) motion.

C. Plaintiff Wakeman

¶ 46 **[4]** Finally, Defendant alleges the trial court erred by not dismissing Plaintiff Wakeman from this action due to a lack of personal jurisdiction. Additionally, Defendant challenges findings of fact numbers 28 and 29, arguing they are not supported by competent evidence. Finding of fact number 28 provides, "Plaintiff Elizabeth Wakeman is not a resident of Richmond County but is a resident of North Carolina[]"; finding of fact number 29 states, "Ms. Wakeman went to an AutoMoney store in South Carolina and exchanged Defendant's loan check for her North Carolina car title."

¶ 47 When a finding of fact is challenged, we look to see whether competent evidence supports the finding of fact. *Lab. Corp. of Am. Holdings*, 212 N.C. App. at 567, 712 S.E.2d at 699. Here, Plaintiffs' unverified, amended complaint frequently stated "each Plaintiff" thereby implicating both Plaintiff Leake and Plaintiff Wakeman. The complaint, however, did not specifically mention Plaintiff Wakeman. Although an unverified complaint "is not an affidavit or other evidence[,]" *Hill v. Hill*, 11 N.C. App. 1, 10, 180 S.E.2d 424, 430 (1971), when "unverified allegations in the complaint meet plaintiff's initial burden of proving the existence of jurisdiction and defendants do not contradict plaintiff's allegations in their sworn affidavit, such allegations are accepted as true and deemed controlling." *Berrier v. Carefusion 203, Inc.*, 231 N.C. App. 516, 521, 753 S.E.2d 157, 162 (2014) (cleaned up) (quoting *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998)).

¶ 48 Other than Plaintiffs' unverified complaint, the only other source of evidence concerning Plaintiff Wakeman is the sworn affidavit of Derbyshire. In her affidavit, Derbyshire stated, "I have reviewed the records of loans made by AutoMoney, Inc. I have not found any evidence that AutoMoney, Inc. made a loan to Elizabeth Wakeman." When, as in this case, a defendant submits some form of evidence to counter a plaintiff's unverified claims, the plaintiff may not rest upon these claims but must file "some form of evidence in the record [to] support[] the exercise of personal jurisdiction." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615-16, 532 S.E.2d 215, 218 (2000); *see Brown v. Refuel Am., Inc.*, 186 N.C. App. 631, 634, 652 S.E.2d 389, 392 (2007). Indeed, "the plaintiff's burden of establishing *prima facie* that grounds for personal jurisdiction exist can still be satisfied if some form of evidence in the record supports the exercise of personal jurisdiction." *Bruggeman*, 138 N.C. App. at 616, 532 S.E.2d at 218 (citation omitted).

¶ 49 Here, Plaintiffs did not file an affidavit or any other evidence with the trial court to support the exercise of jurisdiction. Accordingly, because Derbyshire's affidavit contradicts Plaintiffs' unverified, amended complaint, we hold finding of fact number 29 is not supported by competent evidence. Notwithstanding, Derbyshire's affidavit did not address whether Plaintiff Wakeman is a resident of North Carolina; as such, we hold finding of fact number 28 is supported by competent evidence.

¶ 50 Thus, the only finding of fact supporting the trial court's exercise of personal jurisdiction over Plaintiff Wakeman is that she is a citizen of North Carolina. The mere fact Plaintiff Wakeman is a citizen of North Carolina is insufficient to establish specific jurisdiction. *See Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781, 198

L. Ed. 2d 395, 404 (2017) ("For specific jurisdiction, a defendant's general connections with the forum are not enough."). There is no evidence within the record to show Plaintiff Wakeman interacted with Defendant, received a loan from Defendant, or contacted Defendant in any manner. Although Plaintiff Leake was in contact with Defendant, entered into a loan agreement with Defendant, and had her car repossessed by Defendant, Plaintiff Leake's interactions with Defendant "does not allow the State to assert specific jurisdiction over" Plaintiff Wakeman's claims. *Id.* at 1781, 198 L. Ed. 2d at 405 ("As we have explained, a defendant's relationship with a third party, standing alone, is an insufficient basis for jurisdiction." (cleaned up)). Therefore, notwithstanding our holding today that personal jurisdiction exists over Plaintiff Leake's claims, we hold the trial court did not have personal jurisdiction over Plaintiff Wakeman's claims. As such the trial court erred by allowing Plaintiff Wakeman's claims to proceed.

IV. Conclusion

¶ 51 For the foregoing reasons, Defendant is subject to personal jurisdiction in North Carolina. Furthermore, Defendant's actions violated N.C. Gen. Stat. § 53-190; thus, the trial court did not err by denying Defendant's motion to dismiss under Rule 12(b)(6). However, the trial court does not have jurisdiction over Defendant regarding Plaintiff Wakeman's claims. The order of the trial court is affirmed in all respects except for Plaintiff Wakeman's claims, and thus the portion of the order pertaining to Plaintiff Wakeman is reversed.

AFFIRMED IN PART; REVERSED IN PART.

Judges HAMPSON and GORE concur.

BECKY I. MATTHEWS, ADMINISTRATOR CTA OF THE ESTATE OF ANNA BURWELL HEADLEY, DECEDENT, AND LINDA M. PERRY, ET AL., PLAINTIFFS
v.
ERNEST EARL FIELDS, AND VANESSA FIELDS, AND DENISE JONES, AND HER SPOUSE IF ANY, DEFENDANTS

No. COA21-589

Filed 19 July 2022

Real Property—installment land contract—failure to record—enforceability

In a dispute over the ownership of real property between the property's residents (defendants) and an estate seeking to evict defendants, although a Property Rental Agreement and Offer to Purchase and Contract between defendants and the decedent's attorney-in-fact did not constitute a valid option contract pursuant to N.C.G.S. § 47G, the contracts did constitute an installment land contract pursuant to N.C.G.S. § 47H by memorializing the parties' intent to create a contract for the sale of the property for $50,000, with all rent payments to be credited toward the purchase price. The seller's failure to record the contracts did not convert the agreement into a lease.

Appeal by Defendants Ernest Earl Fields and Vanessa Fields from order entered 16 July 2021 by Judge Cindy King Sturges in Vance County Superior Court. Heard in the Court of Appeals 6 April 2022.

Stam Law Firm, PLLC, by R. Daniel Gibson, for Plaintiffs-Appellees.

The Law Offices of Ajulo E. Othow, PLLC, by Ajulo E. Othow, for Defendants-Appellants.

COLLINS, Judge.

¶ 1 Defendants Ernest Earl Fields and his wife, Vanessa Fields, appeal the trial court's order granting declaratory judgment to Plaintiff Becky I. Matthews, administrator of the Estate of Anna Burwell Headley, deceased ("Estate").[1] The trial court's order declares that the Estate is the sole owner of property located at 200 Perkinson Street in Kitrell, North Carolina, and orders the Fields to vacate the Property. We reverse.

1. Defendant Denise Jones, and her unnamed spouse, if any, are not parties to this appeal.

I. Background

¶ 2 Ms. Headley appointed Denise Jones as her attorney-in-fact by document signed and recorded with the Vance County Register of Deeds on 16 February 2002. With the power of attorney, Jones was authorized to, among other things, "sell and convey real estate, and to lease, encumber, or exchange real estate; . . . [and] to accept payment . . . ." Jones, as Ms. Headley's power of attorney, and Ernest Fields duly executed a "Property Rental Agreement" and an "Offer to Purchase and Contract" on 15 January 2014 concerning property owned by Ms. Headley at 20 Perkinson Street[2] in Kitrell, North Carolina. The Property Rental Agreement designates Jones as the Landlord and the Fields as the Tenants of the property and further provides, in pertinent part:

> 3. PERIOD OF LEASE:
>
> 3.1 The initial period of the lease shall start on the 1st day of February in the year 2014
>
> 3.2 Tenant shall lease the property with the right to purchase. See Offer to Purchase and Contract Agreement hereto attached.
>
> . . . .
>
> 4. RENTAL:
>
> 4.1 The monthly rental for the premises for the initial period is an amount of $450.00 (Four hundred-Fifty dollars).
>
> 4.2 Rental shall be paid monthly in advance on or before the first day of the month, at the following address: 1345 N Chavis Rd, Kittrell NC 27544
>
> 4.3 All monthly rents shall be credited to the purchase price of $50,000 at the time of closing. This shall be reflected in the purchase agreement
>
> . . . .
>
> 4.6 Eviction can occur when the Landlord determines that Tenant(s) can no longer meet his/her obligations.

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2. The original "Property Rental Agreement" and "Offer to Purchase and Contract" state the address of the property at issue is "20 Perkinson Street." At some point after the documents were executed, Vance County legally changed that address to "200 Perkinson Street."

> 5. ADDITIONAL PAYMENTS BY TENANT:
>
> 5.1 The Tenant shall from the date of commencement of this Agreement promptly pay for all expenses incurred by means of electricity and sanitary fees, rubbish disposal and all charges arising out of any telephone or other service installed on the Premises.

The Property Rental Agreement also contains various other provisions addressing, among other things, additional Tenant obligations, Landlord obligations, waiver, and limitation of liability.

¶ 3 The referenced Offer to Purchase and Contract is completed on a standard real estate form. Jones is listed as the Seller and Ernest Fields is listed as the Buyer of property located at 20 Perkinson Street. The Purchase Price of $50,000 is to be paid "in cash at Settlement" and the Settlement Date is "To Be Decided."

¶ 4 Under Section 15. OTHER PROVISIONS AND CONDITIONS, an "x" is placed next to "OTHER: Residential Rental Agreement, all rents shall be credited toward the purchase price on the settlement date[.]" Section 18. PARTIES indicates, "This Contract shall be binding upon and shall inure to the benefit of Buyer and Seller and their respective heirs, successors, and assigns." The document also contains various other provisions. Neither the Property Rental Agreement nor The Offer to Purchase and Contract was recorded.

¶ 5 Ms. Headley died in December 2014. The North Carolina Department of Medicaid Recovery filed a claim with the Vance County Clerk of Superior Court on or about 16 May 2015, requesting the appointment of an administrator in the Estate because there was a Medicaid lien against the Estate in the amount of $9,170.62. Becky Matthews was appointed administrator of the Estate. Matthews and Linda M. Perry, Ms. Headley's cousin or niece and purported heir to the Estate, filed a verified complaint against Jones and the Fields on 24 April 2019.

¶ 6 The complaint alleged, in part, the following: The Fields had paid $14,850 in rent to Jones from 1 February 2014 to October 2017, but had not paid rent to Jones or the Estate since October 2017. The Fields told Matthews that after October 2017, the Fields had paid rent into an escrow account, which should contain $8,550 as of 1 April 2019. The Fields had not provided Matthews with information about the account. Matthews and Perry had "made demand in writing to the . . . Fields, by and through their attorney, that they vacate the property immediately" but the Fields

"have refused to vacate the house when requested." The Fields indicated to Matthews that they believed that "pursuant to the 'alleged' rental agreement and option to purchase contract . . . they 'own' the house," but Matthews and Perry "believe and so allege that the . . . Fields never intended to purchase the house from the [E]state[.]" Matthews and Perry asserted claims for breach of contract and conspiracy to commit fraud and conversion, and sought to recover possession of the property.

¶ 7 The Fields filed an answer on 24 June 2019.[3] On 3 February 2021, Matthews filed a Motion for Declaratory Judgment and Order to Vacate the Residence as to the Fields. In her motion, Matthews alleged, in part: At some time prior to May 2020, Matthews attempted to evict the Fields from the property. At the eviction hearing, the Fields' attorney presented the Property Rental Agreement and Offer to Purchase and Contract to the magistrate and argued the Fields could not be evicted as they owned the property. In May 2020, the Fields indicated they would buy the property if they were given credit for all payments made. Matthews "searched the Vance County Register of Deeds offices and found the documents . . . from [Ms.] Headley has not been recorded . . . and therefore is not enforceable." Matthews informed the Fields that that they "are 'hold over tenants' and they have been given the required notice that they breached the terms of the Lease" and must vacate the property. Matthews sought to recover certain rents paid by the Fields. Further, Matthews moved the court to clear title to 200 Perkinson Street and order the Fields to vacate the property.

¶ 8 Matthews' declaratory judgment motion came on for hearing on 19 April 2021. The Fields were not present. The trial court entered a Declaratory Judgment and Order on 28 April 2021.[4] The Fields filed a motion to set aside that order because they had not received notice of the 19 April 2021 hearing. The trial court granted the Fields' motion. Matthews' declaratory judgment motion again came on for rehearing on 12 July 2021. After hearing arguments of counsel and reviewing the court file, the trial court entered an Order on 16 July 2021 that is

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3. Jones did not answer Plaintiffs' complaint. The Vance County Clerk of Court granted entry of default against Jones. On 3 February 2021, Matthews filed a Motion for Default Judgment against Jones, seeking to collect $25,200 in payments the Fields had allegedly paid to Jones. The trial court granted Matthews' Motion for Default Judgment against Jones on 8 March 2021 for $25,200.

4. The trial court entered an Amended Declaratory Judgment and Order on 6 May 2021, correcting the street address of the property.

substantially identical to the 28 April 2021 Declaratory Judgment and Order, as amended by the 6 May 2021 order, that was set aside. The trial court found, in relevant part, as follows:

> 2. The real property involved in this action is located in Vance County, NC, at 200 Perkinson Street, Kitrell, NC.[5]
>
> 3. This real property was owned by Anna B. Headley, who died on 18 December 2014.
>
> 4. On or about 16 May 2015, the Department of Medicaid Recovery filed a claim with the Vance County Clerk of Superior Court, requesting the appointment of an administrator in the Headley estate since there was a Medicaid Lien in the amount of $9,170.62 against the estate.
>
> 5. Plaintiff Becky I. Matthews (hereinafter Plaintiff Matthews) became the duly appointed Administrator of the Estate of Anna Burwell Headley by the Vance County Clerk of Superior Court on 22 August 2017.
>
> 6. Plaintiff Matthews learned that prior to decedent's death, decedent owned property located at 200 Perkinson Street in Kittrell, NC.
>
> 7. Defendant Jones was "Power of Attorney" for decedent.
>
> 8. Prior to decedent's death, Defendant Jones executed an "Offer to Purchase" contract with Defendant Ernest Fields and Defendant Vanessa Fields (hereinafter Defendants Fields) for the real property and residence owned by decedent located at 200 Perkinson Street, Kittrell, NC.
>
> 9. Plaintiff Matthews searched the records of the Vance County Register of Deeds offices and learned the "Offer to Purchase" contract between Defendant Jones and Defendants Fields was not recorded as required by the provisions of N.C.G.S. § 47G-2(d).

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5. The Order indicates in a footnote, "[1] The original 'Offer to Purchase' contract states the address of the property at issue is '20 Perkinson Street.' At some point after that document was executed, Vance County legally changed that address to '200 Perkinson Street.' "

> 10. Under the terms of the "Offer to Purchase" lease, Defendants Fields were to pay $450.00 per month for rent which will be credited towards the purchase price of $50,000.00 for the property located at 200 Perkinson Street, Kittrell, NC.
>
> 11. Plaintiff Matthews sought to collect the back rent on the Perkinson Street property and to sell such real property in order to satisfy the Medicaid lien against that property, and to distribute any excess funds to the heirs of the Estate of Anna Burwell Headley.
>
> 12. Plaintiff Matthews informed Defendants Fields that they are "hold over tenants" and that they have been given the required notice that they have breached the terms of the Lease, and that they must vacate the 200 Perkinson Street property.
>
> 13. Plaintiff Matthews made several demands upon Defendants Fields to vacate the property, and has advised them, through their attorney at the time, that they were in default of the terms of the Lease and would not benefit from the terms of the Lease.

¶ 9 Based on these findings, the trial court concluded in relevant part:

> 4. Defendant Jones did not fulfill the statutory requirements pursuant to N.C.G.S. § 47G-2, et seq. in her attempt to execute an "Offer to Purchase" of the property located at 200 Perkinson Street, Kittrell, NC.
>
> 5. Because the "Offer to Purchase" the 200 Perkinson Street property was not recorded with the Vance County Register of Deeds pursuant to N.C.G.S. § 47G-2(d), it is not an enforceable contract for purchase. Rather, it is only a rental agreement.
>
> 6. Defendants Fields do not have an ownership interest in the 200 Perkinson Street, Kittrell, NC real property or the residence thereon.
>
> 7. The Estate of decedent Anna Burwell Headley is the sole owner of the real property located at 200 Perkinson Street, Kittrell, NC.

¶ 10 The trial court ordered:

> 1. The sole owner of the property located at 200 Perkinson Street, Kittrell, NC is the Estate of Anna Burwell Headley.
>
> 2. Defendants Fields do not have an ownership interest in the 200 Perkinson Street, Kittrell, NC property.
>
> 3. Defendants Fields are granted 30 days from the file-stamped date of this ORDER to remove themselves and their personal property from the 200 Perkinson Street, Kittrell, NC property.

The Fields timely appealed.

II. Discussion

¶ 11 The Fields argue that the trial court erred by concluding that the "Offer to Purchase" is not an enforceable contract for purchase and is only a rental agreement because it was not recorded; concluding that the Fields have no ownership interest in 200 Perkinson Street; and ordering the Fields to vacate the property.

A. Standard of Review

¶ 12 We review an order entered in a declaratory judgment action by a trial court sitting without a jury "to determine whether competent evidence supports the findings, whether the findings support the conclusions, and whether the conclusions support the judgment." *Carolina Mulching Co. LLC v. Raleigh-Wilmington Invs. II, LLC*, 272 N.C. App. 240, 244, 846 S.E.2d 540, 544 (2020), *aff'd*, 378 N.C. 100, 2021-NCSC-79 (citation omitted). "Unchallenged findings of fact are presumed correct and are binding on appeal." *Id.* (citation omitted) Conclusions of law are reviewed de novo. *Id.*

B. Option Contract

¶ 13 The Fields first argue that the Property Rental Agreement together with The Offer to Purchase and Contract (collectively, the "Writings") constitute a valid option to purchase contract executed with a residential lease agreement, pursuant to N.C. Gen. Stat. § 47G. The Fields argue that because they retained an enforceable option to purchase, the trial court erred by concluding that they have no ownership interest in the property and ordering them to vacate the property.

¶ 14 Chapter 47G governs "Option to Purchase Contracts Executed with Lease Agreements." "[A]n option contract is a contract by which the

owner agrees to give another the exclusive right to buy property at a fixed price within a specified time. In effect, an owner of property agrees to hold his offer [to sell] open for a specified period of time." *Murray v. Deerfield Mobile Home Park, LLC*, 277 N.C. App. 480, 2021-NCCOA-213, ¶ 42 (citation omitted), *disc. review dismissed*, 378 N.C. 366, 860 S.E.2d 921 (2021). An option contract must contain the information enumerated in N.C. Gen. Stat. § 47G-2(b), including "[t]he time period during which the purchaser must exercise the option." N.C. Gen. Stat. § 47G-2(b)(7) (2014).

¶ 15 Here, the Writings fail to include a provision stating that Jones, on behalf of Ms. Headley, agreed to sell 200 Perkinson Street to the Fields at the Fields' request within a *specified period of time*, as required by N.C. Gen. Stat. § 47G-2(b)(7). *See Murray*, 2021-NCCOA-213, ¶ 42 ("An option contract does not exist if 'there is no language indicating that [the seller] in any way agreed to sell or convey [their] real property to [a prospective buyer] at their request within a *specified period of time*.' ") (citation omitted); *Normile v. Miller*, 313 N.C. 98, 106, 326 S.E.2d 11, 17 (1985) (explaining that a seller's promise to hold an offer open for a specified period of time is a "necessary ingredient" to the creation of an option contract). Accordingly, the trial court did not err by concluding that the Fields "do not have an ownership interest in the 200 Perkinson Street" property because the Writings do not form an option contract.[6]

C. Installment Land Contract

¶ 16 The Fields argue, in the alternative, that the Writings constitute an installment land contract governed by N.C. Gen. Stat. § 47H.[7] The Fields argue that by paying rent in installments credited toward the purchase price, they obtained an ownership interest in 200 Perkinson Street, and the trial court erred by determining otherwise and ordering them to vacate the property.

¶ 17 Chapters 47G and 47H of our general statutes were enacted into law in 2010 with the goal of protecting purchasers who enter into real estate purchase contracts with financing arrangements that are alternative to traditional mortgage financing. Chapter 47H governs Contracts for Deeds. A contract for deed is

> [a]n agreement whether denominated a "contract for deed," "installment land contract," "land contract,"

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6. In light of this conclusion, we do not address the Fields' remaining arguments regarding option contracts.

7. The Fields timely raise this argument in their principal brief, albeit fleetingly, and expound upon it in their reply brief.

> "bond for title," ["lease to buy,"] or any other title or description in which the seller agrees to sell an interest in property to the purchaser and the purchaser agrees to pay the purchase price in five or more payments exclusive of the down payment, if any, and the seller retains title to the property as security for the purchaser's obligation under the agreement.

N.C. Gen. Stat. § 47H-1 (2014). An installment land contract

> is a financing device in addition to being a contract dealing with the necessary details of the sale and purchase . . . . [T]he vast majority of [installment land contracts] transfer possession to the vendee at the beginning of the payment period. Legal title remains in the vendor as security for payment of the purchase price.

Boyd v. Watts, 316 N.C. 622, 626-27, 342 S.E.2d 840, 842 (1986) (quoting J. Webster, *Real Estate Law in North Carolina* § 138 (Hetrick Rev. 1981)). While the buyer is making payments to the seller, the buyer is considered to have "equitable title" to the property. *In re Foreclosure of Deed of Tr. Given by Taylor*, 60 N.C. App. 134, 139, 298 S.E.2d 163, 166 (1982) (holding that "the installment contract for sale of the security property transferred equitable title therein to the purchaser and constituted a 'conveyance' within the meaning and intent of that term as used in petitioner's due-on-sale clause"); *Barnes v. McCullers*, 108 N.C. 46, 52, 12 S.E. 994, 996 (1891) ("The contract of sale of the land in question between the son of the *feme* plaintiff and the defendant, as embodied in the bond for title and the notes for the purchase-money, had the effect to put the equitable title to the land in the son."). As an equitable title holder, the buyer has an interest in the property that is the subject of the land installment contract. *See id.*; *see also Skinner v. Terry*, 134 N.C. 305, 309, 46 S.E. 517, 518 (1904) ("That the owner of the perfect equitable title may maintain ejectment or other possessory action under our system of procedure may be regarded as settled beyond controversy." (*citing Taylor v. Eatman*, 92 N.C. 601; *Condry v. Cheshire*, 88 N.C. 375)).

¶ 18 By contrast, a lease "is a contract, by which one agrees, for a valuable consideration, to let another have the occupation and profits of land for a definite time." *Carolina Helicopter Corp. v. Cutter Realty Co.*, 263 N.C. 139, 143, 139 S.E.2d 362 (1964). Leases do not involve the sale of real property. *See id.*

¶ 19 "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).

¶ 20 Here, the Writings unambiguously formed an installment land contract, not a lease. Although not expertly drafted, the Writings unequivocally memorialize the then-present intent of Ms. Headley, through Jones, and the Fields to enter into a contract for the sale of the property. Under the Property Rental Agreement, the Fields agreed to make monthly payments of $450 on or before the first day of the month and "[a]ll monthly rents shall be credited to the purchase price of $50,000 at the time of closing. This shall be reflected in the purchase agreement." The Property Rental Agreement specifies that the Fields "shall lease the property with the right to purchase. See Offer to Purchase and Contract Agreement hereto attached." The Fields are to "pay for all expenses incurred by means of electricity and sanitary fees, rubbish disposal and all charges arising out of any telephone or other service installed on the Premises" and must "promptly attend to any repair that may be necessary and in general attend to the upkeep and maintenance of the Premises, [or] alternatively to reimburse [Jones] for the cost of replacing or repairing any breakages or defects."

¶ 21 In turn, the Offer to Purchase and Contract Agreement specifies a purchase price of $50,000 and indicates that per the "Residential Rental Agreement, all rents shall be credited toward the purchase price at the settlement date." The Offer to Purchase and Contract Agreement further specifies that "[t]he deed is to be made to: Ernest E. Fields." The Writings formed an installment land contract. *See Boyd*, 316 N.C. at 627, 342 S.E.2d at 843.

¶ 22 While an installment land contract is a security device, it lacks many of the formalities and buyer protections included in mortgage laws. Like an option to purchase, an installment land contract must include certain information, where applicable,[8] including certain legal disclosures, designed primarily to protect the buyer. *See* N.C. Gen. Stat. § 47H-2(b).

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8. For instance, "[t]he amount of the purchaser's down payment" N.C. Gen. Stat. § 47H-2(b)(6), would only be required if the purchaser made a down payment.

Pursuant to section 47H-2(d), within five business days after a land installment contract has been signed and acknowledged by both the seller and the purchaser, "the *seller* shall cause a copy of the contract or a memorandum of the contract to be recorded in the office of the register of deeds in the county in which the property is located." N.C. Gen. Stat. § 47H-2(d) (2014) (emphasis added). "A person, *other than a seller and purchaser*[,] may rely on the recorded materials in determining whether the requirements of this subsection have been met." *Id.* (emphasis added). "A *purchaser* may bring an action for the recovery of damages, to rescind a transaction, as well as for declaratory or equitable relief, for a violation of this Chapter." N.C. Gen. Stat. § 47H-8 (2014) (emphasis added).

¶ 23 Here, neither the Property Rental Agreement nor the Offer to Purchase and Contract Agreement were recorded. However, it was Jones, on behalf of Ms. Headley as the seller, who was required to cause a copy of the Writings to be recorded. The purpose of recordation is to put the world on notice of the Fields' interest in the property, preventing Jones, or Headley's heirs, successors, or assigns, from conveying the property outright to another investor who could take the property without notice of the Fields' rights, or from encumbering the Property with a mortgage that could deplete the value of the Property. Jones' failure to record does not transform the purchase contract into a rental agreement, nor does it entitle Ms. Headley, her "respective heirs, successors, [or] assigns," to rescind the contract. *See Scott v. Jordan*, 235 N.C. 244, 248, 69 S.E.2d 557, 561 (1952) ("When an owner of land contracts to sell and convey it and dies intestate without doing so, his heirs take the property subject to (1) the equities of the purchaser under the contract, and (2) the rights of the administrator and the distributees of the owner under the doctrine of equitable conversion."). Accordingly, to the extent the trial court concluded that because the Writings, or Offer to Purchase and Contract Agreement alone, were not recorded it was not an enforceable contract for purchase and was "only a rental agreement," the trial court erred.

¶ 24 Moreover, because the Fields have equitable title in 200 Perkinson Street, the trial court erred by concluding that the "Fields do not have an ownership interest in the [property]" and that Ms. Headley's estate "is the sole owner of the real property located at 200 Perkinson Street[.]" The trial court thus erred by ordering the Fields to vacate the Property.

III. Conclusion

¶ 25 The Writings formed a land installment contract, and the Fields have equitable title in 200 Perkinson Street; Jones' failure to record the

Writings does not convert the land installment contract into a lease. Because the Fields have an ownership interest in the property, the trial court erred by declaring the Estate the sole owner of the property and ordering the Fields to remove themselves and their personal property from 200 Perkinson Street. The trial court's order is reversed.

REVERSED.

Judges ARROWOOD and JACKSON concur.

RALPH HODGE CONSTRUCTION COMPANY, PLAINTIFF
v.
BRUNSWICK REGIONAL WATER & SEWER H2GO, DEFENDANT

No. COA21-565

Filed 19 July 2022

Contracts—public—bids—withdrawn—deposit forfeited

Where plaintiff construction company bid on a public contract for construction of a public water system and subsequently requested to withdraw its bid more than a week after the bids had been opened but before the contract had been awarded, plaintiff's five-percent deposit was forfeited because plaintiff's withdrawal was untimely pursuant to N.C.G.S. § 143-129.1—even if it could be shown that plaintiff ultimately would not have been the successful bidder.

Appeal by Plaintiff from order entered 24 June 2021 by Judge A. Graham Shirley in Wilson County Superior Court. Heard in the Court of Appeals 3 March 2022.

William J. Wolf for the Plaintiff-Appellant.

Ward and Smith, P.A., by Amy H. Wooten and Donalt J. Eglinton, for the Defendant-Appellee.

DILLON, Judge.

¶ 1 This case concerns whether the successful bidder on a government contract may recover its security deposit when it untimely withdraws its bid.

I. Background

¶ 2 Defendant is a government agency that solicited bids for the construction of a public water supply and treatment system. The procedure for bidding on public contract is found in N.C. Gen. Stat. § 143-129 (2020). Under this procedure, bidders are required to submit a deposit, usually five percent (5%) of their bid. *See id.* § 143-129(b). Plaintiff bid on the project, depositing the required security deposit of $254,241.62, equal to 5% of its bid.

¶ 3 On 16 July 2020, the "opening of bids" for the project occurred. Plaintiff was the lowest bidder on the project by nearly $900,000. Subsequently, Plaintiff, requested to withdraw its bid and receive a refund of the deposit.

¶ 4 The procedure for withdrawing a bid is found in N.C. Gen. Stat. § 143-129.1, which states that a "request to withdraw must be made in writing . . . but not later than 72 hours after the opening of bids, or for a longer period as may be specified in the instructions to bidders provided prior to the opening of bids." N.C. Gen. Stat. § 143-129.1 (emphasis added). Plaintiff, though, did not make its request to withdraw its bid until 24 July 2020, *over a week* after the bids were opened.

¶ 5 Plaintiff requested a hearing regarding its request to withdraw its bid and for the return of its bid deposit. After a hearing on the matter, Defendant issued a written ruling denying Plaintiff's request to withdraw its bid, based in part on the untimeliness of the request.

¶ 6 Plaintiff commenced this action seeking a declaratory judgment as to the rights and legal obligations of the parties concerning its request to withdraw. Both parties moved for summary judgment. After a hearing on the matter, the trial court entered summary judgment in favor of Defendant.

¶ 7 Plaintiff timely appealed.

II. Standard of Review

¶ 8 "Summary judgment is appropriate when 'there is no genuine issue as to any material fact' and 'any party is entitled to a judgment as a matter of law.' " *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citing N.C. Gen. Stat. § 1A-1, Rule 56(c)). Our Court reviews the trial court's order allowing summary judgment *de novo*. *Id.* at 88, 637 S.E.2d at 530.

III. Analysis

¶ 9 Plaintiff initially sought the protections provided by Section 143-129.1, which allows a bidder in certain circumstances to withdraw its bid after the bids have been opened without forfeiting its deposit. Judge Shirley, though, affirmed in his summary judgment order the decision of Defendant that Plaintiff's deposit was forfeited. On appeal, Plaintiff additionally argues that neither Defendant nor Judge Shirley had jurisdiction to consider the matter at all, since Plaintiff failed to make its request within 72 hours after the bids were opened. For the reasoning below, we conclude that Judge Shirley ruled correctly and affirm his summary judgment order.

¶ 10 In 1933, our General Assembly enacted Section 143-129 to require certain public contracts to be open to bidding. Our Supreme Court has stated the purpose of Section 143-129

> is to prevent favoritism, corruption, fraud, and imposition in the awarding of public contracts by giving notice to prospective bidders and thus assuring competition which in turn guarantees fair play and reasonable prices in contracts involving the expenditure of a substantial amount of public money.

Mullen v. Louisburg, 225 N.C. 53, 58-59, 33 S.E.2d 484, 487 (1945). To ensure a competitive bidding process, our General Assembly also required that [n]o contract to which G.S. 143-129 applies . . . shall be awarded . . . unless at least three competitive bids have been received[.]" N.C. Gen. Stat. § 143-132.

¶ 11 Section 143-129 provides that a bid cannot be submitted unless it meets certain requirements. Under the statute, bids must be accompanied by a deposit (or bond) equal to 5% of the bid amount, sealed when made, and opened together at a specified time and place. That same section also contemplates that the entity who sought the bids will review all bids at some point after they are opened and "shall award the contract to the lowest *responsible* bidder or bidders." *Id.* at § 143-129(b) (emphasis added). That is, the lowest bidder is not necessarily entitled to an award of the contract, as the entity may take into consideration "quality, performance and the time specified in the proposals for the performance of the contract." *Id.* Section 143-129(b) provides that the successful bidder forfeits its 5% deposit if it "fails to execute the contract within 10 days after the award[.]" All unsuccessful bidders receive a refund of their deposit.

¶ 12 Any bidder has typically been allowed to withdraw its bid *prior* to the opening of the sealed bids without forfeiting its deposit. Prior to 1977, bidders could withdraw their bid *after* the opening of the bids *unless* the request for bids by the public agency included a provision to the contrary. *Compare Elliott Bldg. v. Greensboro*, 190 N.C. 501, 130 S.E.200 (1925) ("This is an action at law to recover the money deposited, and after acceptance this cannot be done.") *with Muirhead v. Durham*, 1 N.C. App. 181, 160 S.E.2d 542 (1968) (invitation for bids provided that "no bid shall be withdrawn for a period of thirty days subsequent to the opening of bids").

¶ 13 However, in 1977, our General Assembly created a statutory right for a bidder to withdraw its bid without forfeiting its deposit in narrow circumstances, by enacting N.C. Gen. Stat. § 143-129.1.

¶ 14 On appeal, Plaintiff suggests that it was not entitled to withdraw its bid at all after three days; that, therefore, neither Defendant nor the trial court could treat its bid as withdrawn; and that since Defendant did not award the contract to Plaintiff, Plaintiff was entitled to a refund of its deposit as a non-winning bidder under Section 143-129. We disagree.

¶ 15 Based on the language in Section 143-129.1, we conclude that a bidder may still withdraw its bid from consideration after the 72-hour period and prior to the award of the contract *but that* said bidder forfeits its deposit, even if it could be shown that the bidder would not have been the successful bidder. Forfeiture of its deposit is the price the bidder pays for being allowed to remove its bid from consideration. That is, the deposit of a withdrawing bidder is forfeited *unless* the bidder meets the requirements of Section 143-129.1.

¶ 16 The first sentence of Section 143-129.1 assumes the general rule to be that a bidder withdrawing its bid after the bids are opened but prior to the awarding of the contract forfeits its deposit. However, the Section provides an exception to that rule:

> A public agency may allow a bidder submitting a bid pursuant to G.S. 143-129 . . . to withdraw his bid from consideration after the bid opening without forfeiture of his bid security *if* . . . .

N.C. Gen. Stat. § 143-129.1.

¶ 17 Section 143-129.1 establishes a procedure by which a bidder can seek a withdrawal of its bid without forfeiting its deposit, but states that a denial by the agency (and reviewing court) to this relief "shall have the same effect as if an award had been made to the bidder and a refusal by

the bidder to accept had been made[.]" That is, under the plain language of the statute, it is not a defense to the forfeiture that the bidder would not have been the successful bidder. Rather, the language of the statute suggests that a bidder loses its deposit if it withdraws its bid from consideration by the public agency when the agency reviews all bids. Section 143-129.1 expressly states that "[i]f it is finally determined that the bidder did not have the right to withdraw his bid pursuant to the provisions of this section, the bidder's security shall be forfeited."

¶ 18 We do not agree with Plaintiff's interpretation that the statutory language prevents a bidder from withdrawing its bid before acceptance after 72 hours of the opening of the bids. Rather, the language simply suggests that said bidder cannot avail itself of the new statutory right to a refund of the deposit where the withdrawal is not requested within the 72-hour period. There is nothing in the language of Section 143-129.1 which prevents an agency to hold a hearing on a request to withdraw even if made after the 72-hour deadline to consider the request. Indeed, the Section states that "[i]f a bidder files a request to withdraw his bid, the agency shall promptly hold a hearing thereon[.]"

IV. Conclusion

¶ 19 Plaintiff was allowed to withdraw its bid after the opening of the bids but before the contract had been awarded. Plaintiff chose to exercise its right to withdraw its bid and not have its bid considered. However, since the evidence conclusively establishes that Plaintiff's withdrawal did not comply with the requirements of Section 143-129.1, we hold Judge Shirley correctly ruled, as a matter of law, that Defendant was entitled to summary judgment.

AFFIRMED.

Judges HAMPSON and WOOD concur.

RH CPAs, PLLC v. SHARPE PATEL PLLC

[284 N.C. App. 424, 2022-NCCOA-493]

RH CPAs, PLLC, F/K/A RIVES & ASSOCIATES, LLP, PLAINTIFF
v.
SHARPE PATEL PLLC, JAY SHARPE, AND AARON PATEL, DEFENDANTS

No. COA21-785

Filed 19 July 2022

1. Civil Procedure—confession of judgment—requirements for filing—Rule 68.1

In a dispute between an accounting firm (plaintiff) and its two former partners (defendants), where the parties entered into a settlement agreement requiring defendants to make a series of payments to plaintiff in exchange for their release from the parties' business partnership, and where the agreement also provided that defendants' payment obligations would be secured by a confession of judgment, the superior court properly denied defendants' various motions for relief from the confession of judgment (entered upon defendants' default under the agreement) and their subsequent appeal to the court. The confession of judgment met all of the requirements under Civil Procedure Rule 68.1 where the clerk of superior court properly entered it, defendants signed and verified it, and it stated all the requisite information.

2. Civil Procedure—Rule 60(b)(3) motion—relief from confession of judgment—no fraud, misrepresentation, or misconduct shown

In a dispute between an accounting firm (plaintiff) and its two former partners (defendants), where the parties entered into a settlement agreement requiring defendants to make a series of payments to plaintiff in exchange for their release from the parties' business partnership, the superior court did not abuse its discretion in denying defendants' Rule 60(b)(3) motion for relief from the confession of judgment entered upon defendants' default under the agreement. Defendants failed to show any fraud, misrepresentation, or misconduct by plaintiff in filing the confession of judgment where the settlement agreement clearly described what defendants were required to pay, how the payments would be calculated, and the consequences of a default; defendants violated the agreement's terms; and defendants did not cure their default after two months of receiving multiple notices from plaintiff.

Judge TYSON dissenting.

Appeal by Defendants from order entered 2 September 2021 by Judge Stanley L. Allen in Davidson County Superior Court. Heard in the Court of Appeals 26 April 2022.

Tuggle Duggins P.A., by Richard W. Andrews and Jeffrey S. Southerland, for Plaintiff-Appellee.

Marcellino & Tyson, PLLC, by Matthew T. Marcellino and Clay A. Campbell, for Defendants-Appellants.

INMAN, Judge.

¶ 1 Sharpe Patel PLLC, Jay Sharpe ("Sharpe"), and Aaron Patel ("Patel") (collectively "Defendants") appeal from the trial court's order denying their motions for relief from judgment pursuant to North Carolina Rules of Civil Procedure 52, 58, 59, 60, and 68.1 and their appeal. Because the Confession of Judgment was properly entered by the clerk and Defendants have failed to demonstrate the trial court abused its discretion in denying them relief from judgment, we affirm.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 2 The record below discloses the following:

¶ 3 RH CPAs, PLLC f/k/a Rives & Associates, LLP ("Plaintiff") is a public accounting firm based in Lexington, North Carolina. Sharpe and Patel are former partners of Plaintiff. Sharpe and Patel informed Plaintiff of their intent to dissolve their partnership and separate from Plaintiff in January 2020 and invoked the mediation provision in their partnership agreement. The parties participated in two days of mediation, which resulted in an impasse.

¶ 4 Shortly after the mediation concluded, Defendants filed suit against Plaintiff in Wake County Superior Court on 5 February 2020. In connection with the suit, Plaintiff discovered that Sharpe and Patel had been planning to leave Plaintiff for months and had contacted Plaintiff's employees and clients about their planned departure, all while they were partners and fiduciaries of Plaintiff.

¶ 5 On 18 February 2020, the parties entered into a Settlement Agreement providing that Defendants would make a series of payments to Plaintiff in exchange for their release from their obligations under the partnership agreement. Paragraph 2a of the Settlement Agreement provided explicit procedures for calculating these payments:

[Defendants] shall pay to [Plaintiff] twenty-five percent (25%) of all Gross Revenue from Accounting Services provided to Partnership Clients ("Gross Revenue Percentage Payments") from the Settlement Date to the second anniversary of the Settlement Date in 2022 (the "Second Anniversary Date"). Such payments shall be calculated, due, and payable on an annual basis. All Gross Revenue Percentage Payments due for Accounting Services provided before the first anniversary of the Settlement Date in 2021 (the "First Anniversary Date"), shall be paid in full not later than February 28, 2021. All Gross Revenue Percentage Payments due for Accounting Services provided after the First Anniversary Date, but before the Second Anniversary Date, shall be paid in full not later than February 28, 2022. [Defendants] shall use their commercially reasonable best efforts to obtain bank financing if necessary to meet these financial obligations; provided that, they do not guarantee that they will be able to obtain such financing. To the extent Gross Revenue Percentage Payments owed are not paid in full on the applicable due date, such amounts due for each year shall accrue interest annually from the date due until the date such amounts are paid in full at a rate of the prime rate published in the Wall Street Journal from time to time plus two percent (2%). Payments of the outstanding amounts owed plus accrued interest will be due monthly and the amortization period is twelve months. Within five (5) business days after the First Anniversary Date and Second Anniversary Date, as applicable, [Plaintiff] shall be provided a calculation of the Gross Revenue Percentage Payments for the applicable year calculated by Rink & Robinson, PLLC, who shall be engaged to conduct agreed upon procedures ("AUP") to calculate the Gross Revenue. The firm conducting the AUP can be changed if mutually agreed upon by the parties. The scope of the AUP will be mutually agreed upon by the parties. Within five (5) business days after the last day of each quarter, [Defendants] will provide [Plaintiff] with a list of Partnership Clients who retained [Defendants] in that quarter. The costs of the AUP engagement will be paid by [Defendants].

The Settlement Agreement defines "Gross Revenue" as "all fees (whether unbilled, billed, or collected)."

¶ 6 Paragraph 2c of the Settlement Agreement provided that Defendants' payment obligations would also be secured by a Confession of Judgment:

> As security for the payments provided herein, [Defendants] hereby agree to execute a Confession of Judgment . . . in the amount of $500,000. . . . This Confession of Judgment . . . shall not be filed or surrendered . . . unless and until [Defendants] have been provided at least fifteen (15) days' notice, in writing, of any alleged default in making any payment allegedly due under this Agreement. During this fifteen days, [Defendants] may cure any alleged default by making the payment that is allegedly past due, in which event the Confession of Judgment . . . shall not be filed with any court[.]

In March 2020, Sharpe and Patel, on behalf of themselves and Sharpe Patel, PLLC, executed the Confession of Judgment to secure and enforce their payment obligations in an amount up to $500,000.

¶ 7 In January and February 2021, the parties exchanged several emails about the procedures to calculate Defendants' first gross revenue payment due on 28 February 2021. Sharpe objected to several procedures outlined by Plaintiff and informed Plaintiff that despite many attempts, Defendants had not been able to retain the agreed-upon firm to calculate the gross revenue percentage payments, Rink & Robinson, PLLC ("Rink & Robinson"). Sharpe invited Plaintiff to propose alternative firms. Plaintiff proposed five potential replacement accounting firms later that same day. The parties continued to correspond via email, but Defendants did not agree to any of the accounting firms proposed by Plaintiff and disputed certain accounting procedures.

¶ 8 Over Plaintiff's objection, in February 2021 Defendants notified Plaintiff they had engaged a new accounting firm, Goldberg & Davis, CPAs ("Goldberg & Davis") and instructed the firm to limit its calculations to only fees *collected*, in direct conflict with the definition of gross revenue in the Settlement Agreement. Plaintiff had a "material concern" about whether Goldberg & Davis would perform the calculation objectively because Patel had a prior relationship with the firm and had even contemplated an acquisition.

¶ 9 On 18 February 2021, Plaintiff's counsel sent a Notice of Breach of Settlement Agreement to Defendants' counsel. Plaintiff sent additional

notices of default to Defendants on 10 March 2021 and 10 May 2021. Based upon the calculations from Goldberg & Davis, Defendants tendered payments totaling $99,842.75 to Plaintiff, which Plaintiff cashed on 29 April 2021.

¶ 10 Because Defendants had not cured their default despite three notices, Plaintiff filed the Confession of Judgment on 27 May 2021. The clerk of court filed the judgment decreeing that Plaintiff "have and recover judgment against Defendants Sharpe Patel PLLC, Jay Sharpe, and Aaron Patel in the principal amount of $307,946.98; plus interest accrued from the date of entry of judgment until paid at the rate of 8% per annum, together with the costs of filing this Confession of Judgment."

¶ 11 Defendants appealed to superior court pursuant to N.C. Gen. Stat. § 1-301 (2021), sought to stay the clerk's judgment, and moved for relief from judgment pursuant to Rules 52, 58, 59, 60, and 68.1. The trial court denied Defendants' motions and appeal on 2 September 2021. Defendants appeal to this Court.

II. ANALYSIS

A. Confession of Judgment

¶ 12 **[1]** The trial court denied Defendants' amended motions under North Carolina Rules of Civil Procedure 52, 58, 59, 60, and 68.1 along with their appeal pursuant to N.C. Gen. Stat. § 1-301.1 because, the trial court concluded, the Confession of Judgment was properly entered. We affirm the trial court's order on this ground.

¶ 13 Rule 68.1 of our Rules of Civil Procedure sets forth the procedure for filing a confession of judgment:

> A prospective defendant desiring to confess judgment shall file with the clerk of the superior court . . . a statement in writing signed and verified or sworn to by such defendant authorizing the entry of judgment for the amount stated. *The statement shall contain the name of the prospective plaintiff, his county of residence, the name of the defendant, his county of residence, and shall concisely show why the defendant is or may become liable to the plaintiff.*

N.C. Gen. Stat. § 1A-1, Rule 68.1(b) (2021) (emphasis added). "When a statement in conformity with this rule is filed with the clerk of the superior court, the clerk shall enter judgment thereon for the amount confessed, and docket the judgment as in other cases, with costs, together with disbursements." *Id.*, Rule 68.1(d).

¶ 14 Here, the clerk entered judgment on 27 May 2021 based on the Confession of Judgment Plaintiff filed. The trial court made the following findings regarding the validity of the Confession of Judgment:

> 5. On May 27, 2021, the Firm filed a Confession of Judgment that had been signed by Sharpe Patel, Sharpe, and Patel in March 2020 (the "Confession of Judgment") with the Clerk of Superior Court of Davidson County.
>
> 6. The Confession of Judgment, on its face, does not identify any conditions that must be met before filing the Confession of Judgment.
>
> 7. The Confession of Judgment is verified or sworn to by Sharpe Patel, Sharpe and Patel; authorizes entry of judgment for the amount stated; contains the name of the prospective plaintiff and its county of residence; contains the names of prospective defendants and their respective counties of residence; and concisely shows why Sharpe Patel, Sharpe, and Patel may become liable to the Firm.

Defendants have not contested these or any other findings of fact in the trial court's order. *See Jonna v. Yaramada*, 273 N.C. App. 93, 104, 848 S.E.2d 33, 43 (2020) ("It was [the appellant's] duty 'to challenge findings and conclusions, and make corresponding arguments on appeal.' " (citation omitted)). As a result, the trial court's findings are binding on this Court. *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) ("Unchallenged findings of fact are presumed correct and are binding on appeal." (citations omitted)).

¶ 15 The trial court's findings of fact support its conclusion that the Confession of Judgment meets the requirements set forth in Rule 68.1 and that the clerk properly entered the Confession of Judgment in accordance with Rule 68.1 and other applicable law. The trial court had no basis to grant Defendants' appeal from entry of the Confession of Judgment. We affirm the trial court's denial of Defendants' motions and appeal on this ground.

B. Rule 60(b)(3)

¶ 16 **[2]** Our dissenting colleague would reverse and remand the trial court's denial of Defendants' Rule 60(b)(3) motion.

¶ 17 "[T]he standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d

114, 118 (2006) (citation omitted). Under this deferential standard, we may reverse the trial court "only upon a showing that its actions are manifestly unsupported by reason." *Id.* (quotation marks and citations omitted). On this record, we cannot reach that conclusion.

¶ 18 Rule 60(b)(3) provides that a trial court may relieve a party from judgment where there is "[f]raud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]" § 1A-1, Rule 60(b)(3). "To obtain relief under Rule 60(b)(3), the moving party must 1) have a meritorious defense, 2) that he was prevented from presenting prior to judgment, 3) because of fraud, misrepresentation or misconduct by the adverse party." *Milton v. Hedrick*, 188 N.C. App. 262, 268, 654 S.E.2d 716, 721 (2008) (quotation marks and citation omitted).

¶ 19 We are satisfied that the Settlement Agreement, despite the dissenting opinion's characterization, sufficiently defined what Defendants were required to pay Plaintiff, how Defendants' payments would be calculated, and what would happen if Defendants defaulted. Defendants were required to pay Plaintiff "twenty-five percent (25%) of all Gross Revenue from Accounting Services provided to Partnership Clients ('Gross Revenue Percentage Payments') from the Settlement Date to the second anniversary of the Settlement Date in 2022 (the 'Second Anniversary Date')." The Settlement Agreement expressly defined "Gross Revenue" as "all fees (*whether unbilled*, *billed*, or collected)[.]" (Emphasis added). The Settlement Agreement also provided that Defendants would submit records for calculation by the firm Rink & Robinson.

¶ 20 Contrary to the Settlement Agreement, Defendants instructed a different accounting firm—without Plaintiff's permission and in lieu of several other firms proposed by Plaintiff—to calculate only those fees which had been *collected* by Defendants omitting at least $10,937.50 in the calculation of the Gross Revenue Percentage Payment due 28 February 2021.

¶ 21 After learning that Defendants proceeded contrary to the terms of the Settlement Agreement, Plaintiff sent Defendants three separate notices, one for breach of the Settlement Agreement and two for default, on 18 February 2021, 10 March 2021, and 10 May 2021. The Settlement Agreement provided that Defendants had fifteen days to cure the alleged default before Plaintiff could file the Confession of Judgment. When Defendants had not cured their default after two months, Plaintiff filed the Confession of Judgment with the clerk of court.

¶ 22 We disagree with our dissenting colleague's characterization of Plaintiff's filing of the Consent Judgment as "fraud, misrepresentation, or

misconduct requiring the trial court to set aside the Consent Judgment." Nor do we agree that Defendants' alleged defense precluded Plaintiff from filing the Confession of Judgment. *Cf. Milton*, 188 N.C. App. at 270, 654 S.E.2d at 722 ("When a Rule 60(b) movant has failed to satisfy his or her burden of demonstrating the existence of a reason justifying relief from a judgment, *see* N.C. Gen. Stat. § 1A-1, Rule 60(b)(1)-(6) (2005), " 'the question of meritorious defense becomes immaterial.' " (quotation marks and citations omitted)). We hold the trial court did not abuse its discretion in denying Defendants' Rule 60 motion.

¶ 23 In sum, to the extent Defendants are aggrieved, they simply sought the wrong remedy. The trial court's denial of their motion for relief does not preclude Defendants from suing Plaintiff for money damages resulting from Plaintiff's alleged breach of the Settlement Agreement when it filed the Confession of Judgment.

III. CONCLUSION

¶ 24 For the reasons outlined above, we affirm the order of the trial court denying Defendants' appeal and motions for relief from judgment.

AFFIRMED.

Judge DIETZ concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

¶ 25 The majority's opinion fails to apply the plain language of N.C. Gen. Stat. § 1A-1, Rule 60(b)(3) (2021). Their application of an abuse of discretion standard of review of the trial court's order condoning Plaintiff's actions is contrary to our general statutes and precedents. Defendants have demonstrated "misrepresentation, or other misconduct of an adverse party," and are entitled to relief. *Id.* I vote to reverse the trial court's order and remand for further proceedings. I respectfully dissent.

I. Standard of Review

¶ 26 "[T]he standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citation omitted). "A [trial] court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100, 135 L.Ed.2d 392, 414 (1996) (citation omitted). The trial

court's conclusions of law are reviewed *de novo*. *Judd v. Tilghman Med. Assocs., LLC*, 272 N.C. App. 520, 530, 847 S.E.2d 45, 52 (2020) (citation omitted). The trial court's denial of Defendants' Rule 60(b)(3) was an error of law and is properly reversed.

II. Rule 60(b)(3)

¶ 27 The trial court's denial of Defendants' Rule 60(b)(3) was an error of law and is properly reversed. Defendant's fraud claims against Plaintiff in their motions are supported by: (1) the lack of a "mutually agreed upon" and completed AUP; (2) no calculation completed by Rink & Robinson; (3) no agreed-upon substitute, nor a determination of a "sum certain" due as prerequisites required to be met; and, (4) no mutual agreement being reached and notice prior to Plaintiff filing the Confession of Judgment. In the absence of satisfying these precedents, Plaintiff had no right to proceed and wrongfully filed the Confession of Judgment. Defendants possessed and presented a meritorious defense. Rule 60(b)(3) permits a court to relieve a party from an order where there is "Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b)(3).

¶ 28 In order "[t]o obtain relief under Rule 60(b)(3), the moving party must 1) have a meritorious defense, 2) that he was prevented from presenting prior to judgment, 3) because of fraud, misrepresentation or *misconduct by the adverse party*." *Milton M. Croom Charitable Remainder Unitrust v. Hedrick*, 188 N.C. App. 262, 268, 654 S.E.2d 716, 721 (2008) (emphasis supplied). Defendants clearly asserted and meet all elements for relief under N.C. Gen State § 1A-1, Rule 60(b)(3).

¶ 29 Plaintiff and Defendants both agree they failed to "mutually agree" on the AUP and the Rink & Robinson firm failed to respond to both party's inquiries. No AUP was ever agreed to or completed, and calculations under the AUP was computed to determine a definitive sum certain. Plaintiff also failed to propose or agree to an alternative firm to Rink & Robinson for the AUP after Defendants had proposed multiple alternative firms.

¶ 30 Before the trial court, Defendants' counsel stated: "The conditions precedent, Your Honor, are these two things: An AUP must be established as agreed upon by the parties, and the CPA firm of Rink & Robinson must perform that AUP process to determine the calculations before my clients can determine the 25 percent and make a payment." During the hearing Plaintiff's counsel did not state Rink & Robinson had performed the AUP process at any time prior to the

hearing or his client had proposed a substitute firm in response to Defendants' proffers of substitutes as provided under the Agreement.

¶ 31 The Settlement Agreement does not contain the terms of the AUP, only these procedures would be "mutually agreed upon" by the parties in the future. Neither Plaintiff nor Defendants received a response from Rink & Robinson. Yet, despite the proffers, tenders. and payments made by Defendants, and without the AUP agreed to and sum certain calculated, Plaintiff pre-emptively filed the Confession of Judgment with their purported calculation of monies due by Defendants. This self-serving assertion was not performed by a "mutually agreed upon" firm. Defendants were unable to present or plead the "meritorious defense[s]" before the clerk and to address the "misconduct by the adverse party" in prematurely filing the Confession of Judgment without authority. *Id.*

¶ 32 Unlike the focus of the majority opinion, the unlawful action and breach by the adverse party, Plaintiff, occurred in the unlawful assertion and untimely filing of the Confession of Judgment before the assistant clerk of court. No date and time of notice and no right to Defendants was provided to challenge that action until the Rule 60 motion and hearing. Contrary to the assertions in the majority's opinion, the action by the assistant clerk of court in filing the Confession is not the issue before the trial court nor on appeal. The remedies Defendants have pursed are the proper means to challenge Plaintiff's premature and unlawful actions. *Id.*

¶ 33 At that time of filing, the only agreement between the parties was to mutually agree upon the AUP in the future, based on calculations from a firm from which neither party ever received a response. Plaintiff's premature and unlawful action forms the basis for the assertion of a Rule 60 motion to be reviewed in the trial court. *Id.*

¶ 34 Defendants have satisfied all elements for relief under Rule 60(b)(3). Plaintiff should not benefit for its unlawful action to unilaterally compute and file the Confession of Judgment. *Id.*

¶ 35 The majority's opinion baldly asserts the Defendants petitioned and pled the improper remedy, and Defendants should have sought monetary damages from Plaintiff from the alleged breach of the Settlement Agreement. Defendants' remedies and their damages for Plaintiff's wrongful conduct cannot be made whole or accomplished in a judicially inefficient and separate breach of contract action. Such action will not extinguish and remove the prematurely and unlawfully filed judgment from the public record nor remove its lingering impacts on Defendants' creditworthiness and history of timely payment of its liabilities. This

reputational damage is particularly relevant to potential clients, credit-reporting agencies, and regulators of a CPA firm.

III. Conclusion

¶ 36 Defendants presented a meritorious Rule 60 motion and are entitled to relief. Plaintiff possessed no lawful right to file the Confession of Judgment. Under *de novo* review, the trial court committed an error of law in denying Defendants' meritorious Rule 60 motion. The trial court's denial of Defendants' Rule 60(b)(3) motion was an error of law and is properly reversed. I respectfully dissent.

SCHOOLDEV EAST, LLC, PETITIONER
v.
TOWN OF WAKE FOREST, RESPONDENT

No. COA21-359

Filed 19 July 2022

1. Appeal and Error—mootness—denial of permit applications to build charter school—amendment to charter application affecting operation

A developer's appeal from a town's denial of its permit applications for major site plan and major subdivision approval, which the developer sought in order to build a charter school, was not rendered moot even though the separate entity that planned to operate the charter school amended its charter application and no longer planned to operate the school. The developer had not applied to establish a charter school pursuant to Chapter 115C of the General Statutes, and there was no requirement that the developer had to have an approved charter application before the town could approve the requested permits. The resolution of the separate legal question of whether the developer met the town's ordinance requirements for approval would have a practical effect on the developer's ability to secure the permits.

2. Zoning—special use permit—denied by town board—standard of review by superior court

Where a town denied a developer's permit applications for major site plan and major subdivision approval (sought in order to build a charter school), the superior court on appeal properly

applied the de novo standard of review when interpreting N.C.G.S. § 160A-307.1 to determine that municipalities are not prevented from regulating pedestrian and bicycle connectivity, but the court erred by applying whole record review instead of de novo review on the issue of whether the developer met its burden of production of competent, material, and substantial evidence that it was entitled to the requested permits. However, the error was not prejudicial because the trial court correctly affirmed the town board's decisions that the developer had not met its burden.

3. Cities and Towns—special use permit to build school—sidewalk requirements—town's authority—not preempted by statute

In reviewing a town's denial of a developer's permit applications for major site plan and major subdivision approval to build a charter school—based in part on the developer's failure to satisfy a town ordinance requiring pedestrian and bicycle access to surrounding residential areas—the superior court correctly interpreted N.C.G.S. § 160A-307.1 as not prohibiting municipalities from requiring or otherwise conditioning approval of school construction on sidewalk connectivity considerations, because the statute's restrictions on requiring "street improvements" related to schools did not include sidewalks.

4. Zoning—unified development ordinance—permit application to build school—applicant's burden to prove compliance—sufficiency of evidence

A developer seeking to build a charter school was not entitled to approval of its applications for a major site plan permit and a major subdivision permit where it failed to present competent, material, and substantial evidence of its compliance with sidewalk connectivity and pedestrian and bicycle access requirements contained in the town's unified development ordinance (UDO) and where the town's UDO was not preempted by the limits imposed on street improvements related to schools in N.C.G.S. § 160A-307.1. Although the town also determined that the developer failed to comply with multiple policies of the town's comprehensive plan on community schools, those policies were merely advisory, did not have the force of law, and therefore were not a proper basis for denial of the permits.

Judge TYSON concurring in part and dissenting in part.

SCHOOLDEV E., LLC v. TOWN OF WAKE FOREST

[284 N.C. App. 434, 2022-NCCOA-494]

Appeal by plaintiff from order entered 14 April 2021 by Judge Vinston M. Rozier, Jr. in Wake County Superior Court. Heard in the Court of Appeals 26 January 2022.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Tobias R. Coleman, J. Mitchell Armbruster, and Patrick D. Wilson, and Stam Law Firm P.L.L.C., by Paul Stam and R. Daniel Gibson, for Petitioner-Appellant.

Wyrick Robbins Yates & Ponton LLP by Samuel A. Slater for Respondent-Appellee.

CARPENTER, Judge.

¶ 1 Appeal by Schooldev East, LLC ("Petitioner") from the Wake County Superior Court's order (the "Order") entered 14 April 2021, which affirmed the Town of Wake Forest's (the "Town") 20 November 2020 orders denying Plaintiff's applications for major site plan and major subdivision approval to build a charter school. On appeal, Petitioner argues the Town's "sidewalk requirements violate N.C. Gen. Stat. § 160A-307.1[.]" Alternatively, Petitioner contends it met the applicable local requirements, and therefore, the superior court erred in denying its applications. After careful review, we conclude Petitioner failed to present competent, material, and substantial evidence to establish a *prima facie* case for entitlement of the permits because the evidence did not satisfactorily show Petitioner met the Town's ordinances requiring pedestrian connectivity to surrounding residential areas and accessibility by schoolchildren to the school. Accordingly, we affirm the Order.

I. Factual & Procedural Background

¶ 2 This case arises out of Petitioner's applications for major site plan and major subdivision plan approval to build a kindergarten through twelfth-grade charter school, to be named Wake Preparatory Academy ("Wake Prep"). Petitioner contracted with Jane Harris Pate ("Pate") to purchase approximately 35 acres (the "Property") of Pate's undeveloped, 68.29-acre tract of real property located on Harris Road, on which Petitioner planned to build Wake Prep. At all relevant times, the Property was located in the Town's rural holding zoning district ("RD District") and within the Town's planning jurisdiction.

¶ 3 On 4 November 2019, Petitioner filed a major subdivision plan permit application (the "Subdivision Plan Application") to subdivide Pate's property into three parcels, and a major site plan permit application (the

"Site Plan Application") (together, the "Applications") seeking approval to construct Wake Prep on the middle parcel, or the Property.

¶ 4 On 3 September 2020, Petitioner presented evidence in support of its applications to the Town's Planning Board and Board of Commissioners (the "Board") in a quasi-judicial joint public hearing pursuant to the Wake Forest Unified Development Ordinance (the "UDO"). According to Sections 15.8.2 and 15.9.2 of the UDO,

> The Board of Commissioners shall approve, deny or approve with conditions the Site Master Plan [and the Subdivision Master Plan]. No Site Master Plan [or Subdivision Master Plan] approval shall be granted unless it complies with the following findings of fact:
>
> (1) The plan is consistent with the adopted plans and policies of the town;
>
> (2) The plan complies with all applicable requirements of this ordinance;
>
> (3) There exists adequate infrastructure (transportation and utilities) to support the plan as proposed; and
>
> (4) The plan will not be detrimental to the use or development of adjacent properties or other neighborhood uses.

¶ 5 During its 20 October 2020 meeting, the Board unanimously denied both of Petitioner's applications based on its determination that Petitioner failed to offer sufficient evidence to satisfy the findings of fact as required by UDO Sections 15.8.2 and 15.9.2. On 17 November 2020, the Board entered its written decisions denying the Applications. The denial was based on a determination that the evidence did not satisfy certain policies of the Town's Community Plan and a Town zoning ordinance. The relevant Community Plan policies provide:

> Policy S-1: ADVANCED PLANNING FOR THE LOCATION OF NEW PUBLIC SCHOOLS serving Wake Forest should be a joint effort between the Wake County School Board and the Town. School locations should serve to reinforce desirable growth patterns rather than promoting sprawl. New elementary school locations should be viewed as a CORNERSTONE OF THE NEIGHBORHOODS they are intended to serve.

. . . .

> Policy S-3: School campuses shall be designed to allow safe, PEDESTRIAN ACCESS FROM ADJACENT NEIGHBORHOODS. Transportation facilities within 1.5 miles of all public schools shall be a priority for construction of sidewalks, bike paths and pedestrian trails.
>
> . . . .
>
> Policy S-5: THE CO-LOCATION AND JOINT DEVELOPMENT of school facilities in conjunction with other community facilities and services shall be encouraged. This policy shall be especially applicable to schools co-located with park and recreation facilities.

¶ 6 With respect to the Site Plan Application, the Board found Petitioner submitted insufficient evidence regarding findings of fact 1, 2, and 4. Specifically, the Board found there was insufficient evidence to support: finding of fact 1 because the evidence submitted failed to meet policies S-1 and S-3 of the Town's Community Plan; finding of fact 2 because the Site Plan Application failed to comply with a portion of UDO Section 3.7.5(B)(2), which requires "[c]onnectivity (vehicular and pedestrian) to surrounding residential areas"; and finding of fact 4 because the evidence submitted failed to meet policies S-1, S-3, and S-5 of the Town's Community Plan.

¶ 7 For the Subdivision Plan Application, the Board found that Petitioner submitted insufficient evidence regarding finding of fact 2 because the Subdivision Plan Application failed to comply with UDO Section 3.7.5(A), which states schools in the RD District are:

> [t]o encourage walking and bicycle accessibility by schoolchildren to schools, [by] requir[ing] the applicant to demonstrate how such accessibility can be achieved, given the low density nature of this district. Accommodation may include the construction of additional off-premise sidewalks, multi-use trails/paths or greenways to connect to existing networks.

¶ 8 On 11 December 2020, Petitioner filed a petition for writ of certiorari pursuant to N.C. Gen. Stat. § 160A-393, recodified as N.C. Gen. Stat. § 160D-1402, in the Wake County Superior Court. Petitioner argued in its petition: (1) N.C. Gen. Stat. § 160A-307.1 prohibits the Town from

denying the Applications for failing to meet the Town's policies requiring school connectivity to adjoining neighborhoods; (2) the Town cannot deny the Subdivision Plan Application because it found the Subdivision Plan Application complied with all provisions of the applicable subdivision ordinances; and (3) Petitioner presented sufficient evidence to establish it is entitled to the permits, and there was no competent evidence in the record to support denial.

¶ 9 On 14 December 2020, the Clerk of Superior Court for Wake County issued a writ of certiorari. On 24 February 2021, the Honorable Vinston M. Rozier, Jr., judge presiding, heard arguments from the parties. On 14 April 2021, Judge Rozier entered an Order in which he denied Petitioner's request to reverse the Board's decision and affirmed the Board's decision. Judge Rozier made the following pertinent conclusions of law:

> (21) As to the interpretation of N.C. Gen. Stat. § 160A-307.1, the Court proceeds de novo. The Board of Commissioners properly analyzed the scope of a novel North Carolina Statute and determined that it did not preempt Town plans and ordinances requiring Schooldev to demonstrate pedestrian and bicycle connectivity.
>
> (22) Having established that N.C. Gen. Stat. § 160A-307.1 does not prohibit towns from regulating pedestrian and bicycle connectivity in relation to proposed new schools, the Court next reviews the whole record to determine if the applicant submitted sufficient evidence to establish a *prima facie* case for entitlement to the requested permits by satisfying the Town's plans and ordinances requiring pedestrian and bicycle connectivity.
>
> (23) A review of the whole record shows that Schooldev presented sufficient, competent evidence that its Site Plan Application will not be detrimental to the use and development of adjacent properties, as required in Finding 4 of Section 15.8.2 of the UDO.
>
> (24) A review of the whole record then shows that Schooldev's Site Plan Permit Application does not satisfy the Town's plan and ordinances requiring pedestrian and bicycle connectivity.

(25) As a result, the Board of Commissioners properly denied both the Site Plan Application and the Subdivision Application.

¶ 10 On 20 April 2021, Petitioner filed notice of appeal to this Court.

II. Jurisdiction

¶ 11 This Court has jurisdiction to address Petitioner's appeal from the Wake County Superior Court's Order entered upon review of a quasi-judicial decision by a municipality pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

¶ 12 The issues before this Court are whether: (1) Petitioner's appeal is moot considering Wake Prep has amended its charter application and will no longer operate the school in which Petitioner proposes to develop; (2) N.C. Gen. Stat. § 160A-307.1 prohibits the Town from using local pedestrian and bicyclist connectivity and accessibility requirements to deny Petitioner's development permits for a charter school; (3) the superior court erred in applying the whole record standard of review in determining whether Petitioner established a *prima facie* case for entitlement to the permits at issue; and (4) the superior court erred in holding Petitioner did not present sufficient evidence to establish a *prima facie* case for entitlement to its requested development permits for a charter school.

IV. The Town's Motion to Dismiss Appeal as Moot

¶ 13 **[1]** As an initial matter, we consider the Town's motion to dismiss filed on 23 September 2021 pursuant to Rule 37 of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 37(e)(2) ("After the record on appeal has been filed, an appellant . . . may move the appellate court in which the appeal is pending, prior to the filing of an opinion, for dismissal of the appeal."). The Town contends the case is moot because "Schooldev . . . renounced its legal right to operate a charter school in [Wake Forest]" after filing its notice of appeal. Petitioner argues this Court should deny the Town's motion to dismiss because Petitioner can establish standing in this case, and the case is not moot because "a court can still grant [it] effectual relief." Petitioner also clarifies in its response to the Town's motion to dismiss that it only develops schools. After developing the schools, Petitioner then seeks a separate entity to operate the school after the entity leases or buys the property that Petitioner has developed for school use.

¶ 14 Our Supreme Court has held:

> [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), *cert. denied*, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979). "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Chavez v. McFadden*, 374 N.C. 458, 467, 843 S.E.2d 139, 146 (2020) (citations omitted).

¶ 15 In the instant case, Petitioner sought site plan and subdivision permits from the Town. The record does not tend to show Petitioner applied for the establishment of the charter school pursuant to Chapter 115C of the North Carolina General Statutes; rather, Petitioner applied only for development permits under the Town's UDO. Based on the evidence before us, it was a separate entity—Wake Preparatory Academy—that sought the charter applications, which would allow it to "operate the school." *See* N.C. Gen. Stat. § 115C-218.5(a)(2) (2021). Thus, the Town's contention that Petitioner "renounced its legal right to *operate* a charter school in the Town," which rendered the case moot is without merit. (Emphasis added).

¶ 16 Furthermore, the Town provides no support to its argument that Petitioner was required to have an approved charter application from the State Board of Education before the Town could approve Petitioner's requested development permits. Our review of the UDO reveals there is no ordinance requiring Petitioner to show it obtained the charter before it can proceed with zoning permits. In fact, the UDO provides only general zoning requirements for all elementary and secondary schools. The issue of whether Petitioner satisfied the Town's four findings entitling it to the permits, is a separate legal question from whether the operator of the proposed school obtained final approval of its charter under Chapter 115C of the North Carolina General Statutes. Therefore, we cannot conclude, as the Town urges us to, that "the questions originally in controversy" between Petitioner and the Town are moot. *See In re Peoples*, 296 N.C. at 147, 250 S.E.2d at 912. Petitioner seeks our review of the superior court's determination of its development permits. Our decision on the existing controversy would have a "practical effect" on Petitioner's ability to obtain the required development permits; therefore, we hold

Petitioner's appeal is not moot and consider the merits of the case. *See Chavez*, 374 N.C. at 467, 843 S.E.2d at 146.

V. Standard of Review

¶ 17 **[2]** Before a case arising from an application for site plan or subdivision approval comes to this Court, "the proceeding in question has been subject to several levels of examination and review." *PHG Asheville, LLC v. City of Asheville*, 374 N.C. 133, 148–49, 839 S.E.2d 755, 765 (2020). The stage at which the application sits determines the standard of review to be utilized by the reviewing body. *See id.* at 149, 839 S.E.2d at 765–66.

¶ 18 Initially, the application for a permit comes before a local governmental board, and the board "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 [the requested permit]." *Id.* at 149, 839 S.E.2d at 766 (citation, emphasis, and internal quotation marks omitted). If the applicant satisfies the initial burden of production, the applicant is "*prima facie* . . . entitled to the issuance of the requested permit." *Id.* at 149, 839 S.E.2d at 766 (internal quotation marks omitted). Where the applicant is entitled to the approval of its application, "any decision to deny the application should be based upon findings *contra* which are supported by competent, material, and substantial evidence appearing in the record . . . ." *Id.* at 149, 839 S.E.2d at 766 (emphasis added and internal quotation marks omitted).

¶ 19 Should an applicant appeal the board's decision to the superior court by filing a petition for writ of certiorari under N.C. Gen. Stat. § 160D-1402, the superior court's task of reviewing the application upon issuing a writ includes:

> ensur[ing] 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.

N.C. Gen. Stat. § 160D-1402(j)(1)(a)-(f) (2021).

¶ 20 "The proper standard for the superior court's judicial review depends upon the particular issues presented on appeal." *Mann Media, Inc. v. Randolph Cnty. Plan. Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citations and internal quotation marks omitted). In the event the "petitioner contends the board's decision was based on an error of law, '*de novo*' review is proper." *Id.* at 13, 565 S.E.2d at 17 (citations omitted and emphasis added). "Under *de novo* review[,] a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board['s] conclusions of law." *Morris Commc'ns Corp. v. City of Bessemer*, 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011) (emphasis added). "Whether the record contains competent, material, and substantial evidence is a conclusion of law, reviewable *de novo*." N.C. Gen. Stat. § 160D-1402(j)(2) (2021); *see also PHG Asheville*, 374 N.C. at 150–51, 839 S.E.2d at 766–67 (citation omitted). Our Court has defined "material evidence" as "[e]vidence having some logical connection with the consequential facts or the issues." *Am. Towers, Inc. v. Town of Morrisville*, 222 N.C. App. 638, 642, 731 S.E.2d 698, 702 (2012) (citation omitted), *disc. rev. denied*, 366 N.C. 603, 743 S.E.2d 189. "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 642, 731 S.E.2d at 702 (citation omitted).

¶ 21 "In the event that the petitioner contends that the local governmental body's decision was either (1) arbitrary or capricious or (2) not supported by competent, material, or substantial evidence, the superior court is required to conduct a whole record review." *PHG Asheville, LLC*, 374 N.C. at 150–51, 839 S.E.2d at 766–67. Under the whole record test, "the reviewing court must examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by substantial evidence." *Mann Media, Inc.*, 356 N.C. at 14, 565 S.E.2d at 17 (citations and internal quotation marks omitted). In applying "the whole record test, [a] finding must stand unless it is arbitrary [or] capricious." *Id.* at 16, 565 S.E.2d at 19.

¶ 22 When this Court reviews an order of the superior court relating to an agency decision, we examine the order for errors of law in a twofold

process: "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* at 14, 565 S.E.2d at 18.

¶ 23 In this case, it is clear the superior court correctly exercised the *de novo* standard of review in conducting its statutory interpretation of N.C. Gen. Stat. § 160A-307.1 because the court's Order states it proceeded *de novo* on the issue. *See id.* at 14, 565 S.E.2d at 18. For the reasons set forth below, we conclude the trial court properly applied *de novo* review in reaching its decision that N.C. Gen. Stat. § 160A-307.1 does not prohibit municipalities from regulating pedestrian and bicycle connectivity. *See id.* at 14, 565 S.E.2d at 18.

¶ 24 Petitioner contends "[t]he Superior Court erred when it applied whole record review" to the issue of whether the burden of production is met. We agree. The trial court should have "applied *de novo* review to determine the initial legal issue of whether Petitioner had presented competent, material, and substantial evidence." *See PHG Asheville, LLC v. City of Asheville*, 262 N.C. App. 231, 241, 822 S.E.2d 79, 86 (2018), *aff'd*, 374 N.C. 133, 839 S.E.2d 755 (2020). Instead, the trial court erroneously exercised the whole record test in determining the preliminary legal question concerning the sufficiency of Petitioner's evidence. For the reasons discussed below, we nevertheless conclude the trial court correctly affirmed the Board's decisions because Petitioner failed to meet its burden of production to show it is entitled to the requested permits; thus, we find no prejudicial error. *See Cannon v. Zoning Bd. of Adjustment*, 65 N.C. App. 44, 47, 308 S.E.2d 735, 737 (1983) (concluding the petitioner's challenged findings were "a recitation of largely uncontroverted evidence" and therefore the board's decision was not prejudicial error).

VI. Analysis

A. The Town's Local Ordinances "Requiring Sidewalks"

¶ 25 **[3]** In its first argument, Petitioner contends N.C. Gen. Stat. § 160A-307.1 prohibits "municipalities from requiring or otherwise conditioning approval of school construction on meeting local street improvement requirements," including sidewalk improvement requirements. The Town asserts the plain text of the statute indicates the legislature's intent to limit a municipality's "ability to require 'street improvements' for schools to only those that are required for safe ingress and egress 'to the municipal street system' and that are physically connected to the school's driveway"; thus, the legislature did not contemplate sidewalks falling within the meaning of a "street improvement."

¶ 26 After careful review, we agree with the Town's interpretation of N.C. Gen. Stat. § 160A-307.1, and we reject Petitioner's contention that sidewalks are included within the meaning of "street improvements" for purposes of interpreting N.C. Gen. Stat. § 160A-307.1.

¶ 27 We review *de novo* the issue of whether N.C. Gen. Stat. § 160A-307.1 was properly interpreted. *See Mann Media, Inc.*, 356 N.C. at 13, 565 S.E.2d at 17; *see also Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 18, 789 S.E.2d 454, 457 (2016) ("We review matters of statutory interpretation de novo . . . .").

¶ 28 N.C. Gen. Stat. § 160A-307.1 provides in pertinent part:

> A city may only require street improvements related to schools that are required for safe ingress and egress to the municipal street system and that are physically connected to a driveway on the school site. The required improvements shall not exceed those required pursuant to [N.C. Gen. Stat. §] 136-18(29).

N.C. Gen. Stat. § 160A-307.1 (2021).

¶ 29 Petitioner argues the broad definition of "improvements" found under N.C. Gen. Stat. § 136-18(29a) is controlling as to the definition of "street improvements" under N.C. Gen. Stat. § 160A-307.1. Petitioner reasons N.C. Gen. Stat. § 160A-307.1 references "[t]he required improvements" in citing to N.C. Gen. Stat. § 136-18(29). The Town maintains Petitioner's reading of the statute would lead to "absurd results" and "conflict[s] with the plain language of the statute."

¶ 30 "In the interpretation of statutes, the legislative will is the all-important or controlling factor." *In re Hardy*, 294 N.C. 90, 95, 240 S.E.2d 367, 371 (1978). "Statutory interpretation properly begins with an examination of the plain words of the statute." *Jeffries v. Cnty. of Harnett*, 259 N.C. App. 473, 488, 817 S.E.2d 36, 47 (2018) (citation omitted), *disc. rev. denied*, 372 N.C. 297, 826 S.E.2d 710 (2019). When language is "clear and unambiguous within the context of the statute," the courts must give the words their "plain and ordinary meanings." *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 896 (1998). "[U]ndefined words in a statute 'must be given their common and ordinary meaning' " when interpreting the plain language. *State v. Rieger*, 267 N.C. App. 647, 649, 833 S.E.2d 699, 701 (2019) (quoting *In re Clayton-Marcus Co., Inc.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202 (1974)). However, "[w]ords and phrases of a statute may not be interpreted out of context, but individual expressions must be construed as a part of the composite whole and

must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." *In re Hardy*, 294 N.C. at 95–96, 240 S.E.2d at 371–72 (internal quotations omitted). Under the interpretative canon of *noscitur a sociis*, "[w]hen a word used in a statute is ambiguous or vague, its meaning 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." *Winston v. Beeson*, 135 N.C. 271, 280, 47 S.E. 457, 460 (1904); *see State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944) ("*Noscitur a sociis* is a rule of construction applicable to all written instruments.").

¶ 31 "[S]treet improvements" is not defined in Chapter 160A; thus, we look to the ordinary meaning of the words that comprise the term. *See Rieger*, 267 N.C. App. at 649, 833 S.E.2d at 701. According to Merriam-Webster, a "street" is defined as "a thoroughfare especially in a city, town, or village that is wider than an alley or lane that *usually includes sidewalks*." *Street*, Merriam-Webster, https://www.merriam-webster.com/dictionary/street (last visited June 9, 2022) (emphasis added). An "improvement" means "the act or process of improving." *Improvement*, Merriam-Webster, https://www.merriam-webster.com/dictionary/improvement (last visited June 9, 2022). "Improve" means "to make (something better)." *Improve*, Merriam-Webster, https://www.merriam-webster.com/dictionary/improve (last visited June 9, 2022).

¶ 32 Applying the ordinary meaning of the word "street" to the statute at issue, the statute would prohibit municipalities from mandating improvements of thoroughfares—and potentially improvements of sidewalks—unless such improvement is "required for safe ingress and egress to the municipal street system and [is] physically connected to a driveway on the school site." *See* N.C. Gen. Stat. § 160A-307.1. We next determine if the language of the statute is "clear and unambiguous" as to whether sidewalks should be included within the ordinary meaning of "street improvements" based on the "context of the statute." *See Brown*, 349 N.C. at 522, 507 S.E.2d at 896; *In re Hardy*, 294 N.C. at 95–96, 240 S.E.2d at 371.

¶ 33 According to Black's Law Dictionary, "ingress" is "[t]he act of entering," and "egress" is "[t]he act of going out or leaving." *Ingress*, Black's Law Dictionary (10th ed. 2014); *egress*, Black's Law Dictionary (10th ed. 2014). In applying the principle of *noscitur a sociis*, we cannot conclude the legislature intended sidewalks to be required for safely entering into, and leaving from, the municipal street system, nor did it intend for cities to require only sidewalks which are "physically connected to a driveway on the school site." *See* N.C. Gen. Stat. § 160A-307.1.

¶ 34 Finally, we consider the other statutory sections of Chapter 160A dealing with sidewalks, streets, and/or improvements. "[W]e must be guided by the 'fundamental rule of statutory construction that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other.' " *Martin v. N.C. Dep't Health & Hum. Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) (emphasis added) (quoting *Redevelopment Comm'n v. Sec. Nat'l Bank*, 252 N.C. 595, 610, 114 S.E.2d 688, 698 (1960)). We have stated "[w]hen a legislative body includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion." *N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) (internal quotation marks omitted) (quoting *Rodriquez v. United States*, 480 U.S. 522, 525, 107 S. Ct. 1391, 94 L. Ed. 2d 533, 537 (1987)).

¶ 35 Petitioner contends the definition of "improvements" found in N.C. Gen. Stat. § 136-18(29a) should "control [in this case] because it comes from a statute that limits the types of roadway improvements that can be imposed on schools by government." N.C. Gen. Stat. § 136-18(29a) provides: "[t]he term 'improvements,' as used in this subdivision, refers to all facilities within the right-of-way required to be installed to satisfy the road cross-section requirements depicted upon the approved plans," including, *inter alia*, roadway construction, ditches and shoulders, and *sidewalks*. N.C. Gen. Stat. § 136-18(29a) (2021). The use of the phrase "as used in this subdivision," indicates the legislature's intent to restrict this definition of general "improvements" to this particular subsection. Additionally, N.C. Gen. Stat. § 136-18(29), the statute cited in N.C. Gen. Stat. § 160A-307.1, is referring *only to driveway connections*—not sidewalks. Thus, we are not persuaded by Petitioner's argument that we should apply the definition of "improvements" found in N.C. Gen. Stat. § 136-18(29a) to interpret "street improvements" under N.C. Gen. Stat. § 160A-307.1.

¶ 36 Additionally, our review of North Carolina statutes reveals not only has the General Assembly specifically referred to "sidewalks" when it intended to pass laws affecting sidewalks, *see, e.g.*, N.C. Gen. Stat. § 160A-296 (2021); N.C. Gen. Stat. § 160A-189 (2021); N.C. Gen. Stat. 160A-300 (2021), but it has also specifically referred to "sidewalk improvements" when it intended to pass laws affecting sidewalk improvements. *See* N.C. Gen. Stat. § 160A-217 (2021).

¶ 37 In passing N.C. Gen. Stat. § 160A-217, the legislature distinguished between "street improvements" and "sidewalk improvements" in the

context of levying special assessments for such improvements by using the disjunctive term "or" in separating the phrases "street improvements" and "sidewalk improvements." *See Miller v. Lillich*, 167 N.C. App. 643, 646, 606 S.E.2d 181, 183 (2004) (The legislature's use of the word "or" to separate sub-parts of the statute at issue indicated the sub-parts "should be read disjunctively, each being an alternative to the other."). The General Assembly's specific use of the terms "street improvements," "sidewalk improvements," and "improvements" in certain sections of Chapter 160A indicates its intent to have the categories separate and distinct from one another. Accordingly, we conclude the term "street improvements" referred to in N.C. Gen. Stat. § 160A-307.1 does not include sidewalk improvements. Therefore, we hold the superior court correctly concluded "N.C. Gen. Stat. § 160A-307.1 does not prohibit towns from regulating pedestrian and bicycle connectivity in relation to proposed new schools."

¶ 38 We briefly discuss the separate concurring and dissenting opinion, which concludes N.C. Gen. Stat. § 160A-307.1 preempts the Town's ordinances requiring sidewalks. The separate opinion correctly considers the plain meaning of the terms "street" and "improvement," then erroneously offers cases that neither interpret the statute at issue nor consider the legislative intent of the statute. Rather, the cases are offered as support for the proposition that streets include sidewalks. Although these cases may appear to support the desired conclusion, their consideration in this context is contrary to the rules regarding statutory interpretation that have been developed by the Courts in this State. *See Blowing Rock v. Gregorie*, 243 N.C. 364, 371, 90 S.E.2d 898, 904 (1956) ("Statutes *in pari materia* are to be construed together, and it is a general rule that the courts must harmonize such statutes, if possible, and give effect to each, that is, all applicable laws on the same subject matter should be construed together so as to produce a harmonious body of legislation, if possible."); *Wal-Mart Stores East v. Hinton*, 197 N.C. App. 30, 41–42, 676 S.E.2d 634, 644 (2009).

B. Sufficiency of Evidence to Establish *Prima Facie* Case for Entitlement of Permits

¶ 39 **[4]** As previously stated, the proper standard of review for the initial legal issue of whether Petitioner had presented competent, material, and substantial evidence is *de novo*. *See PHG Asheville, LLC*, 262 N.C. App. at 241, 822 S.E.2d at 86.

¶ 40 There is no dispute Petitioner's Applications complied with finding of fact 3 of UDO Sections 15.8.2 and 15.9.2. Moreover, the superior

court concluded Petitioner's Applications complied with finding of fact 4, and the Town does not contest this conclusion. Thus, only the superior court's rulings as to findings of fact 1 and 2 are relevant to Petitioner's appeal of the Applications. We consider the sufficiency of evidence for each factual finding in turn.

1. Finding of Fact 1: Conformity with the Town's Plans and Policies

¶ 41 Finding of fact 1 requires the requested permits are "consistent with the adopted plans and policies of the [T]own." Here, denial of Petitioner's Applications was based in part on Petitioner's non-compliance with policies S-1 and S-3 of the Town's policies for community-oriented schools.

a. Community Plan, Policy S-1

¶ 42 As stated above, policy S-1 provides:

> ADVANCED PLANNING FOR THE LOCATION OF NEW PUBLIC SCHOOLS serving Wake Forest should be a joint effort between the Wake County School Board and the Town. School locations should serve to reinforce desirable growth patterns rather than promoting sprawl. New elementary school locations should be viewed as a cornerstone of the neighborhoods they are intended to serve.

¶ 43 Petitioner argues "N.C. Gen. Stat. § 115C-218.35 prevents the Town from using vague and general policies on school development to prevent the construction of a charter school in a specific location." The Town asserts N.C. Gen. Stat. § 115C-218.35 did not prohibit the Town from denying permit applications related to charter schools. Additionally, the Town explains in its brief that it did not deny the Applications based on Wake Prep's location, and it accepted the permit applications for the location. Rather, the Town admits that it denied the Applications because Petitioner failed "to include adequate sidewalks to satisfy the [T]own's policies and ordinances in contravention of UDO §§ 15.8.2 and 15.9.2 . . . ."

¶ 44 The pertinent part of N.C. Gen. Stat. § 115C-218.35 upon which Petitioner relies provides: "[a] charter school's specific location shall not be prescribed or limited by a local board or other authority except a zoning authority." N.C. Gen. Stat. § 115C-218.35(a) (2021). Because the Board is acting as a zoning authority in this case, Petitioner's argument that this statute prevents the Town from considering Community Plan policies and corresponding regulations is without merit. We next

consider whether Petitioner offered sufficient evidence that it complied with the Town's plans and policies.

¶ 45 "A comprehensive plan is a policy statement to be implemented by zoning regulations, and it is the latter that have the force of law. It is generally deemed to be advisory, rather than controlling, and it may be changed at any time." *Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill*, 63 N.C. App. 244, 251, 304 S.E.2d 251, 255 (1983) (citations and internal quotation marks omitted). A board of commissioners "must also proceed under standards, rules, and regulations, uniformly applicable to all who apply for permits." *Application of Ellis*, 277 N.C. 419, 425, 178 S.E.2d 77, 81 (1970) ("[C]ommissioners cannot deny applicants a permit in their unguided discretion or, stated differently, refuse it solely because, in their view, [it] would 'adversely affect the public interest.' "). "The inclusion of a use in a zoning district, even where a . . . permit is required, establishes a *prima facie* case that the use conforms with the comprehensive plan." *Am. Towers, Inc. v. Town of Morrisville*, 222 N.C. App. 639, 643, 731 S.E.2d 698, 703 (2012) (citing *Woodhouse v. Bd. of Comm'rs*, 299 N.C. 211, 216, 261 S.E.2d 882, 886 (1980)).

¶ 46 Here, policy S-1 is a policy statement applicable to the planning of a new school location. *See Piney Mt. Neighborhood Ass'n*, 63 N.C. App. at 251, 304 S.E.2d at 255. The Town does not argue that policy S-1 was implemented by a zoning regulation, nor does the Town contest that it accepted Petitioner's permit applications for the Property to be the site location for Wake Prep. Therefore, policy S-1 is solely advisory, is irrelevant to Petitioner's Applications, and was not a proper basis for the Board to deny the Site Plan Application. *See id.* at 251, 304 S.E.2d at 255. Furthermore, an elementary and secondary school is a permitted use within the RD District of the Property with additional supplemental standards; therefore, such an educational use "establishes a *prima facie* case that the use conforms with the comprehensive plan." *See Am. Towers, Inc.*, 222 N.C. App. at 643, 731 S.E.2d at 703.

b. Community Plan, Policy S-3

¶ 47 Policy S-3 provides: "[s]chool campuses shall be designed to allow safe, pedestrian access from adjacent neighborhoods. Transportation facilities within 1.5 miles of all public schools shall be a priority for construction of sidewalks, bike paths and pedestrian trails."

¶ 48 Similar to policy S-1, policy S-3 is a policy of the Town's comprehensive plan to be implemented by a zoning regulation and can be changed at any time. *See Piney Mt. Neighborhood Ass'n*, 63 N.C. App. at 251, 304 S.E.2d at 255. Standing by itself, S-3 is only advisory and does not have

the force of law. *See id.* at 251, 304 S.E.2d at 255. However, UDO Section 3.7.5 is an ordinance by which policy S-3 was implemented. Thus, as discussed in detail below, Petitioner's failure to satisfy UDO Section 3.7.5 was a proper basis on which the Town denied Petitioner's applications.

2. Finding of Fact 2: Compliance with Applicable Ordinances

¶ 49 Finding of fact 2 requires the Applications to "compl[y] with all applicable requirements of this ordinance."

¶ 50 In the instant case, the Town denied Petitioner's Subdivision Plan Application because it did not comply with requirements set forth in UDO Section 3.7.5(A), which requires an applicant for a school to demonstrate how its plan will achieve "walking and bicycle accessibility by schoolchildren to schools" through off-premise sidewalks, multi-use trails or paths, or greenways connecting to existing networks. Similarly, the Town denied Petitioner's Site Plan Application on the ground that Petitioner did not show it met the requirements of UDO Section 3.7.5(B), which requires all schools within the Town's planning jurisdiction to have vehicular and pedestrian connectivity to surrounding residential areas.

¶ 51 Relying on *Lanvale Properties, LLC v. County of Cabarrus*, 366 N.C. 142, 731 S.E.2d 800 (2012), Petitioner contends the Town erred in denying its Subdivision Plan Application on the ground that it failed to comply with UDO Section 3.7.5 because it is a zoning ordinance, and it is inapplicable to its subdivision request. We disagree and note Petitioner makes no argument as to why UDO Section 3.7.5 is inapplicable to its Site Plan Application.

¶ 52 In *Lanvale Properties, LLC*, our Court explained the difference between zoning ordinances and subdivision ordinances:

> [A]s a general matter, subdivision ordinances are designed to regulate the creation of new lots or separate parcels of land. Unlike zoning, which controls the use of land and remains important before, during and after development, subdivision regulation generally refers to controls implemented during the development process. To this end, subdivision ordinances have several purposes, including, among other things, facilitat[ing] record keeping regarding land ownership; establishing standards on the size and shape of new lots and the layout of public facilities (such as

> street location, intersection design, and the like); and requir[ing] the provision of essential infrastructure (such as roads, utilities, recreational lands, and open space) and the details of how [that infrastructure] is to be laid out and constructed. Therefore, county subdivision ordinances control the development of specific parcels of land while general zoning ordinances regulate land use activities over multiple properties located within a distinct area of the county's territorial jurisdiction.

Lanvale Props., LLC, 366 N.C. at 158–59, 731 S.E.2d at 812 (citations and internal quotation marks omitted).

¶ 53 In this case, UDO Section 3.7.5 is intended to regulate the development of land to be used for educational uses and requires the provision of "off-premise sidewalks, multi-use trails or paths, or greenways" to allow for accessibility by students to the schools and for vehicular and pedestrian connectivity to surrounding residential areas. *See id.* at 158, 731 S.E.2d at 812. Since the ordinance concerns a component of "essential infrastructure" for an elementary and secondary school within the Town's planning jurisdiction, we conclude UDO Section 3.7.5 is a subdivision ordinance, and the superior court properly considered the ordinance in denying Petitioner's Subdivision Plan Application. *See id.* at 158, 731 S.E.2d at 812.

¶ 54 As discussed in detail in Section A, the Town's UDO Section 3.7.5 was not preempted by N.C. Gen. Stat. § 160A-307.1, and Petitioner has failed to show that it was not required to comply with UDO Section 3.7.5 to satisfy conditions for approval of the Applications.

¶ 55 The separate concurring and dissenting opinion states "[t]he Town's staff reviewed Petitioner's submittals and submitted a written report. The Town's written report noted no deficiencies or further improvements needed." We note the staff report *recommended the Board determine* if Petitioner met the required findings of fact, including determining whether the plan complies with all applicable requirements of the UDO, including UDO Section 3.7.5. We further note the ultimate decision as to whether Petitioner presented "competent, material, and substantial evidence" and met the UDO requirements remained with the Board.

¶ 56 Our review of the record shows Petitioner brought forth evidence demonstrating it would dedicate a twenty-five-foot right of way line along the frontage of the property and provide a ten-foot-wide multi-use

path one foot behind the right of way line. Petitioner also offered testimony tending to show "the [proposed] sidewalk . . . would align with the entrance into Joyner Park and the trails within Joyner Park." Since Petitioner demonstrates that it would provide pedestrian connectivity to only one residential neighborhood through Joyner Park located to the south of the proposed school, we hold the superior court did not err in affirming the Board's decision to deny the Applications.

VII. Conclusion

¶ 57 We deny the Town's motion to dismiss Petitioner's appeal because the case is not moot. We hold the Town's local ordinances requiring pedestrian connectivity and accessibility for schoolchildren to a school is not preempted by N.C. Gen. Stat. § 160A-307.1. Although the superior court erred in applying the whole record test in considering whether Petitioner presented competent, material, and substantial evidence, we find no prejudicial error. Our *de novo* review of the record reveals Petitioner failed to meet its burden of production to show it met Section 3.7.5 of the Town's UDO to establish a *prima facie* case for entitlement of the permits. Accordingly, we affirm the decision of the superior court.

AFFIRMED.

Judge ARROWOOD concurs.

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

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

¶ 58 I concur with the majority's opinion holding the Town's motion to dismiss as moot be denied. I also agree with the majority's conclusions the superior court erred and applied the incorrect "whole record" standard of review. I further concur with "[the Town's Board] cannot deny applicants a permit in their unguided discretion or, stated differently, refuse it solely because, in their view, [it] would 'adversely affect the public interest.' " "The inclusion of a [permitted] use in a zoning district, even where a special use permit is required, establishes a *prima facie* case the use conforms with the comprehensive plan." *Am. Towers, Inc. v. Town of Morrisville*, 222 N.C. App. 638, 643, 731 S.E.2d 698, 703 (2012) (citing *Woodhouse v. Bd. of Comm'rs*, 299 N.C. 211, 216, 261 S.E.2d 882, 886 (1980)). As such, Petitioner's subdivision application should be approved. The Town found Petitioner complied with all provisions of the applicable subdivision ordinances and future improvements to a parcel

are subject to site plan review, and are not reviewed under the subdivision ordinance.

¶ 59 However, the majority incorrectly concludes the superior court's erroneous whole record review was harmless; the Town's UDO can pre-empt a limiting state statute, N.C. Gen. Stat. § 160A-307.1 (2021); and, Petitioner's evidence failed to establish a *prima facie* case of entitlement to the special use permit. I respectfully dissent.

I. Issues

¶ 60 Petitioner petitioned for a writ of certiorari pursuant to N.C. Gen. Stat. § 160A-393, recodified as N.C. Gen. Stat. § 160D-1402 (2021). Petitioner argued in its petition: (1) N.C. Gen. Stat. § 160A-307.1 prohibits the Town from denying the Applications for failing to meet the Town's policies requiring school connectivity to adjoining neighborhoods; (2) the Town cannot deny the Subdivision Plan Application because it found the Subdivision Plan Application complied with all provisions of the applicable subdivision ordinances; and, (3) Petitioner presented sufficient evidence to establish it is entitled to the permits, and there was no competent evidence *contra* in the record to support denial.

II. Standards of Review

¶ 61 "Whether the record contains competent, material, and substantial evidence is a conclusion of law, reviewable de novo." N.C. Gen. Stat. § 160D-1402(j)(2). Petitioner argues no disputed facts exist in this case and the only question is whether it "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 special use permit[.]" *Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974).

¶ 62 We all agree the Petitioner correctly argues: "[t]he Superior Court erred when it applied whole record review," to the issue of whether Petitioner's *burden of production* was met, a deferential review to the Town. Our Supreme "Court has clearly held, the extent to which an applicant has presented competent, material, and substantial evidence tending to satisfy the standards set out in the applicable ordinance" for a quasi-judicial permit "is a question directed toward the sufficiency of the evidence presented by the applicant and involves the making of a legal, rather than a factual, determination." *PHG Asheville, LLC v. City of Asheville*, 374 N.C. 133, 152, 839 S.E.2d 755, 767 (2020).

¶ 63 We all also agree the trial court should have "applied *de novo* review to determine the initial legal issue of whether Petitioner had presented

competent, material, and substantial evidence." *PHG Asheville, LLC v. City of Asheville*, 262 N.C. App. 231, 241, 822 S.E.2d 79, 86 (2018), *aff'd*, 374 N.C. 133, 839 S.E.2d 755 (2020). Instead, the trial court erroneously applied the deferential "whole record" test to determine the legal question concerning the sufficiency of Petitioner's evidence. *See id.*

¶ 64 Also, the issue of whether N.C. Gen. Stat. § 160A-307.1 was properly interpreted and applied is reviewed *de novo*. *See Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002); *see also Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 18, 789 S.E.2d 454, 457 (2016) ("We review matters of statutory interpretation de novo") (citation omitted).

¶ 65 "The fundamental right to [own and use] property is as old as our state." *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 852, 786 S.E.2d 919, 923 (2016) (citations omitted). "Public policy has long favored the free and unrestricted use and enjoyment of land. *Id.* at 853, 786 S.E.2d at 924 (citations and internal quotation marks omitted).

¶ 66 "The general rule is that a zoning ordinance, being in derogation of common law property rights, should be construed in favor of the free use of property." *Dobo v. Zoning Bd. of Adjustment of Wilmington*, 149 N.C. App. 701, 712, 562 S.E.2d 108, 115 (2002) (Tyson, J., dissenting), *rev'd per curiam for reasons stated in the dissenting opinion*, 356 N.C. 656, 576 S.E.2d 324 (2003); *See Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966); *City of Sanford v. Dandy Signs, Inc.*, 62 N.C. App. 568, 569, 303 S.E.2d 228, 230 (1983); *Innovative 55, LLC v. Robeson Cty.*, 253 N.C. App. 714, 720, 801 S.E.2d 671, 676 (2017).

> **Zoning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly their express terms**. It has been held that well-founded doubts as to the meaning of obscure provisions of a Zoning Ordinance should be resolved in favor of the free use of property.

¶ 67 *Land v. Village of Wesley Chapel*, 206 N.C. App. 123, 131, 697 S.E.2d 458, 463 (2010) (emphasis original)(citations omitted). The Town's restrictive ordinances are to be construed narrowly and their applicability is limited and pre-empted by a state statute, which addresses and controls the very issue of the interior sidewalk improvements. N.C. Gen. Stat. § 160A-307.1.

III. Sufficiency of Evidence to Establish a *Prima Facie* Case

¶ 68 The Petitioner's *burden of production* at a use permit hearing is well established: "[W]hether the applicant for a conditional use permit made out the necessary *prima facie* case does not involve determining whether the applicant met a burden of persuasion, as compared to a burden of production, and is subject to *de novo*, rather than whole record, review during the judicial review process." *PHG Asheville, LLC*, 374 N.C. at 153 n.5, 839 S.E.2d at 768 n.5. Under *de novo* review, the question is whether Petitioner "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." *Id.* at 149, 839 S.E.2d at 766 (citation omitted).

¶ 69 "In the event that the applicant satisfies this initial burden of production, then 'prima facie he is entitled to' the issuance of the requested permit." *Id.* (internal citation omitted). The Supreme Court has analogized the applicant's burden of production in these cases "to the making of the showing necessary to overcome a directed verdict motion during a jury trial." *Id.* at 152, 839 S.E.2d at 767. In cases where facts are not in dispute, "the City simply lack[s] the legal authority to deny," if an applicant produces "competent, material, and substantial evidence" on each of the relevant standards for approval. *Id.* at 158, 839 S.E.2d at 771; *Id.* at 145, 839 S.E.2d at 763.

¶ 70 Petitioner correctly argues the Town cannot deny the Subdivision Plan Application because the evidence supports and the Town found: (1) the Subdivision Plan Application complied with all provisions of the applicable subdivision ordinances; (2) it presented sufficient evidence to establish it is entitled to the permits; and, (3) no competent evidence *contra* in the record supports denial.

¶ 71 Also, no party disputes Petitioner's Applications complied with finding of fact 3 of UDO §§ 15.8.2 and 15.9.2. As noted above, the superior court concluded Petitioner's Applications also complied with finding of fact 4. The Town does not contest this conclusion on appeal. Thus, only factors 1 and 2 are at issue.

¶ 72 The Town, the superior court, and the majority's opinion incorrectly weighs the evidence Petitioner produced in determining whether competent, material, and substantial evidence was submitted. The RD Zoning District applicable to the Property unambiguously states an elementary and secondary school is a *permitted use*, with additional supplemental standards. This permitted educational use "establishes a *prima facie* case that the use conforms with the comprehensive

plan." *See Am. Towers, Inc.*, 222 N.C. App. at 643, 731 S.E.2d at 703 (citation omitted).

¶ 73 The majority's opinion correctly concludes S-1 is a non-binding policy statement not applicable or controlling to Petitioner's applications. *See Piney Mt. Neighborhood Ass'n v. Town of Chapel Hill*, 63 N.C. App. 244, 251, 304 S.E.2d 251, 255 (1983). The majority's opinion also correctly notes the Town does not argue on appeal that policy S-1 was implemented by a zoning regulation, nor does the Town contest it accepted Petitioner's permit applications for the Property as a permitted use to be the site location for an educational facility, Wake Prep, and not as a re-zoning application. S-1 is solely advisory, irrelevant to Petitioner's Applications, and was an improper basis for the Board to deny the Site Plan Application. *See id.* We all agree this basis neither supports the Board's denial of Petitioner's applications nor the superior court's affirmance thereof.

¶ 74 Petitioner contends the Town erred in denying its Subdivision Plan Application on the ground it failed to comply with UDO Section 3.7.5 because it is a zoning ordinance, and it is inapplicable to its subdivision request. The majority's opinion improperly conflates the separate and distinct functions of subdivision and zoning ordinances.

¶ 75 Our Supreme Court in *Lanvale Properties, LLC*, sets out the differences between and in interpreting zoning ordinances and subdivision ordinances:

> [A]s a general matter, **subdivision ordinances are designed to regulate the creation of new lots or separate parcels** of land. Unlike **zoning, which controls the use of land** and remains important before, during and after development, subdivision regulation generally refers to controls implemented during the development process. **To this end, subdivision ordinances have several purposes, including among other things, facilitat[ing] record keeping regarding land ownership; establishing standards on the size and shape of new lots and the layout of public facilities (such as street location, intersection design, and the like); and requir[ing] the provision of essential infrastructure (such as roads, utilities, recreational lands, and open space) and the details of how [that infrastructure] is to be laid out and constructed.**

> Therefore, county **subdivision ordinances control the development of specific parcels of land while general zoning ordinances regulate land use activities over multiple properties located within a distinct area** of the county's territorial jurisdiction.

Lanvale Props., LLC v. Cnty. Of Cabarrus, 366 N.C. 142, 158-59, 731 S.E.2d 800, 812 (2012) (citations and internal quotation marks omitted) (emphasis supplied).

¶ 76 In this case, the plain language of the Town's UDO contains the word "development" in addition to prescribing policy goals for "adequate infrastructure (transportation and utilities)" and "development of adjacent properties or other neighborhood uses." The intended regulation of the "development" of land to be used for educational uses requires the provision of "off-premise sidewalks, multi-use trails or paths, or greenways" to allow for accessibility by students to the schools and for vehicular and pedestrian connectivity to surrounding residential areas." *Id.* at 158, 731 S.E.2d at 812. Since the ordinance concerns a component of "essential infrastructure" relating to "transportation and utilities" for an elementary and secondary school within the Town's planning jurisdiction, the Town and the superior court erred in denying Petitioner's Applications. *See id.*

¶ 77 Under this standard, Petitioner clearly produced competent, material, and substantial evidence sufficient of a *prima facie* showing of entitlement to the respective permits. Petitioner's evidence proffers to build a ten-foot-wide multi-use path along the front of the property, inside the public right of way. The Town's staff reviewed Petitioner's submittals and submitted a written report. The Town's written report noted no deficiencies or further improvements needed. No competent testimony nor evidence *contra* was offered to challenge Petitioner's evidence or this report. While none of the Town's commissioners stated UDO 3.7.5 was relevant to the overall decision, Petitioner still offered competent, material, and substantial evidence to meet those requirements by showing this multi-use path would be for pedestrians and cyclists to use as a public sidewalk and path to a neighborhood located at the property's southern point.

¶ 78 The Commissioners violated their oath to be an impartial decision maker in a quasi-judicial proceeding. The decision must be based solely on the evidence presented. The Board ignored the evidence and merely substituted their subjective and unqualified hunches and notions to

place an unlawful burden of persuasion upon Petitioner. This they cannot lawfully do. A "necessary *prima facie* case does not involve determining whether the applicant met a burden of persuasion, as compared to a burden of production, and is subject to *de novo*, rather than whole record, review during the judicial review process." *PHG Asheville, LLC*, 374 N.C. at 153 n.5, 839 S.E.2d at 768 n.5.

¶ 79 In addition to the Town staff's testimony and report, Petitioner's permit requests met Town ordinances at the quasi-judicial hearing. Nine witnesses, three of which qualified and were received as experts, testified for Petitioner at the Town's public hearing. No one from the Town or any opponents presented any evidence of noncompliance with any of the Town's ordinances or policies. This evidence clearly satisfied Petitioner's burden of production at a quasi-judicial hearing to be issued the special use permit.

¶ 80 Regarding Petitioner's permit applications and the additional internal sidewalks, the Town's Mayor stated, "it's not just that we can't require it, it's that we cannot deny it because [of a lack of sidewalks]." The Town's attorney affirmed this statement. Petitioner provided competent evidence to show their application met all requirements for approval.

¶ 81 The Town had accepted and affirmed Petitioner's findings in its own set of hearings on the issue. The Town offers no lawful basis to deny, and its Commissioners were sworn to be impartial and to base their decision solely on the record evidence, rather than their personal preferences or unsupported allegations. *Id.* "[C]ommissioners cannot deny applicants a permit in their unguided discretion or, stated differently, refuse it solely because, in their view, [it] would 'adversely affect the public interest.' " *In re Application of Ellis*, 277 N.C. 419, 425, 178 S.E.2d 77, 81 (1970).

¶ 82 Petitioner argues "N.C. Gen. Stat. § 115C-218.35 prevents the Town from using vague and general policies on school development to prevent the construction of a [public] charter school in a specific location." The Town admits it denied the Applications solely because Petitioner failed "to include adequate sidewalks to satisfy the [T]own[']s policies and ordinances in contravention of UDO §§ 15.8.2 and 15.9.2[.]"

¶ 83 The Town's quasi-judicial hearing "must also proceed under standards, rules, and regulations, uniformly applicable to all who apply for permits." *Id.* The Town's decision must be based solely upon the evidence presented at the hearing, by an impartial decision maker, and any decision maker's bias, personal and subjective policy preferences are immaterial, are not evidence *contra*, and cannot support denial. *Id.* ("[C]ommissioners cannot deny applicants a permit in their unguided

discretion or, . . . , refuse it solely because, . . . , [it] would 'adversely affect the public interest.' ").

¶ 84 "The inclusion of a [permitted] use in a zoning district, even where a . . . permit is required, establishes a *prima facie* case that the use conforms with the comprehensive plan." *Am. Towers, Inc.*, 222 N.C. App. at 643, 731 S.E.2d at 703 (citing *Woodhouse v. Bd. of Comm'rs*, 299 N.C. 211, 216, 261 S.E.2d 882, 886 (1980)). This prior legislative finding is binding upon the Town and is not subject to review by the city, town, or the superior court during a quasi-judicial special use permit hearing or review. *Id.*

¶ 85 Here, an elementary and secondary school is a permitted use within the RD District of the Property with supplemental permit standards. Such educational uses as a permitted use in the RD District "establishes a *prima facie* case that the use conforms with the comprehensive plan" to satisfy that factor. *Id.*

¶ 86 Again, we all agree policy S-1 is only a policy statement applicable to the planning of a new school location. *See Piney Mt. Neighborhood Ass'n*, 63 N.C. App. at 251, 304 S.E.2d at 255. The Town does not argue policy S-1 was implemented by a zoning regulation, nor does the Town contest that it accepted Petitioner's permit applications for the Property as currently zoned, to be the new school site location for Wake Prep. Petitioner's Applications do not seek a rezoning of the Property.

¶ 87 Policy S-1 is solely advisory and is irrelevant to Petitioner's Applications and the Town's and superior court's reliance thereon is not a lawful basis to deny the Site Plan Application. *See id.*; *see C.C. & J. Enter., Inc. v. City of Asheville*, 132 N.C. App. 550, 553, 512 S.E.2d 766, 769, *disc. review improvidently allowed*, 351 N.C. 97, 521 S.E.2d 117 (1999) (speculative assertions or mere expression of opinion about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body); *Jackson v. Guilford Cnty. Bd. of Adjustment*, 275 N.C. 155, 164-65, 166 S.E.2d 78, 84-85 (1969) (the legislature may only confer upon a subordinate agency the authority or discretion to execute a law if adequate guiding standards are laid down).

1. Community Plan, Policy S-3

¶ 88 Policy S-3 provides: "[s]chool campuses shall be designed to allow safe, pedestrian access from adjacent neighborhoods. Transportation facilities within 1.5 miles of all public schools shall be a priority for construction of sidewalks, bike paths and pedestrian trails."

¶ 89 Similar to our analysis and conclusions of policy S-1, policy S-3 is also a policy of the Town's comprehensive plan, is not an ordinance, and can be changed at any time. *See Piney Mt. Neighborhood Ass'n*, 63 N.C. App. at 251, 304 S.E.2d at 255. Standing by itself, policy S-3 is only advisory and has no force of law. *See id.*

¶ 90 Petitioner's site plan in evidence demonstrates it would dedicate a twenty-five-foot right of way line along the frontage of the property and provide a ten-foot-wide multi-use path one foot behind the right of way line. Petitioner also offered unchallenged expert testimony tending to show "the [proposed] sidewalk . . . would align with the entrance into Joyner Park and the trails within Joyner Park." The Town's local ordinances requiring pedestrian connectivity and accessibility for schoolchildren to a school is clearly pre-empted by N.C. Gen. Stat. § 160A-307.1.

¶ 91 We all agree the superior court erred in applying the whole record test in considering whether Petitioner presented competent, material, and substantial evidence. No competent, material, and substantial evidence *contra* rebuts Petitioner's *prima facie* showing. Upon *de novo* review Petitioner clearly met its burden of *production* to show its compliance with § 3.7.5 of the Town's UDO to establish a *prima facie* case for entitlement of the permits.

¶ 92 Upon *de novo* review of the order, as is required by statute and well-established Supreme Court precedents, the superior court erred when it applied whole record review and affirmed the Board's decision. The decision was prejudicial and not harmless. Petitioner clearly produced competent, material, and substantial evidence to make a *prima facie* showing of entitlement to the respective permits. The Town's and the superior court's reliance on this non-ordinance to deny Petitioner's permit was unlawful and is properly reversed.

IV. N.C. Gen. Stat. § 160A-307.1 Pre-emption

¶ 93 "Notwithstanding any provision of this Chapter to the contrary, a *city may not condition the approval* of any zoning, rezoning, or *permit request on the waiver or reduction of* any provision of this section." N.C. Gen. Stat. § 160A-307.1 (emphasis supplied). Petitioner contends N.C. Gen. Stat. § 160A-307.1 prohibits "municipalities from requiring or otherwise conditioning approval of school construction on meeting local street improvement requirements," including sidewalk improvement requirements. The language of the statute is clear, and no party asserts it contains any ambiguity. *Id.*

¶ 94 The analysis of whether Petitioner met the requirements of the Town's UDO is subject to and must be reviewed under N.C. Gen. Stat. § 160A-307.1, which pre-empts and controls this issue. The Town is statutorily barred from withholding or conditioning the issuance of permits based upon "an out-and-out plan of extortion" or other interior site improvements. *Nollan v. California Coastal Comm.*, 483 U.S. 825, 837, 97 L. Ed. 2d 677, 689 (1987).

¶ 95 N.C. Gen. Stat. § 160A-307.1 provides in pertinent part:

> A city *may only require* street improvements related to schools that are required for safe ingress and egress *to the municipal street system and that are physically connected to a driveway on the school site.* The required improvements shall not exceed those required pursuant to [N.C. Gen. Stat. §] 136-18(29).

N.C. Gen. Stat. § 160A-307.1 (emphasis supplied).

¶ 96 Petitioner correctly asserts the plain text of the statute indicates the legislature's intent to pre-empt and limit a municipality's "ability to require 'street improvements' for schools to only those which are required for safe ingress and egress 'to the municipal street system' and are physically connected to the school's driveway."

A. Definitions

¶ 97 Petitioner asserts the inclusion of the broad definition of "improvements" found under N.C. Gen. Stat. § 136-18(29a) controls the definition of "street improvements" under N.C. Gen. Stat. § 160A-307.1. Petitioner reasons N.C. Gen. Stat. § 160A-307.1 specifically references "[t]he required improvements" in citing "improvements shall not exceed those required" in N.C. Gen. Stat. § 136-18(29). N.C. Gen. Stat. § 160A-307.1.

¶ 98 N.C. Gen. Stat. § 136-18(29a) provides: "[t]he term 'improvements,' as used in this subdivision, refers to *all facilities within the right-of-way* required to be installed to satisfy the road cross-section requirements depicted upon the approved plans," including, *inter alia*, roadway construction, ditches and shoulders, and *sidewalks*. N.C. Gen. Stat. § 136-18(29a) (2021) (emphasis supplied).

¶ 99 Petitioner contends the definition of "improvements" used in N.C. Gen. Stat. § 136-18(29a) "controls [in this case] because it comes from a statute that limits the types of roadway improvements that can be imposed on schools by government."

¶ 100 The use of the phrase "as used in this subdivision," clearly indicates the legislature's intent to restrict this definition of general "improvements" to this subsection. Additionally, N.C. Gen. Stat. § 136-18(29), the statute cited in N.C. Gen. Stat. § 160A-307.1, is referring *only to driveway connections*—not sidewalks.

¶ 101 The statute also contains the express limitation a city "may only require street improvements . . . [which] are required for safe ingress and egress to the municipal street system *and* that are physically connected to a driveway on the school site." N.C. Gen. Stat. § 160A-307.1 (2021) (emphasis supplied). By its own terms, the statute limits internal on-site improvements such as sidewalks, bike paths, trails, etc. to link a school campus to surrounding neighborhood.

¶ 102 The Town cannot require more as a condition of development approval unless they are "required for safe ingress and egress to the municipal street system and that are physically connected to a driveway on the school site." *Id.* This limiting language of the statute could not be plainer.

¶ 103 While "street improvements" are not defined in Chapter 160A, the ordinary meaning of the words are used that comprise the term. *See State v. Rieger*, 267 N.C. App. 647, 649, 833 S.E.2d 699, 701 (2019). According to The American Heritage College Dictionary, a "street" is defined as "a public way or thoroughfare in a city or town, *usu[ally] with a sidewalk or sidewalks*." *Street*, The American Heritage College Dictionary (3d ed. 1993) (emphasis supplied). An "improvement" is defined as "the act or process of improving." *Improvement*, The American Heritage College Dictionary (3d ed. 1993). "Improve" means "to . . . make better." *Improve*, The American Heritage College Dictionary (3d ed. 1993).

B. Application

¶ 104 Applying the ordinary meaning of the word "street" to the statute at issue, "[a] city may only require street improvements" of thoroughfares—and potentially improvements of sidewalks solely as "required for safe ingress and egress to the municipal street system and [is] physically connected to a driveway on the school site." N.C. Gen. Stat. § 160A-307.1. Presuming N.C. Gen. Stat. § 160A-307.1 was ambiguous and requires statutory interpretation, the inclusion of the word "street" in the statute includes sidewalks.

¶ 105 For more than a century, our appellate courts have held the "street" includes sidewalks. *See Willis v. New Bern*, 191 N.C. 507, 510, 132 S.E. 286, 287 (1926) ("[A] street includes the roadway . . . and sidewalks.");

see also Hester v. Durham Traction Co., 138 N.C. 288, 291, 50 S.E. 711, 713 (1905) ("The rights, powers, and liability of the municipality extend equally to the sidewalk as to the roadway, for both are parts of the street."); *see also State v. Mabe*, 85 N.C. App. 500, 503, 355 S.E.2d 186, 188 (1987)(citation omitted) ("By way of analogy, courts have universally held that a 'street' includes not only the roadway and travelled portions but also the sidewalks.").

C. Contradiction with Town Ordinances

¶ 106 The Town's and the superior court's position not only contradicts § 160A-307.1, it contradicts its own ordinance enforcement, which treats sidewalks as "street improvements."

¶ 107 To prevent municipalities from attempting to evade the restrictions of § 160A-307.1 by narrowly defining what constitutes "street improvements" in their jurisdictions, the legislature provided such "improvements" include "all facilities within the right-of-way required to be installed to satisfy the road cross-section requirements" of the local government. N.C. Gen. Stat. § 136-18(29a).

¶ 108 In this case, "sidewalks" are included by name in the facilities the Town's ordinances require to be installed in the street improvements right-of-way. The inclusion of sidewalks within the required "street improvements" is expressly illustrated in the Town's staff report on Petitioner's Applications and its opinion of Petitioner's compliance therewith.

¶ 109 The Town's ordinances state sidewalks are "required street improvements." UDO § 6.6.2(E). The Town's arguments and the majority opinion's conclusion that the UDO requires more and can exceed and violate the express limitations in the statute are wholly without merit. N.C. Gen. Stat. § 160A-307.1 bars the Town from extorting and conditioning approval of Petitioner's special use permit and a subdivision application on such further internal site improvements. The Town's arguments are without merit.

V. Conclusion

¶ 110 We all agree the Town's motion to dismiss Petitioner's appeal is properly denied because the issues presented on appeal are not moot. We also agree the superior court erred in applying the whole record test in considering whether Petitioner produced competent, material, and substantial evidence. Plan policies are not ordinances, do not have the force of law, and are not competent evidence *contra* to defeat a *prima facie* case to support denial of a use permit. There is no dispute Petitioner

satisfied two of the required findings and the Town does not argue otherwise. I fully concur with the majority's opinion on these conclusions.

¶ 111 When properly reviewed narrowly and construed in favor of the free use of private property, I disagree a *de novo* review of the record reveals Petitioner failed to meet its *burden of production* to show compliance with § 3.7.5 of the Town's UDO and N.C. Gen. Stat. § 160A-307.1. As the Mayor and Town attorney agreed and advised the other Commissioners, Petitioner clearly met its burden of *production* at the quasi-judicial hearing before impartial decision makers and, with no evidence in the record *contra*, established a p*rima facie* case for entitlement to the permits.

¶ 112 I also disagree with the majority's notion N.C. Gen. Stat. § 160A-307.1 does not pre-empt the Town's non-ordinance policy statements from requiring further internal pedestrian improvements beyond those specified in the statute.

¶ 113 Under de novo review, the order is affected by prejudicial errors, is properly vacated in its entirety, and remanded to the superior court with instructions to order the Town to issue Petitioner's permits. I concur in part and respectfully dissent in part.

STATE OF NORTH CAROLINA
v.
DARREN OBRIEN LANCASTER, DEFENDANT

No. COA21-231

Filed 19 July 2022

Indictment and Information—fatally defective indictment—going armed to the terror of the public—essential element—act committed on a public highway

Defendant's indictment for the common law offense of going armed to the terror of the public was fatally defective and did not confer jurisdiction on the trial court to enter judgment where it failed to allege that the act was committed while going about a public highway, which, pursuant to *State v. Staten*, 32 N.C. App. 495 (1977), is an essential element of the offense that must be included in the charge. The indictment's allegation that defendant waved a firearm around in the parking lot of a private apartment complex was insufficient because that location did not constitute a "public highway" for purposes of this offense.

Judge GRIFFIN concurring in part and dissenting in part.

Appeal by Defendant from judgments entered 14 September 2020 by Judge Joshua Willey, Jr., in Craven County Superior Court. Heard in the Court of Appeals 23 February 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melissa H. Taylor, for the State.

Cooley Law Office, by Craig M. Cooley, for the Defendant.

DILLON, Judge.

¶ 1 Defendant Darren O. Lancaster was found guilty of possession of a firearm by a felon; resisting a public officer; injury to personal property; and going armed to the terror of the public for acts committed in the parking lot of an apartment complex.

¶ 2 Defense counsel, finding no errors in the record, asks this Court to conduct its own review for possible meritorious issues. Defense counsel has demonstrated to the satisfaction of this Court compliance with the requirements of *Anders v. California*, 386 U.S. 738 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising Defendant of his right to file written arguments with this Court and providing him with the necessary documents.[1]

¶ 3 In our review of the record, we have found one error. Based on our Court's holding in *State v. Staten*, 32 N.C. App. 495, 232 S.E.2d 488 (1977), we are compelled to conclude that the trial court lacked jurisdiction to enter its judgment on the charge of going armed to the terror of the public (a crime that is sometimes described as going armed to the terror of the *people*). Specifically, the indictment charging that offense was fatally defective in that it failed to allege that Defendant committed his act on a "public highway." We, therefore, vacate the judgment convicting Defendant of this charge and remand the matter for resentencing.

I. Analysis

¶ 4 Our state constitution provides that "[e]xcept in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment."

1. It is not apparent from the record that Defendant properly noticed his appeal. To the extent we do not have jurisdiction, in our discretion we issue a writ of *certiorari* "in aid of [our] jurisdiction." N.C. Gen. Stat. § 7A-32(c).

N.C. Const. art. I, § 22. In compliance with our constitution, a common method in which a criminal case is initiated *in superior court* is by indictment, where a grand jury of twelve has first determined that probable cause exists that the defendant committed the crime. *State v. Barker*, 107 N.C. 913, 918, 12 S.E. 115, 117 (1890) (stating that every defendant "charged with a criminal offense [by indictment] has the right to the decision of twenty-four of his fellow-citizens upon the question of his guilt: first, by a grand jury [of twelve], and secondly, by a petit jury [of twelve]"). The superior court, therefore, does not obtain jurisdiction to try a defendant by way of grand jury indictment unless the indictment "asserts facts supporting every element of the criminal offense" being charged. *State v. Oldroyd*, 2022-NCSC-27, ¶8. And "[w]hether or not a trial court possesses subject-matter jurisdiction is a question of law that is reviewed de novo." *In re A.L.L.*, 376 N.C. 99, 101, 852 S.E.2d 1, 4 (2020).

¶ 5 Though indictments are typically used to charge felonies, the principles concerning indictments apply equally to misdemeanor charges initiated in superior court. *See State v. Thomas*, 236 N.C. 454, 459, 73 S.E.2d 283, 286-87 (1952) (instructing that "[a]s a general rule, a person charged with the commission of a misdemeanor in any case other than that [provided for by our General Assembly] must be prosecuted in the Superior Court on an indictment by a grand jury").

¶ 6 In this matter, the prosecutor chose to have Defendant tried in superior court in the first instance by way of indictment for the common law crime of "going armed to the terror of the public," a misdemeanor. The grand jury alleged in its indictment that Defendant committed this crime while *in the parking lot* of a private apartment complex, specifically that he "unlawfully, willfully and feloniously did go armed to the terror of the public by causing a disturbance and waving a firearm around in the parking lot of 326 McCotter Blvd Apartment, Havelock[.]"

¶ 7 This issue before us is whether the indictment charging Defendant with going armed to the terror of the public adequately asserted facts supporting every element of that crime. For the reasoning below, we must conclude that the indictment is fatally defective because it fails to allege that Defendant acted on a public highway. Specifically, in 1977, our Court – construing a 1968 opinion from our Supreme Court – held that "the four essential elements" of this common law crime are:

> (1) armed with unusual and dangerous weapons, (2) for the unlawful purpose of terrorizing the people of the named county, (3) by going about the public

> highways of the county, (4) in a manner to cause terror to the people.

State v. Staten, 32 N.C. App. 495, 497, 232 S.E.2d 488, 490 (1977) (relying on *State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1 (1968)). Our Court held that the charging document was "insufficient" because if failed to allege that the defendant committed his act of terror while going about the public highways of the county[.]" *Id.*

A. *Staten* is controlling.

¶ 8 For at least six and a half centuries, courts (including our Supreme Court) understood that a defendant could commit the crime of "going armed to the terror of the public" in any location that the public is likely to be exposed to his acts, even if committed on privately-owned property. As explained by our Supreme Court in 1843, "the offense of riding or going about armed with unusual and dangerous weapons, to the terror of the people" was first recognized legislatively as a common law crime in the Statute of Northampton adopted in 1328 during the reign of Edward III of England, *State v. Huntly*, 25 N.C. 418, 420-21 (1843). *See also State v. Dawson*, 272 N.C. 535, 543, 159 S.E.2d 1, 7 (1968). This 1328 Statute stated that the common law crime could be committed at "**Fairs [and] Markets [or] elsewhere**," with no mention that it could only be committed along a public highway or other public property. Statute of Northampton 1328, 2 Edw. 3, ch. 3 (quoted in *Rogers v. Grewal*, 140 S. Ct. 1865, 1869 (2020) (Thomas dissenting)).

¶ 9 In its 1843 *Huntly* decision, our Supreme Court quotes Blackstone and other early authorities which understood that the common law crime is committed when the defendant carries weapons in a manner which "cause terror to the people" or "to the terror of others" or "affrighteth and maketh men afraid", etc., without any reference that the defendant *must* have acted while on a "public highway" to be subject to criminal liability. *Huntly*, 25 N.C. at 421-22.

¶ 10 Our Supreme Court actually discussed this common law crime in 1824, 19 years prior to *Huntly* in a case that has never been cited by a North Carolina appellate court (until today) but which was cited by the United States Supreme Court in its landmark Second Amendment *Heller* decision. *Dist. Of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (citing *State v. Langford*, 10 N.C. 381 (1824)). In *Langford*, Chief Justice John Louis Taylor, our State's first Chief Justice, writing for the Court, sustained a conviction where the defendant committed his act of terror while on private property. Specifically, the indictment in that case alleged that the act of terror occurred while the defendant was "at the

house of one Sarah Roffle[.]" *Langford*, 10 N.C. at 381. The Court based on its decision partly on its understanding that "a man [who] arms himself . . . in such manner as will naturally cause a terror to the people [commits] an offence at common law[.]" *Id.*, at 383-84.

¶ 11 We point out that in both the 1824 *Langford* decision and the 1843 *Huntly* decision, our Supreme Court noted that this common law crime was historically viewed as a type of "affray". *Id.* and *Langford*, 25 N.C. at 421. Our Supreme Court though has recognized that *technically* the crime of causing an affray and the crime of going armed to the terror of the public, though similar, are two distinct crimes. That is, an affray technically only occurs when there are at least two bad actors who engage in a fight to the terror of the public, *In re May*, 357 N.C. 423, 427, 584 S.E.2d 271, 274 (2003) (stating that "[a]n affray is defined at common law as a fight between two or more persons in a public place as to cause terror to the public," relying on *State v. Wilson*, 61 N.C. 237 (1867)). Going armed to the terror of the public, however, can occur when one bad actor acts alone. *See State v. Rambert*, 341 N.C. 173, 177, 459 S.E.2d 510, 513 (1995) (holding that evidence showing that a defendant acting alone causing terror was sufficient to sustain a conviction).

¶ 12 Like the crime at issue here, it has long been understood that the common law crime of affray can occur in locations other than along a public highway. For instance, in its 1993 *May* decision – decided 16 years after our Court held that the common law crime of going armed to the terror of the people could only occur on a public highway – our Supreme Court explained that a common law affray could occur in locations "open to public traffic," whether publicly or privately owned, such as "roads, streets, highways, sidewalks, shopping malls, ***apartment complexes***, parks, and commons." *May*, 357 N.C. at 427, 584 S.E.2d at 274 (emphasis added).

¶ 13 A panel of our Court, however, in our 1977 *Staten* decision, expressly cited and relied on our Supreme Court's 1968 *Dawson* decision to hold that the common law crime of going armed to the terror of the public only occurs when one causes terror while "going about the public highways of the county[.]" *Staten*, 32 N.C. App. at 497, 232 S.E.2d at 490 (explaining that "going about the public highways" is a "necessary element[]" which must be alleged in the charging document to sustain a conviction).

¶ 14 The indictment at issue in the 1968 *Dawson* case does allege that the defendant committed his act on a "public highway." Likewise, the indictment in the 1843 *Huntly* case alleged that the defendant acted while

going along the public highways. While *we* might not construe *Dawson* (or *Huntly*) as *requiring* the act to have occurred on a public highway to sustain a prosecution of this common law crime, we are bound by the *Staten* panel's interpretation of *Dawson*. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). *In re Civil Penalty* requires that we follow a holding from another panel of our Court which involves the "narrowing or distinguishing [of] an earlier controlling precedent – even one from the Supreme Court[.]" *State v. Gonzalez*, 263 N.C. App. 527, 531, 823 S.E.2d 886, 888 (2019).[2]

¶ 15 And while in 1993 our Supreme Court took the occasion in *May* to explain the common law crime of affray need not occur on a public highway, that Court has never addressed our 1977 *Staten* decision. In fact, our Supreme Court has only addressed going armed to the terror of the public once since *Staten*, in its 1995 *Rambert* decision. However, the "public highway" issue did not come up in *Rambert*, as the indictment in that case (contained in the Onslow County Superior Court file - 92 CVS 13019) alleged that "while thus armed [Mr. Rambert] went about *the public highways* of Onslow County in a manner to cause terror to the people[.]" (Emphasis added.)

B. The parking lot of an apartment complex is not a "public highway".

¶ 16 We conclude that the private parking lot of an apartment complex – the location alleged in the indictment in this case – does not constitute a "public highway" for purposes of charging Defendant with going armed to the terror of the public.

¶ 17 Though we found no North Carolina case defining "public highway" for purposes of the common law crime before us, we are persuaded by decisions from our Supreme Court in other contexts in reaching our conclusion. For instance, as previously noted, that Court in *May* distinguished "highways" from "shopping malls, apartment complexes, parks, and commons[.]" *May*, 357 N.C. at 427, 584 S.E.2d at 274 (emphasis added). Also, our Supreme Court has described a "cartway" as a "*quasi*-public road", but distinguished a "cartway" from a "public

2. Had our panel in *Staten* not mentioned our Supreme Court's 1966 *Dawson* decision or other controlling Supreme Court precedent in reaching its decision, we could ignore *Staten*. *See Gonzalez*, 263 N.C. App. at 531, 823 S.E.2d at 889; *BB&T v. Smith*, 239 N.C. App. 293, 298, 769 S.E.2d 638, 642 (2015) (following a 1938 Supreme Court case rather than more recent Court of Appeals holdings which did not reference the earlier Supreme Court decision). But such is not the case, as our panel in *Staten* expressly interprets the *Dawson* holding.

highway", defining the latter as a road "*established and maintained by public authority* for the traveling public[.]" *Waldroup v. Ferguson*, 213 N.C. 198, 195 S.E.2d 615 (1938) (emphasis added). *See also Parsons v. Wright*, 223 N.C. 520, 522, 27 S.E.2d 534, 537 (1943) (describing cartways as "an auxiliary part of the public road system of the county although they are distinguished from public highways proper"); *State v. Purify*, 86 N.C. 681, 682 (1882) (defining a "public highway" as "one established by a public authority and kept in order by the public . . .").

II. Conclusion

¶ 18 Irrespective of our view concerning our Court's interpretation in *Staten* of our Supreme Court's 1967 *Dawson* opinion, we must follow *Staten*'s interpretation. As such, we conclude the superior court lacked jurisdiction to enter judgment against Defendant for going armed to the terror of the public; and, therefore, the judgment of the superior court convicting Defendant of this crime must be vacated.

¶ 19 The trial court consolidated this conviction into a single judgment with the felony possession conviction. We, therefore, remand the consolidated judgment for resentencing. *See State v. Toney*, 187 N.C. App. 465, 472, 653 S.E.2d 187, 191 (2007) (relying on *State v. Brown*, 350 N.C. 193, 213, 513 S.E.2d 57, 70 (1999)).

¶ 20 We, otherwise, did not find any error with respect to the other judgments and, therefore, leave those judgments undisturbed.

NO ERROR IN PART, VACATED IN PART, REMANDED FOR RESENTENCING IN PART.

Judge DIETZ concurs.

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

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

¶ 21 I agree with the majority that this Court's decision in *State v. Staten*, 32 N.C. App. 495, 232 S.E.2d 488 (1977), was likely decided incorrectly but that we are bound by it. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). I write separately because our Supreme Court's decision in *State v. Rambert*, 341 N.C. 173, 459 S.E.2d 510 (1995), decided eighteen years after *Staten*, supports holding that the indictment in the case at bar is not fatally defective.

¶ 22 In *Rambert*, the defendant pulled his car up next to an acquaintance in the parking lot of a Piggly Wiggly store. *Id.* at 176, 459 S.E.2d at 512. After exchanging some words, the defendant pointed a gun at the acquaintance's vehicle and fired a shot through the vehicle's windshield. *Id.* A chase ensued in the parking lot, and the defendant fired additional shots at the vehicle. *Id.* at 176, 459 S.E.2d at 512–13. The defendant was charged and convicted of several offenses, including the felony charge of "going armed to the terror of the people." *Id.* at 174, 459 S.E.2d at 511. As noted by the majority, "the indictment in *Rambert* (found in the Onslow County Superior Court file - 92 CVS 13019) alleged that 'while thus armed [Mr. Rambert] went about *the public highways* of Onslow County in a manner to cause terror to the people[.]' " (Emphasis added).

¶ 23 On appeal, the Supreme Court did not take issue with the fact that the crime was committed in a parking lot. Instead, the Court remanded the matter with instructions for the trial court to enter a conviction on the charge of going armed to the terror of the people as a misdemeanor, holding that the charge was "improperly elevated to a felony." *Id.* at 177, 459 S.E.2d at 513. If the Supreme Court did not consider a parking lot to be a public highway or otherwise considered the indictment fatally defective, it not only would have reversed the conviction entirely, it would have been bound to do so for lack of subject matter jurisdiction. *See Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986) ("When the record clearly shows that subject matter jurisdiction is lacking, the Court *will* take notice and dismiss the action *ex mero motu*." (emphasis added) (citation omitted)); *In re Harts*, 191 N.C. App. 807, 809, 664 S.E.2d 411, 413 (2008) ("Subject matter jurisdiction may not be waived, and this Court has the power *and the duty* to determine issues of jurisdiction *ex mero motu*, and to dismiss an appeal if we find it lacking." (emphasis added) (citation omitted)).

¶ 24 Based on *Rambert*, the indictment in this case sufficiently alleged that Defendant committed his act on a "public highway." The indictment states that Defendant went "armed to the terror of the public by causing a disturbance and waving a firearm around *in the parking lot of 210 Shipman Road Apartments*[.]" (Emphasis added). Although the indictment does not use the phrase "public highway," "indictments need only allege the ultimate facts constituting each element of the criminal offense[,]" and "a very detailed account is not necessary for legally sufficient indictments[.]" *Rambert*, 341 N.C. at 176, 459 S.E.2d at 512 (citation omitted). By alleging that the act was committed in the parking lot of an apartment complex, the indictment was legally sufficient. *Id.*

¶ 25 For these reasons, I find no error in the trial court's judgments.

STATE v. ROUSE

[284 N.C. App. 473, 2022-NCCOA-496]

STATE OF NORTH CAROLINA
v.
STEVEN RAY ROUSE, DEFENDANT

No. COA21-580

Filed 19 July 2022

1. Identification of Defendants—show-up—drunk driver—due process—Eyewitness Identification Reform Act

There was no error in the trial court's denial of defendant's motion to suppress an eyewitness's show-up identification of defendant where, although defendant being handcuffed in the back of a police car was impermissibly suggestive, there was no due process violation because the witness's identification was reliable under the circumstances—the witness had spent at least 25 minutes with defendant after defendant's vehicle crashed in a ditch (before defendant fled into the woods), the witness had paid close attention to defendant's appearance, the witness gave a generally detailed and accurate description of defendant before the show-up, the witness expressed absolute certainty that defendant was the man from the crashed vehicle, and the time between the crash and the show-up was only about 80 minutes. Furthermore, the show-up did not violate the Eyewitness Identification Reform Act.

2. Motor Vehicles—impaired driving—sufficiency of evidence—circumstantial—operation of vehicle

In a prosecution for driving while impaired, the State submitted sufficient evidence of the element that defendant was driving a vehicle where, although no witness saw defendant driving the vehicle, a witness heard a crash and arrived within a minute to find defendant sitting with a bloody nose in the driver's seat of his own vehicle, which was crashed in a ditch, with no one else nearby. Further, defendant asked the witness for assistance in removing his vehicle from the ditch, fled the scene on foot and was found hiding behind a bush with the vehicle keys in his pocket, and later made an incriminating statement in jail.

3. Motor Vehicles—driving while impaired—jury instructions—flight—evidence indicating consciousness of guilt

In a driving while impaired prosecution, the trial court did not err by instructing the jury on flight as evidence indicating consciousness of guilt where, after defendant's vehicle crashed into a ditch, defendant abandoned his vehicle, walked down a dirt road, and was

found hiding on the ground behind a bush. Defendant's alternate explanation for his conduct—that he was walking in the direction of his own home—did not render the flight instruction erroneous.

Appeal by defendant from judgment entered on or about 10 March 2021 by Judge Frank Jones in Superior Court, Brunswick County. Heard in the Court of Appeals 5 April 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Dunn, Pittman, Skinner & Cushman, PLLC, by Rudolph A. Ashton, III, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant Steven Ray Rouse appeals from a judgment for habitual impaired driving entered following a jury trial. On appeal, Defendant contends the trial court erred when it (1) denied Defendant's motion to suppress an eyewitness identification, (2) denied Defendant's motion to dismiss for insufficiency of the evidence, and (3) instructed the jury on flight as evidence of guilt over Defendant's objection. Because the trial court's unchallenged Findings of Fact support its Conclusions of Law that the eyewitness identification did not violate Defendant's due process rights or the relevant eyewitness identification statute, we affirm the trial court's denial of the motion to suppress. Further, because the State presented sufficient evidence Defendant drove a vehicle, fled the scene, and took steps to avoid apprehension, we find no error in the trial court's rulings on the sufficiency or jury instruction issues.

I. Background

¶ 2 The State's evidence at trial tended to show that on 29 November 2019, Charles Randy Hewett was outside behind his mother's house in Bolivia, North Carolina, when he heard a crash at about 4:40 p.m. Hewett ran to the front yard, arrived at the crash scene "less than a minute" later, and found Defendant sitting with "his nose . . . bleeding a little bit" in the driver's seat of a pickup truck that had crashed nose-first into a ditch alongside the road. No one other than Hewett's family members were around the scene of the crash. Police later determined the truck was registered to Defendant.

¶ 3 After coming upon Defendant at the crash scene, Hewett talked with Defendant and called a phone number at his request. Defendant

asked Hewett to assist in pulling the truck out of the ditch, but Hewett declined, and someone called 911. At this point, Defendant grew increasingly "aggravated," and left down the main road toward Highway 17, walking in a "wobbly" manner before he appeared to head down a dirt road into the woods.

¶ 4 Law enforcement arrived on the scene about ten to fifteen minutes after Defendant left. Hewett gave an officer on the scene, State Highway Patrol Trooper James Ballard, a written description of "a white male [with a] green jacket [and] long sandy brown hair" who had exited the truck and walked up the main road. Sergeant Keith Bowling of the Brunswick County Sheriff's Office arrived a short time later with a police canine and started to search where Hewett had indicated. About 15 minutes after arriving, the sergeant said, his K-9 found Defendant "behind a bush" that was three or four feet tall. Defendant was "laying on the ground" and appeared to be "hiding." The sergeant estimated Defendant was found "probably within a couple hundred feet" of where Hewett had indicated and about "a quarter mile" from the crash site. While interacting with Defendant, Sergeant Bowling "noticed a strong odor of alcohol and slurred speech." Officers also found the keys to Defendant's truck in Defendant's pocket. After the police dog found Defendant, Sheriff's Deputy Gary Green handcuffed Defendant and eventually put him into the back of his patrol car. Deputy Green observed Defendant "seemed to be very impaired" and "had trouble walking" because he was "stumbling [and] tripping."

¶ 5 Deputy Green drove Defendant back to the crash site, where the witness, Hewett, was waiting roadside with Trooper Ballard. The deputy pulled up and rolled down the rear passenger-side window where Defendant was sitting. In response to Trooper Ballard asking, "Is this the person?", Hewett responded that he was "[a] hundred percent" sure the man in the police car was the same man from the crashed truck. Around the same time as this identification, Trooper Ballard noticed Defendant had "a very strong odor of alcohol coming from his breath," "droopy eyelids," and "slurred speech."

¶ 6 Defendant was then taken to a hospital for a "pretty minor" dog bite he sustained when the police dog found him, as Defendant had made "no attempts to warn [police] of his presence." While at the hospital, Defendant refused to consent to a blood test. Trooper Ballard then took Defendant to the Brunswick County jail, obtained a warrant, and had the jail nurse draw the blood sample. A subsequent State Crime Laboratory analysis found Defendant had a blood-alcohol concentration of 0.22.

¶ 7 On 29 November 2019, the same day as the incident, Defendant was charged with driving while impaired "and other related offenses." On 2 March 2020, those charges were dismissed after the State's motion to continue was denied. The State refiled charges for the same conduct the same day but charged Defendant with habitual impaired driving; he was indicted for habitual impaired driving on or about 1 June 2020.[1]

¶ 8 On 30 April 2020, Defendant filed a motion to suppress "all evidence and statements obtained as the result of a 'show-up' performed in violation of N.C.G.S. § 15-A-284.52(c1)." On 16 November 2020, the trial court held a hearing on Defendant's motion to suppress Hewett's eyewitness identification. At the hearing, Hewett testified about the crash, his interactions with Defendant, and the identification process. Trooper Ballard, Sergeant Bowling, and Deputy Green testified about tracking down Defendant, procuring Hewett's eyewitness identification, and testing Defendant's blood-alcohol concentration. Defendant and the State then argued both the statutory issue[2] and whether the "suggestive procedure" violated constitutional due process.

¶ 9 Following the hearing, the trial court denied Defendant's motion to suppress. The trial court made the following Findings of Fact: Defendant was driving before Hewett heard a crash, ran to the road, and found Defendant behind the steering wheel of a truck in a ditch; "Hewett spent approximately 25-30 minutes at a minimum with the Defendant," who sought help pulling his truck from the ditch; Defendant walked away toward Highway 17 before law enforcement responded; Hewett told officers about "a white man with stringy brown hair wearing what appeared to be a green jacket or hoodie" who "was heading towards Highway 17, and . . . appeared to head through a gate into the woods"; Sergeant Bowling arrived with a police canine who searched and found Defendant behind a bush in the "area consistent with the direction" Hewett had indicated; Defendant was handcuffed, placed in the back of a police vehicle, and taken back to the crash scene for a show-up identification

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1. Defendant was also indicted on habitual felon status the same day. On the judgment, the trial court "adjudge[d]" Defendant "to be a habitual felon," after Defendant admitted at trial, outside the presence of the jury, to prior felonies sufficient to qualify as a habitual felon. Defendant did not raise any arguments related to the habitual felon status or conviction on appeal.

2. Although the written motion to suppress only mentions North Carolina General Statute § 15A-284.52(c1), Defendant's attorney argued at the suppression hearing the trial court needed to also look at the part of the statute "that directs law enforcement to look for the North Carolina Criminal Justice Education and Training Standards Commission for policy," which is § 15A-284.52(c2). N.C. Gen. Stat. § 15A-284.52(c2) (2019).

by Hewett that was recorded by police body cameras and dashboard camera; Trooper Ballard performed a show-up identification because he "was concerned with the rapid metabolism and dissipation of alcohol as it related to this Defendant" and the driving while impaired investigation such that he "felt" a show-up identification "was necessary"; and finally Hewett said he was "one hundred percent certain" Defendant was the same man from the truck that had crashed about 80 minutes earlier.

¶ 10 Based on those Findings, the trial court concluded that "proper procedure was followed pursuant to North Carolina General Statute 15A-284.52[(c1)]"; "there was no Due Process violation in regard to the identification procedure"; and "based on the totality of the circumstances, the witness's identification was reliable even if the confrontation procedure was in fact suggestive." The trial court also concluded the identification procedure generally "did not violate the Defendant's rights under the United States Constitution and the North Carolina Constitution." Based on these conclusions, the trial court denied Defendant's motion to suppress.

¶ 11 Defendant's trial started 8 March 2021 after delays primarily due to COVID-19 shutdowns. Before the trial started, Defendant raised a motion to dismiss due to speedy trial violations, which he had originally filed on 13 April 2020. The trial court denied Defendant's motion to dismiss due to speedy trial violations, noting the COVID-19 enforced delays, Defendant's consent to the only continuance not related to COVID-19, and Defendant's custody on an unrelated charge in another county since October 2020. Defendant raises no issues regarding the speedy trial motion dismissal on appeal.

¶ 12 After jury selection but outside the presence of the jury, Defendant admitted to three prior impaired driving offenses within ten years of the 2019 incident, satisfying one statutory element of habitual impaired driving. N.C. Gen. Stat. § 20-138.5 (2019). The only issue for the jury was whether Defendant was guilty of driving while impaired on 29 November 2019. *See id.* (listing driving while impaired as the other statutory element of habitual impaired driving).

¶ 13 The trial included testimony from Hewett about his interactions with and identification of Defendant. As part of Hewett's testimony, the State introduced Hewett's written statement to police the night of the incident, which recounted his description of Defendant and the direction he saw Defendant go when Defendant left the scene. Trooper Ballard, Sergeant Bowling, and Deputy Green once again testified for the State about tracking down Defendant, procuring Hewett's eyewitness

identification, and testing Defendant's blood-alcohol concentration. As part of his testimony, Trooper Ballard described the crash diagram he had sketched based on his observations at the scene, and the State introduced that diagram into evidence. A forensic scientist from the North Carolina State Crime Laboratory also testified about testing Defendant's blood. As part of this testimony, the State introduced the lab report documenting Defendant's blood-alcohol concentration of 0.22 the night of the crash.

¶ 14 At the close of the State's evidence, Defendant made an oral motion to dismiss based on insufficient evidence, specifically on the issue of whether Defendant drove his truck; the trial court heard a response from the State and denied that motion. After declining to present evidence or witnesses, Defendant renewed the motion to dismiss based on insufficient evidence, which the trial court again denied.

As the parties and court prepared jury instructions, Defendant objected to the State's proposed instruction on flight showing consciousness of guilt. The State argued there was "plenty of evidence" supporting the instruction and "for the jury to consider that [Defendant] did flee from the scene of the accident and from the crime" including that Defendant "went down the road and into the woods" before being found "hiding behind a bush." Defendant argued a flight instruction would be unwarranted and "prejudicial" because Defendant lived "within a mile" of the crash site, was "found about a fourth of a mile" away, and it was "not a situation where somebody ran from an officer or ignored commands." The trial court ruled "the State [was] entitled to that instruction" because Defendant was not "heading toward a home or toward" a highway. The jury charge included the standard instruction on flight drawn from North Carolina Pattern Jury Instructions for Criminal Cases 104.35:

> The State contends that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt.

¶ 15 The jury found Defendant guilty of driving while impaired. Taking into account Defendant had already admitted to three prior impaired driving offenses, the trial court then sentenced Defendant to 131 to 170 months in prison for habitual impaired driving as enhanced by his status as a habitual felon. Defendant gave oral notice of appeal in open court.

II. Motion to Suppress

¶ 16 **[1]** Defendant contends the trial court erred in denying Defendant's motion to suppress the eyewitness's show-up identification of Defendant. Specifically, Defendant challenges the eyewitness identification on two separate grounds. First, he contends the identification was "impermissibly suggestive" such that "the procedures created a substantial likelihood of irreparable misidentification" in violation of his constitutional due process rights. Second, he argues "law enforcement failed to follow the recommend procedures under the Eyewitness Identification Reform Act," specifically North Carolina General Statute § 15A-284.52(c1) and (c2). After discussing the standard of review, we address each of the two grounds in turn.

A. Standard of Review

¶ 17 On appeal, "review of the denial of a motion to suppress is limited to determining 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) (quotations and citations omitted). "Unchallenged findings are deemed supported by competent evidence and are binding on appeal." *State v. Fields*, 268 N.C. App. 561, 566–67, 836 S.E.2d 886, 890 (2019) (citing *State v. Biber*, 365 N.C. 162, 167, 712 S.E.2d 874, 878 (2011)). Challenged findings "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Malone*, 373 N.C. at 145, 833 S.E.2d at 786 (quotations and citations omitted). "However, the trial court's conclusions of law are fully reviewable on appeal." *Id.* (citation omitted); *see also Fields*, 268 N.C. App. at 567, 836 S.E.2d at 890 ("Conclusions of law are reviewed de novo.").

B. Analysis

¶ 18 As defined in the Eyewitness Identification Reform Act ("EIRA"), a "[s]how-up" is an identification where "an eyewitness is presented with a single live suspect for the purpose of determining whether the eyewitness is able to identify the perpetrator of a crime." N.C. Gen. Stat. § 15A-284.52(a)(8). A show-up " 'is a much less restrictive means of determining, at the earliest stages of the investigation process, whether a suspect is indeed the perpetrator of a crime,' allowing an innocent person to be 'released with little delay and with minimal involvement with the criminal justice system.' " *State v. Rawls*, 207 N.C. App. 415, 422, 700 S.E.2d 112, 117 (2010) (alteration omitted) (quoting *In re Stallings*, 318 N.C. 565, 570, 350 S.E.2d 327, 329 (1986)).

¶ 19 While show-ups have been criticized, not every show-up identification undermines a conviction. *See Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972 (1967) (noting criticism while explaining the standard for overturning convictions based on show-ups), *abrogated on other grounds by U.S. v. Johnson*, 457 U.S. 537, 102 S. Ct. 2579 (1982); *see also State v. Reaves-Smith*, 271 N.C. App. 337, 345, 844 S.E.2d 19, 25 (2020) (noting potential for show-up identifications to be "inherently suggestive" before saying they "are not *per se* violative of a defendant's due process rights" (quoting *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982))). Rather, appellate courts review the denial of motions to suppress eyewitness identifications, including show-ups, under the constitutional requirement of due process. *See Malone*, 373 N.C. at 146, 833 S.E.2d at 787 (outlining due process review for all eyewitness identifications). Our Courts also review for compliance with EIRA, but we only evaluate the identification based on the requirements in § 15A-284.52(c1); we do not evaluate based on (c2). *See Reaves-Smith*, 271 N.C. App. at 340–45, 844 S.E.2d at 22–25 (evaluating the trial court's conclusions of law on compliance with (c1) but explaining (c2) "does not place additional statutory requirements on law enforcement" that our courts would review).

1. Due Process

¶ 20 We first address the constitutional requirements of due process in eyewitness identification. This inquiry asks "whether the identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification." *Malone*, 373 N.C. at 146, 833 S.E.2d at 787 (quoting *State v. Fowler*, 353 N.C. 599, 617, 548 S.E.2d 684, 697–98 (2001)).

¶ 21 Reviewing courts split this inquiry into two steps, first assessing "whether the identification procedures were impermissibly suggestive." *Id.* (citations and quotations omitted). "If this question is answered negatively, our inquiry is at an end." *State v. Headen*, 295 N.C. 437, 439, 245 S.E.2d 706, 708 (1978). If the answer is affirmative, courts then determine "whether the procedures create a substantial likelihood of irreparable misidentification." *Malone*, 373 N.C. at 146, 833 S.E.2d at 787 (citations and quotations omitted). At this second step, "[t]he central question is whether under the totality of the circumstances the identification was reliable even if the confrontation procedure was suggestive." *Reaves-Smith*, 271 N.C. App. at 345, 844 S.E.2d at 25 (citing *State v. Oliver*, 302 N.C. 28, 45–46, 274 S.E.2d 183, 195 (1981)); *see also State v. Richardson*, 328 N.C. 505, 510, 402 S.E.2d 401, 404 (1991) (clarifying that "totality of the circumstances" applies only to the second step).

¶ 22 Addressing the first step, our courts have determined several different factors bear on whether "the identification procedures were impermissibly suggestive." *Malone*, 373 N.C. at 146, 833 S.E.2d at 787. Our Supreme Court has said show-ups generally may be "inherently suggestive [because] the witnesses would likely assume that the police had brought them to view persons whom they suspected might be the guilty parties." *State v. Matthews*, 295 N.C. 265, 285–87, 245 S.E.2d 727, 739–41 (1978) (finding impermissibly suggestive a show-up at a police station outside which the witness could see a distinctive vehicle resembling the one used in the crime). This Court held a show-up "unduly suggestive" when the defendant was "brought before [the witness] from the back of a police car for identification." *State v. Patterson*, 249 N.C. App. 659, 667, 791 S.E.2d 517, 522 (2016). Officers' leading statements also have led our Supreme Court to conclude a procedure was "unnecessarily suggestive." *Oliver*, 302 N.C. at 45, 274 S.E.2d at 194. Finally, presenting a suspect in handcuffs may have some suggestive influence, but that factor "alone is insufficient to make the show-up impermissibly suggestive." *State v. Lee*, 154 N.C. App. 410, 416, 572 S.E.2d 170, 174 (2002).

¶ 23 Here, Defendant's show-up identification was impermissibly suggestive because officers exhibited Defendant in a way that "witnesses would likely assume the police had brought them to view persons whom they suspected might be the guilty parties." *Matthews*, 295 N.C. at 285–86, 245 S.E.2d at 739. Like in *Patterson*, Defendant was brought for the show-up in the back of a police car. 249 N.C. App. at 667, 791 S.E.2d at 522. On top of that, Defendant was handcuffed. While this fact alone was not sufficient in *Lee*, 154 N.C. App. at 416, 572 S.E.2d at 174, here, combined with the Defendant being in the back of a police car, we conclude the show-up was impermissibly suggestive.

¶ 24 After affirmatively answering the first question of this two-part test, we next determine "whether the procedures create a substantial likelihood of irreparable misidentification." *Malone*, 373 N.C. at 146, 833 S.E.2d at 787. Post-*Malone*, we continue to rely on five factors to assess the substantial likelihood question:

> [(1)] the opportunity of the witness to view the accused at the time of the crime, [(2)] the witness' degree of attention at the time, [(3)] the accuracy of his prior description of the accused, [(4)] the witness' level of certainty in identifying the accused at the time of the confrontation, and [(5)] the time between the crime and the confrontation.

Id., 373 N.C. at 147, 833 S.E.2d at 787 (quoting *State v. Thompson*, 303 N.C. 169, 172, 277 S.E.2d 431, 434 (1981) (in turn citing *Neil v. Biggers*, 409 U.S. 188, 200, 93 S. Ct. 375, 382 (1971))).[3]

¶ 25 Reviewing courts do not need to find all five factors weigh against a substantial likelihood of irreparable misidentification to admit the evidence over due process concerns. *See Malone*, 373 N.C. App. at 147, 833 S.E.2d at 787–88 (stating in terms of specific question before *Malone* Court about independent origin of in-court identification). Instead, "[a]gainst these factors must be weighed the corrupting effect of the suggestive procedure itself." *State v. Pigott*, 320 N.C. 96, 100, 357 S.E.2d 631, 634 (1987) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2255 (1977)).

¶ 26 Here, the trial court concluded that "based on the totality of circumstances, the witness' identification was reliable even if the confrontation procedure was in fact suggestive." While the trial court did not explicitly address the five reliability factors, they were outlined and argued by counsel at the motion hearing.

¶ 27 Under the standard of review articulated in *Malone*, appellate courts only review the conclusions of law to confirm they are supported by findings of fact that in turn are supported by competent evidence. 373 N.C. at 145, 833 S.E.2d at 786. "[F]indings of fact to which [a] defendant failed to assign error are binding on appeal." *State v. Campbell*, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724 (2008); *see also Fields*, 268 N.C. App. at 566–67, 836 S.E.2d at 890 ("Unchallenged findings are deemed supported by competent evidence and are binding on appeal."). "Here, [D]efendant 'failed to assign error' to any of the trial court's [F]indings of [F]act in the order denying his motion to suppress. Therefore, the trial court's [F]indings of [F]act are binding on appeal." *State v. Williams*, 209 N.C. App. 255, 257, 703 S.E.2d 905, 907 (2011) (citing *Campbell*, 188 N.C. App. at 704, 656 S.E.2d at 724). Using the trial court's binding Findings of Fact, we conclude Hewett's identification was more reliable than that in *Malone*, which our Supreme Court still found "sufficiently reliable." *Id.*, 373 N.C. at 149, 833 S.E.2d at 789.

¶ 28 Turning to the specific factors from *Malone*, first, Hewett had ample opportunity to view the man behind the wheel of Defendant's crashed

3. While *Malone* discusses these factors in the context of "determining whether the witness's in-court identification had the necessary independent origin," 373 N.C. at 147, 833 S.E.2d at 787, it later clarifies this "independent origin inquiry . . . is merely the second part of the due process inquiry" that asks "whether due process requires the suppression of eyewitness identification evidence." 373 N.C. at 148 & n.2, 833 S.E.2d at 788 & n.2.

truck, whom he would later identify as Defendant. In an unchallenged Finding, the trial court found Hewett spent "approximately 25-30 minutes at a minimum" with Defendant before Defendant walked away from the crash. That is far longer than indicated in *Malone*, where two eyewitnesses saw the perpetrators for less than two minutes. 373 N.C. at 149, 833 S.E.2d at 789. Additionally, Hewett did not just see Defendant but also conversed with Defendant, who asked for help pulling his truck from the ditch.

¶ 29 Second, Hewett clearly paid attention while he interacted with Defendant. Hewett was attentive enough to give the officers a detailed description of "a white man with stringy brown hair wearing what appeared to be a green jacket or hoodie" who "was heading towards Highway 17, and . . . appeared to head through a gate into the woods." Hewett paid close attention because Defendant's arrival—by crashing his truck into a ditch—was out of the ordinary and sufficient to arouse suspicion, much like how a witness in *Malone* paid close attention to a stranger because he approached with hands in his pockets. 373 N.C. at 150, 833 S.E.2d at 789.

¶ 30 Third, Hewett gave a detailed, consistent, and generally accurate description before identifying Defendant. Hewett described the suspect to law enforcement as "a white man with stringy brown hair wearing what appeared to be a green jacket or hoodie." While the trial court did not make Findings on the accuracy of this description and the body cam photos in our record are indiscernible, Defendant's mugshots show Defendant as a white male with long, sandy-brown hair. Hewett thus provided more accurate details than the witness in *Malone* who "accurately described defendant's shoulder-length hair, [which] appears to be the only accurate detail identified by the trial court." 373 N.C. at 150, 833 S.E.2d at 790. In *Malone*, this factor cut for the defendant but was outweighed by the other factors suggesting reliability. 373 N.C. at 152, 833 S.E.2d at 790. Thus, even if the greater accuracy here does not tip this factor in the State's favor, it still does not entitle Defendant to relief on this ground.

¶ 31 Defendant asserts "[s]ome of [Hewett's] descriptions of the perpetrator were inconsistent," apparently in reference to how Defendant appeared at the time, but fails to specify the alleged inconsistencies. Focusing only on Hewett's description prior to the show-up, *see Malone*, 373 N.C. at 147, 833 S.E.2d at 787 (limiting third factor to "accuracy of [witness's] *prior* description of the accused" (emphasis added)), the only potential inconsistency relates to Defendant's clothing. The trial court's unchallenged Finding of Fact indicates Hewett described

Defendant to law enforcement as "wearing what appeared to be a green jacket or hoodie." The color of the hoodie in the mugshot photos in our record is open to differing interpretations. Even if we assume this is what Defendant meant regarding inconsistent descriptions and further assume *arguendo* the hoodie from the mugshot photos is not green, Hewett's description otherwise appears accurate. At most, this factor slightly favors Defendant, but that alone does not require us to determine due process bars the show-up identification evidence. *See Malone*, 373 N.C. App. at 147, 150–52, 833 S.E.2d at 787–88, 790 (explaining not all factors need to be met to find no due process violation occurred before concluding no due process violation occurred even though the third factor weighed in the defendant's favor).

¶ 32 Fourth, Hewett expressed absolute certainty Defendant was the man from the truck, with the trial court making an unchallenged Finding that at the time of the show-up, Hewett was "one hundred percent certain that it was the same individual" he saw earlier. This matches or exceeds the certainty of the witness in *Malone* who testified that, upon seeing another photo of the defendant on social media, "she was sure that he was the" perpetrator. 373 N.C. at 151, 833 S.E.2d at 790. Hewett's confidence also contrasts with a rare case rejecting an identification by a witness who expressed doubt at the time of the identification, among other factors. *Headen*, 295 N.C. at 442–43, 245 S.E.2d at 710.

¶ 33 Finally, the time between the crime and the confrontation was relatively short. The trial court found about 80 minutes had passed between crash and show-up. The trial court also found Hewett spent "approximately 25 to 30 minutes, minimum," with the man in the truck—which means Hewett identified Defendant within an hour of when he had last seen Defendant. That is much faster than indicated in *Malone*, where our Supreme Court noted "*only a week or two* passed between the crime and [the witness's independent] identification of [the] defendant from [a] Facebook picture." 373 N.C. at 151, 833 S.E.2d at 790 (emphasis added).

¶ 34 Overall, at least four of the five reliability factors weigh in favor of finding Hewett's identification of Defendant was reliable, even if the show-up procedure was suggestive. Defendant identifies some ambiguity or imprecision regarding the color of a piece of clothing, but all other elements of Hewett's detailed description are consistent. Even if that one factor weighs in Defendant's favor, the other four factors all weigh strongly in favor of reliability. When considering the totality of the circumstances and weighing the reliability factors against the corruptive effect of the impermissibly suggestive procedure, Hewett's identification did not present a substantial risk of irreparable misidentification. The trial court

therefore did not err in denying Defendant's motion to suppress on the grounds the show-up violated Defendant's due process rights.

¶ 35 Defendant also argues "the in-court identification was tainted by the illegal pretrial procedures." Because the pretrial procedures did not violate due process, they could not have tainted the in-court identification and thus it also did not violate due process.

2. Eyewitness Identification Reform Act ("EIRA")

¶ 36 In addition to his due process arguments, Defendant contends officers "failed to follow the recommended procedures under the [EIRA]." Defendant notes the EIRA section detailing requirements for show-ups, North Carolina General Statute § 15A-284.52(c1), but does not specify how those requirements may have been violated. Defendant also argues the show-up here ran afoul of standards under § 15A-284.52(c2).

¶ 37 Looking at § 15A-284.52(c1) first, that subsection has three parts that might be applicable, but Defendant cannot successfully challenge any of them. The subsection's first requirement is "a suspect matching the description of the perpetrator is located in close proximity in time and place to the crime." § 15A-284.52(c1)(1). According to the trial court's unchallenged Findings and as discussed above, Defendant largely matched Hewett's description and was found nearby less than 80 minutes after the crash. That first subsection also limits show-ups to "circumstances that require the immediate display of a suspect to an eyewitness." *Id.* That requirement is satisfied by the trial court's unchallenged Finding that Trooper Ballard was "concerned with the rapid metabolism and dissipation of alcohol . . . and felt that it was necessary to perform a show-up identification" to protect the driving while impaired investigation.

¶ 38 The subsection's second requirement is "using a live suspect" rather than a photograph. § 15A-284.52(c1)(2). The trial court's unchallenged Findings show this requirement is easily satisfied; Defendant was brought before the eyewitness in person.

¶ 39 The subsection's final mandate is that officers "photograph a suspect at the time and place of the show-up to preserve a record of the appearance of the suspect." § 15A-284.52(c1)(3). The trial court found "still pictures were taken at the approximate time [of] the show-up through in car camera and body cam." The record contains images taken from police body-camera recordings, which this Court has recognized as sufficient. *See Reaves-Smith*, 271 N.C. App. at 343, 844 S.E.2d at 24 (concluding officers complied with EIRA requirements when

"[t]he show-up identification was conducted with a live person" and "was recorded on the officers' body cameras"). Therefore, the trial court's unchallenged Findings of Fact support its Conclusion of Law that "proper procedure was followed pursuant to North Carolina General Statute 15A-284.52[(c1)]."

¶ 40 Defendant raises another EIRA issue under § 15A-284.52(c2) arguing officers failed to follow "recommended procedures" by "omitt[ing] standard instructions" and inquiries about the witness's vision and communications with other people. Defendant notes Trooper Ballard testified he did not offer any instructions but "just asked [Hewett] if that was the gentleman he saw in the vehicle."

¶ 41 Section 15A-284.52(c2) provides: "The North Carolina Criminal Justice Education and Training Standards Commission shall develop a policy regarding standard procedures for the conduct of show-ups in accordance with this section. The policy shall apply to all law enforcement agencies and shall address" items including "[s]tandard instructions for eyewitnesses" and "[c]onfidence statements by the eyewitness including information related to the eyewitness' vision, the circumstances of the events witnessed, and communications with other eyewitnesses, if any." N.C. Gen. Stat. § 15A-284.52(c2).

¶ 42 Contrary to Defendant's argument, this Court has held § 15A-284.52(c2) "does not place additional statutory requirements on law enforcement, but rather requires the North Carolina Criminal Justice Education and Training Standards Commission to develop nonbinding guidelines." *Reaves-Smith*, 271 N.C. App. at 344–45, 844 S.E.2d at 25. "[O]nly Section 15A-284.52(c1) sets forth the requirements for show-up identification compliance." *Id.*, 271 N.C. App. at 345, 844 S.E.2d at 25. As a result, according to "[t]he plain language of the statute," the recommended procedures promulgated under (c2) are merely "nonbinding guidelines." *Id.*, 271 N.C. App. at 344, 844 S.E.2d at 25. Thus, Defendant cannot claim a violation of Section 15A-284.52(c2).

¶ 43 We conclude the unchallenged, and therefore binding, Findings of Fact support the trial court's Conclusions of Law on both the due process and EIRA issues. Therefore, we affirm the trial court's denial of Defendant's motion to suppress.

III. Motion to Dismiss

¶ 44 **[2]** Defendant next contends the trial court erred in denying Defendant's motion to dismiss for insufficiency of evidence. Specifically, Defendant argues "there was insufficient evidence as a matter of law that he was operating the vehicle." We disagree.

A. Standard of Review

¶ 45 "In order to justify the denial of a motion to dismiss for insufficient evidence, the State must present substantial evidence of (1) each essential element of the charged offense and (2) defendant's being the perpetrator of such offense." *State v. Privette*, 218 N.C. App. 459, 470–71, 721 S.E.2d 299, 308 (2012) (quotations, citation, and alterations omitted).

¶ 46 "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.*, 218 N.C. App. at 471, 721 S.E.2d at 308 (quoting *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980)). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Burris*, 253 N.C. App. 525, 544–45, 799 S.E.2d 452, 464 (2017) (quotations and citation omitted); *see also State v. Franklin*, 327 N.C. 162, 171–72, 393 S.E.2d 781, 787 (1990) ("If there is any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction, it is for the jury to say whether it is convinced beyond a reasonable doubt of defendant's guilt.").

¶ 47 In other words, "[t]he trial court need only satisfy itself that the evidence is sufficient to take the case to the jury; it need not be concerned with the weight of that evidence." *Franklin*, 327 N.C. at 171, 393 S.E.2d at 787. As such:

> "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances.

State v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75–76, 430 S.E.2d 914, 918–19 (1993)).

¶ 48 "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). On appeal, similar to the trial court's approach, "we view 'the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.' " *Privette*, 218 N.C. App. at 471, 721 S.E.2d at 308 (quoting *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004)).

B. Analysis

¶ 49 Here, the only charge for the jury to decide was whether Defendant was driving while impaired. The judgment in turn says Defendant was convicted of Habitual Impaired Driving under North Carolina General Statute § 20-138.5. Habitual Impaired Driving involves driving while impaired in violation of North Carolina General Statute § 20-138.1 and having "been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within 10 years of the date of this offense." N.C. Gen. Stat. § 20-138.5 (2019). Outside the presence of the jury, Defendant admitted to three prior impaired driving offenses within ten years of the offense date, so the only issue for the jury, and thus for our review of sufficiency, was the driving while impaired under § 20-138.1.

¶ 50 "The essential elements of driving while impaired under Section 20-138.1 are: '(1) Defendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this State; (3) while under the influence of an impairing substance.' " *State v. Romano*, 268 N.C. App. 440, 453–54, 836 S.E.2d 760, 772 (2019) (quoting *State v. Mark*, 154 N.C. App. 341, 345, 571 S.E.2d 867, 870 (2002)).

¶ 51 Defendant only challenges the sufficiency of the evidence as to the first element, whether he was driving, because "no one saw [him] operating the pick-up truck." Driving means "actual physical control of a vehicle which is in motion or which has the engine running." *Burris*, 253 N.C. App. at 545, 799 S.E.2d at 465 (quoting *Fields*, 77 N.C. App. at 406, 335 S.E.2d at 70).

¶ 52 In *Burris*, this Court found "circumstantial evidence" the defendant drove—namely that the defendant was found sitting in the driver's seat of a car registered to him with the engine off while parked by the front door of a hotel rather than in a parking spot—sufficient alongside the defendant's admission he drove. 253 N.C. App. at 546, 799 S.E.2d at 465. Similarly, in *State v. Clowers*, this Court found evidence the defendant was driving the vehicle on the day in question combined with "circumstantial evidence" that no one else was in the car around the time of the police officers' arrival following an accident sufficient to overrule the defendant's argument the State "merely provide[d] 'a strong suspicion' that he was operating a motor vehicle . . . since no witness identified him as the driver." 217 N.C. App. 520, 526–27, 720 S.E.2d 430, 435 (2011). Both *Burris* and *Clowers* show DWI is no different from any other area of law when it comes to circumstantial evidence sufficing to "withstand a motion to dismiss and support a conviction." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

¶ 53 Here, viewing the evidence in the light most favorable to the State after *de novo* review, the State presented sufficient circumstantial evidence for us to conclude Defendant was driving the vehicle. Hewett testified he came running from behind the house when he heard the crash, arrived within a minute or so, and found Defendant sitting with a bloody nose in the driver's seat of his own truck, the front of which rested in a ditch, with no one else nearby except Hewett's family members who were at the house before the crash. Thus, similar to *Burris*, a truck registered to Defendant was in a spot where vehicles are not normally parked, i.e., in a ditch by the side of the road, unless they have been driven there recently. 253 N.C. App. at 546, 799 S.E.2d at 465. As in *Clowers*, a witness saw Defendant and only Defendant near the vehicle in the immediate aftermath of a crash. 217 N.C. App. at 526, 720 S.E.2d at 435. Defendant also asked Hewett for assistance in removing his truck from the ditch, indicating his continued intent to possess and control his truck and, one could certainly infer, to avoid interaction with law enforcement related to any investigation of the accident.

¶ 54 Further, Defendant had a bloody nose, and a permissible inference from that is that he was in the truck when it crashed and may have hit his nose on the steering wheel of the truck, thereby indicating he was driving. *See Burris*, 253 N.C. App. at 544, 799 S.E.2d at 464 (giving State "benefit of every reasonable inference" when reviewing sufficiency of the evidence). After leaving the scene on foot, Defendant was then found hiding behind a bush near the scene of the crash, with the truck keys in his pocket. Finally, Defendant made a statement while in jail that could be reasonably considered as an admission of guilt in general, not just of driving; he specifically said the last time he was accused of DWI "he wasn't guilty, but this time he probably was; he was going to go to jail for a long time." Taking this evidence in the light most favorable to the State, the State presented substantial evidence Defendant was driving.

¶ 55 While Defendant accurately notes a lack of *direct* evidence Defendant drove his truck, the above circumstantial evidence is substantial. Our precedents show circumstantial evidence alone may suffice if it supports a reasonable inference, *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455, especially while "giving the State the benefit of all reasonable inferences" on appeal. *Privette*, 218 N.C. App. at 471, 721 S.E.2d 299 at 309 (quotation and citation omitted).

¶ 56 As part of this argument, Defendant cites cases where our courts have found substantial evidence in the past that is "substantially more egregious" or "significantly stronger" than the evidence in this case. (Citing *Romano*, 268 N.C. App. 440, 836 S.E.2d 760, and *Burris*, 254 N.C.

App. 525, 799 S.E.2d 452.) This argument misunderstands the nature of the test for sufficiency of the evidence. The test sets a floor the State's evidence must clear; it does not matter by how much the State's evidence clears that floor. *See Franklin*, 327 N.C. at 171, 393 S.E.2d at 787 ("The trial court need only satisfy itself that the evidence is sufficient to take the case to the jury; it need not be concerned with the weight of that evidence."). Thus, it does not matter if Defendant can find other cases that clear the sufficiency of the evidence floor more substantially than the evidence here; it only matters the State's evidence here is sufficient, as we have detailed already.

¶ 57 Defendant also tries to distinguish certain cases, but we are not convinced. First, Defendant tries to distinguish *Burris* on the grounds the evidence there was "significantly stronger than the evidence in the instant case," but as we have laid out above, that argument carries no weight. Defendant also seeks to distinguish *Clowers* because that defendant was "under continuous observation by a witness while operating the red car and after it crashed." The distinction is minor since Hewett reached the scene within a minute or two and there is no evidence that anyone else left Defendant's truck. Deducing from the circumstances that Defendant drove his truck into the ditch is an eminently reasonable inference to which the State is entitled on appeal. *See Privette*, 218 N.C. App. at 471, 721 S.E.2d at 308 ("On appeal, we view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." (quotations and citation omitted)).

¶ 58 After *de novo* review, viewing the evidence in the light most favorable to the State, we conclude the State presented sufficient evidence Defendant was driving the vehicle. Therefore, we hold the trial court did not err in denying Defendant's motion to dismiss for insufficient evidence.

IV. Jury Instruction on Flight

¶ 59 **[3]** Finally, Defendant asserts the trial court "erred by instructing the jury on flight" as "evidence indicating consciousness of guilt" with Pattern Jury Instruction 104.35 over his objection. (Capitalization altered.) Defendant specifically argues "the evidence in this case was insufficient to support the flight instruction because it showed nothing more than his leaving the scene of the accident and walking in the direction of his home" whereas the jury instruction can only be given if "there is some evidence in the record reasonably supporting the theory that the defendant fled after commission of the crime charged." Defendant also argues giving the instruction "was prejudicial . . . because a different verdict might have been reached absent this instruction." We disagree.

A. Standard of Review

¶ 60 "[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Golden*, 224 N.C. App. 136, 148, 735 S.E.2d 425, 433 (2012) (alteration in original) (quoting *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009)). "An instruction about a material matter must be based on sufficient evidence." *Osorio*, 196 N.C. App. at 466, 675 S.E.2d at 149.

B. Analysis

¶ 61 Our courts have long evaluated evidence of a defendant's flight as follows:

> We have held that evidence of a defendant's flight following the commission of a crime may properly be considered by a jury as evidence of guilt or consciousness of guilt. A trial court may properly instruct on flight where there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged. However, mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension.

State v. Lloyd, 354 N.C. 76, 119, 552 S.E.2d 596, 625–26 (2001) (citations, quotations, and alterations omitted).

¶ 62 "The bar for a defendant taking 'steps to avoid apprehension' such that an instruction on flight will be deemed proper is low." *State v. Bradford*, 252 N.C. App. 371, 377, 798 S.E.2d 546, 550 (2017). Such steps might include "an action that was not part of [a d]efendant's normal pattern of behavior." *State v. Shelly*, 181 N.C. App. 196, 209, 638 S.E.2d 516, 526 (2007). "The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Parks*, 264 N.C. App. 112, 118, 824 S.E.2d 881, 886 (2019) (alteration from original removed) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)).

¶ 63 For example, in all the following cases, our courts found no error when the trial court gave a flight instruction. First, this Court recently found no error in a flight instruction where a defendant left the scene, entered a wooded area, and was found by a police dog "curled in a ball behind a large tree." *State v. Miller*, 275 N.C. App. 843, 852–53, 852 S.E.2d 704, 711–12 (2020). Further, in *State v. Harvell*, the trial court did

not err in giving a flight instruction when a defendant fled the scene to a dirt road that an officer said was "not a road that people use for traffic." 236 N.C. App. 404, 412–13, 762 S.E.2d 659, 664–65 (2014). This Court has also held a defendant abandoning his own vehicle was sufficient evidence of flight. *State v. Ethridge*, 168 N.C. App. 359, 363, 607 S.E.2d 325, 328 (2005). Finally, in *State v. Levan*, our Supreme Court rejected the defendant's argument a flight instruction was improper because he "did not merely drive home" but rather told others to conceal or destroy evidence. 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990).

¶ 64 Here, the record before us contains sufficient evidence tending to show Defendant fled and took steps to avoid apprehension. Defendant exited and abandoned his own vehicle, as in *Ethridge*. 168 N.C. App. at 363, 607 S.E.2d at 328. He walked down a road and turned off onto a dirt road, as in *Harvell*. 236 N.C. App. at 412, 762 S.E.2d at 664. Sergeant Bowling testified his police dog found Defendant "hiding" on the ground "behind a bush," much like the defendant in *Miller* was found hiding behind a tree, 275 N.C. App. at 852, 852 S.E.2d at 711–12, and Defendant "made no attempts to warn [the police searching for him] of his presence." Thus, the evidence here is sufficient for a flight instruction.

¶ 65 Defendant contends this evidence is insufficient because the record "showed nothing more than his leaving the scene of the accident and walking in the direction of his home." As an initial matter, Defendant presenting an alternate explanation for his conduct does not require us to conclude the record lacks sufficient evidence to support a flight instruction; such an instruction may be proper even if "there may be other reasonable explanations for [a] defendant's conduct." *Parks*, 264 N.C. App. at 118, 824 S.E.2d at 886. Additionally, Defendant's argument is not convincing. Defendant may have lived nearby, but his location on the ground behind a bush in the woods off a road shows he "did not merely [go] home." *Levan*, 326 N.C. at 165, 388 S.E.2d at 434.

¶ 66 Defendant also argues someone "who was actually fleeing a crime would certainly go more than" the quarter-mile Defendant covered in about an hour. However, flight does not require successfully making it far from the scene before apprehension, as in *Miller* where the defendant was found in the woods "not far from the scene of the crime." 275 N.C. App. at 852, 852 S.E.2d at 711. As Sergeant Bowling said in the trial testimony Defendant cites: "[T]hey don't always keep running. They can stop and hide." In addition, Hewett described Defendant as "wobbly" as he left the scene of the crash; there was no indication he was moving particularly fast. Defendant seeks to distinguish this case from the "egregious nature of the flight" in many precedents, but our precedents do not

grade flight by its egregiousness. To the extent they discuss weight of the evidence at all, they make clear "[t]he bar for a defendant taking 'steps to avoid apprehension' such that an instruction on flight will be deemed proper is low." *Bradford*, 252 N.C. App. at 377, 798 S.E.2d at 550.

¶ 67 After our *de novo* review, we hold Defendant's actions provided sufficient evidence that he took steps to avoid apprehension and thus clear the low bar to justify the trial court's flight instruction. As a result, we need not reach Defendant's allegation of prejudice because the trial court did not err in giving the instruction.

V. Conclusion

¶ 68 Having reviewed all Defendant's arguments, we find no error. We affirm the trial court's denial of Defendant's motion to suppress the eyewitness identification because unchallenged Findings of Fact support its legal conclusions on the due process and EIRA issues. The trial court also did not err when it denied Defendant's motion to dismiss for insufficient evidence because, taking the evidence in the light most favorable to it, the State presented sufficient circumstantial evidence the Defendant was driving. Finally, the trial court did not err in instructing the jury on flight because there was sufficient evidence Defendant took steps to avoid apprehension.

AFFIRMED AND NO ERROR.

Judges TYSON and ZACHARY concur.

BECKY TROUBLEFIELD, PLAINTIFF
v.
AUTOMONEY, INC., DEFENDANT

No. COA21-421

Filed 19 July 2022

1. Appeal and Error—interlocutory order—substantial right—personal jurisdiction—venue

In an action seeking relief from alleged predatory lending practices, the trial court's order denying defendant's motion to dismiss for lack of personal jurisdiction and improper venue was immediately appealable where both issues affected a substantial right. With regard to the denial of defendant's motion to dismiss under Civil Procedure Rule 12(b)(6), given the significance of the issues involved, including whether North Carolina law prohibiting predatory title lending constitutes a fundamental public policy, and in the interest of promoting judicial economy given the number of cases pending against defendant, a writ of certiorari was granted to review defendant's substantive arguments on the claims raised.

2. Jurisdiction—personal—specific—minimum contacts—non-resident loan company—direct solicitation of borrowers in North Carolina

In an action seeking relief from alleged predatory lending practices against defendant, a car title loan company operating in South Carolina, defendant had sufficient minimum contacts with North Carolina and its residents and purposefully availed itself of the privilege of conducting business in this state to be subject to personal jurisdiction. Defendant directly solicited borrowers in North Carolina through phone calls, print and online advertisements, and mail solicitation letters; offered referral bonuses to North Carolina residents to refer new borrowers from North Carolina; received loan payments made from North Carolina; and repossessed vehicles located in this state.

3. Consumer Protection—predatory lending practices—loan agreement—choice of law provision—violation of fundamental public policy

In an action seeking relief from alleged predatory lending practices against defendant, a car title loan company operating in South Carolina, with whom plaintiff entered into a loan agreement, defendant's 12(b)(6) motion to dismiss was properly denied despite its

argument that the agreement's choice of law provision required any claims relating to the agreement to be brought in South Carolina. The protections contained in section 53-190 of the North Carolina Finance Act, under which plaintiff asserted one claim, demonstrates that protection of residents from illicit lending schemes is a fundamental public policy of North Carolina. Therefore, defendant's conduct in directly soliciting and offering high-interest loans to borrowers in North Carolina violated section 53-190 and rendered its choice of law provision void as against public policy.

4. Venue—predatory lending practices—nonresident loan company—forum selection clause—violation of fundamental public policy

In an action brought by plaintiff, a North Carolina borrower, seeking relief from alleged predatory lending practices against defendant, a car title loan company operating in South Carolina, the trial court did not abuse its discretion by denying defendant's motion to dismiss for improper venue and declaring that the loan agreement's forum selection clause requiring suit to be brought in South Carolina was against public policy and was therefore void and unenforceable. Where plaintiff's claims were based on defendant's activities directly soliciting and offering high-interest loans to North Carolina borrowers, enforcement of the forum selection clause would violate this state's fundamental public policy of protecting residents from illicit lending schemes.

Appeal by Defendant from orders entered 19 January 2021 and 1 February 2021 by Judge Stephan R. Futrell in Scotland County Superior Court. Heard in the Court of Appeals 8 February 2021.

Brown, Faucher, Peraldo & Benson, PLLC, by Jeffrey K. Peraldo and James R. Faucher, for Plaintiff-Appellee.

Womble Bond Dickinson (US) LLP, by Michael Montecalvo and Scott D. Anderson; L.W. Cooper Jr., LLC, by Lindsey W. Cooper, Jr, for Defendant-Appellant.

WOOD, Judge.

¶ 1 AutoMoney, Inc. ("Defendant") appeals from an order denying its motion to dismiss under N.C. Gen. Stat. § 1A-1 Rule 12(b)(3) and another order denying its motion to dismiss under N.C. Gen. Stat. § 1A-1 Rule 12(b)(6). On appeal, Defendant contends the trial court erred by 1) not

enforcing the choice-of-law provisions contained within its loan agreements; 2) not enforcing its loan agreements forum selection clause; and 3) determining minimum contacts existed to render personal jurisdiction over it. Defendant petitions this Court by writ of certiorari to review the trial court's denial of its motion to dismiss under Rule 12(b)(6). In our discretion, we grant Defendant's writ of certiorari. After careful review of the record and applicable law, we affirm the orders of the trial court.

I. Factual and Procedural Background

¶ 2 This dispute arises out of a car title loan agreement Defendant made with Becky Troublefield ("Plaintiff"). Defendant is a licensed South Carolina corporation with its principal place of business in Charleston, South Carolina. Defendant makes loans to individuals, which are secured by motor vehicles, commonly known as "car title loans." Defendant is a supervised lender under South Carolina law, and its consumer lending activities are regulated by the South Carolina State Board of Financial Institutions, Consumer Finance Division.

¶ 3 Plaintiff is a resident of Scotland County, North Carolina. In 2017, Plaintiff received an advertisement flier at her home in North Carolina from Defendant advertising its loan services. Upon receipt of the flier, Plaintiff called Defendant from North Carolina to inquire about a loan. Plaintiff spoke with one of Defendant's employees who asked her about the year, make, model, mileage, and condition of her vehicle. During the phone call, Defendant's employee told Plaintiff based upon her description of her vehicle, Defendant could provide her a loan in the amount of at least $1,000.00. When asked by the employee if she wanted the loan, Plaintiff responded in the affirmative. Plaintiff was directed by the employee to drive to one of Defendant's stores in South Carolina with her car, car title, a paycheck stub, and proof of residency.

¶ 4 On March 31, 2020, Plaintiff traveled to Defendant's Bennettsville, South Carolina office. Upon reviewing Plaintiff's loan application and inspecting her vehicle to determine the amount of the loan, Defendant offered Plaintiff a higher amount for a loan than was initially discussed on the phone. At the South Carolina office, Plaintiff finalized and signed a loan agreement, presented her vehicle for an appraisal and inspection, and received a loan for $2,200.00 at an interest rate of 159%.

¶ 5 Plaintiff's loan agreement with Defendant contained both a choice of law and choice of venue provision that read, in relevant part:

> This Loan Agreement, Promissory Note, and Security Agreement (the "Agreements") are entered into

> by and between Creditor/Lender ("Lender") and Borrower/Debtor and Co-Borrower (collectively, the "Borrowers" or "you") in South Carolina as of the above date, subject to the terms and conditions set forth herein and any and all representations Borrowers have made to Lender in connection with these agreements. You acknowledge and agree you voluntarily entered into South Carolina, you entered into the Agreements in South Carolina, the Agreements are to be performed in South Carolina, and the lender is a regulated South Carolina consumer finance company. Therefore, the Agreements shall be interpreted, construed, and governed by and under the laws of South Carolina, without regard to conflict of law principles (whether of South Carolina or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than South Carolina. In the event that any dispute whatsoever arises between Lender and Borrowers in relation to or in any way in connection with the Agreements (a "Dispute"), the Dispute shall be brought exclusively in the courts of competent jurisdiction located in South Carolina, and the Agreements are subject to the exclusive jurisdiction of the state and federal courts located in South Carolina. The parties, knowingly, voluntarily, and irrevocably consent to jurisdiction and venue in South Carolina and waive any arguments as to forum non conveniens.

¶ 6 Plaintiff also signed a separate document entitled in bold and in caps, "ATTENTION NORTH CAROLINA CUSTOMERS ACKNOWLEDGMENT OF SOUTH CAROLINA LAW AND WAIVER OF CLAIMS FORM." This form states:

> The Borrower and/or the Co-Borrower is a resident of North Carolina or the vehicle subject to the Agreements is registered in North Carolina. In the section titled "Applicable Law, Jurisdiction, Venue" on page 1 of the Agreements . . . the Borrowers acknowledge and agree that they voluntarily entered into the State of South Carolina, they entered into the Agreements in the State of South Carolina, the Agreements are to be performed in South Carolina,

> and Lender is a regulated South Carolina consumer finance company. Borrowers separately initialed this section of the Agreements expressly agreeing that, in light of the above, the Agreements shall exclusively be interpreted, construed, and governed by and under the laws of the State of South Carolina. Because only South Carolina law applies to the Agreements, the Borrowers hereby explicitly waive, forfeit and release any and all demands, causes of action, actions, suits, damages, claims, counterclaims, and liabilities whatsoever arising under the laws or statutes of North Carolina or any other state than South Carolina relating to the Agreements.

¶ 7 In order to secure the loan, Defendant utilized a third-party electronic title storage company to place a lien on Plaintiff's vehicle with the North Carolina Department of Motor Vehicles. Thereafter, Plaintiff proceeded to make loan payments to Defendant over the phone. Plaintiff made these calls from North Carolina, and Defendant received the payments at one of its South Carolina office locations.

¶ 8 On May 18, 2020, Plaintiff filed a complaint against Defendant in Scotland County Superior Court alleging three causes of action against Defendant for violations of N.C. Gen. Stat. § 53-165 et seq.—the North Carolina Consumer Finance Act (NCCFA)—, N.C. Gen. Stat. § 75-1.1.—Unfair and Deceptive Trade Practices Act (UDTPA)—, and alternatively, N.C. Gen. Stat. § 24-1.1, et seq.—North Carolina usury laws.

¶ 9 In response, Defendant filed motions to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) and Rule 12(b)(6).[1] Defendant alleged it was not subject to jurisdiction in North Carolina, Plaintiff's claims should be dismissed due to the forum selection clause in the contract, and Plaintiff cannot state claims for which relief can be granted. In support of its Motion to Dismiss, Defendant filed an affidavit by Linda Derbyshire, ("Derbyshire") the owner, executive officer, and manager of Defendant. Derbyshire stated that Defendant is not registered to do

1. The record does not contain a copy of Defendant's motion to dismiss under Rule 12(b)(3). Notwithstanding, the trial court judge at the hearing on January 11, 2021, Defendant "made a motion under Rule 12(b)(3) to dismiss based on improper venue . . . ." Plaintiff, in her brief, conceded Defendant filed a motion to dismiss pursuant to Rule 12(b)(3). Both parties briefed and addressed their respective arguments concerning Defendant's Rule 12(b)(3) motion. Thus, in our discretion we presume Defendant filed a Rule 12(b)(3) motion and address it herein.

business in North Carolina and never has been; does not make title loans in North Carolina; does not maintain offices in North Carolina; does not have a representative agent in North Carolina; and does not have a mailing address or telephone number in North Carolina. According to Derbyshire, Defendant does not advertise through radio, television, or billboards within North Carolina, does not directly market into North Carolina, and those loans can only be entered into and executed at one of Defendant's physical offices in South Carolina. Derbyshire attested that the "only way a loan payment can be made is via one of [Defendant's] South Carolina locations with payments [to] be accepted in person, by mail, or by card over the phone."

¶ 10 Derbyshire stated that Defendant maintains a website which is accessible by anyone, regardless of their residency, but the website prevents customers from submitting loan applications over the internet. Additionally, this website's homepage states: "Title loan transactions are prohibited with the State of North Carolina," and before anyone may enter the website, they must read the terms and conditions which state the same. As part of their motion to dismiss, Defendant also attached Plaintiff's loan agreement showing the choice of law provision and forum selection clause.

¶ 11 Subsequently, Plaintiff filed affidavits in opposition to Defendant's motion. Plaintiff submitted an authenticated page from Defendant's website featuring an advertisement specifically addressing North Carolina residents:

> Are you a North Carolina resident? We've got you covered! You are just a short drive away from getting the cash you need! Do you live in the Charlotte area? What about Fayetteville or Wilmington? How about Hendersonville, Lumberton, Monroe, or Rockingham? There is a [sic] [AutoMoney] Title Loans right across the border with a professional and courteous staff ready to help you get the cash you need. Is it worth the drive? Our thousands of North Carolina customers would certainly say it is.

¶ 12 Moreover, a former assistant manager for Defendant attested that "during certain times of the year [Defendant] . . . would mail loan solicitation flyers into North Carolina" and mailed the materials to current and former borrowers. The affidavit of John Simmons, the owner of Steals & Deals Southeastern LLC [Steals & Deals], an advertisement magazine headquartered and primarily published in North Carolina,

stated that from February 2013 through May 2019, Defendant ran a weekly advertisement within the magazine.[2] Affidavits from customers of Defendant, who were also North Carolina residents, attested to viewing television advertisements for Defendant and contacting Defendant while in North Carolina. A manager of Associates Asset Recovery, LLC, a North Carolina business, stated that between January 1, 2016 to October 7, 2020, the business recovered 442 motor vehicles in North Carolina for Defendant.

¶ 13 On January 14, 2021, the trial court denied Defendant's Rule 12(b)(3) motion and concluded that the forum selection clause was unenforceable. On January 26, 2021, the trial court denied Defendant's Rules 12(b)(2) and 12(b)(6) motions and concluded that the court's exercise of personal jurisdiction over Defendant was constitutionally reasonable. On February 18, 2021, Defendant filed written notice of appeal from the trial court's two orders denying its motions to dismiss. Defendant also petitions this court by writ of certiorari to review the trial court's denial of its Rule 12(b)(6) motion to dismiss.[3]

II. Appellate Jurisdiction

¶ 14 **[1]** As a preliminary matter, we note an order denying a motion to dismiss is an interlocutory order and thus not immediately appealable. *Can Am South, LLC v. State*, 234 N.C. App. 119, 122, 759 S.E.2d 304, 307 (2014) (quoting *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007)); *see Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, 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."). A party may not appeal from "an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974) (citations omitted); *see also* N.C. Gen. Stat. § 1-277 (2021). Therefore, since Defendant's appeal from the trial court's orders denying its motion to

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2. According to Simmons, Steals & Deals "is distributed in the following North Carolina counties: Harnett, Cumberland, Hoke, Robeson, Scotland, Richmond, Anson, Moore and Lee, and also in Chesterfield, Marlboro, Dillon and Darlington Counties in South Carolina.

3. On September 23, 2021, Plaintiff filed a motion with this Court to dismiss Defendant's appeal pertaining to the trial court's denial of its Rule 12(b)(6) motion. Plaintiff also requested an expedited ruling. This motion was referred to this panel.

dismiss is interlocutory, we first determine whether this appeal affects a substantial right.

¶ 15 Regarding Defendant's Rule 12(b)(2) motion, "motions to dismiss for lack of personal jurisdiction affect a substantial right and are immediately appealable." *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 257-58, 625 S.E.2d 894, 898 (2006) (citations omitted); *see* N.C. Gen. Stat. § 1-277(b) ("Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . . ."); *Can Am South, LLC*, 234 N.C. App. at 122, 759 S.E.2d at 307; *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 188 N.C. App. 302, 304, 655 S.E.2d 446, 448 (2008). Thus, Defendant's appeal from the order denying its Rule 12(b)(2) motion is properly before us on appeal.

¶ 16 Likewise, the denial of Defendant's motion to dismiss under Rule 12(b)(3) affects a substantial right and may be immediately appealed. *Capital Bank, N.A. v. Cameron*, 231 N.C. App. 326, 329, 753 S.E.2d 153, 155 (2013) (citing *Cable Tel Servs. v. Overland Contr.*, 154 N.C. App. 639, 641, 574 S.E.2d 31, 33 (2002) ("[C]ase law establishes firmly that an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right that would be lost.")). As such, Defendant's appeal from the trial court's order denying its Rule 12(b)(3) motion is properly before us.

¶ 17 Turning next to Defendant's Rule 12(b)(6) motion, Defendant petitions this Court by a writ of certiorari to review the denial of its motion. We have held "it 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." *Cryan v. Nat'l Council of YMCA of the United States*, 280 N.C. App. 309, 2021-NCCOA-612, ¶ 17 (cleaned up) (quoting *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 606, 596 S.E.2d 285, 289 (2004)). Particularly, we have issued a writ of certiorari when the issue in question is significant, important, and will promote judicial economy. *Id.* at ¶ 18. The issue raised by Defendant's motion to dismiss under Rule 12(b)(6) in the present case is significant as it raises the critical question of whether our State's legislation prohibiting predatory title lending constitutes a fundamental public policy. Likewise, granting Defendant's petition for writ of certiorari will promote judicial economy as this appeal represents one of thirty-two proceedings against Defendant in North Carolina courts, seven of which are currently before this Court. Therefore, in our discretion, we grant Defendant's petition for writ of certiorari to review its motion to dismiss under Rule 12(b)(6).

III. Discussion

¶ 18 Defendant raises several issues on appeal. Each will be addressed in turn.

A. Personal Jurisdiction

¶ 19 **[2]** Defendant first contends the trial court erred by denying its Rule 12(b)(2) motion to dismiss. We disagree.

¶ 20 This Court utilizes a two-step analysis to determine whether personal jurisdiction exists over a non-resident defendant: "First, the transaction must fall within the language of the State's long-arm statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution." *Banc of Am. Sec. LLC*, 169 N.C. App. at 693, 611 S.E.2d at 182 (cleaned up) (citing *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986)); *see Lab. Corp. of Am. Holdings v. Caccuro*, 212 N.C. App. 564, 566, 712 S.E.2d 696, 699 (2011). *But see Tom Togs, Inc.*, 318 N.C. at, 365, 348 S.E.2d at 785 ("We have also held in considering N.C.G.S. § 1-75.4 that the requirements of due process, not the words of the long-arm statute, are the ultimate test of jurisdiction over a non-resident defendant."). Because Defendant does not challenge on appeal the applicability of our long-arm statute, we confine our analysis to whether the trial court's conclusion that it had personal jurisdiction over Defendant violated the requirements of due process.

¶ 21 The Due Process Clause of the Fourteenth Amendment to the United States Constitution "prevents states from rendering valid judgments against nonresidents." *In re F.S.T.Y.*, 374 N.C. 532, 534, 843 S.E.2d 160, 162 (2020) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S. Ct. 559, 564, 62 L. Ed. 2d 490, 497 (1980)). A defendant must "be given adequate notice of the suit . . . and be subject to the personal jurisdiction of the court[] . . . ." *World-Wide Volkswagen Corp.*, 444 U.S. at 291, 100 S. Ct. 564, 62 L. Ed. 2d at 497; *accord In re F.S.T.Y.*, 374 N.C. at 534, 843 S.E.2d at 162.

¶ 22 Under the Due Process Clause, *minimum contacts* must exist between the forum state and nonresident such that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 786 (cleaned up and emphasis added) (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945)). In other words, "there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus

invoking the benefits and protections of its laws." *Id.*; *see also World-Wide Volkswagen Corp.*, 444 U.S. at 297, 100 S. Ct. at 567, 62 L. Ed. 2d at 501 ("[I]t is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."); *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 632, 394 S.E.2d 651, 655 (1990). However, "our minimum contacts analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden v. Fiore*, 571 U.S. 277, 285, 134 S. Ct. 1115, 1122, 188 L. Ed. 2d 12, 20 (2014) (internal quotation marks omitted).

¶ 23 There are two types of personal jurisdiction recognized by our Supreme Court sufficient for establishing minimum contacts: general and specific jurisdiction. *Beem USA Limited-Liability Ltd. P'ship v. Grax Consulting, LLC*, 373 N.C. 297, 303, 838 S.E.2d 158, 162 (2020). "General jurisdiction is applicable in cases where the defendant's affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State." *Id.* (internal quotations marks omitted) (quotation omitted); *see also Lab. Corp. of Am. Holdings*, 212 N.C. App. at 569, 712 S.E.2d at 701 ("General jurisdiction may be asserted over a defendant even if the cause of action is unrelated to defendant's activities in the forum as long as there are sufficient continuous and systematic contacts between defendant and the forum state." (internal quotation marks omitted)). Specific jurisdiction exists when "the controversy arises out of the defendant's contacts with the forum state . . . ." *Tom Togs, Inc.*, 318 N.C. at 366, 348 S.E.2d at 786; *Beem USA Limited-Liability Ltd. P'ship*, 373 N.C. at 303-04, 838 S.E.2d at 162.

¶ 24 In the case *sub judice*, Plaintiff asserts Defendant is subject to a suit in North Carolina under specific jurisdiction. As such, our analysis is limited to whether this State has specific jurisdiction over Defendant. A specific jurisdiction inquiry analyzes "the relationship among the defendant, the forum state, and the cause of action . . . ." *Tom Togs, Inc.*, 318 N.C. at 366, 348 S.E.2d at 786; *see Banc of Am. Sec. LLC*, 169 N.C. App. at 696, 611 S.E.2d at 184. "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden*, 571 U.S. at 284, 134 S. Ct. at 1121, 188 L. Ed. 2d at 20. This Court has established several factors to consider when evaluating whether minimum contacts exist: "(1) the quantity of the contacts; (2) the nature and quality of the contacts; (3) the source and connection of the cause of action with those contacts; (4) the interest of the forum state; and (5) the convenience to the parties." *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 260, 625

S.E.2d 894, 899 (2006) (citation omitted); *see Sherlock v. Sherlock*, 143 N.C. App. 300, 304, 545 S.E.2d 757, 761 (2001); *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 617, 532 S.E.2d 215, 219; *Cherry Bekaert & Holland*, 99 N.C. App. at 632, 394 S.E.2d at 655.

¶ 25 The evidence presented in this present case shows Defendant's conduct created a substantial connection to North Carolina. Defendant contacted Plaintiff by sending her a publication to her North Carolina residence, soliciting her business; discussing the terms of the loan with her over the phone; offering her a loan amount over the phone; and accepting payments from Plaintiff while she was in North Carolina. In addition to its contact with this State through Plaintiff, Defendant contacted this State through the following methods: 1) online advertisements directed towards North Carolina residents; 2) advertisements in Steals & Deals, a local North Carolina publication which primarily advertises therein; 3) telephone calls between Defendant and North Carolina residents; 4) repossession of vehicles located within North Carolina; 5) discussion of terms of the loan over the phone; 6) written solicitation letters; 7) offers of referral bonuses to North Carolina residents for referring new North Carolina customers; and 8) receipt of loan payments made from North Carolina.

¶ 26 Regarding Defendant's online advertisements, this court in *Havey v. Valentine* outlined the following tests to determine whether an internet website warrants the exercise of personal jurisdiction:

> [A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts.

Havey v. Valentine,172 N.C. App. 812, 816-17, 616 S.E.2d 642, 647 (2005). Notably, at least one of Defendant's internet advertisements directly targeted North Carolina:

> Are you a North Carolina resident? We've got you covered! You are just a short drive away from getting the cash you need! Do you live in the Charlotte area? What about Fayetteville or Wilmington? How about Hendersonville, Lumberton, Monroe, or Rockingham? There is a [sic] [AutoMoney] Title Loans right across the border with a professional and courteous staff

> ready to help you get the cash you need. Is it worth the drive? Our thousands of North Carolina customers would certainly say it is.

This advertisement is clearly a "manifested intent" to engage in business within North Carolina by recruiting our residents and providing them with information on how to acquire loans. Defendant's high interest car title loans would be void as a matter of public policy if offered by a company within North Carolina. Because Defendant attempts to circumvent North Carolina's predatory lending laws by operating from South Carolina while directly marketing to North Carolina residents, Defendant's internet advertisements satisfy the test for personal jurisdiction over internet communications as stated in *Havey*.

¶ 27 Moreover, Defendant ran an advertisement in a North Carolina publication for six consecutive years. Although running an advertisement in a national publication is not sufficient, standing alone, to establish personal jurisdiction, this Court has yet to address whether advertisements in a local publication can give rise to personal jurisdiction. *See Stallings v. Hahn*, 99 N.C. App. 213, 216, 392 S.E.2d 632, 634 (1990); *Marion v. Long*, 72 N.C. App. 585, 587, 325 S.E.2d 300, 303 (1985). Certainly, placing an advertisement in a publication which primarily circulates in a single state is sufficient for a defendant to reasonably anticipate being haled into that state's court. *See World-Wide Volkswagen Corp.*, 444 U.S. at 297, 100 S. Ct. at 567, 62 L. Ed. 2d at 501.

¶ 28 Because Defendant had direct contact with North Carolina through its business operations, internet advertisements, and local publication advertisements, Defendant purposefully "avail[ed] [it]self of the privilege of conducting activities within" North Carolina. *Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 786 (citation omitted). In other words, the sum and quality of Defendant's contacts with this State, paired with Defendant's obvious intent to recruit North Carolina clients, is sufficient to establish personal jurisdiction. Accordingly, we hold the trial court did not err by denying Defendant's Rule 12(b)(2) motion to dismiss.

B. Rule 12(b)(6) Motion

¶ 29 **[3]** Defendant next asserts the trial court erred by denying its motion to dismiss under Rule 12(b)(6). After a careful review of the record and applicable law, we conclude the trial court committed no error.

¶ 30 We review a trial court's ruling on a motion to dismiss under Rule 12(b)(6) *de novo*. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003), *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673

(2003); *see Grich v. Mantelco, LLC*, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013). A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency of the complaint." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citing *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970)). When "ruling on . . . [a Rule 12(b)(6)] motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback*, 297 N.C. at 185, 254 S.E.2d at 615 (citing *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976)); *see Sutton*, 277 N.C. at 103, 176 S.E.2d at 166 ("[A] complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim."); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, 84 (1957).

¶ 31 Here, Defendant argues the trial court should have granted its Rule 12(b)(6) motion because of the South Carolina choice of law provisions within its loan agreement and acknowledgement and waiver form mandating the application of South Carolina law and, thus, precluding Plaintiff's claims arising from North Carolina law. As a general rule, a "court interprets a contract according to the intent of the parties to the contract." *Cable Tel Servs. v. Overland Contr.*, 154 N.C. App. 639, 642, 574 S.E.2d 31, 33 (2002) (citing *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631, 518 S.E.2d 205, 209 (1999)); *Duke Power Co. v. Blue Ridge Electric Membership Corp.*, 253 N.C. 596, 602, 117 S.E.2d 812, 816 (1961). However, the intent of the parties must not "require the performance of an act prohibited by law." *Duke Power Co.*, 253 N.C. at 602, 117 S.E.2d at 816. When "parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect." *Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980); *see Bueltel*, 134 N.C. App. at 631, 518 S.E.2d at 209 ("[I]t is apparent that when a choice of law provision is included in a contract, the parties intend to make an exception to the presumptive rule that the contract is governed by the law of the place where it was made."). A choice of law provision is binding "on the interpreting court as long as they had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental public policy of the state or otherwise applicable law." *Torres v. McClain*, 140 N.C. App. 238, 241, 535 S.E.2d 623, 625 (2000) (quoting *Behr v. Behr*, 46 N.C. App. 694, 696, 266 S.E.2d 393, 395 (1980)); *see also Glover v. Rowan Mut. Fire Ins. Co.*, 228 N.C. 195, 198, 45 S.E.2d 45, 47 (1947) ("[I]t is a general rule of law that agreements against public policy are illegal and void."). A choice of law provision, or any such agreement,

is against public policy when it "tend[s] to the violation of a statute." *Glover*, 228 N.C. at 198, 45 S.E.2d at 47 (citation omitted).

¶ 32 Plaintiff asserts that regardless of the choice of law provisions, Defendant is subject to North Carolina law under N.C. Gen. Stat. § 53-190. As such, we must determine whether N.C. Gen. Stat. § 53-190 constitutes a "fundamental public policy" or "otherwise applicable law" as to invalidate Defendant's choice of law provision and acknowledgement and waiver form. *See Torres*, 140 N.C. App. at 241, 535 S.E.2d at 625.

1. N.C. Gen. Stat. § 53-190 is a Fundamental Public Policy

¶ 33 N.C. Gen. Stat. § 53-190 states:

> (a) No loan contract made outside this State in the amount of or the value of fifteen thousand dollars ($15,000) or less, for which greater consideration or charges than are authorized by . . . [N.C. Gen. Stat. §§] 53-173 and . . . 53-176 of this Article have been charged, contracted for, or received, shall be enforced in this State. Provided, the foregoing shall not apply to loan contracts in which all contractual activities, including solicitation, discussion, negotiation, offer, acceptance, signing of documents, and delivery and receipt of funds, occur entirely outside North Carolina.
>
> (b) If any lender or agent of a lender who makes loan contracts outside this State in the amount or of the value of fifteen thousand dollars ($15,000) or less, comes into this State to solicit or otherwise conduct activities in regard to such loan contracts, then such lender shall be subject to the requirements of this Article.
>
> (c) No lender licensed to do business under this Article may collect, or cause to be collected, any loan made by a lender in another state to a borrower, who was a legal resident of North Carolina at the time the loan was made. The purchase of a loan account shall not alter this prohibition.

N.C. Gen. Stat. § 53-190 (2021). In other words, N.C. Gen. Stat. § 53-190 aims to protect North Carolina residents from predatory lending by nonresident, predatory loan corporations that infiltrate North Carolina through the contractual activities listed above.

¶ 34 In making our determination whether § 53-190 constitutes a fundamental public policy of this State, we are guided by our case law concerning predatory lending. In *State ex rel. Cooper v. NCCS Loans*, Inc., defendant offered immediate cash advances under the guise of an internet store wherein the customer was required to sign a year-long contract for "internet access." 174 N.C. App. 630, 635-36, 624 S.E.2d 371, 375 (2005). The customers were charged "100 times more" for internet access compared to legitimate internet providers and a high interest rate on the cash advanced. *Id.* at 637-38, 624 S.E.2d at 376-77. The trial court granted summary judgment against defendants for usury laws, violation of the North Carolina Consumer Finance act, and unfair and deceptive trade practices. *Id.* at 633, 624 S.E.2d at 373-74. On appeal, defendant challenged, among other things, the trial court's entry of summary judgment on plaintiff's claim of unfair and deceptive trade practices. *Id.*, 174 N.C. App. at 640, 624 S.E.2d at 378. We agreed with the trial court, stating "it is a 'paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws.' " *Id.* at 641, 624 S.E.2d at 378; *see* N.C. Gen. Stat. § 24-2.1(g) (2021); *Odell v. Legal Bucks, LLC*, 192 N.C. App. 298, 319, 665 S.E.2d 767, 780 (2008).

¶ 35 Moreover, a review of North Carolina's General Assembly's legislative action regarding predatory lending within our State further guides our decision. On December 20, 2006, our Supreme Court in *Skinner v. Preferred Credit*, addressed whether North Carolina had personal jurisdiction over the 1997-1 Trust, a nonresident defendant who held high interest loans. 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006). In a 4 to 3 decision, Justice Newby writing for the majority concluded "North Carolina courts lack personal jurisdiction over a nonresident trust that has no connections to this state other than holding mortgage loans secured by deeds of trust on North Carolina property." *Id.* at 127, 638 S.E.2d at 213. Justice Timmons-Goodson strongly dissented, writing the "Court's decision today aids in the exploitation of our state's most vulnerable citizens[,]" and "the majority's decision effectively undermines the right of unwitting victims of predatory lending practices . . . ." *Id.* (Timmons-Goodson, J., dissenting).

¶ 36 Less than four months after the decision in *Skinner*, our General Assembly enacted House Bill 1374, thus overturning the *Skinner* case. The bill was entitled "An Act to Overturn the Shepard Case and Amend the Limitation Regarding Actions to Recover for Usury; *To Overturn The Skinner Case* And Amend The Long-Arm Statute To Allow North Carolina Courts to Exercise Personal Jurisdiction Over Certain Nonresident

Defendants; To Require That a Notice of Foreclosure Contain Certain Information; And to Provide for Mortgage Debt Collection and Servicing." 2007 N.C. Session Laws, House Bill 1374 (emphasis added). In addition to House Bill 1374, our General Assembly proceeded to pass four other bills addressing consumer mortgage lending in the summer of 2007. Susan E. Hauser, *Predatory Lending, Passive Judicial Activism, and the Duty to Decide*, 86 N.C.L. Rev. 1501, 1555 (2008).

¶ 37 Based upon our General Assembly's legislation prohibiting predatory lending, its swift response to *Skinner*, and our case law governing predatory lending practices within the State of North Carolina, the issue of predatory lending is clearly a question of fundamental public policy for this State. Thus, since N.C. Gen. Stat. § 53-190 protects North Carolina citizens from predatory lending and our conclusion it constitutes a fundamental public policy of this State, we next determine whether Defendant violated this statute.

¶ 38 In pertinent part, N.C. Gen. Stat. § 53-190 prohibits predatory loans made elsewhere unless "all contractual activities, including solicitation, discussion, negotiation, offer, acceptance, signing of documents, and delivery and receipt of funds, occur entirely outside North Carolina." N.C. Gen. Stat. § 53-190(a). "Negotiation" is defined as "deliberation, discussion, or conference upon the terms of a proposed agreement, or as the act of settling or arranging the terms of a bargain or sale." *Cooper v. Henderson*, 55 N.C. App. 234, 235, 284 S.E.2d 756, 757 (1981). "Discussion" is defined as "[t]he act of exchanging views on something; a debate." *Discussion*, Black's Law Dictionary (10th ed. 2014).

¶ 39 Here, Defendant negotiated and discussed the terms of the loan agreement with North Carolina residents while they were in North Carolina. Plaintiff recounted the following in her deposition:

> In or about 2017, I got a car title loan from AutoMoney in Bennettsville, South Carolina. AutoMoney had mailed me a flier offering me a loan at my home in North Carolina. . . . After I received the flier, I called AutoMoney from my home in North Carolina. . . . The AutoMoney employee asked me if I had a car with clear title . . . [and the] year, make, model, mileage and condition of my car. . . . The AutoMoney employee told me that based on my car AutoMoney could make me a loan in the amount of at least $1000.00. They asked me if I wanted to get a loan. I told them I did want the loan and they told me to drive to the

> AutoMoney store in South Carolina. They told me to bring the car and the title to my car, a paycheck stub and proof of residency.

Per Plaintiff's affidavit, Defendant discussed details of the loan amount and the security interest for the loan with her over the phone. Furthermore, Derbyshire, in her deposition, stated Defendant would provide information about its business to potential borrowers who contacted Defendant. Because Defendant's business was providing high interest loans, these details would naturally be included in "information about its business."

¶ 40 We pause to note Defendant contends the trial court's February 1, 2020 order lacked findings of fact or analysis to support its ultimate dismissal of Defendant's Rule 12(b)(6) motion.[4] We are unpersuaded by this argument. Within the February 1, 2020 order, the trial court made specific findings of fact regarding Plaintiff's experience with Defendant as stated above. The trial court made further findings of fact that Defendant called other North Carolina residents to discuss a loan, the details of the loan, offer a loan, and receive acceptances of a loan. As such, we conclude the trial court's order contained sufficient findings of fact.

¶ 41 By discussing its business and the terms of contracts by phone with North Carolina residents, Defendant discussed and negotiated loans within North Carolina as defined by N.C. Gen. Stat. § 53-190. Therefore, we conclude Defendant violated N.C. Gen. Stat. § 53-190, and in turn, violated a fundamental public policy of North Carolina. As such, we hold the choice of law provisions within Defendant's loan agreement and its acknowledgement and waiver form is void as a matter of public policy and the trial court properly denied Defendant's Rule 12(b)(6) motion.

C. Venue

¶ 42 **[4]** Defendant next contends the trial court erred by denying its motion to dismiss under Rule 12(b)(3), and thus failing to enforce its South Carolina forum selection clause. We disagree.

¶ 43 In the case *sub judice*, the trial court concluded, *inter alia*, "the forum selection clause is against public policy and is void and unenforceable." This Court reviews a trial court's decision concerning forum selection clauses under the abuse of discretion standard of review. *Mark Group Int'l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161

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4. A trial court is not required to make findings of fact or conclusions of law unless otherwise specifically requested by a party or as required under N.C. Gen. Stat. § 1A-1, R. 41(b). N.C. Gen. Stat. § 1A-1, R. 52. Defendant specifically requested such findings of fact at the end of the January 11, 2020 hearing.

(2002); *see Appliance Sales & Serv. v. Command Elecs. Corp.*, 115 N.C. App. 14, 21, 443 S.E.2d 784, 789 (1994). *But cf. US Chem. Storage, LLC v. Berto Constr., Inc.*, 253 N.C. App. 378, 382, 800 S.E.2d 716, 720 (2017) ("A trial court's interpretation of a forum selection clause is an issue of law that is reviewed *de novo*."). "The test for abuse of discretion requires the reviewing court 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.' " *State v. Locklear*, 331 N.C. 239, 248, 415 S.E.2d 726, 732 (1992) (quoting *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986)).

¶ 44 Defendant's loan agreement contained a forum selection clause, designating South Carolina as the venue in which Plaintiff may bring suit. A forum selection clause "allow[s] a court to refuse to exercise that jurisdiction in recognition of the parties' choice of a different forum." *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 143, 423 S.E.2d 780, 782 (1992). Under N.C. Gen. Stat. § 22B-3,

> any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable. This prohibition shall not apply to non-consumer loan transactions or to any action or arbitration of a dispute that is commenced in another state pursuant to a forum selection provision with the consent of all parties to the contract at the time that the dispute arises.

N.C. Gen. Stat. § 22B-3 (2021). Moreover, "a forum selection clause should be invalid if enforcement would 'contravene a strong public policy of the forum in which suit is brought.' " *Perkins* at 144, 423 S.E.2d at 783 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S. Ct. 1907, 1916, 32 L. Ed. 2d 513, 523 (1972)).

¶ 45 The threshold question becomes whether Defendant's forum selection clause contravenes a strong public policy, thus rendering it invalid. Here, the trial court found "[t]he car title loan giving rise to this civil action was by law made and entered into pursuant to N.C. Gen. Stat. § 24-2.1[,]" and, therefore, under N.C. Gen. Stat. § 22B-3 is void as a matter of public policy.

¶ 46 As discussed above, protecting North Carolina residents from predatory lending is a strong public policy of this State. The enforcement

of Defendant's forum selection clause would contravene our State's interest in offering such protection by allowing corporations to circumvent our laws through merely establishing themselves in a different state. Moreover, because we are affirming the trial court's denial of Defendant's motion to dismiss under Rule 12(b)(2) and Rule 12(b)(6), to uphold its forum selection clause would functionally undermine our ruling. Therefore, we conclude Defendant's loan agreement forum selection clause is void as a matter of public policy.

¶ 47 Even if the forum selection clause is valid notwithstanding the reasons stated *supra*, it is nonetheless invalid under N.C. Gen. Stat. §§ 24-2.1 and 22B-3. Turning first to N.C. Gen. Stat. § 24-2.1, it provides,

> (a) For purposes of this Chapter, any extension of credit shall be deemed to have been made in this State, and therefore subject to the provisions of this Chapter *if the lender offers or agrees in this State to lend to a borrower who is a resident of this State*, *or if such borrower accepts or makes the offer in this State to borrow*, regardless of the situs of the contract as specified therein.
>
> (b) *Any solicitation or communication to lend*, oral or written, originating outside of this State, but forwarded to and received in this State by a borrower who is a resident of this State, shall be deemed to be an offer or agreement to lend in this State.
>
> . . .
>
> (g) It is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws. Any provision of this section which acts to interfere in the attainment of that public policy shall be of no effect.

N.C. Gen. Stat. § 24-2.1(a)-(b) (2021) (emphasis added); *see NCCS Loans, Inc.*, 174 N.C. App. at 641, 624 S.E.2d at 378. "Deem," as used above, is defined as "[t]o treat [something] as if . . . it were really something else[] . . . ." *Deem*, Black's Law Dictionary, (10th Ed. 2014).

¶ 48 Defendant's actions are subject to the provisions of N.C. Gen. Stat. § 24-2.1. First, Plaintiff is a citizen and resident of Scotland County, North Carolina. Second, Plaintiff received an advertisement letter from Defendant to her North Carolina address. This advertisement letter, in effect, solicited her to engage in a loan with Defendant. As a result of

Defendant's solicitation, Plaintiff called Defendant and discussed the terms of a loan. While on the phone, Defendant asked Plaintiff if she wanted to acquire a loan, to which she answered in the affirmative. Although Plaintiff entered into the loan with Defendant in South Carolina, Defendant "offer[ed] or agree[d] in this State to lend to . . . Plaintiff who is a resident of this State" and "solicitit[ed] or communicat[ed] to lend" while Plaintiff was in North Carolina. As a result of these actions with Plaintiff, Defendant is subject to N.C. Gen. Stat. § 24-2.1(a)-(b).

¶ 49 Accordingly, we review Defendant's loan agreement as though it was made in North Carolina. Because N.C. Gen. Stat. § 22B-3 provides that forum selection clauses in contracts such as the one prepared by Defendant are "against public policy and . . . void and unenforceable[,]" Defendant's loan agreement forum selection clause is void as a matter of public policy under N.C. Gen. Stat. §§ 24-2.1 and 22B-3. *Szymczyk v. Signs Now Corp.*, 168 N.C. App. 182, 185, 606 S.E.2d 728, 731 (2005) (citation omitted).

IV. Conclusion

¶ 50 Based on the reasons stated above, Defendant is subject to personal jurisdiction in North Carolina, and as such, the trial court did not err by denying Defendant's motion to dismiss under Rule 12(b)(2). Furthermore, Defendant's actions violated N.C. Gen. Stat. § 53-190. Therefore, the trial court did not err by denying Defendant's motion to dismiss under Rule 12(b)(6). Additionally, the trial court did not err by denying Defendant's motion to dismiss under Rule 12(b)(3). Thus, the orders of the trial court are affirmed. It is so ordered.

AFFIRMED.

Judges HAMPSON and GORE concur.

WALL v. AUTOMONEY, INC.

[284 N.C. App. 514, 2022-NCCOA-498]

DORIS WALL, PATRICIA SMITH, COREY DAVIS, MARIO ROBINSON, TIMOTHY SMITH, GLORIA GILLIAM, MICHAEL WADDELL, TERIA BOUKNIGHT, JUNE BARBOUR, EMMANUEL SMITH, DONQUIS JONES, DIANNE KIRKPATRICK, ASBURY FORTE, III, ARETHA HAYES AND POONAM PATEL, PLAINTIFFS
v.
AUTOMONEY, INC., DEFENDANT

No. COA21-419

Filed 19 July 2022

1. Appeal and Error—interlocutory orders—substantial right—jurisdiction—venue—forum selection clause

In an action seeking relief from alleged predatory lending practices, the trial court's order denying defendant's motion to dismiss for lack of personal jurisdiction and improper venue was immediately appealable where both issues affected a substantial right. With regard to the denial of defendant's motion to dismiss under Civil Procedure Rule 12(b)(6), in which defendant argued that the loan agreement's forum selection clause prohibited claims relating to the agreement being brought under North Carolina law, where the issue was closely related to the issue of venue, a writ of certiorari was granted to review all of the preliminary issues together.

2. Jurisdiction—personal—specific—purposeful availment—nonresident loan company—direct solicitation of borrowers in North Carolina

In an action seeking relief from alleged predatory lending practices against defendant, a car title loan company operating in South Carolina, defendant was subject to personal jurisdiction in North Carolina where it purposefully availed itself of the privilege of doing business there by deliberately and systematically targeting North Carolinians to enter into loan agreements. Defendant held itself out as having made "thousands" of loans to North Carolina residents; directly solicited borrowers in North Carolina through phone calls, advertisements, and mail solicitation letters; instructed North Carolina residents to drive to its offices in South Carolina; paid borrowers to refer new borrowers from North Carolina; perfected its security interests using the N.C. Department of Motor Vehicles; and utilized recovery services to take possession of collateral vehicles in this state.

3. Consumer Protection—predatory lending practices—loan agreement—choice of law provision—violation of fundamental public policy

In an action seeking relief from alleged predatory lending practices against defendant, a car title loan company operating in South Carolina, with whom plaintiffs entered into loan agreements, defendant's 12(b)(6) motion to dismiss was properly denied despite its argument that the agreements' choice of law provisions required any claims relating to the agreement to be brought in South Carolina. Where plaintiffs adequately alleged extra-contractual statutory claims under the North Carolina Finance Act, the Unfair and Deceptive Trade Practices Act, and the usury statute—based on defendant's activities directly soliciting and offering high-interest loans to North Carolina borrowers and enforcing those loans in North Carolina—defendant's attempt to avoid the application of North Carolina law would violate this state's fundamental public policy of protecting residents from illicit lending schemes.

4. Venue—predatory lending practices—nonresident loan company—forum selection clause—violation of fundamental public policy

In an action seeking relief from alleged predatory lending practices against defendant, a car title loan company operating in South Carolina, the trial court did not abuse its discretion by denying defendant's motion to dismiss for improper venue despite defendant's argument that its loan agreement's forum selection clause prohibited plaintiffs (North Carolina borrowers) from bringing any claims related to their loan agreements under North Carolina law. Where plaintiffs brought claims for violations of the North Carolina Finance Act, unfair and deceptive trade practices, and usury—based on defendant's activities directly soliciting and offering high-interest loans to North Carolina borrowers and enforcing those loans in North Carolina—enforcement of the forum selection clause would violate this state's fundamental public policy of protecting residents from illicit lending schemes.

Appeal by Defendant from Order entered 15 January 2021 by Judge Dawn M. Layton in Richmond County Superior Court. Heard in the Court of Appeals 8 February 2022.

Brown, Faucher, Peraldo & Benson, PLLC, by James R. Faucher and Jeffrey K. Peraldo, for plaintiffs-appellees.

Womble Bond Dickinson (US) LLP, by Michael Montecalvo and Scott D. Anderson, and Law Offices of L. W. Cooper Jr., LLC, by Lindsey W. Cooper Jr., for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Automoney, Inc. (Defendant) appeals from an Order entered 15 January 2021 denying Defendant's Motion to Dismiss under N.C. R. Civ. P. 12(b)(2), (b)(3) and (b)(6). The Record before us—including the factual allegations contained in Plaintiffs' Complaint—tends to reflect the following:

¶ 2 Defendant is a South Carolina corporation who makes consumer car title loans to residents of North Carolina. Plaintiffs are residents of North Carolina who entered into loan agreements with Defendant in amounts ranging from $621.00 to $3,520.00. Defendant based the amount of the loan on the value of an individual Plaintiff's car and placed a lien on the vehicle to secure the loan. Defendant registered these liens with the North Carolina Department of Motor Vehicles. Plaintiffs' loan agreements included an annual percentage rate (APR) set by Defendant that ranged from 129% to 229%. All the loan agreements also included a choice-of-law provision that read, in relevant part:

> As Lender is a regulated South Carolina consumer finance company and you, as Borrower, have entered into this Agreement in South Carolina, this Agreement shall be interpreted, construed, and governed by and under the laws of the State of South Carolina, without regard to conflicts of law rules and principles . . . that would cause the application of the laws of any jurisdiction other than the State of South Carolina.[1]

In 2018, this choice-of-law provision was updated to include a choice-of-venue provision that stated, in relevant part:

> In the event that any dispute whatsoever arises between the Parties . . . the Dispute shall be brought exclusively in the courts of competent jurisdiction

1. This language is from the earliest version of the choice-of-law provision. In 2019, Defendant required customers to sign a completely separate document titled "Attention North Carolina Customers Acknowledgement of South Carolina Law and Waiver of Claims Form" that contained a similar choice-of-law provision.

> located in the State of South Carolina, and the exclusive jurisdiction of the state and federal courts located therein. . . .

Ten out of the fifteen Plaintiffs' agreements included this choice-of-venue provision.

¶ 3 On 4 June 2020, Plaintiffs filed a Complaint in Richmond County Superior Court alleging three causes of action against Defendant for violations of N.C. Gen. Stat. § 53-165 et seq.—the North Carolina Consumer Finance Act (NCCFA)—, N.C. Gen. Stat. § 75-1.1—Unfair and Deceptive Trade Practices Act (UDTPA)—, and alternatively, N.C. Gen. Stat. § 24-1.1, et seq.—Usury. Specifically, Plaintiffs alleged Defendant violated the NCCFA by charging each Plaintiff annual interest rates that far exceed the maximum annual rate of interest allowed by the statute; alternatively, violated the usury laws by soliciting Plaintiffs for the loans, discussing and negotiating the loans, offering to make Plaintiffs loans, and receiving each Plaintiffs' acceptance to the loans while Plaintiffs were in the State of North Carolina; and violated the UDTPA by knowingly extending usurious loans to North Carolina residents. Plaintiffs sought a declaratory judgment declaring the loans and security interests thereon to be void and unenforceable and to recover statutory damages in an amount not in excess of $75,000.00 each.

¶ 4 Moreover, in their Complaint, Plaintiffs alleged:

> 3. This Court has jurisdiction over Defendant pursuant to N.C.G.S. § 1-75.4 in that at all times relevant to the events and transactions alleged herein, Defendant, via the internet, cellular telephone and other media and communication methods solicited, marketed, advertised, offered, accepted, discussed, negotiated, facilitated, collected on, threatened enforcement of, and foreclosed upon automobile title loans with Plaintiffs and other North Carolina citizens . . . Plaintiffs further allege that, for a considerable amount of time prior to the events and transactions with Plaintiffs as alleged herein, Defendant had regular, ongoing, continuous and systematic contacts with the State of North Carolina and its citizens . . . such that this Court has personal jurisdiction over Defendant.
>
> 7. Defendant has knowingly and intentionally constructed and engineered it[s] internet advertising to

> ensure that Defendant's South Carolina office locations appear as internet search results when a North Carolina consumer conducts an internet search for a "car title loan" or similar terms.
>
> 8. Defendant has purposefully established its business locations just across the North Carolina-South Carolina state line to avoid the application of North Carolina law to loan contracts Defendant enters into with North Carolina residents, such as Plaintiffs.

¶ 5 On 22 July 2020, Defendant filed a Motion to Dismiss alleging: (1) Defendant was not subject to personal jurisdiction in North Carolina and the action should be dismissed pursuant to N.C.R. Civ. P. 12 (b)(2); (2) venue was improper in Richmond County under N.C.R. Civ. P. 12(b)(3) and the matter was required to be brought in South Carolina based on the forum selection clause contained in ten out of the fifteen named Plaintiffs' loan agreements; and, (3) the Complaint failed to state a claim on which relief under North Carolina law could be granted under N.C.R. Civ. P. 12(b)(6) based on the choice-of-law clauses in the Plaintiffs' loan agreements. In support of its Motion to Dismiss, Defendant also filed the Affidavit of Linda Derbyshire, (Derbyshire) the owner, executive officer, and manager of Defendant. Derbyshire denied Plaintiffs' allegations that Defendant solicited, marketed, advertised, offered, accepted, discussed, negotiated, facilitated, or otherwise made any title loans in North Carolina. Defendant also attached Plaintiffs' loan agreements showing the choice-of-law provisions and forum selection clauses.

¶ 6 Plaintiffs subsequently filed Affidavits in opposition to Defendant's Motion to Dismiss. In these affidavits, Plaintiffs rebuffed Derbyshire's claim that Defendant had no contacts with North Carolina. For example, Plaintiffs submitted, *inter alia*, an authenticated page from Defendant's website that specifically targeted North Carolina residents and claimed to have made "thousands" of loans to North Carolinians and be the "trusted name in title loans" in North Carolina; an affidavit from an assistant manager and loan officer for Defendant who stated Defendant mailed loan solicitation flyers into North Carolina to both current and former borrowers and regularly engaged in phone conversations with North Carolina residents regarding Defendant's loans; an affidavit from the Owner and Managing Member of the North Carolina publication "Steals & Deals" who—from February 2013 to May 2019—ran a weekly advertisement for Defendant's title loans to residents of North Carolina; and a manager of Associates Asset Recovery, LLC, a North Carolina business, who recovered 442 motor vehicles for Defendant in North Carolina over the course of four years.

¶ 7 On 30 November 2020 Defendant's Motion to Dismiss came on for hearing and the trial court denied the Motions to Dismiss by Order entered 15 January 2021. Defendant filed Notice of Appeal on 10 February 2021.

Appellate Jurisdiction

¶ 8 **[1]** Here, the trial court's Order constitutes three separate interlocutory rulings denying Defendant's Motion to Dismiss alleging lack of personal jurisdiction, improper venue, and failure to state a claim. "Generally, the denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." *McClennahan v. N.C. School of the Arts*, 177 N.C. App. 806, 808, 630 S.E.2d 197, 199 (2006) (citation and quotation omitted). "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." *Id.* "However, N.C. Gen. Stat. § 1-277 allows a party to immediately appeal an order that either (1) affects a substantial right or (2) constitutes an adverse ruling as to personal jurisdiction." *Id.*

¶ 9 First, the denial of Defendant's Motion asserting lack of personal jurisdiction is clearly immediately appealable under Section 1-277(b). *See Cohen v. Cont'l Motors, Inc.*, 279 N.C. App. 123, 2021-NCCOA-449, ¶ 16-17, *disc. rev. denied*, 868 S.E.2d 859 (2022); *see also A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 257–58, 625 S.E.2d 894, 898 (2006) ("[M]otions to dismiss for lack of personal jurisdiction affect a substantial right and are immediately appealable").

¶ 10 Second, we have previously recognized an order denying a motion based on improper venue and which asserts venue is proper elsewhere may affect a substantial right. *Thompson v. Norfolk & Southern Ry.*, 140 N.C. App. 115, 121-122, 535 S.E.2d 397, 401 (2000). Likewise, orders addressing the validity of a forum selection clause also affect a substantial right. *US Chem. Storage, LLC v. Berto Constr., Inc.*, 253 N.C. App. 378, 381, 800 S.E.2d 716, 719 (2017). Thus, Defendant's appeal from the denial of its motion based on improper venue is also properly before us.

¶ 11 Third, immediate appealability of the denial of Defendant's Motion to Dismiss under Rule 12(b)(6) based on the assertion of a choice-of-law clause is less clear. Nevertheless, in several other cases involving choice-of-law related issues, this Court has elected to review the matter under writ of certiorari. *Harco Nat. Ins. Co. v. Grant Thornton LLP*, 206 N.C. App. 687, 691, 698 S.E.2d 719, 722 (2010); *Stetser v. TAP Pharm. Prod., Inc.*, 165 N.C. App. 1, 12, 598 S.E.2d 570, 579 (2004); *United Virginia Bank v. Air-Lift Assocs., Inc.*, 79 N.C. App. 315, 319,

339 S.E.2d 90, 92 (1986). Defendant here has also filed a Petition for Writ of Certiorari in the event we determine there is no immediate right to appeal. Given our prior practice, the fact the choice of law issue is substantially related to the issue of venue as well as, to a lesser extent, personal jurisdiction which are both properly before us, and the fact that all three issues address vital preliminary questions impacting both this litigation and other related litigation pending in our Courts which would benefit from an early decision on these threshold matters, in our discretion we grant Defendant's Petition for Writ of Certiorari to ensure our appellate jurisdiction over the entirety of Defendant's appeal and turn to the merits of the appeal.

Issues

¶ 12 The issues on appeal are whether the trial court erred by denying Defendant's Motion to Dismiss pursuant to North Carolina Rules of Civil Procedure: (I) 12(b)(2) for lack of personal jurisdiction when Defendant purposefully availed itself of the privilege of doing business in North Carolina; (II) 12(b)(6) for failure to state a claim when Plaintiffs' claims are based on North Carolina law and Plaintiffs' loan contracts contain a choice-of-law provision stating South Carolina law should apply; and (III) 12(b)(3) for improper venue when Plaintiffs filed suit in Richmond County, North Carolina, despite the inclusion of a forum selection clause in Plaintiffs' loan contracts stating suits should be brought in South Carolina and the fact that only two out of fifteen Plaintiffs resided in Richmond County.

Analysis

I. Personal Jurisdiction

A. Standard of Review

¶ 13 **[2]** "The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005).

> Typically, the parties will present personal jurisdiction issues in one of three procedural postures: (1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues.

Id. In this case, the parties submitted dueling affidavits and other discovery materials in support of their respective jurisdictional arguments; therefore, this case falls into the third category. *See id.*

¶ 14 If the parties "submit dueling affidavits[,] . . . the court may hear the matter on affidavits presented by the respective parties, . . . [or] the court may direct that the matter be heard wholly or partly on oral testimony or depositions." *Id.* at 694, 611 S.E.2d at 183 (second and third alterations in original; citations and quotation marks omitted); *see also Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217 (2000) ("If the exercise of personal jurisdiction is challenged by a defendant, a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits." (citation omitted)). In addition, where "defendants submit some form of evidence to counter plaintiffs' allegations, those allegations can no longer be taken as true or controlling and plaintiffs cannot rest on the allegations of the complaint." *Bruggeman*, 138 N.C. App. at 615-16, 532 S.E.2d at 218 (citations omitted).

¶ 15 Where the trial court elects to decide the motion to dismiss on competing affidavits, "the plaintiff has the initial burden of establishing prima facie that jurisdiction is proper. Of course, this procedure does not alleviate the plaintiff's ultimate burden of proving personal jurisdiction at an evidentiary hearing or at trial by a preponderance of the evidence." *Id.* at 615, 532 S.E.2d at 217 (citations omitted). "If the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Banc of Am. Secs. LLC*, 169 N.C. App. at 694, 611 S.E.2d at 183 (alterations, citation, and quotation marks omitted).

¶ 16 Thus, in this context, "[t]he standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record[.]" *Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011) (second alteration in original; quotation marks omitted) (quoting *Replacements, Ltd. v. Midwesterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999)). "We review de novo the issue of whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over defendant." *Id.* (citation omitted).

¶ 17 The North Carolina Supreme Court has held

> that a two-step analysis must be employed to determine whether a non-resident defendant is subject to the in personam jurisdiction of our courts. First,

> the transaction must fall within the language of the State's "long-arm" statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution.

Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986) (citations omitted). In this case, the parties appear to agree North Carolina's "long-arm" statute is applicable to this case. Indeed, the parties focus on the question of whether the exercise of personal jurisdiction in this case is consistent with the Due Process Clause of the Fourteenth Amendment.

B. Specific Personal Jurisdiction

¶ 18 The Supreme Court of the United States recently addressed the issue of a state court's authority to assert personal jurisdiction over an out-of-state Defendant under the Fourteenth Amendment in *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 209 L. Ed. 2d 225 (2021). "The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant." *Id.* at 1024, 209 L. Ed. at 233. Our courts "recogniz[e] two kinds of personal jurisdiction: general . . . jurisdiction and specific . . . jurisdiction." *Id.* (citing *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 919, 180 L. Ed. 2d 796, 803 (2011)). Specific jurisdiction "covers defendants less intimately connected with a State, but only as to a narrower class of claims. The contacts needed for this kind of jurisdiction often go by the name 'purposeful availment.' " *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 542 (1985)). "The defendant . . . must take 'some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State.' " *Id.* (bracket in original) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298 (1985)). "The contacts must be the defendant's own choice and not 'random, isolated, or fortuitous.' " *Id.* at 1025, 209 L. Ed. 2d at 234 (citation omitted). "The[se] [contacts] must show that the defendant deliberately 'reached out beyond' its home—by, for example, 'exploi[ting] a market' in the forum State or entering a contractual relationship centered there.' " *Id.* (second bracket in original) (quoting *Walden v. Fiore*, 571 U.S. 277, 285, 188 L. Ed. 2d 12, 20 (2014)). *See also*, *Travelers Health Ass'n v. Va.*, 339 U.S. 643, 647, 94 L. Ed. 1154, 1161 (1950) (concluding "where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state," a business has consented to jurisdiction in the latter state.). "Yet even then . . . the forum State may exercise jurisdiction in only certain cases. The plaintiff's

claims . . . 'must arise out of or relate to the defendant's contacts' with the forum." *Id.* (quoting *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1780, 198 L. Ed. 2d 395, 403 (2017)).

¶ 19 For example, in *Travelers Health Association v. Virginia*, the United States Supreme Court held Virginia could properly exercise jurisdiction over a Nebraska corporation where the defendant did not engage in mere isolated or short-lived transactions, but rather, systematically and widely entered into contracts with citizens of Virginia. 339 U.S. at 648, 94 L. Ed. at 1161. In rendering its decision, the Court considered the following significant facts: at the time of the suit, the defendant had 800 contracts with Virginia citizens; the defendant sent targeted mail solicitations to Virginians; new members obligated themselves to pay periodic assessments; the defendant had a referral system whereby members could refer other Virginia citizens; the defendant could enter the state to investigate claims for losses; and the Virginia courts were available to them in seeking to enforce obligations created by the insurance policies. *Id.*

¶ 20 Here, the trial court's Findings of Fact, which are supported by the competent evidence found in Plaintiffs' Affidavits, show, just as in *Travelers*, the Defendant had substantial contacts with North Carolina. For example, the trial court found: Defendant holds itself out as having made "thousands" of loans to North Carolinians; calls potential borrowers who are located in North Carolina; offers loans over the phone to North Carolinians and receives acceptances of its loan offers by telephone from North Carolinians; instructs North Carolinians to travel out of state to its stores; creates continuing obligations between itself and borrowers in North Carolina; perfects security interests using the North Carolina Division of Motor Vehicles; pays borrowers to refer new borrowers from North Carolina; sends written solicitations into North Carolina; makes collections calls into North Carolina; and directs others to enter into North Carolina to take possession of collateral motor vehicles.

¶ 21 Thus, applying *Ford* and *Travelers*, it is not unreasonable to subject Defendant to suit in North Carolina because Defendant deliberately and systematically 'reached out beyond' South Carolina to enter into loan agreements with thousands of North Carolina citizens. *See Ford Motor Co.*, 141 S. Ct. at 1025, 209 L. Ed. 2d at 234. Therefore, the trial court appropriately concluded the exercise of personal jurisdiction in North Carolina over Defendant does not offend the Due Process Clause of the Fourteenth Amendment. Consequently, the trial court did not err in denying Defendant's Motion under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure.

II. Choice-of-Law Provision and Failure to State a Claim

¶ 22 **[3]** Next, Defendant contends the trial court erred in denying Defendant's Motion to Dismiss under Rule 12(b)(6). Defendant argues Plaintiffs' contracts contain a choice-of-law provision mandating the application of South Carolina law and, thus, precluding Plaintiff's claims arising from North Carolina law.[2]

¶ 23 "The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient." *Shoffner Indus., Inc. v. W. B. Lloyd Constr. Co.*, 42 N.C. App. 259, 263-264, 257 S.E.2d 50, 54 (1979). "A complaint may be dismissed on motion filed under Rule 12(b)(6) if it is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made . . ." *Id.* "For the purpose of a motion to dismiss, the allegations of the complaint are treated as true." *Id.*

¶ 24 "Historically, parties have endeavored to avoid potential litigation concerning judicial jurisdiction and the governing law by including in their contracts provisions concerning these matters." *Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 92, 414 S.E.2d 30, 33 (1992). "Although the language used may differ from one contract to another, one or more of three types of provisions (choice of law, consent to jurisdiction, and forum selection), which have very distinct purposes, may often be found in the boilerplate language of a contract." *Id.* "[A] choice of law provision, names a particular state and provides that the substantive laws of that jurisdiction will be used to determine the validity and construction of the contract, regardless of any conflicts between the laws of the named state and the state in which the case is litigated." *Id.* "The parties' choice of law is generally binding on the interpreting court as long as they had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental policy of the state of otherwise applicable law." *Behr v. Behr*, 46 N.C. App. 694, 696, 266 S.E.2d 393, 395 (1980). Further, "not all [contract] provisions cover extra-contractual statutory claims." *Strange v. Select Mgmt. Res., LLC*, 2021 U.S. Dist. LEXIS 121076, *24, 2021 WL 2649269 (M.D.N.C. Oct. 17, 2019) (unpublished). It follows that where claims are brought under statutes reflective of fundamental North Carolina policy, a choice-of-law provision which has the effect of attempting to avoid such claims is not binding on a trial

2. Defendant, at this stage, seems to accept for purposes of this appeal that if North Carolina law applies then Plaintiffs' Complaint is sufficient to state a claim for relief. Therefore, we do not address the adequacy of Plaintiffs' Complaint as it relates to the underlying claims.

court. *See Shwarz v. St. Jude Med., Inc.*, 254 N.C. App. 747, 754, 802 S.E.2d 783, 789 (2017) ("[O]ur courts have not honored choice-of-law provisions in contracts when application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of applicable law in the absence of an effective choice of law by the parties." (citation and quotation omitted)). *Cf. Burke Cty. Pub. Sch. Bd. of Educ. v. Shaver P'ship*, 303 N.C. 408, 423, 279 S.E.2d 816, 825 (1981) (Holding choice-of-law provision attempting to preclude application of the Federal Arbitration Act invalid because "[t]o allow the parties to contract away the application of the Act . . . would be inconsistent with the Act itself.").

¶ 25 In this case, Plaintiffs have brought extra-contractual statutory claims under the NCCFA, the UDTPA, and alternatively, North Carolina usury law. We address each of these claims in turn.

1. Violation of the NCCFA

¶ 26 The NCCFA makes unenforceable any "loan contract made outside this State in the amount or of the value of fifteen thousand dollars ($15,000) or less, for which greater consideration or charges than those authorized by N.C.G.S. § 53-173 and N.C.G.S. § 53-176 have been charged, contracted for, or received." N.C. Gen. Stat. § 53-190(a) (2021). Lenders may only avoid application of the NCCFA if "all contractual activities, including solicitation, discussion, negotiation, offer, acceptance, signing of documents, and delivery and receipt of funds, occur entirely outside North Carolina." N.C. Gen. Stat. § 53-190(a) (2021). Moreover, in enacting the most recent version of the NCCFA our state legislature recognized:

> new schemes continue to be devised in order to circumvent the lending laws of North Carolina and to avoid regulation by the Commissioner of Banks. It is the intent of the General Assembly that [the NCCFA] should be construed broadly to prohibit illicit lending schemes and to clarify the devices, subterfuges, and pretenses that are prohibited . . .

An Act to Clarify the Application of the North Carolina Consumer Finance Act to Various Lending Subterfuges, S.L. 2006-243, § 1, 2006 N.C. Sess. Laws 1038, 1038.

¶ 27 Here, Defendant has attempted to avoid application of North Carolina law, and in particular here application of the NCCFA, by including a choice-of-law provision in their loan agreements and by requiring

Plaintiffs to drive to South Carolina to sign the loan documents and receive the funds. However, the NCCFA expressly states the law is to be applied to loans made outside the state unless all contractual activities occur entirely outside of the state. Indeed, in this case, Plaintiffs have made specific allegations—which solely for the purpose of this appeal we treat as true—to show Defendant has conducted contractual activities within the state, rendering the NCCFA applicable. For example, Plaintiffs alleged Defendant solicited, discussed, and negotiated the terms of loan agreements, used the DMV to perfect their security interest, and repossessed cars in North Carolina.

¶ 28 Despite Defendant's arguments to the contrary seeking to avoid application of the NCCFA, for the purpose of this claim, to enforce the choice-of-law provision at this stage of the proceeding,[3] would violate the stated fundamental public policy of North Carolina to broadly construe and apply the NCCFA to cover loan contracts made outside this state. *See* N.C. Gen. Stat. § 53-190(a). Thus, the trial court did not err by declining to enforce the choice-of-law clause to bar Plaintiffs' NCCFA claim. Therefore, Plaintiff's Complaint—to the extent the NCCFA provides a private citizen a cause of action[4]—states a claim under North Carolina law. Consequently, the trial court properly denied Defendant's Motion to Dismiss the NCCFA claim.

2. Violation of the UDTPA

¶ 29 N.C. Gen. Stat. § 75-1.1 (2021) states:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

The legislative history of the UDTPA, as succinctly explained by *Broussard v. Meineke Discount Muffler Shops*, indicates the legislature intended for the statute to be broadly applied in order to protect citizens of North Carolina.

> Prior to 1977, section 75-1.1 was specifically limited to 'dealings within this state.' North Carolina's General

3. As this case proceeds, there may well be facts to show Defendant did not conduct any contractual activities within North Carolina, and thus, the NCCFA would not apply. Indeed, the trial court seemed to recognize this possibility and expressly stated: "This Order denying Defendant's Rule 12(b)(6) motion is without prejudice to the Court making a determination of any choice of law issue in the future based upon a more complete evidentiary record."

4. An issue not before us.

> Assembly deleted the geographical limitation in 1977. Courts interpreted the legislature's action as a desire to expand the scope of section 75-1.1 to the limits of North Carolina's long-arm statute, N.C. Gen. Stat. § 75.4(4). Thus, section 75-1.1 applies if the plaintiff alleges a substantial injurious effect on [a] plaintiff . . . in North Carolina.

Broussard v. Meineke Discount Muffler Shops, 945 F. Supp. 901, 917 (W.D.N.C. 1996) (citation and quotation marks omitted). *See also*, *Bhatti v. Buckland*, 328 N.C. 240, 245, 400 S.E.2d 440, 443-44 (1991) ("The wording of the statute and its purpose is broad and section (b), on its face, extends the statute to commercial dealings between persons at all levels of commerce."). Moreover, our Supreme Court has previously concluded "violations of statutes designed to protect the consuming public and violations of established public policy may constitute unfair and deceptive practices." *Stanley v. Moore*, 339 N.C. 717, 723, 454 S.E.2d 225, 228 (1995). Indeed, this Court has consistently held defendants who offer usurious loans to residents of North Carolina commit unfair and deceptive trade practices as a matter of law. *See State of N.C. v. NCCS Loans*, 174 N.C. App. 630, 641, 624 S.E.2d 371, 378 (2005); *Odell v. Legal Bucks, LLC*, 192 N.C. App. 298, 320, 665 S.E.2d 767, 781 (2008).

¶ 30 Here, Plaintiffs have alleged sufficient facts—which we treat as true for purpose of the 12 (b)(6) Motion—to show Defendant's acts in or affecting commerce have a substantial injurious effect on citizens in North Carolina by depriving them of the protection of North Carolina usury law. *See Broussard*, 945 F. Supp. at 917. For example, Plaintiffs alleged Defendant "knew or should have known that each Plaintiff was a North Carolina resident and held a North Carolina title on their vehicle," but nevertheless, entered into loan agreements with each Plaintiff "at an annual interest rate that far exceeds the lawful rate of interest in North Carolina." Moreover, Plaintiffs alleged "Defendant purposefully established its business locations just across the North Carolina-South Carolina state line to avoid the application of North Carolina law to contracts . . ." and "required the execution of the written title loan agreements at issue in South Carolina in bad faith with the specific purpose and intent of evading the usury laws of North Carolina."

¶ 31 Therefore, despite Defendant's effort to avoid the application of North Carolina law, for the purposes of Plaintiffs' UDTPA claim, to enforce the choice-of-law provisions would violate the inherent public policy of North Carolina to broadly construe the UDTPA in order to provide a private cause of action for injured North Carolina consumers. *See*

Broussard, 945 F. Supp. at 917. Thus, the trial court did not err by concluding Plaintiffs' Complaint contains sufficient allegations to support a claim under the UDTPA despite the inclusion of a choice-of-law provision in Plaintiffs' contracts stating South Carolina law should apply. Consequently, the trial court did not err by denying Defendant's Motion to Dismiss pursuant to 12(b)(6).

3. Usury Claim

¶ 32 The North Carolina usury statute states: "any extension of credit shall be deemed to have been made in this State, and therefore subject to the provisions of this Chapter if the lender offers or agrees in this State to lend to a borrower who is a resident of this State, or if such borrower accepts or makes the offer in this State to borrow, regardless of the situs of the contract as specified therein." N.C. Gen. Stat. § 24-2.1(a) (2021). Moreover, the statute expressly states: "[i]t is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws." N.C. Gen. Stat. § 24-2.1(g) (2021).

¶ 33 Here, Plaintiffs alleged:

> as to one, some or all Plaintiffs, Defendant engaged in solicitations and made oral offers to lend that were received in North Carolina[.] As to one, some or all Plaintiffs, Defendant received solicitations or communications from Plaintiffs that originated in North Carolina for Plaintiffs to borrow.

Thus, here too, because Plaintiffs have alleged sufficient facts to show Plaintiffs' loan contracts are subject to the application of North Carolina usury law, to enforce the choice-of-law provision would violate the stated public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina usury laws. Therefore, the trial court did not err by concluding Plaintiffs adequately alleged claims under North Carolina usury law applicable to the loan agreements in this case for purposes of a Motion to Dismiss. Consequently, the trial court did not err in denying Defendant's Motion to Dismiss for failure to state a claim.

III. Proper Venue & Forum Selection Clause

¶ 34 **[4]** Defendant contends the trial court erred by denying its Motion to Dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(3) because ten out of fifteen of Plaintiffs' loan agreements contain a forum selection clause mandating disputes "in relation to or in any way in

connection with the Agreements . . . be brought exclusively in the courts of competent jurisdiction located in South Carolina."[5] Thus, according to Defendant, the forum selection clause mandates venue was only proper in South Carolina. Moreover, Defendant contends Richmond County is not a proper venue because "none of the Plaintiffs except Doris Wall, Patricia Smith, and Michael Waddell are residents of Richmond County."

A. Standard of Review

¶ 35 "A party may move to change venue based on several grounds under the applicable statute, N.C. Gen. Stat. § 1-83, and our standard of review is dependent upon the particular ground alleged by the movant." *Lowrey v. Choice Hotels Int'l, Inc.*, 279 N.C. App. 107, 2021-NCCOA-436, ¶ 19 (unpublished).

¶ 36 Generally, our Court reviews a trial court's order denying a motion to dismiss for improper venue in cases involving a forum selection clause under the abuse of discretion standard.[6] *SED Holding, LLC v. 3 Star Props., LLC*, 246 N.C. App. 632, 636, 784 S.E.2d 627, 630 (2016). "The test for abuse of discretion requires the reviewing court 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.' " *Appliance Sales & Serv. v. Command Elecs. Corp.*, 115 N.C. App. 14, 22, 443 S.E.2d 784, 789 (1994) (citing *Little v. Penn Ventilator, Inc.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986)). However, if a party moves for change of venue on the basis that the plaintiff brought suit in the wrong county, the motion and order entered thereon concern a question of law we review de novo. *Stern v. Cinoman*, 221 N.C. App. 231, 232, 728 S.E.2d 373, 374 (2012).

B. Enforceability of the Forum Selection Clause

¶ 37 "A forum selection provision designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out

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5. This Court has recognized "a forum selection clause designates the venue and therefore a motion to dismiss for improper venue pursuant to Rule 12(b)(3) would be most applicable." *Hickox v. R&G Group Int'l*, 161 N.C. App. 510, 511, 588 S.E.2d 566, 567 (2003). "The motion should accordingly be treated as one to remove the action, not dismiss it." *Id.* (citing *Coats v. Hospital*, 264 N.C. 332, 141 S.E. 2d 490 (1965)).

6. The standard for reviewing "a trial court's *interpretation* of a forum selection clause is an issue of law that is reviewed de novo." *US Chem. Storage, LLC v. Berto Constr., Inc.*, 253 N.C. App. 378, 382, 800 S.E.2d 716, 720 (2017) (emphasis added). However, this Court applies an abuse of discretion standard when the trial court issues an order regarding the *enforceability* of the clause under a Rule 12(b)(3) motion. *See SED Holding, LLC v. 3 Star Props., LLC*, 246 N.C. App. 632, 636, 784 S.E.2d 627, 630 (2016).

of the contract and their contractual relationship." *Johnston Cty.*, 331 N.C. at 93, 414 S.E.2d at 33. "Forum selection clauses do not deprive the courts of jurisdiction but rather allow a court to refuse to exercise that jurisdiction in recognition of the parties' choice of a different forum." *Id.* Generally, a forum selection clause should be enforced unless the contract is a product of fraud or unequal bargaining power, enforcement of the clause would be unreasonable or unfair, or enforcement of the clause would contravene a strong public policy of the forum in which suit is brought. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 32 L. Ed. 2d 513, 523 (1972). For contracts entered into in North Carolina, "forum selection clauses . . . are generally disfavored, 'against public policy,' and 'void and unenforceable' unless they appear in 'non-consumer loan transactions.' " *SED Holding, LLC*, 246 N.C. App. at 637, 784 S.E.2d at 631. Indeed, N.C. Gen. Stat. § 22B-3 generally prohibits enforceability of a forum selection clause:

> . . . in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable. This prohibition shall not apply to non-consumer loan transactions or to any action or arbitration of a dispute that is commenced in another state pursuant to a forum selection provision with the consent of all parties to the contract at the time that the dispute arises.

N.C. Gen. Stat. § 22B-3 (2021).

¶ 38 We address the applicability of the forum selection clause under each claim.

1. NCCFA Claim

¶ 39 As discussed above, the NCCFA expressly applies to loans made outside this state unless all contractual activities including solicitation, discussion, negotiation, offer, acceptance, signing of documents, and delivery and receipt of funds occur entirely outside of North Carolina. N.C. Gen. Stat. § 53-190(a) (2021). Therefore, since Defendant—at a minimum—solicited in North Carolina, the NCCFA applies. Moreover, the NCCFA, by its terms, evinces a clear public policy that loans to which it applies should be subject to oversight in North Carolina. Enforcement of the forum selection clause despite the clear application of the NCCFA to Plaintiffs' loan contracts would run counter to this policy. Thus, for the purpose of Plaintiffs' NCCFA claim, to enforce the forum-selection

clause would violate the inherent public policy of North Carolina, as reflected in the NCCFA, to regulate loan contracts made elsewhere if some form of contractual activity took place in North Carolina. Therefore, the forum selection clause is rendered unenforceable as against public policy. Consequently, the trial court did not abuse its discretion in denying Defendant's Motion to Dismiss for improper venue.

2. UDTPA Claim

¶ 40 In determining whether, for the purposes of the UDTPA claim, enforcement of the forum selection clause would contravene a strong public policy of North Carolina, we consider the purposes underlying the protections provided by the UDTPA. The General Assembly initially stated the purpose of section 75-1.1 as follows:

> The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business and between persons engaged in business and the consuming public *within this State* to the end that good faith and fair dealings between buyers and sellers at all level[s] of commerce be had in this State.

N.C. Gen. Stat. § 75-1.1 (1975) (emphasis added). Indeed, even after the law was amended in 1977, our Supreme Court reiterated: "[t]he law was enacted 'to establish an effective private cause of action for aggrieved consumers *in this State*.' " *Bhatti v. Buckland*, 328 N.C. 240, 245, 400 S.E.2d 440, 443 (1991) (emphasis added) (citing *Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981)).

¶ 41 Here, for the purpose of the UDTPA claim, enforcement of the forum selection would defeat the original purpose of the law by requiring aggrieved consumers to bring a cause of action *outside* of this State. Thus, insofar as Plaintiffs have a claim under the UDTPA, to enforce the forum selection clause, would violate the public policy of this state to provide a private cause of action to citizens *within* North Carolina. Therefore, the trial court did not abuse its discretion by refusing to enforce the forum selection clause for the purpose of the UDTPA.

3. Usury Claim

¶ 42 N.C. Gen. Stat. §22B-3 renders a contract "*entered into in North Carolina* that requires the prosecution of any action . . . to be instituted or heard in another state [ ] against public policy and [ ] void and unenforceable." N.C. Gen. Stat. §22B-3 (2021) (emphasis added). Generally, "the test of the place of a contract is as to the place at which the last

act was done by either of the parties essential to a meeting of minds." *Bundy v. Commercial Credit Co.*, 200 N.C. 511, 515, 157 S.E. 860, 862 (1931) (citations omitted). For written contracts, the last act essential to the formation of the contract is the affixation of the final signature. *Szymczyk v. Signs Now Corp.*, 168 N.C. App. 182, 187, 606 S.E.2d 728, 733 (2005).

¶ 43 However, N.C. Gen. Stat. § 24-2.1(a) modifies this general rule, and for the purpose of a usury law claim, deems a loan agreement:

> *to have been made* in this State, and therefore subject to the provisions of this Chapter if the lender offers or agrees in this State to lend to a borrower who is a resident of this State, or if such borrower accepts or makes the offer in this State to borrow, regardless of the situs of the contract as specified therein.

N.C. Gen. Stat. § 24-2.1(a) (2021) (emphasis added).

¶ 44 Indeed, Plaintiffs' Complaint contains facts to show that their contracts meet the definition of a contract deemed "to have been made in this State." For example, the Complaint alleges while some of the Plaintiffs were in North Carolina, Defendant discussed the terms of the loans with some of the Plaintiffs including the specific loan amount and asked if the Plaintiff wanted to obtain the loan. If the Plaintiff said yes, Defendant would tell the Plaintiff to drive to South Carolina with the proper documentation. Thus, since Defendant offered the loan to Plaintiffs and Plaintiffs verbally accepted the terms of the loan while they were in North Carolina, under N.C. Gen. Stat. § 24-2.1, the loan agreements would be deemed to have been made in North Carolina. *See* N.C. Gen. Stat. § 24-2.1(b) (2021) ("Any solicitation or communication to lend, oral or written, originating outside of this State, but forwarded to and received in this State by a borrower who is a resident of this State, shall be deemed to be an offer or agreement to lend in this State."). Therefore, for the purposes of the usury law claim, since the contracts are deemed to have been entered into in North Carolina, N.C. Gen. Stat. § 22B-3 renders the clause unenforceable as against public policy. *See* N.C. Gen. Stat. § 22B-3 (2021).

¶ 45 Moreover, even presuming N.C. Gen. Stat. § 22B-3 does not apply to render the forum selection clause unenforceable, North Carolina usury law makes clear that "[i]t is the paramount public policy of North Carolina to protect North Carolina resident borrowers" from usurious loans. N.C. Gen. Stat. § 24-2.1(g). Therefore, for the purpose of Plaintiffs' usury law claim, to enforce the forum-selection clause would violate the

stated fundamental public policy of North Carolina "to protect North Carolina resident borrowers" as it would divest North Carolina of the opportunity to enforce their laws and protect its citizens. Consequently, the forum selection clause is rendered unenforceable as against public policy. Thus, the trial court did not abuse its discretion in denying Defendant's Motion to Dismiss for improper venue.

C. Venue in Richmond County, North Carolina

¶ 46 Venue "is defined as 'the proper or a possible place for a lawsuit to proceed, usually because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant.' " *Stokes v. Stokes*, 371 N.C. 770, 773, 821 S.E.2d 161, 163 (2018) (quoting Venue, Black's Law Dictionary (10th ed. 2014)). "It has long been understood that venue is regulated by statute." *Osborne v. Redwood Mt., LLC*, 275 N.C. App. 144, 148, 852 S.E.2d 699, 702 (2020). "However, there are specific venue statutes for only a limited number of actions." *Id.* Thus, unless subject to a venue statute of more specific application,

> [i]n all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement, or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside . . .

N.C. Gen. Stat. § 1-82 (2021).

¶ 47 Here, Plaintiffs' claims are not subject to a venue statute of more specific application, and thus, N.C. Gen. Stat. § 1-82 applies. Under this statute—contrary to Defendant's contention—only one of the Plaintiffs was required to reside in Richmond County on 4 June 2020 when the Complaint was filed because Defendant is not a resident of North Carolina, and all the Plaintiffs reside in North Carolina. Thus, the trial court did not err by concluding "venue was proper in Richmond County because at least one Plaintiff was (and remains) a resident of Richmond County at the time the matter was filed." Consequently, the trial court did not err in denying Defendant's Motion to Dismiss for lack of venue.

Conclusion

¶ 48 Accordingly, for the foregoing reasons, we affirm the trial court's Order denying Defendant's Motion to Dismiss pursuant to Rules 12(b)(2), 12(b)(3), and 12(b)(6).

AFFIRMED.

Judges WOOD and GORE concur.

WEBB v. JARVIS

[284 N.C. App. 534, 2022-NCCOA-499]

JAMES R. WEBB AND DOTTIE WEBB, PLAINTIFFS
v.
JERRY REODD JARVIS AND TINA PEATROSS, DEFENDANTS
v.
ANDREA JARVIS, INTERVENOR

No. COA21-591

Filed 19 July 2022

Child Custody and Support—standing—non-parent—parent's constitutionally protected status—acts inconsistent

A maternal aunt had standing to seek custody of her nephew where the child's mother was deceased and the father had acted inconsistently with his constitutionally protected status as a parent by consenting to the aunt being appointed as the child's guardian (thus allowing her to make decisions regarding the child's health and education), allowing the child to reside with the aunt at all times since her appointment as guardian, and engaging in criminal activity leading to a prison sentence—including trafficking in cocaine and attaining habitual felon status.

Appeal by Defendant-Appellant from order entered 5 February 2021 by Judge Lawrence J. Fine in Forsyth County District Court. Heard in the Court of Appeals 27 April 2022.

Morrow, Porter, Vermitsky and Taylor, PLLC, by Erin Woodrum, for Defendant-Appellant.

Craige Jenkins Liipfert & Walker LLP, by H. David Niblock and Edgar Santiago, for Defendant-Appellee.

GRIFFIN, Judge.

¶ 1 Defendant-Appellant Jerry Reodd Jarvis appeals from an order denying Jarvis's motion to dismiss and concluding that Peatross has standing to bring her claim in the child custody dispute. On appeal, Jarvis argues the trial court erred in determining that Peatross has standing to bring her child custody claim because he did not act inconsistent with his constitutional right to parent his child. After review, we affirm the trial court's order.

I. Factual and Procedural Background

¶ 2 On 28 July 2010, Sean[1] was born to Jarvis and Sarah Webb. Jarvis and Webb never married, and shared custody of Sean pursuant to a parenting agreement. On 20 December 2015, Webb died from cervical cancer. At the time of her death, Webb was living with her mother and her sister, Tina Peatross. Before Webb's death, she told Peatross "that it was her wish that [Sean] live [with] [Peatross] and still see [Jarvis] and his mom."

¶ 3 On 4 January 2016, Forsyth County Superior Court, with Jarvis's consent, appointed Peatross as Sean's Guardian. Jarvis considered Peatross's appointment to be temporary, and in Sean's best interest "in that it allowed [Sean] to grieve the death of his mother and to continue living in the home of Peatross instead of uprooting him during a difficult time." At this time, Jarvis was involved in the illegal "drug scene" and "between relationships[.]" Since Peatross's appointment, Sean has resided with the Peatross family and, for a majority of the time, maintained regular contact with Jarvis.

¶ 4 In April 2016, Jarvis was arrested in Mecklenburg County and charged with felony fleeing to elude arrest and attaining habitual felon status. Jarvis was subsequently indicted on both charges. Jarvis later testified that he was aware that if he was "apprehended and convicted of [these] crimes, that [he] would serve [an] active sentence[,]" and that he did commit these crimes despite this knowledge. These charges were not disclosed to Peatross at this time. On 28 October 2017, Jarvis was arrested and charged with trafficking cocaine. While Sean was not in Jarvis's presence at the time of his October 2017 arrest, Jarvis was exercising custody of Sean that weekend. Jarvis was convicted and sentenced to an active sentence of 85 to 114 months for the felony fleeing to elude arrest and habitual felon charges on 1 November 2017. Then, on 14 May 2019, Jarvis was convicted of attempted trafficking cocaine and sentenced to an active sentence of 33 to 47 months to run concurrent with his prior convictions. After learning that Jarvis was imprisoned in November 2017, Peatross did not allow contact between Jarvis and Sean, until her guardianship was set aside in October 2019.

¶ 5 This action began prior to Jarvis's October 2017 arrest when Sean's maternal grandfather and step-grandmother (together, "Plaintiffs") sought visitation with Sean and named Jarvis and Peatross as defendants.

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1. We use a pseudonym for protection of the minor child and ease of reading. *See* N.C. R. App. P. 42(b).

Peatross later filed an amended answer as well as a counterclaim against Plaintiffs and a crossclaim against Jarvis seeking custody of Sean. On 27 February 2020, Jarvis filed a motion to dismiss "claims asserted by the Plaintiffs as well as the claim for custody of [Sean] asserted by Peatross."

¶ 6 The trial court held a hearing to determine whether Peatross had standing to seek custody of Sean on 16 November 2020. On 5 February 2021, the trial court entered an order concluding that "Jarvis ha[d] acted inconsistently with his constitutionally protected rights as the biological father of [Sean] and thereby ha[d] waived such constitutionally protected rights as a parent." Accordingly, the trial court denied Jarvis's motion to dismiss Peatross's claim because it determined that "Peatross has standing to seek custody of [Sean]." Jarvis's motion to dismiss Plaintiffs' claims was granted. Jarvis timely appeals.

II. Analysis

¶ 7 On appeal, Jarvis argues that the trial court erred in denying his motion to dismiss Peatross's custody claim and determining that he acted inconsistent with his constitutionally protected right, such that Peatross has standing to bring her claim for custody of Sean. Jarvis also challenges Finding of Fact #27, which states:

> 27. Regardless of Jarvis'[s] intention for the arrangement to be temporary, Jarvis took advantage of the custodial arrangement and abdicated his parental decision-making responsibilities in favor of Peatross from 2015-2017. He took no action to have the Guardianship set aside prior to his arrest. The custodial relationship between Peatross and [Sean] became permanent when Jarvis was incarcerated on October 28, 2017, due to his criminal acts.

¶ 8 "[A] trial court's legal conclusion that a parent acted inconsistently with his constitutionally protected status as a parent is reviewed de novo to determine whether the findings of fact cumulatively support the conclusion and whether the conclusion is supported by clear and convincing evidence." *In re I.K.*, 377 N.C. 417, 2021-NCSC-60, ¶ 20 (citing *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 502–03 (2010); *Adams v. Tessener*, 354 N.C. 57, 65–66, 550 S.E.2d 499, 504 (2001)). Unchallenged findings and findings supported by competent evidence are conclusive on appeal. *I.K.*, 2021-NCSC-60, ¶ 20 (citing *In re L.R.L.B.*, 377 N.C. 311, 2021-NCSC-49, ¶ 11).

A. Finding of Fact #27

¶ 9 With regard to Finding of Fact #27, Jarvis contends that "[t]he record is devoid of evidence to support this finding[,]" but concedes that "there is evidentiary support for the fact that [Jarvis] did not take action to set aside the Guardianship prior to his arrest[.]" Since it is conceded that there is evidentiary support for this part of the finding, this part of the finding is binding on appeal, and we focus our attention to the remaining parts of the finding. The evidence presented in support of the findings preceding Finding of Fact #27 could support the finding that, based on Jarvis's actions, he did take advantage of the arrangement and abdicated the majority of his parental responsibility to Peatross. The evidence tends to show, and Jarvis admits, that Peatross has been Sean's primary caregiver and was appointed guardian to make decisions regarding Sean's health care and education—decisions that are generally reserved for natural parents. Additionally, Jarvis admitted at the hearing that he "made a conscious decision to basically give the authority to [Peatross] to look after [Sean][.]"

¶ 10 The final part of the finding regarding the permanency of the custodial arrangement may be inferred from the fact that at the time of Jarvis's imprisonment, the only two individuals that had a custodial relationship with Sean were Peatross and Jarvis. When Jarvis was imprisoned, this left Peatross as the only person who had an existing custodial relationship with Sean such that, at that time, the custodial relationship between Peatross and Sean was permanent until a different custody arrangement was determined. We therefore hold that there was evidence to support Finding of Fact #27, and it is thus binding on appeal.

B. Standing

¶ 11 Under North Carolina law, "[a]ny parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child." N.C. Gen. Stat. § 50-13.1(a) (2021). If a party has standing in the child custody action, then the court will make the custody determination based on the "best interest of the child" standard. *See* N.C. Gen. Stat. § 50-13.2(a) (2021) ("An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child.").

¶ 12 However, while North Carolina law identifies parties that may have standing in a child custody proceeding, there are federal and state constitutional limitations "on the application of § 50-13.1." *Mason*

v. Dwinnell, 190 N.C. App. 209, 219, 660 S.E.2d 58, 65 (2008). In child custody proceedings where natural parents are involved, such as in the case *sub judice*, "[t]he interest implicated . . . is a natural parent's liberty interest in the companionship, custody, care, and control of his or her child . . . [that] [t]he United States Supreme Court has recognized . . . is protected by the Constitution." *Price v. Howard*, 346 N.C. 68, 74, 484 S.E.2d 528, 531 (1997); *see Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (" 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' ")); *see also Troxel v. Granville*, 530 U.S. 57, 66 (2000) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."). "So long as a parent has this paramount interest in the custody of his or her children, a custody dispute with a nonparent regarding those children may not be determined by the application of the 'best interest of the child' standard." *Boseman*, 364 N.C. at 548, 704 S.E.2d at 502 (citation omitted).

¶ 13 However, this paramount status is not absolute. Our state Supreme Court has held that where a parent acts inconsistent with the presumption "that he or she will act in the best interest of the child[,]" that "parent may no longer enjoy a paramount status[.]" *See Price*, 346 N.C. at 79, 484 S.E.2d at 534. Accordingly, in a custody dispute between a parent and a nonparent where the parent has acted inconsistent with this presumption, the nonparent party would have standing, and applying the "best interest of the child" standard would not offend the Due Process Clause. *Id.*; *see also Adams*, 354 N.C. at 62, 550 S.E.2d at 503 ("As a result, the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody . . . or where the parent's conduct is inconsistent with his or her constitutionally protected status[.]" (citations omitted)).

¶ 14 "[T]here is no bright-line test to determine whether a parent's conduct amounts to action inconsistent with his constitutionally protected status." *I.K.*, 2021-NCSC-60, ¶ 34 (citing *Boseman*, 364 N.C. at 549, 704 S.E.2d 494). "[E]vidence of a parent's conduct should be viewed cumulatively." *Id.* (internal quotation marks omitted) (citing *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 267 (2003)).

> When examining a legal parent's conduct to determine whether it is inconsistent with his or her constitutionally-protected status, the focus is not on

> whether the conduct consists of "good acts" or "bad acts." Rather, the gravamen of "inconsistent acts" is the volitional acts of the legal parent that relinquish otherwise exclusive parental authority to a third party.

Mason, 190 N.C. App. at 228, 660 S.E.2d at 70 (citation omitted).

¶ 15 Here, the trial court made multiple unchallenged findings relating to Jarvis's volitional acts to conclude that he acted in a manner inconsistent with his constitutionally protected status. The trial court found that Jarvis consented to Peatross being appointed Sean's guardian. While the trial court also made a finding that Jarvis consenting to Peatross being Sean's guardian was not, in isolation, an act inconsistent with this right, this act considered with his other acts detailed in the court's other findings support the court's conclusion. Part of the reason that Peatross decided to be Sean's guardian was so she, the nonparent, could make decisions regarding Sean's health care and education. Sean has at all times resided with Peatross since she was appointed guardian. While the court did make a finding that Jarvis, prior to being incarcerated, maintained regular contact with Sean, Jarvis conceded that Peatross has been Sean's primary caregiver since 24 December 2015.

¶ 16 Further, Jarvis's volitional acts which led to his current prison sentence support the court's conclusion. Jarvis was charged with, and later convicted of, felony fleeing to elude arrest, and was aware that this conviction would qualify him as a habitual felon. *See* N.C. Gen. Stat. § 14-7.1(a) (2021) ("Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon and may be charged as a status offender pursuant to this Article."); *see also* N.C. Gen. Stat. § 14-7.6 (2021) ("When an habitual felon . . . commits any 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[.]").

¶ 17 Jarvis was aware that if he was convicted of these crimes it would result in his imprisonment and his inability to exercise physical custody of Sean. Yet, he proceeded to engage in conduct leading to him being, on one occasion, indicted as a habitual felon and convicted of felony fleeing to elude arrest, as well as being convicted of trafficking cocaine on a later occasion. Based on the findings establishing the degree of Jarvis's voluntary relinquishment of parental authority to Peatross and his repeated criminal convictions, we conclude that there was clear and convincing evidence to support the trial court's determination that, based on the

totality of his actions, Jarvis acted inconsistent with his constitutional right to parent his child.

III. Conclusion

¶ 18 We hold that there was clear and convincing evidence to support the trial court's determination that Jarvis acted inconsistently with his constitutionally protected parental rights, such that Peatross has standing. We therefore affirm the trial court's order.

AFFIRMED.

Judges DIETZ and JACKSON concur.

SHARON L. WOODY, Plaintiff
v.
ACCUQUEST HEARING CENTER, LLC, Defendant

No. COA21-563

Filed 19 July 2022

1. Disabilities—Persons with Disabilities Protection Act—cause of action for wrongful termination—no preemption of common law remedy—statute of limitations

Plaintiff's common law claim for wrongful discharge in violation of public policy—in which she asserted that she was terminated by her employer due to her atrial fibrillation—was not preempted by the Persons with Disabilities Protection Act (PDPA), even though it provided an alternative remedy, based on the legislative history of the PDPA and statutory construction principles. Therefore, plaintiff's action was subject to a three-year statute of limitations and not the 180-day statute of limitations in the PDPA, and the trial court erred by dismissing plaintiff's complaint as being time-barred.

2. Disabilities—wrongful discharge in violation of public policy—"person with a disability"—substantial limitation of major life activity—sufficiency of pleading

Plaintiff adequately pleaded her claim for common law wrongful discharge in violation of public policy where her complaint's allegations met the definition of "person with a disability" under the Persons with Disabilities Protection Act and where she alleged that she suffered from atrial fibrillation, a heart condition that affects

major life activities such as walking and exercising, that if her condition is left untreated it could lead to stroke or death, and that her employer terminated her because of this disability and the treatment it required. Although plaintiff did not explicitly state that her condition was "substantially" limiting, she pleaded sufficient facts to survive defendant's motion to dismiss.

Judge DILLON dissenting.

Appeal by plaintiff from order and judgment entered 27 April 2021 by Judge John O. Craig, III, in Guilford County Superior Court. Heard in the Court of Appeals 5 April 2022.

Higgins Benjamin, PLLC, by Robert N. Hunter, Jr., and Jonathan Wall, for plaintiff-appellant.

A.Y. Strauss, LLC, by Kory Ann Ferro, pro hac vice, and Sharpless McClearn Lester Duffy, PA, by Frederick K. Sharpless, for defendant-appellee.

ZACHARY, Judge.

¶ 1 Plaintiff Sharon L. Woody appeals from the trial court's order and judgment granting Defendant AccuQuest Hearing Center, LLC's motion to dismiss Plaintiff's claim for wrongful termination in violation of public policy. After careful review, we reverse and remand for further proceedings.

Background

¶ 2 This case arises out of Plaintiff's suit against Defendant alleging her wrongful termination in violation of public policy. Plaintiff alleged as follows in her complaint: Defendant hired Plaintiff to serve as a patient care coordinator in October 2018. She worked in both of Defendant's Greensboro and High Point offices, "receiving positive performance reviews" in her first few months. In February 2019, she "began experiencing symptoms for which she sought the advice of a cardiologist[,]" who determined that she needed a cardiac ablation to correct her atrial fibrillation. On the last workday before Plaintiff's procedure, "the employee with primary responsibility for making bank deposits . . . failed to make deposits" for each office; consequently, Plaintiff took the deposits with her when she left work for the day. She intended to make the deposits that evening, but the bank was closed when she arrived. Plaintiff brought the deposits home and "kept them secure."

¶ 3 On 5 March 2019, Plaintiff had surgery, and she missed one week of work while she recuperated. On her first days back in each office she returned the deposits. On 13 March 2019, the employee tasked with making the bank deposits again failed to do so. Before beginning her shift on 14 March, Plaintiff picked up the deposits and delivered them to the bank when it opened.

¶ 4 Later that day, a member of Defendant's Human Resources Department called Plaintiff and informed her that "she was being terminated" because she had committed "multiple procedural violations in a short period of time." Although Plaintiff asked what procedures she violated, she was not provided with any detailed examples of policies or procedures violated. Plaintiff was told she would receive an email "explaining the reason for the termination[,]" but she never received any such email, despite her follow-up request a few days later.

¶ 5 On 29 September 2019, Plaintiff filed suit against Defendant, claiming wrongful termination in violation of public policy. Plaintiff alleged, *inter alia*, that her "termination violated the established public policy of North Carolina as expressed in N.C[.]G.S. § 143-422.2"—the Equal Employment Practices Act ("EEPA")—"and as set forth in other statutes and regulations, such as the Persons with Disabilities Protection Act," ("PDPA"). *See* N.C. Gen. Stat. § 168A-1 *et seq.* (2019).

¶ 6 On 30 November 2019, Defendant filed a motion to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Defendant also filed a memorandum in support of its motion to dismiss, in which it alleged that "Plaintiff's claim . . . is governed by the [PDPA], which she cite[d] to in her Complaint, as the exclusive statutory remedy[,]" and that therefore Plaintiff's common-law wrongful-discharge claim was time-barred by the 180-day statute of limitations provided by the PDPA. *See* N.C. Gen. Stat. § 168A-12.

¶ 7 On 16 March 2021, Defendant's motion to dismiss came on for hearing in Guilford County Superior Court. By order entered on 27 April 2021, the trial court dismissed Plaintiff's complaint with prejudice. The trial court specifically found and concluded that Plaintiff's "common law remedy [wa]s precluded under the statutory provisions of the [PDPA,]" and therefore, Plaintiff's claim was time-barred by the PDPA's statute of limitations. Plaintiff timely filed notice of appeal.

Discussion

¶ 8 On appeal, Plaintiff argues that the trial court erred by concluding that her common-law claim for wrongful discharge in violation of public

policy was preempted by the PDPA, and thus granting Defendant's motion to dismiss. We agree.

I. Standard of Review

¶ 9 "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)." *Bill Clark Homes of Raleigh, LLC v. Town of Fuquay-Varina*, 281 N.C. App. 1, 2021-NCCOA-688, ¶ 11. Similarly, "[q]uestions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo." *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018) (citation omitted). When conducting de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the trial court." *Jackson v. Charlotte Mecklenburg Hosp. Auth.*, 238 N.C. App. 351, 353, 768 S.E.2d 23, 25 (2014) (citation omitted).

¶ 10 "When reviewing a motion to dismiss, an appellate court considers whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 2021-NCSC-58, ¶ 12 (citation and internal quotation marks omitted). "The statute of limitations may provide the basis for dismissal on a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) if the face of the complaint establishes that [the] plaintiff's claim is barred." *Liptrap v. City of High Point*, 128 N.C. App. 353, 355, 496 S.E.2d 817, 818, *disc. review denied*, 348 N.C. 73, 505 S.E.2d 874 (1998). "In reviewing a trial court's Rule 12(b)(6) dismissal the issue for the court is not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claim." *Bill Clark Homes*, 2021-NCCOA-688, ¶ 12 (citation and internal quotation marks omitted).

II. Preemption

¶ 11 **[1]** On appeal, Plaintiff argues that the trial court erred in concluding that her common-law claim for wrongful discharge in violation of public policy was preempted by the PDPA. Defendant frames the question presented as one of first impression for our appellate courts: whether the PDPA preempts Plaintiff's common-law wrongful-discharge claim, such that the PDPA's 180-day statute of limitations controls the case at bar, *see* N.C. Gen. Stat. § 168A-12, rather than the three-year statute of limitations that applies to the common-law claim of wrongful discharge in violation of public policy, *see id.* § 1-52(1); *Winston v. Livingstone Coll., Inc.*, 210 N.C. App. 486, 488, 707 S.E.2d 768, 770 (2011) ("The limitations period for a tort action based upon wrongful discharge in violation of

public policy is three years."). For the reasons that follow, we conclude that it does not.

¶ 12 "Ordinarily, an employee without a definite term of employment is an employee at will and may be discharged without reason." *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 446 (1989). However, it is well settled that "[w]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy." *Id.* at 175, 381 S.E.2d at 447 (citation omitted). "Public policy has been defined as the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Id.* at 175 n.2, 381 S.E.2d at 447 n.2.

¶ 13 In the case at bar, Plaintiff raises both the EEPA and the PDPA in support of her claim. The EEPA declares, in pertinent part, that "the public policy of this State [is] to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees." N.C. Gen. Stat. § 143-422.2(a). The PDPA provides, in pertinent part and as quoted by Plaintiff:

> (a) The purpose of [the PDPA] is to ensure equality of opportunity, to promote independent living, self-determination, and economic self-sufficiency, and to encourage and enable all persons with disabilities to participate fully to the maximum extent of their abilities in the social and economic life of the State, to engage in remunerative employment, to use available public accommodations and public services, and to otherwise pursue their rights and privileges as inhabitants of this State.
>
> (b) The General Assembly finds that: the practice of discrimination based upon a disabling condition is contrary to the public interest and to the principles of freedom and equality of opportunity; the practice of discrimination on the basis of a disabling condition threatens the rights and proper privileges of the inhabitants of this State; and such discrimination results in a failure to realize the productive capacity of individuals to their fullest extent.

Id. § 168A-2.

¶ 14 Taking the allegations of Plaintiff's complaint as true, as we must at this stage, *Deminski*, 377 N.C. 406, 2021-NCSC-58, ¶ 12, Defendant violated the public policy of North Carolina as expressed by our legislature by terminating Plaintiff's employment because of her disability. Defendant contends, however, that the General Assembly intended for the PDPA to be the exclusive statutory remedy for Plaintiff's claim, thus preempting the common law and preventing Plaintiff from seeking common-law tort remedies for wrongful discharge in violation of public policy.

¶ 15 Our Supreme Court has explained that the public-policy exception to the employment-at-will doctrine is "designed to vindicate the rights of employees fired for reasons offensive to the public policy of this State. The existence of other remedies, therefore, does not render the public policy exception moot." *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 356, 416 S.E.2d 166, 171 (1992).

¶ 16 Nevertheless, "a legislative remedy may be deemed exclusive" in certain circumstances:

> If federal legislation preempts state law under the Supremacy Clause, U.S. Const. art. VI, cl. 2, then state claims, such as one for wrongful discharge, will be precluded. Additionally, if our state legislature has expressed its intent to supplant the common law with exclusive statutory remedies, then common law actions, such as wrongful discharge, will be precluded.

Id. (citation omitted).

¶ 17 In sum, a party may bring a common-law claim for wrongful discharge in violation of public policy in the absence of "(a) federal preemption or (b) the intent of our state legislature to supplant the common law with exclusive statutory remedies[.]" *Id.* at 356–57, 416 S.E.2d at 171. This is the framework that guides our analysis of this case.

¶ 18 There is no claim of federal preemption in the instant case. Instead, Defendant alleged in its memorandum in support of its motion to dismiss that the General Assembly enacted the PDPA "to preclude a common law cause of action as to disability discrimination in favor of an exclusive statutory remedy under the PDPA." Accordingly, the resolution of this case turns on that question.

¶ 19 "In determining whether the state legislature intended to preclude common law actions, we first look to the words of the statute to see if the legislature expressly precluded common law remedies." *Id.* at

358, 416 S.E.2d at 172. As Defendant acknowledges, the PDPA "contains no specific language of preemption of the common law claim[.]" Accordingly, "[b]ecause the legislature did not expressly preclude common law remedies, we look to the purpose and spirit of the statute and what the enactment sought to accomplish, considering both the history and circumstances surrounding the legislation and the reason for its enactment." *Id.* (citation and internal quotation marks omitted).

¶ 20 In seeking to ascertain the purpose and spirit of a statute, we consider "the policy objectives behind [its] passage and the consequences which would follow from a construction one way or another. A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (citations and internal quotation marks omitted). We may also consider canons of statutory construction, but "[a]n analysis utilizing the plain language of the statute and the canons of construction must be done in a manner which harmonizes with the underlying reason and purpose of the statute." *Id.*

¶ 21 We first review the history and circumstances surrounding the enactment of the PDPA, in light of both the EEPA and the common-law claim of wrongful discharge in violation of public policy. As our Supreme Court noted in *Amos*, "[i]t seems elementary that before a legislative body can intend to eliminate certain forms of remedy it must be aware that such remedies exist." 331 N.C. at 359, 416 S.E.2d at 173 (citation omitted).

¶ 22 The EEPA was enacted in 1977 and, as stated above, provides that the public policy of North Carolina is "to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees." N.C. Gen. Stat. § 143-422.2(a). Although no private cause of action exists under the EEPA, "[t]his Court has repeatedly recognized that the EEPA may form the basis for a wrongful discharge claim." *Jarman v. Deason*, 173 N.C. App. 297, 301, 618 S.E.2d 776, 779 (2005) (Geer, J., concurring).

¶ 23 The PDPA was enacted in 1985[1] and, as stated above, provides its own statement of purpose. *See* N.C. Gen. Stat. § 168A-2. In pertinent

1. The PDPA was originally titled the "North Carolina Handicapped Persons Protection Act," but effective 1 October 1999, the Act was renamed "and amended such that 'person with a disability' [wa]s generally substituted for 'handicapped person' throughout" the PDPA. *Simmons v. Chemol Corp.*, 137 N.C. App. 319, 322, 528 S.E.2d 368,

part, the PDPA recognizes the right of persons with disabilities "to engage in remunerative employment," *id.* § 168A-2(a), and finds that discrimination on the basis of disability "is contrary to the public interest and to the principles of freedom and equality of opportunity[,]" *id.* § 168A-2(b). The PDPA provides a cause of action, with a 180-day statute of limitations, for persons with disabilities aggrieved by discrimination in employment. *Id.* §§ 168A-5, -11 to -12.

¶ 24 The PDPA was enacted in the midst of our appellate courts' recognition of the public-policy exception to the employment-at-will doctrine. Our General Assembly ratified the PDPA on 3 July 1985, and it became effective 1 October 1985. An Act to Protect Handicapped Persons, ch. 571, § 4, 1985 N.C. Sess. Laws 649, 656. Meanwhile, this Court first recognized the public-policy exception in *Sides v. Duke University*, which was published on 7 May 1985 and which our Supreme Court declined to review on 13 August 1985. 74 N.C. App. 331, 342–43, 328 S.E.2d 818, 826–27, *disc. review denied*, 314 N.C. 331, 335 S.E.2d 13 (1985). Our Supreme Court did not itself affirmatively recognize the public-policy exception until 1989. *Coman*, 325 N.C. at 176, 381 S.E.2d at 447–48.

¶ 25 Defendant argues that this history evinces our General Assembly's intent that the PDPA preempt the common-law claim of wrongful discharge in violation of public policy with respect to cases of disability discrimination. However, this chronological argument acknowledges but a small part of "the history and circumstances surrounding the [PDPA] and the reason for its enactment[,]" while ignoring "the purpose and spirit of the [PDPA] and what [its] enactment sought to accomplish[.]" *Amos*, 331 N.C. at 358, 416 S.E.2d at 172 (citation omitted).

¶ 26 Looking to the purpose and spirit of the PDPA, in concert with the EEPA as emblematic statements of the public policy of this state, our Supreme Court has consistently cautioned against precisely the argument that Defendant now makes. Defendant's contention—that the PDPA's statutory cause of action for disability discrimination in employment preempts the common-law claim of wrongful discharge in violation of public policy—disregards our Supreme Court's holding in *Amos* that "the availability of alternative remedies *does not prevent a plaintiff from seeking tort remedies for wrongful discharge based on the public policy exception*." *Id.* at 356–57, 416 S.E.2d at 171 (emphasis added). This must be so, the *Amos* Court reasoned, because "[t]he availability of alternative common law and statutory remedies . . . *supplements rather*

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370 (2000). For ease of reading, we refer to it as the PDPA throughout our rendition of its history.

than hinders the ultimate goal of protecting employees who have been fired in violation of public policy." *Id.* at 357, 416 S.E.2d at 171 (emphasis added).

¶ 27 Indeed, our Supreme Court has long recognized the rule that "if a statute is remedial in nature, seeking to advance the remedy and repress the evil[,] it must be liberally construed to effectuate the intent of the legislature." *Misenheimer v. Burris*, 360 N.C. 620, 623, 637 S.E.2d 173, 175 (2006) (citation and internal quotation marks omitted). Nearly two centuries ago, our Supreme Court concluded that the existence of a statutory remedy did not eliminate a remedy at common law, and described alternative statutory remedies as often "giving an easier or cumulative remedy for a wrong, for which there was an action at the common law." *McKay v. Woodle*, 28 N.C. 352, 353–54 (1846); *see also*, *e.g.*, *Humphrey v. Wade*, 70 N.C. 280, 281 (1874) ("[A]lthough the relief sought may possibly have been under the act of 1846, . . . that remedy is only cumulative . . . ."); *Oliveira v. Univ. of N.C.*, 62 N.C. 69, 70 (1867) ("Supposing, therefore, that the complainant has [a] complete remedy at law, . . . it is only concurrent, and not exclusive . . . .").

¶ 28 Consequently, adopting Defendant's preferred construction of the PDPA—by holding that its statutory remedy implicitly precludes a common-law claim, despite the absence of any evidence that the General Assembly intended such a result—would contravene this well-established maxim of remedial statutes. Stated another way, accepting Defendant's argument would require us "to [repress] the remedy and [advance] the evil" that our General Assembly sought to remedy. *Misenheimer*, 360 N.C. at 623, 637 S.E.2d at 175 (citation and internal quotation marks omitted).

¶ 29 In addition, Defendant asks that we ignore well-established canons of statutory construction by reading into the PDPA an implicit preclusion that is not explicit in its text. Our Supreme Court has often reiterated that "[c]ourts should give effect to the words actually used in a statute and should neither delete words that are used *nor insert words that are not used* into the relevant statutory language during the statutory construction process." *N.C. Farm Bureau Mut. Ins. Co. v. Dana*, 379 N.C. 502, 2021-NCSC-161, ¶ 16 (emphasis added). "Nothing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012); *see also Wilson Funeral Dirs., Inc. v. N.C. Bd. of Funeral Serv.*, 244 N.C. App. 768, 774, 781 S.E.2d 507, 511 (2016) (applying the *casus omissus* canon). Although the *casus*

omissus canon allows for reasonable implications, Defendant's proposal does not fall within the boundary of our longstanding rule favoring the broad construction of statutory remedies.

¶ 30 Plaintiff argues that "this Court should not find some kind of implied 'exclusive remedy provision' where the legislature has remained silent[,]" observing that our General Assembly "is familiar with such clauses, such as in the area of workers[']compensation, where it provided a comprehensive statutory framework" that includes such an exclusive remedy provision. *See* N.C. Gen. Stat. § 97-10.1 ("[T]he rights and remedies herein granted . . . shall exclude all other rights and remedies . . . as against the employer at common law or otherwise . . . ."). Indeed, Defendant's chronological argument, discussed above, arguably weighs more heavily on this point, and favors Plaintiff. That our General Assembly—which explicitly precludes common-law remedies when it so chooses—declined to include an explicit preclusion provision in the PDPA either at its enactment or in its subsequent amendments speaks to the General Assembly's intent that the PDPA be viewed as a cumulative remedy, rather than exclusive or preclusive of the common-law cause of action.

¶ 31 Defendant relies heavily in its preclusion argument on *Lederer v. Hargraves Tech. Corp.*, in which a federal district court applied the *Amos* framework to conclude that our General Assembly "intended to preclude common law actions for wrongful discharge in violation of public policy with respect to members of the National Guard" by the enactment of N.C. Gen. Stat. §§ 127A-202, -202.1 and -203. 256 F. Supp. 2d 467, 472 (W.D.N.C. 2003). However, "[w]ith regard to matters of North Carolina state law, neither this Court nor our Supreme Court is bound by the decisions of federal courts, including the Supreme Court of the United States, although in our discretion we may conclude that the reasoning of such decisions is persuasive." *Salvie v. Med. Ctr. Pharmacy of Concord, Inc.*, 235 N.C. App. 489, 493 n.2, 762 S.E.2d 273, 277 n.2 (2014) (citation omitted).

¶ 32 Our careful review of *Lederer* shows it to be an outlier among decisions issued by other courts that have reviewed whether various statutes exclusively preempt the common-law claim of wrongful termination in violation of public policy. For example, "[o]ur courts have previously held that a plaintiff may pursue both a statutory claim under [the Retaliatory Employment Discrimination Act ("REDA")] and a common law wrongful discharge claim based on a violation of REDA." *White v. Cochran*, 216 N.C. App. 125, 133, 716 S.E.2d 420, 426 (2011). Neither does Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*,

preclude the common law claim. *See Atkins v. USF Dugan, Inc.*, 106 F. Supp. 2d 799, 810 (M.D.N.C. 1999) ("Consistent with *Amos*, this Court finds that [the plaintiff]'s assertion of a Title VII claim does not preclude his discharge in violation of public policy cause of action . . . ."). *Atkins* also concerned concurrent claims under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, which the defendant moved to dismiss, and the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, which the defendant did not. 106 F. Supp. 2d at 801–02. The district court allowed the common-law claim to proceed alongside the three federal statutory claims. *Id.* at 814.

¶ 33 In sum, we conclude that the General Assembly did not intend for the PDPA to preclude the common-law claim of wrongful discharge in violation of public policy, in light of (1) the plain text of the PDPA; (2) the history and circumstances of the enactment of the PDPA in light of the EEPA and the common-law claim; (3) our longstanding principle of construing remedial statutes broadly; and (4) the guidance of several other applicable canons of statutory construction. As such, the trial court erred as a matter of law by concluding that the PDPA's 180-day statute of limitations bars Plaintiff's common-law claim of wrongful discharge in violation of public policy, and thus erred by dismissing Plaintiff's complaint as time-barred.

III. Failure to State a Claim

¶ 34 **[2]** Our dissenting colleague contends that assuming, *arguendo*, that the PDPA's statute of limitations does not apply to—and therefore, bar—Plaintiff's common-law claim of wrongful discharge in violation of public policy, the trial court's order granting Defendant's motion to dismiss should nevertheless be affirmed because "Plaintiff has failed to allege sufficient facts to establish she is a member of the protected class of disabled individuals." *Dissent* ¶ 71. However, upon careful review of the allegations of Plaintiff's complaint in the deferential light of our standard of review, we conclude that Plaintiff has pleaded a claim sufficient to survive Defendant's motion to dismiss.

¶ 35 As stated above, "[t]he standard of review of an order granting a Rule 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Bill Clark Homes*, 281 N.C. App. 1, 2021-NCCOA-688, ¶ 11 (citation omitted).

¶ 36 Although the EEPA declares that the public policy of this State is to protect against discrimination in employment on the basis of

"handicap[,]" the EEPA does not itself define the word "handicap" as used in this context. *See* N.C. Gen. Stat. § 143-422.2 (containing no definition of "handicap"). However, this Court has previously determined that the PDPA's definition of "person with a disability" applies to common-law claims of wrongful discharge in violation of public policy, as set forth in the EEPA, prohibiting discrimination on account of a person's handicap or disability. *McCullough v. Branch Banking & Tr. Co.*, 136 N.C. App. 340, 347–48, 524 S.E.2d 569, 574 (2000). The PDPA defines "person with a disability" as: "Any person who (i) has a physical or mental impairment which *substantially limits* one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment." N.C. Gen. Stat. § 168A-3(7a) (emphasis added).

¶ 37 The dissent views Plaintiff's complaint as alleging the bare possibility of a future impairment or handicap. Our dissenting colleague asserts that "Plaintiff merely alleges that she has a heart condition that requires occasional treatment which *could* be impairing in the future if untreated and that her condition 'impairs' her ability to walk and exercise." *Dissent* ¶ 74. However, our dissenting colleague argues, Plaintiff "does not expressly allege that her condition *substantially* impairs these activities, nor does she allege facts which show that her condition substantially impairs these activities." *Id.*

¶ 38 Yet, construing Plaintiff's complaint liberally and taking all allegations therein as true, as we must, *Bill Clark Homes*, 281 N.C. App. 1, 2021-NCCOA-688, ¶ 11, we conclude that Plaintiff's complaint is sufficient to survive Defendant's Rule 12(b)(6) motion. In her complaint, Plaintiff alleges the following facts:

> In February 2019, [Plaintiff] began experiencing symptoms for which she sought the advice of a cardiologist. It was determined that she suffered from a serious health condition that would require a cardiac ablation procedure. The procedure involves cauterizing arteries in the heart with the objective of correcting atrial fibrillation, an irregular and often rapid heartbeat that can increase the risk of strokes, heart failure, and other heart-related complications.

¶ 39 She also recounts the "many healthcare appointments" that her condition required and her week-long absence from work that was necessary for Plaintiff to undergo and recuperate from a cardiac ablation procedure.

¶ 40 In the portion of her complaint setting forth her wrongful-discharge allegations, Plaintiff adds that she "suffers from a disability. Her heart

condition affects major life activities, such as walking and exercising, and if left untreated can lead to stroke or death. Plaintiff had a record of a disability at the time she was wrongfully terminated." She further alleges that she "was retaliated against and wrongfully discharged from her employment because of (a) her disability, (b) the time she took off to have her disability treated, and (c) Defendant's discrimination and preconceived notions about her future performance as an employee based on her disability." Lastly, she claims that her "medical condition and status as 'disabled' was a substantial factor in . . . Defendant's decision to terminate her employment."

¶ 41 Considering the PDPA's definition of "person with a disability," there does not appear to be any dispute that Plaintiff has pleaded: (1) that she has a record of (2) a physical impairment (atrial fibrillation) (3) that limits one or more major life activities.[2] Our dissenting colleague only challenges the sufficiency of Plaintiff's allegations regarding the degree of her physical limitation—*i.e.*, whether her condition *substantially* limits these major life activities.

¶ 42 The dissent relies on *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 259 S.E.2d 248 (1979), to support its contention that Plaintiff did not allege that her condition is *substantially* impairing. *Dissent* ¶ 74. In *Burgess*, our Supreme Court considered "whether a person who suffers from 'simple glaucoma,' but has 20/20 vision in both eyes with glasses, is a 'handicapped person' as defined" by the PDPA's predecessor statute. 298 N.C. at 522, 259 S.E.2d at 250. The *Burgess* Court concluded that "[f]airly construed, the remedial provisions of [the PDPA's predecessor statute] are intended to aid only those who are presently disabled. The problems of individuals, not presently disabled, who suffer from conditions which may or may not disable them in the future are beyond the scope of the statute." *Id.* at 528, 259 S.E.2d at 253–54. Thus, because the *Burgess* plaintiff alleged "that he has an eye disease but that his vision is functioning normally with glasses[,]" the Court concluded that the plaintiff was "not visually disabled within the meaning of the statute." *Id.* at 528, 259 S.E.2d at 253.

¶ 43 However, the use of eyeglasses to correct poor vision is specifically addressed in the PDPA. *See* N.C. Gen. Stat. § 168A-3(7a)(d) ("The determination of whether an impairment substantially limits a major life

2. "[W]alking" is specifically included among the PDPA's non-exhaustive list of "[m]ajor life activities." N.C. Gen. Stat. § 168A-3(7a)(b). "A major life activity also includes the operation of a major bodily function, including, but not limited to, . . . circulatory . . . functions." *Id.*

activity shall be made without regard to the ameliorative effects of mitigating measures, such as . . . low-vision devices, *which do not include ordinary eyeglasses or contact lenses* . . . ." (emphasis added)). Thus, the PDPA instructs that "the ameliorative effects" of eyeglasses shall be considered in "[t]he determination of whether an impairment substantially limits a major life activity[,]" *id.*, making this specific example less than illustrative for the case at bar.

¶ 44 As for the broader holding of *Burgess*, there is little in Plaintiff's pleading that suggests that she is "not presently disabled"; rather, the issue seems to be that her pleading could be read to suggest that her condition "may or may not disable [her] in the future[.]" *Burgess*, 298 N.C. at 528, 259 S.E.2d at 253–54. But what speculative language exists in Plaintiff's complaint—concerning the potential dire effect of failing to treat the atrial fibrillation with the cardiac ablation procedure to which Plaintiff was compelled to submit—should not be overread to deny the existence of her present condition as pleaded in her complaint.

¶ 45 Plaintiff alleges in her complaint that she "had a record of a disability": namely, atrial fibrillation, which is "a serious health condition" that "affects major life activities" and, if left untreated, could "lead to stroke or death." Plaintiff also alleges that she had been experiencing symptoms serious enough to require her week-long absence from work so that she could undergo and recuperate from a cardiac ablation procedure. And Plaintiff alleges that she "was retaliated against and wrongfully discharged from her employment because of (a) her disability, (b) the time she took off to have her disability treated, and (c) Defendant's discrimination and preconceived notions about her future performance as an employee based on her disability."

¶ 46 Altogether, construed liberally and taken as true, as we must at this stage of litigation, *Bill Clark Homes*, 281 N.C. App. 1, 2021-NCCOA-688, ¶ 11, the allegations of Plaintiff's complaint are sufficient to plead that Plaintiff is a "person with a disability," notwithstanding Plaintiff's omission of the word "substantially" from her description of the myriad ways her condition limits her major life activities.

¶ 47 At this juncture, this Court is not tasked with passing on the merits of Plaintiff's claim, only her pleading. We express no opinion on whether Plaintiff "will ultimately prevail" on the merits of her claim. *Id.* ¶ 12 (citation omitted). Our dissenting colleague posits that Plaintiff may have difficulty proving that she was terminated based on her disability; regardless, she has alleged facts supporting such a claim and we must not construe them unfavorably against her at this stage of the proceedings.

Rather, we merely conclude that Plaintiff "is entitled to offer evidence to support [her] claim." *Id.* (citation omitted).

¶ 48 Our opinion sounds in the longstanding and oft-recognized principle that a remedial statute "should be construed liberally, in a manner which assures fulfillment of the beneficial goals for which it is enacted and which brings within it all cases fairly falling within its intended scope." *Burgess*, 298 N.C. at 524, 259 S.E.2d at 251. Dismissal of Plaintiff's claim at this preliminary stage of litigation would frustrate those beneficial goals more than it would ensure their fulfillment.

Conclusion

¶ 49 For the foregoing reasons, the trial court's order dismissing Plaintiff's claim is reversed, and this matter is remanded for further proceedings.

REVERSED AND REMANDED.

Judge ARROWOOD concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

¶ 50 Though Plaintiff pleads in her complaint that she was terminated shortly after she retained for over a week funds her employer had directed to be deposited immediately into her employer's bank account, our role is to determine whether she has stated a claim for wrongful termination based on workplace disability discrimination. I conclude that she has not, as a matter of law for two independent reasons as explained below. Therefore, I respectfully dissent.

I. No Common Law Action Exists.

¶ 51 First, I conclude that our General Assembly intended the *statutory* remedies it created in Section 168A-11 (the "1985 PDPA") to be exclusive, and not to co-exist with a judicially created, common law remedy based on that body's public policy pronouncement in N.C. Gen. Stat. § 143-422.2 (the "1977 EEPA"). And since Plaintiff did not file her claim within the applicable 180-day statute of limitations contained in the 1985 PDPA, Judge Craig was correct in dismissing the complaint.

¶ 52 In North Carolina, "[o]rdinarily, an employee without a definite term of employment is an employee at will and may be discharged without reason." *Coman v. Thomas Mfg.*, 325 N.C. 172, 175, 381 S.E.2d 445, 446

(1989). However, in 1989, our Supreme Court first recognized a cause of action under our common law for wrongful discharge where one is discharged "for an unlawful reason or purpose *that contravenes public policy*." *Id.* at 175, 381 S.E.2d at 447 (emphasis added). In *Coman*, the Court held that a trucker had stated a cause of action for wrongful termination based on allegations he was terminated for refusing to falsify his driving log to show that he was not driving for periods in excess of that allowed under federal law. "Thus, according to plaintiff's allegations when defendant discharged plaintiff, it violated the federal regulations and the public policy of North Carolina as established in the Administrative Code." *Id.* at 176, 381 S.E.2d at 447. It should be noted that our General Assembly had, otherwise, not provided Mr. Coman with a remedy to sue for wrongful termination.

¶ 53 In the present case, however, our General Assembly has provided a remedy for wrongful termination based on workplace disability discrimination, through its passage of the 1985 PDPA. We are tasked to determine whether the 1985 PDPA constitutes Plaintiff's exclusive remedy or whether she also has a common law claim for wrongful termination based on a violation of the public policy announced by our General Assembly in the 1977 EEPA. Since the 1985 PDPA does not contain any express statement concerning whether the remedies contained in the 1985 PDPA are meant to be exclusive, our Supreme Court instructs that we are to "look to the purpose and spirit of the statute and what the enactment sought to accomplish, considering both the history and circumstances surrounding the legislation and the reasons for its enactment." *Amos v. Oakdale*, 331 N.C. 348, 358, 416 S.E.2d 166, 172 (1992).

¶ 54 Applying our Supreme Court's reasoning in *Amos* to the history and circumstances surrounding the passage of the 1985 PDPA, I conclude that our General Assembly did not intend that a judicially created, common law action based on the 1977 EEPA was to co-exist with the cause of action it was establishing.

¶ 55 In *Amos*, our Supreme Court determined that the termination of the plaintiffs' employment for their refusal to work for less than the minimum wage established by our state's Wage and Hour Act violated the public policy of our State. *Id.* at 350, 416 S.E.2d at 167. The question, though, was whether the Act provided the sole remedy.

¶ 56 The Court recognized that the "strongest argument" for the remedies in the Act to be exclusive was that at the time the Act was passed, neither our Court nor our Supreme Court "had recognized the public policy exception to the employment at-will doctrine." *Id.* at 358-59, 416 S.E.2d at 172.

¶ 57 The Court held, though, that the remedies provided by the Act were not exclusive because "[j]udging from these statutory remedies, it seems apparent that the intent of the legislature was to provide an employee an avenue to recover back wages *while remaining employed* . . . [but] provides *no remedy* for refusing to work for less than the statutory minimum wage." *Id.* at 358, 416 S.E.2d at 172.

¶ 58 Like the Wage and Hour Act, the 1985 PDPA was enacted before our Supreme Court recognized the public policy exception in *Coman* and at the time our Court first recognized the exception. *Sides v. Duke*, 74 N.C. App. 331, 342, 328 S.E.2d 818, 826 (1985). (The 1985 PDPA was introduced before our *Sides* opinion and enacted a few months after *Sides*. I doubt *Sides*, which involved a different public policy concern, was in our General Assembly's consciousness when it considered the 1985 PDPA.)

¶ 59 However, unlike the Wage and Hour Act at issue in *Amos*, the 1985 PDPA does provide a comprehensive range of remedies, not only for those terminated or not hired based on their disability, but for those refusing to work under discriminatory conditions. Specifically, the 1985 PDPA mandates an employer to provide reasonable accommodations, a new duty not contemplated even in the 1977 EEPA which established the public policy. *See Head v. Adams Farm Living, Inc.*, 242 N.C. App. 546, 553, 775 S.E.2d 904, 909 (2015) (recognizing that unlike the 1985 PDPA, the 1977 EEPA "does *not* impose a corresponding duty of reasonable accommodation by an employer"). That is, under the 1977 EEPA, discriminatory practices included treating disabled persons who could otherwise perform a job differently than fully abled persons. The 1985 PDPA fully proscribes this practice *and adds* the failure to provide reasonable accommodations as a discriminatory practice.

¶ 60 I note that the language in the 1985 PDPA, its history, and other circumstances occurring around the time of its passage indicate that the 1985 PDPA was intended to be exclusive, as explained below.

¶ 61 The General Assembly already provided a remedy for workplace disability discrimination prior to the 1977 EEPA. Specifically, in 1973, our General Assembly enacted the Handicapped Persons Act (the predecessor of the 1985 PDPA), codified in N.C. Gen. Stat. §§ 168-1, *et seq.* The 1973 Act was entitled "AN ACT TO PROVIDE FOR TREATMENT OF HANDICAPPED AND DISABLED PERSONS EQUAL TO THAT AFFORDED OTHER PERSONS[,]" and its stated purpose was to "encourage and enable handicapped persons to participate fully in the social and economic life of the State and to engage in remunerative

employment." *Id.* § 168-1. One of the sections under the 1973 Act established certain rights to disabled individuals in the workplace, as follows:

> **Right to employment**. Handicapped persons shall be employed in [all] employment, both public and private, on the same terms and conditions as the able-bodied, unless it is shown that the particular disability impairs the performance of the work involved.

N.C. Gen. Stat. § 168-6 (1973) (repealed and superseded by the 1985 PDPA). As the 1973 Act did not specify any statute of limitations, any claim filed for workplace disability discrimination was subject to the 3-year statute of limitations under N.C. Gen. Stat. 1-52(2). *Spaulding v. R.J. Reynolds Tobacco Co.*, 93 N.C. App. 770, 771-72, 379 S.E.2d 49, 50 (1989), *aff'd*, 326 N.C. 44, 387 S.E.2d 168 (1990).

¶ 62 In 1977, our General Assembly enacted the EEPA, which recognized as the public policy of our State that employers of fifteen (15) or more people should not discriminate based on "race, religion, color, national origin, age, sex or handicap[.]" N.C. Gen. Stat. § 143-422.2. The General Assembly certainly did not understand that this Act would be the basis of a new cause of action in addition to that provided in its 1973 Act, as no court had yet recognized a common law claim. The 1973 Act provided the cause of action, and the 1977 EEPA is clearly just a statement of public policy.

¶ 63 In 1985, our General Assembly replaced the portion of the 1973 Act dealing with workplace discrimination with the more robust 1985 PDPA. The language of the 1985 PDPA established a new cause of action with broader rights than that even contemplated in its 1970's legislation (as discussed above), again without any understanding that the cause of action was supplementing some common law claim as shown by the language in the Act.

¶ 64 The General Assembly repealed the section in the 1973 Act which initially created a cause of action for disability workplace discrimination. *See* 1985 Session Law, Chapter 571, Sec. 3 ("G.S. 168-6 is repealed.").

¶ 65 The "Statement of purpose" contained in the 1985 Act (codified in Chapter 168A-2) is substantially similar to the public policy as announced in the 1977 EEPA, as it relates to disabled persons.

¶ 66 Where its 1977 EEPA merely announces a public policy regarding discrimination by employers of 15 or more persons, the 1985 PDPA creates a cause of action against employers of 15 or more persons. *See* N.C. Gen. Stat. § 168A-3(2).

¶ 67 Our General Assembly made specific policy decisions for the procedure one would have to follow to pursue a claim for workplace disability discrimination. For instance, the 1985 PDPA provides that actions for a discriminatory practice "shall be tried to the court without a jury." N.C. Gen. Stat. § 168A-11(a). The Act provides that an employer's liability for back pay shall be limited to two years. *Id.* § 168A-11(b). And the Act limits the time within which a plaintiff may sue for workplace disability discrimination to 180 days. It seems odd that our General Assembly would enact these limitations while intending litigants could sue for the same conduct without these limitations through a common law claim.

¶ 68 And the 1985 PDPA states that our State's jurisdiction to consider a plaintiff's claim under that Act ends after the plaintiff commences a federal action raising a claim under the Americans with Disabilities Act for the same conduct. *Id.* § 168A-11(c). There is no mention that jurisdiction for common law claims likewise ends. If our General Assembly understood that a common law claim existed, it seems that this statute would have been amended to include a statement that our State's jurisdiction to consider any such claim ends once a federal action was commenced. But that body did not reference any such claim.

¶ 69 Finally, I note that in 1990, the year after recognizing the public-policy exception in *Coman*, our Supreme Court affirmed a decision from our Court holding that a claim for workplace disability discrimination was subject to the 180-day limitation period found in the 1985 PDPA that replaced the 1973 Act and, therefore was subject to the 180-day limitation period in the 1985 PDPA. *See Spaulding*, 93 N.C. App. at 773, 379 S.E.2d at 51, *aff'd*, 326 N.C. at 44, 387 S.E.2d at 168.[1]

¶ 70 There is a place for our courts to recognize a cause of action where an employer fires an at-will employee for a reason that violates some stated public policy. However, I do not believe that our Supreme Court intended for us to recognize a common law claim in the present context. Indeed, our General Assembly had already recognized the ill of workplace disability discrimination and created a cause of action for that ill four years prior to its public policy pronouncement in the 1977

1. I do note that, in 2000, our Court held that certain jury instructions for a *common law* workplace disability claim based the 1977 EEPA were not erroneous, suggesting that North Carolina does recognize a common law cause of action apart from the 1985 PDPA. *See McCullough v. BB&T*, 136 N.C. App. 340, 524 S.E.2d 569 (2000). However, the record in that case shows that the defendant bank never raised the issue of preemption. Further, whether the claim in that case should have been one under the 1985 PDPA was not dispositive on the issue before the Court, which merely centered on the definition of "handicapped" contained in the jury instruction. *Id.* at 348, 524 S.E.2d at 574.

EEPA. And in its 1985 PDPA, our General Assembly essentially restated the public policy contained in the 1977 EEPA when it repealed the 1973 Act and replaced it with legislation designed to remediate the public policy concern with broader rights.

II. Failure to Allege "Substantial" Impairment

¶ 71 Even assuming North Carolina recognizes a common law claim for workplace disability discrimination, Plaintiff has failed to allege sufficient facts to establish she is a member of the protected class of disabled individuals.

¶ 72 The term "handicap" is not defined in the 1977 EEPA. However, our Court has held that the definitions contained in the 1985 PDPA apply. *See McCullough v. BB&T*, 136 N.C. App. 340, 524 S.E.2d 569 (2000).

¶ 73 The 1985 PDPA defines a person with a disability as one who has a physical "impairment which *substantially* limits one or more major life activities" or is "treated as" having such impairment. N.C. Gen. Stat. § 168A-3(7a) (emphasis added).

¶ 74 In her complaint, Plaintiff merely alleges that she has a heart condition that requires occasional treatment which *could* be impairing in the future if untreated and that her condition "impairs" her ability to walk and exercise. However, she does not expressly allege that her condition *substantially* impairs these activities, nor does she allege facts which show that her condition substantially impairs these activities. *See*, *e.g.*, *Burgess v. Joseph Schlitz*, 298 N.C. 520, 259 S.E.2d 248 (1979) (holding in an action brought under the 1973 Act that one is not "handicapped" who had glaucoma but who had 20/20 vision when wearing glasses).

¶ 75 Therefore, assuming it is appropriate for us to recognize a common law remedy in the face of the comprehensive remedies provided by the 1985 PDPA, Plaintiff's complaint still fails because of her failure to allege facts showing that she is a member of a protected class under the 1977 EEPA.

¶ 76 I conclude by noting to address Plaintiff's allegations that she was "wrongfully discharged" because of "(a) her disability, (b) the time she took off to have her disability treated, and (c) Defendant's discrimination and preconceived notions about her future performance as an employee based on her disability."

¶ 77 Assuming North Carolina recognizes a common law claim and that Plaintiff has properly alleged such claim, Plaintiff cannot base her "common law" claim on Defendant's desire not to accommodate her (allowing

her to attend doctor's appointments, etc.) Indeed, our Court has held that *the duty to accommodate* did not arise under the 1977 EEPA, but this duty is exclusive to claims brought under the 1985 PDPA. *Head v. Adams Farm*, 242 N.C. App. at 553, 775 S.E.2d at 909 (reiterating that the 1977 EEPA "does *not* impose a corresponding duty of reasonable accommodation by the employer"). Therefore, to succeed in her claim, Plaintiff must show how, based on her condition, she was treated differently than other employees without the condition. Plaintiff would have an almost impossible burden of showing that Defendant treated her differently based on her heart condition. Indeed, Plaintiff has admitted in her complaint that Defendant had a non-discriminatory reason to terminate her; namely, her failure to make a bank deposit for her employer for over a week. And she makes no allegation that some employee without a heart condition was *not* fired for similar conduct.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 JULY 2022)

FOUR ROSES, LLC v. FIRST PROTECTIVE INS. CO. 2022-NCCOA-501 No. 21-427	Dare (20CVS355)	Affirmed
IN RE J.L.L. 2022-NCCOA-502 No. 21-791	Davie (14JA6)	Affirmed
IN RE J.W. 2022-NCCOA-503 No. 21-772	McDowell (17JT98)	Affirmed
IN RE L.T. 2022-NCCOA-504 No. 21-790	Union (19JT186)	Affirmed
IN RE T.S. 2022-NCCOA-505 No. 21-710	Mecklenburg (21SPC4141)	Affirmed
KUBICA v. MORGAN 2022-NCCOA-506 No. 21-508	Orange (17CVD758)	Affirmed
MOSELEY v. HENDRICKS 2022-NCCOA-507 No. 21-747	Wilson (19CVS928)	Dismissed
SEARCY v. THORNTON 2022-NCCOA-508 No. 21-590	Durham (21CVS1500)	Dismissed
SMITH v. AUTOMONEY, INC. 2022-NCCOA-509 No. 21-271	Hoke (20CVS295)	Affirmed
STATE v. JOHNSON 2022-NCCOA-510 No. 21-573	Craven (17CRS52440) (18CRS12-13) (20CRS583)	No Error
STATE v. JUAREZ 2022-NCCOA-511 No. 21-779	Mecklenburg (17CRS221812) (17CRS221931)	No error; Remanded.

STATE v. MARTIN 2022-NCCOA-512 No. 21-601	Rockingham (17CRS1645) (17CRS52819)	No Error in part; Dismissed without Prejudice in part.
STURDIFEN v. BROWN 2022-NCCOA-513 No. 21-541	Carteret (19CVD1386)	Vacated and Remanded.
WALLACE v. AUTOMONEY, INC. 2022-NCCOA-514 No. 21-418	Richmond (20CVS245)	Affirmed
WARLEY v. AUTOMONEY, INC. 2022-NCCOA-515 No. 21-249	Guilford (20CVS5460)	Affirmed

ASHE CNTY. v. ASHE CNTY. PLAN. BD.

[284 N.C. App. 563, 2022-NCCOA-516]

ASHE COUNTY, NORTH CAROLINA, PLAINTIFF
v.
ASHE COUNTY PLANNING BOARD AND APPALACHIAN MATERIALS, LLC, RESPONDENTS

No. COA18-253-2

Filed 2 August 2022

Zoning—permits—asphalt plant—ordinance moratorium—permit choice statutes

An application for a permit to operate an asphalt plant was not complete on the date it was initially submitted, and only became complete when the applicant obtained a state-issued air quality permit several months later, by which point the county board of commissioners had adopted a moratorium on the issuance of any new permits under its local Polluting Industries Development Ordinance. Therefore, the applicant could not avail itself of the permit choice statutes and its application was subject to the moratorium. Further, the proposed plant would have been located within 1,000 feet of two commercial buildings (a quarry and a barn) in violation of the ordinance. Since the application could not have been approved under these circumstances, the trial court's order requiring the county to issue a permit was reversed.

Judge DILLON dissenting.

Appeal by Petitioner from order entered on 30 November 2017 by Judge Susan E. Bray in Ashe County Superior Court. Heard in the Court of Appeals on 3 October 2018. *See Ashe Cnty. v. Ashe Cnty. Plan. Bd.*, 265 N.C. App. 384, 829 S.E.2d 224 (2019). Heard in the Supreme Court on 1 September 2020. Remanded to the Court of Appeals by the Supreme Court on 18 December 2020. *See Ashe Cnty. v. Ashe Cnty. Plan. Bd.*, 376 N.C. 1, 852 S.E.2d 69 (2020). Heard in the Court of Appeals again on 15 April 2021.

Womble Bond Dickinson (US) LLP, by Amy O'Neal and John C. Cooke, for Petitioner-Appellant.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt, for Respondent-Appellee Appalachian Materials, LLC.

No brief for Respondent-Appellee Ashe County Planning Board.

Law Offices of F. Bryan Brice, Jr., and David E. Sloan, for Blue Ridge Environmental Defense League and Protect Our Fresh Air, amicus curiae.

Teague Campbell Dennis & Gorham, LLP, by Natalia K. Isenberg, for the North Carolina Association of County Commissioners, amicus curiae.

JACKSON, Judge.

¶ 1 A panel of this Court issued an opinion in this case on 21 May 2019, affirming the order of the trial court. *Ashe Cnty. v. Ashe Cnty. Plan. Bd.*, 265 N.C. App. 384, 394, 829 S.E.2d 224, 231 (2019) ("*Ashe Cnty. I*"), *rev'd in part*, 376 N.C. 1, 852 S.E.2d 69 (2020). On 18 December 2020, our Supreme Court reversed in part the prior opinion of this Court, remanding the case to our Court for us to resolve outstanding issues in the appeal in light of the Supreme Court's holding that the primary holding of this Court's prior opinion was erroneous. *Ashe Cnty. v. Ashe Cnty. Plan. Bd.*, 376 N.C. 1, 16, 20-21, 852 S.E.2d 69, 79, 82-83 (2020) ("*Ashe Cnty. II*"). Our Supreme Court's opinion recounts the facts of the case in detail, *id.* at 2-9, 852 S.E.2d at 70-75, so we repeat only those necessary for an understanding of the disposition of the issues that remain.

I. Factual and Procedural Background

¶ 2 In 2015, Ashe County had a land use ordinance called the Polluting Industries Development Ordinance ("PID Ordinance"), which had been in effect for 16 years. The PID Ordinance created a permit system administered by the Ashe County Planning Department with numerous requirements, the most relevant of which were that

> (1) the applicant pay a $500 uniform permit fee;
>
> (2) the applicant have obtained all necessary federal and state permits;
>
> (3) the polluting industry not be located within 1,000 feet of a residential dwelling unit or commercial building; and
>
> (4) the polluting industry not be located within 1,320 feet of a school, daycare, hospital, or nursing home facility.

Ashe Cnty. II, 376 N.C. at 2-3, 852 S.E.2d at 71.

¶ 3 This case is about a permit application submitted under the PID Ordinance that did not meet the second requirement because at the time the application was submitted, the applicant had not yet obtained an air quality permit issued by the North Carolina Department of Environmental Quality ("DEQ") that would have been required for its proposed use of 3.58 acres of land in the County to proceed.

¶ 4 Defendant Appalachian Materials, LLC ("Appalachian Materials") is an asphalt sales and production company that beginning in at least 2015 was interested in operating an asphalt plant in Ashe County. In early June of 2015, Appalachian Materials submitted an application and $500 permit fee under the PID Ordinance to the County's Planning Director to obtain County approval of the proposed plant. While Appalachian Materials had applied for an air quality permit from DEQ at the time it submitted the PID Ordinance application, the air quality permit application was still pending. DEQ issued the air quality permit on 26 February 2016, and Appalachian Materials promptly forwarded the air quality permit to the County's Planning Director to supplement the PID Ordinance application it had submitted the previous June.

¶ 5 In the intervening period—between June 2015 when Appalachian Materials submitted its initial, incomplete PID Ordinance permit application and February 2016 when Appalachian Materials supplemented the application with the required air quality permit issued by DEQ—the political winds had shifted against Appalachian Materials in Ashe County. In response to concerned citizens raising questions about the location of the proposed plant, the Ashe County Board of Commissioners (the "County Board") enacted a moratorium prohibiting the issuance of new PID Ordinance permits on 19 October 2015, which was effective until 19 April 2016. In other words, by the time Appalachian Materials supplemented its application because DEQ had finally issued the air quality permit, the moratorium had taken effect, barring issuance of the PID Ordinance permit until at least 19 April 2016.

¶ 6 On 4 April 2016, the moratorium was extended an additional six months. On 3 October 2016, after the moratorium had lifted, the County Board repealed the PID Ordinance and enacted a new ordinance in its place, the High Impact Land Use Ordinance, which created new and more onerous requirements applicable to permits to operate asphalt plants.

¶ 7 By this point, Appalachian Materials was embroiled in a dispute with the County over when and whether its application for the PID Ordinance permit was complete and whether it had complied with the PID Ordinance and was entitled to issuance of a permit under the less

onerous, now-repealed regulatory regime that had governed at the time the initial, incomplete application was submitted and for the previous 16 years.

¶ 8 The Planning Director denied the application on 20 April 2016, giving three reasons for the decision: (1) a complete application was not submitted before the moratorium went into effect on 15 October 2015; (2) the 3.58 acres was within 1,000 feet of two commercial buildings—a quarry and a barn; and (3) the incomplete application submitted by Appalachian Materials on 29 February 2016 contained material misrepresentations. Based on a comparison of the incomplete PID Ordinance application and the air quality permit application submitted to DEQ, the Planning Director concluded that inconsistencies between the applications proved deceptive intent on the part of Appalachian Materials. Specifically, the air quality permit application submitted to DEQ represented that the annual output of the asphalt plant would be 300,000 tons per year or less, whereas the incomplete PID Ordinance application submitted to the County represented that the annual output of the asphalt plant would be 150,000 tons per year or less. Based on the scale of the output of the proposed plant reflected by the representations in the air quality permit application submitted to DEQ, the Planning Director additionally concluded that Appalachian Materials potentially anticipated using the quarry within 1,000 feet of the proposed plant as part of the operation, which if true, would mean that the proposed plant was within 1,000 feet of *both* commercial buildings *and* residences, neither of which was permitted. Appalachian Materials noted an appeal to the Ashe County Planning Board (the "Planning Board") from the Planning Director's denial.[1]

¶ 9 On appeal to the Planning Board, Appalachian Materials took the position that a 22 June 2015 letter from the Planning Director to Appalachian Materials was a final determination that bound the County to issue the PID Ordinance permit. The letter read as follows:

> I have reviewed the plans you have submitted on behalf of Appalachian Materials LLC for a polluting industries permit. The proposed asphalt plant is located on Glendale School Rd, property identification number 12342-016, with no physical address.
>
> The proposed site does meet[] the requirements of the Ashe County Polluting Industries Ordinance, Chapter

1. A County ordinance authorized the Ashe County Planning Board to act as Ashe County's board of adjustment.

> 159 (see attached checklist). However, the county ordinance *does require that all state and federal permits be in hand prior to a local permit being issued*. We have on file the general NCDENR Stormwater Permit and also the Mining Permit for this site. *Once we have received the NCDENR Air Quality Permit[,] our local permit can be issued for this site.*
>
> If you have any questions regarding this review[,] please let me know.

(Emphasis added.)

¶ 10 Despite the language emphasized above, Appalachian Materials prevailed in its appeal to the Planning Board, and the Planning Board reversed the Planning Director's decision and ordered that a PID Ordinance permit be issued to Appalachian Materials. The County Board then petitioned to Ashe County Superior Court for judicial review of the Planning Board's decision. In the trial court, Appalachian Materials prevailed again, and the court ordered the County Board to issue the permit within ten days. The County Board then noted an appeal to our Court.

¶ 11 In the appeal to our Court, Appalachian Materials prevailed a third time. *Ashe Cnty. I*, 265 N.C. App. at 394, 829 S.E.2d at 231. This Court's prior opinion, which was unanimous, reasoned that the 22 June 2015 letter was not a final determination but that it nonetheless "did have *some* binding effect[,]" and that Appalachian Materials was prejudiced by the letter because it could have sought a variance were it not for the letter. *Id.* at 392-93, 829 S.E.2d at 229-30 (emphasis in original). The Court essentially held that the County Board was estopped from denying that the 22 June 2015 letter was a final determination because the County Board had not appealed from the issuance of the letter to the Planning Board within 30 days (presumably from the date the Planning Director dated the letter rather than the date Appalachian Materials received it, although the prior opinion did not address this detail), even though there was no existing procedure for such an appeal at the time. *Id.* at 392-94, 829 S.E.2d at 229-31.

¶ 12 Our Supreme Court was unpersuaded. In a unanimous opinion, the Court held that the 22 June 2015 letter was not "any sort" of a final determination, "in whole or in part," reversing the holding of this Court based on the estoppel theory. *Ashe Cnty. II*, 376 N.C. at 16, 852 S.E.2d at 79. The Supreme Court was more circumspect about the implications of this holding, however, remanding the case to our Court to determine

(1) "whether Appalachian Materials' application was sufficiently complete at the time that it was submitted to the Planning Director to trigger the application of the permit choice statutes"; (2) "whether the Planning Director was authorized to deny Appalachian Materials' permit application on the basis of the moratorium statute"; (3) "whether the proposed asphalt plant was located within 1,000 feet of a commercial building"; and (4) "whether the Planning Board erred by rejecting the Planning Director's determination that Appalachian Materials' application contained material misrepresentations." *Id.* at 20, 852 S.E.2d at 82.

¶ 13 Striking a deferential tone, the Supreme Court first noted this Court's prior reliance on the 22 June 2015 letter to resolve nearly the entirety of the substance of the appeal and second, "the fact that all of the[] additional issues appear[ed] to . . . be . . . interrelated with the appeal-related issue . . . resolved" by its opinion, concluding that "the Court of Appeals should revisit each of these additional issues and decide them anew without reference to the fact that Ashe County did not appeal the 22 June 2015 letter." *Id.* at 21, 852 S.E.2d at 82. "Although the 22 June 2015 letter did not constitute a final decision triggering the necessity for an appeal," the Court added, "we do not hold that that letter is irrelevant to the making of the necessary determinations on remand, with the parties remaining free to argue any legal significance that the letter may or may not, in their view, have." *Id.* Accordingly, the Court remanded the case to our Court "for reconsideration of each of the[] additional issues[.]" *Id.*

II. Standard of Review

¶ 14 On appeal from the decision of the Planning Board, a body authorized by a local ordinance to act as the County's board of adjustment, the trial court sat as an appellate court, reviewing the Planning Board's decision on a writ of certiorari. *See Dellinger v. Lincoln Cnty.*, 248 N.C. App. 317, 322, 789 S.E.2d 21, 26 (2016). At the time of the Planning Board's decision and the proceeding in Superior Court, former N.C. Gen. Stat. § 160A-388 provided that "[e]very quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393." N.C. Gen. Stat. § 160A-388(e2)(2) (2019) (repealed by 2019 S.L. 111 § 2.3) (recodified at N.C. Gen. Stat. § 160D-406(k) (2021)).

> The Superior Court's functions when reviewing the decision of a board sitting as a quasi-judicial body include:
>
> (1) Reviewing the record for errors in law,

> (2) [E]nsuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) [E]nsuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) [E]nsuring that decisions of [the Planning Board] are supported by competent, material and substantial evidence in the whole record, and
>
> (5) [E]nsuring that decisions are not arbitrary and capricious.
>
> . . .
>
> When [an] assignment of error alleges an error of law, *de novo* review is appropriate. Under a *de novo* standard of review, a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance[.]

Thompson v. Union Cnty., 2022-NCCOA-382, ¶ 10-11.

III. Analysis

¶ 15 We review each of the outstanding issues in the order they are listed in our Supreme Court's opinion.

A. The Permit Choice Statutes Do Not Apply Because the Application Was Not Submitted Until After the Moratorium Went into Effect

¶ 16 Based on our Supreme Court's holding that the 22 June 2015 letter was not "any sort" of a final determination, *Ashe Cnty. II*, 376 N.C. at 16, 852 S.E.2d at 79, we hold that the application was complete on 29 February 2016—when Appalachian Materials forwarded the air quality permit issued by DEQ to the Planning Director and demanded that the PID Ordinance permit be issued. In June 2015, Appalachian Materials had not "obtained all necessary federal and state permits[,]" *id.* at 2, 852 S.E.2d at 71, as was required, because DEQ had not issued the air quality permit until 26 February 2016, and this "necessary . . . state permit" was not submitted to the Planning Director by counsel for Appalachian Materials until three days later, on 29 February 2016. As the 22 June 2015 letter from the Planning Director noted, "the county ordinance [] require[d] that all state and federal permits be in hand *prior to a local*

permit being issued." (Emphasis added.) Only after Appalachian Materials supplemented its application with the required air quality permit on 29 February 2016 could the "local [PID Ordinance] permit [] be issued for th[e] site[,]" to quote the 22 June 2015 letter again. However, by that time, the County Board had adopted a moratorium prohibiting the issuance of new PID Ordinance permits.

¶ 17 The permit choice statutes—N.C. Gen. Stat. §§ 143-755, 153A-320.1, and 160A-360.1 on 29 February 2016 and N.C. Gen. Stat. §§ 143-755 and 160D-108 today—provide, in general, that if a land use regulation changes between the time a permit application is "submitted" and the time a permit decision is made, then the applicant may choose which version of the regulation applies.[2] N.C. Gen. Stat. § 143-755(a) (2021). The purpose of these provisions is to protect the investment and reasonable reliance of developers on the decisions of local government regarding "site evaluation, planning, development costs, consultant fees, and related expenses." *Id.* § 160D-108(a). Our General Assembly has found that they "strike an appropriate balance between private expectations and the public interest" by "provid[ing] for the establishment of certain vested rights in order to ensure reasonable certainty, stability, and fairness in the development regulation process, to secure the reasonable expectations of landowners, and to foster cooperation between the public and private sectors in land-use planning and development regulation." *Id.*

¶ 18 However, application of the permit choice statutes to the PID Ordinance application submitted by Appalachian Materials depends on the "permit application [being] submitted" where "a rule or ordinance changes between the time a permit application is submitted and a permit decision is made[.]" N.C. Gen. Stat. § 153A-320.1(a) (2016) (repealed 2020). That is, application of the statutes depends on when the PID Ordinance application was "submitted," and the statutes do not apply unless an application has been submitted *before* the land use regulation changes.

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2. In 2019, the General Assembly enacted "An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State[,]" repealing N.C. Gen. Stat. §§ 150A-320 to 153A-326. 2019 S.L. 111 § 2.2. Session Law 2019-111 consolidated and reorganized the municipal and county land-use planning and development statutes into one Chapter of the General Statutes. *Id.* § 2.1(e). It also made various changes and clarifying amendments, *id.* § 1.1, *et seq.*, and gave persons aggrieved a separate cause of action, distinct from the certiorari statute, which it amended significantly, *id.* §§ 1.7, 1.9 (codified at N.C. Gen. Stat. §§ 160A-393.1, -393). In 2020, the General Assembly enacted Session Law 2020-25, completing the consolidation of the land use statutes into one Chapter of the General Statutes, as directed by Session Law 2019-111. *An Act to Complete the Consolidation of Land-use Provisions into One Chapter of the General Statutes as Directed by S.L. 2019-111, as Recommended by the General Statutes Commission*, 2020 S.L. 25.

¶ 19 We hold that the PID Ordinance permit application submitted by Appalachian Materials was not "submitted" within the meaning of the permit choice statutes until it was complete—on 29 February 2016, when counsel for Appalachian Materials forwarded the air quality permit issued by DEQ on 26 February 2016 to the Planning Director and demanded that the PID Ordinance permit be issued—because only then did the application meet the requirements that "(1) the applicant pay a $500 uniform permit fee; [and] (2) the applicant have obtained all necessary federal and state permits[.]" *Ashe Cnty. II*, 376 N.C. at 2, 852 S.E.2d at 71. Yet, on 29 February 2016, when the application was complete, the relevant land use regulation—the PID Ordinance—had not yet been repealed and replaced by the High Impact Land Use Ordinance, which did not occur until 3 October 2016. Instead, the County Board had adopted a moratorium on the issuance of any new permits under the PID Ordinance. Whether the Planning Director was justified in denying the application on 20 April 2016 that was submitted within the meaning of the permit choice statutes by Appalachian Materials the previous February thus depends on whether the moratorium adopted by the County Board on 19 October 2015 and later extended until 3 October 2016 barred the Planning Director from issuing the permit.

B. The Moratorium Statute Did Not Authorize the Planning Director to Approve the Application

¶ 20 The moratorium statute in effect in February 2016, when Appalachian Materials submitted a complete PID Ordinance application, authorized counties to adopt development moratoria under certain conditions, but exempted from the applicability of these moratoria "development for which substantial expenditures ha[d] already been made in good faith reliance on a *prior* valid administrative or quasi-judicial permit or approval[.]" N.C. Gen. Stat. § 153A-340(h) (2016) (repealed 2020) (emphasis added). The moratorium statute in effect today preserves the exemption contained in former-§ 153A-340(h) from the applicability of these moratoria to "development for which substantial expenditures have already been made in good-faith reliance on a *prior* valid development approval[.]" N.C. Gen. Stat. § 160D-107(c) (2021) (emphasis added). Eliminating any ambiguity about whether the permit choice statutes apply to a permit application that has been submitted but not yet approved before a moratorium goes into effect that prohibits the requested land use, the current moratorium statute goes on to specify that "if a *complete* application for a development approval has been *submitted* prior to the effective date of a moratorium, G.S. 160D-108(b) [i.e., the permit choice rule] applies when permit processing resumes." *Id.* (emphasis added).

¶ 21 In other words, under former-§ 153A-340(h) only "permitted" or "approved" land uses were exempt from the moratorium statute in effect in February 2016—an exemption former-§ 153A-340(h)'s successor statute, § 160D-107(c), both preserves and clarifies in relation to the permit choice statutes, by cross-referencing one of the permit choice statutes in effect today and specifically providing that the permit choice rule applies only to "*complete*[*d*] application[s] for . . . approval[.]" *Id.* § 160D-107(c) (emphasis added). *See also Town of Hazelwood v. Town of Waynesville*, 320 N.C. 89, 95, 357 S.E.2d 686, 689 (1987) ("When the legislature amends an ambiguous statute, the presumption is not that its intent was to change the original act, but merely to clarify that which was previously doubtful." (internal marks and citation omitted)).

¶ 22 We therefore hold that the application by Appalachian Materials submitted within the meaning of the permit choice statutes in February 2016 was not exempt from the moratorium adopted by the County Board on 19 October 2015 because Appalachian Materials never obtained "a *prior* valid administrative or quasi-judicial *permit*" or "*approval*" of the application. *See*, *e.g.*, *Ashe Cnty. II*, 376 N.C. at 19, 852 S.E.2d at 81 ("[*N*]*o part* of the 22 June 2015 letter constituted a final, binding decision[.]" (emphasis in original)). Indeed, Appalachian Materials could not have obtained a permit or approval of the application by October 2015 when the application was not even submitted until four months later, after the outstanding air quality permit was submitted, which completed the application. *See* N.C. Gen. Stat. § 153A-320.1 (2016) ("*If* a rule or ordinance changes between the time a permit application is *submitted* and a permit decision is made, *then* G.S. 143-755 shall apply.") (emphasis added); N.C. Gen. Stat. § 143-755(a) (2021) ("If a development permit applicant submits a permit application for any type of development and a rule or ordinance is amended, . . . between the time the development permit application was submitted and a development permit decision is made, the development permit applicant may choose which adopted version of the rule or ordinance will apply[.]"). *See also id.* § 160D-107(c) ("Notwithstanding the foregoing, if a *complete* application for a development approval has been *submitted prior* to the effective date of a moratorium, G.S. 160D-108(b) applies when permit processing resumes.") (emphasis added); *id.* § 160D-108(b) ("If a land development regulation is amended between the time a development permit application was submitted and a development permit decision is made or if a land development regulation is amended after a development permit decision has been challenged and found to be wrongfully denied or illegal, G.S. 143-755 applies.").

¶ 23 North Carolina General Statute § 153A-340(h) authorized Ashe County, through the County Board, N.C. Gen. Stat. § 153A-340(c1) (2016) (repealed 2020), to "adopt temporary moratoria on any county development approval required by law[,]" with exceptions not applicable here, *id.* § 153A-340(h), and in the absence of any exemption provided by the moratorium statute in effect in February 2016, we hold that under the moratorium approved by the County Board in October 2015, the Planning Director lacked the authority to approve the application.[3]

C. The Proposed Asphalt Plant Was Located within 1,000 Feet of a Commercial Building

¶ 24 As noted above, the Planning Director concluded in the 20 April 2016 denial of the incomplete PID Ordinance application submitted by Appalachian Materials that the 3.58 acres leased by Appalachian Materials for the proposed plant was within 1,000 feet of two commercial buildings—a quarry and a barn—and it was a requirement of the PID Ordinance in effect in February 2016 that permitted polluting industries "*not be* located within 1,000 feet of a residential dwelling unit or commercial building[.]" *Ashe Cnty. II*, 376 N.C. at 2, 852 S.E.2d at 71 (emphasis added). We hold that the record supports the Planning Director's conclusions regarding the location of these commercial buildings, and that the buildings did, in fact, qualify as commercial buildings within the meaning of the PID Ordinance in February 2016. Although any mention of the quarry is conspicuously absent from this Court's prior opinion, even the prior opinion conceded that the evidence was "uncontradicted . . . that the barn was owned by a neighbor who ran a business in which he harvested and sold hay and that he used the barn to store his hay inventory and to store farm equipment used to harvest hay." *Ashe Cnty. I*, 265 N.C. App. at 393, 829 S.E.2d at 230.

¶ 25 Our Supreme Court's reversal of the holding in this Court's prior opinion that the County was estopped from later denying anything the 22 June 2015 letter said repudiates the reasoning in this Court's prior opinion that it was unnecessary to resolve whether the buildings identified in the 20 April 2016 denial qualified as commercial buildings. *See*, *e.g.*, *Ashe Cnty. I*, 265 N.C. App. at 393, 829 S.E.2d at 230 ("[T]he Planning Director made the determination that they were *not* commercial buildings in his June 2015 Letter and [] his determination was binding on the County.")

3. The Planning Director could have held the application in abeyance until the moratorium lifted. Because we hold that Appalachian Materials was not entitled to the benefit of the permit choice statutes based on the time the application was submitted, after the PID Ordinance was repealed, the Planning Director would no longer have had the authority to do anything but deny the application.

(emphasis in original). Based on our Supreme Court's holding that the 22 June 2015 letter was not "any sort" of a final determination, "in whole or in part," *Ashe Cnty. II*, 376 N.C. at 16, 852 S.E.2d at 79, we hold that denial of the application by the Planning Director was required because the proposed plant would have been located within 1,000 feet of not one, but two commercial buildings—a quarry and a barn, *see Ashe Cnty. I*, 265 N.C. App. at 393, 829 S.E.2d at 230 (noting the definition of "business" in a County ordinance as a "commercial trade . . . including but not limited to . . . agricultural . . . and other similar trades or operations").

D. Alleged Material Misrepresentations in the Application Submitted by Appalachian Materials

¶ 26 Because there were two independently sufficient reasons in February 2016 preventing the Planning Director from granting the permit application submitted by Appalachian Materials—a complete version of the application was not submitted until 29 February 2016, after the 15 October 2015 moratorium went into effect, and there were two commercial buildings within 1,000 feet of the 3.58 acres leased by Appalachian Materials where the proposed plant was to be located—we do not reach the issue of whether the alleged material misrepresentations in the PID Ordinance application were, in fact, misrepresentations, and if so, whether they constituted an independent basis for denying the PID Ordinance application submitted by Appalachian Materials.

¶ 27 In general, "we do not make credibility assessments as an appellate court." *State v. Daw*, 277 N.C. App. 240, 268-69, 2021-NCCOA-180 (citation omitted). The reason is that trial courts, unlike our Court, have "the opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges[.]" *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (cleaned up).

¶ 28 Nevertheless, we note that the inconsistency between the representation in the incomplete PID Ordinance application and the air quality permit application submitted to DEQ regarding the anticipated output of the proposed plant supports the inference of deceptive intent drawn by the Planning Director: Appalachian Materials obtained an air quality permit from DEQ representing to DEQ that it anticipated operating an asphalt plant in Ashe County producing as much as twice as much asphalt annually as it had represented that it planned to produce to local officials in Ashe County in its PID Ordinance application. On the cold record, it is impossible to determine whether the representation in the PID Ordinance application is false, the representation in the air

quality permit application is false, or whether any false representation in the PID Ordinance application was made knowingly. Yet, the representations could not both be true at the time a complete PID Ordinance application was submitted in February of 2016.

IV. Conclusion

¶ 29 We reverse the order of the trial court requiring Ashe County to issue Appalachian Materials a PID Ordinance permit.

REVERSED.

Chief Judge STROUD concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

¶ 30 I vote to affirm Judge Bray's order, affirming the Planning Board's decision to direct the issuance of the permit to Appalachian Materials ("AM").

¶ 31 I conclude AM is entitled to have its permit application considered under the more developer-friendly version of the County's ordinance in place when AM's application was submitted in June 2015. The fact that AM's application filed with the State for the required air quality permit was pending does not render AM ineligible for protection under our permit choice law.

¶ 32 I further conclude the Planning Board's findings support its conclusion that the barn and quarry located within 1000 feet from AM's proposed operation were not "commercial buildings" under the County ordinance which prohibits the location of asphalt plants within 1000 feet of a commercial building.

¶ 33 Finally, I conclude the Planning Board's findings support its conclusion that AM's permit application should not be denied based on alleged material misrepresentations made by AM in its application.

¶ 34 Accordingly, I respectfully dissent.

I. Background

¶ 35 This matter concerns AM's desire to operate an asphalt plant on land it owns in Ashe County. To have the legal right to do so, AM is required

to obtain a permit from the County as well as an air quality permit from the State.

¶ 36 In June 2015, AM filed its application with Ashe County for the County permit along with the required application fee. At the same time, AM filed its application with the State for the required air quality permit. Shortly after the County application was filed, the County's Planning Director sent a letter to AM stating that AM's proposal appeared to meet the County's Code requirements but that the County permit could not be issued until the State permit was issued.

¶ 37 Four months later, in October 2015, due to political pressure from the some of the County's citizenry regarding AM's proposed plant, the County's elected Board enacted a temporary moratorium on asphalt plant permits.

¶ 38 In February 2016, four months into the moratorium, AM obtained and forwarded the required air quality permit from the State.

¶ 39 But two months later, in April 2016, while the moratorium was still in place, the County's Planning Director denied AM's permit application. The Planning Director articulated three separate reasons for its denial, discussed herein. AM appealed that decision to the County Planning Board, an *unelected* board which essentially serves as a board of adjustments for Ashe County.

¶ 40 In October 2016, while AM's appeal was pending before the Planning Board, the County's *elected* Board of Commissioners lifted the moratorium but enacted a new ordinance under which AM proposed would not qualify for approval.

¶ 41 In December 2016, the County's Planning Board issued its order, reversing the Planning Director's denial and directing the permit be issued. The County's Board of Commissioners, though, disagreeing with the decision of the Planning Board, appealed the Planning Board's decision to superior court.

¶ 42 In November 2017, Superior Court Judge Bray affirmed the Planning Board's decision to direct the permit be issued.

¶ 43 In May 2019, we affirmed as well, but on a narrow legal ground. We held that the County was bound by the June 2015 statements of its Planning Director that AM's proposal met the requirements under the County ordinance.

¶ 44 However, in September 2020, our Supreme Court issued an opinion disagreeing with our conclusion regarding the binding effect of the

Planning Director's initial impressions of AM's application. That Court held that the communications were not binding and remanded the matter for us to consider the other issues raised on appeal.

¶ 45 In this present appeal, the majority concludes the County's Planning Board's decision directing the permit be issued was incorrect and the Planning Director's denial should be reinstated. The majority so concludes based on two of the three independent reasons that were articulated by the Planning Director in his denial letter to AM. The majority takes no position on the third reason. My vote is to affirm Judge Bray and the Planning Board, for the reasoning below.

II. Discussion

A. Permit Choice Law

¶ 46 The majority concludes the Planning Director correctly determined that AM was not entitled to have its application considered under the version of the County's ordinance in place in June 2015, when AM submitted its application and paid its fee, reasoning that AM's application was not complete without the State air quality permit in hand. I disagree with the majority's reading of our permit choice law.

¶ 47 The permit choice law was first enacted by our General Assembly in 2014 and is found in Section 143-755 (entitled "Permit choice") and is cross-referenced in Section 160D-108 (entitled "Permit choice and vested rights") of our General Statutes. Our General Assembly enacted this law to provide that *if* a local government changes its development ordinance between the time a developer applies for a permit and the time a decision is made on that permit application, *then* the developer can choose to have its application decided under the ordinance in place at the time the "applicant submits [its] permit application." N.C. Gen. Stat § 143-755(a) (2015). The General Assembly enacted Section 160D-108 in 2019, recognizing that developers have certain "vested rights" under the common law and by statute at some point in the development process, typically after a permit is issued, which cannot be taken away. The right to have one's application considered under existing law may not be a "vested right" under Section 160D-108. But when it enacted Section 160D-108, our General Assembly reiterated in Section 160D-108 that this statutory right of an applicant was still in place, reiterating that "G.S. 143-755 applies" where "development regulation is amended between the time a development permit application was submitted and [the] decision is made[.]" N.C. Gen. Stat. § 160D-108(b).

¶ 48 The development of land is typically a long process. Our "General Assembly recognizes the reality that local government approval of

development typically follows significant investment by the developer in site evaluation, planning, development costs, consultant fees, and related expenses." N.C. Gen. Stat. § 160D-108(a). Clearly, the elected board in a county has discretion to amend its development regulations for what it believes to be in the public good or in its political interest. Our General Assembly enacted the permit choice laws to "strike a balance" between these realities: A local government should be allowed to amend its ordinances, while at some point of the development process, a developer should have certainty as to the ordinance by which its application will be evaluated. Our General Assembly has defined this point as being the time when the developer "submits a permit application" with the local government. N.C. Gen. Stat. § 143-755.

¶ 49 The phrase "submits a permit application" in Section 143-755 is not defined, nor is there case law construing its meaning.

¶ 50 The majority holds that AM's application was not "submitted" until AM provided proof the State had *approved* the air quality permit, which occurred eight months after AM applied for the County permit: It was not enough that the air quality permit had been submitted and was pending with the State. I disagree for several reasons.

¶ 51 First, there is nothing in Ashe County's 2015 ordinance to suggest that a developer have all required State and Federal permits in hand before it could submit its application for the required County permit. Rather, the ordinance merely requires that an application not be submitted without payment of the required application fee. The ordinance otherwise merely stated that any required State and Federal permits be in hand before the County would *issue* the permit:

> A permit is required from the Planning Department for any polluting industry. A uniform permit fee of $500.00 shall be paid *at the time of the application* for the permit. No permit from the planning department *shall be issued* until the appropriate Federal and State permits have been issued.

Code of Ashe County, § 159.06(A) (2015) (entitled "Permitting Standards"). This language does not even hint that AM's application could not be submitted (allowing the County to begin its due diligence processing the permit) until after the State permit was in hand. The language merely suggests that the County will not *issue* the permit, even if the County is satisfied that the County requirements are met, until the State permit was in hand. To be sure, back and forth between a county and a developer is common during the county's due diligence approval process.

But the fact that a county may ask for additional information during its due diligence does not render the application *not* submitted. And in this case, the record shows that Ashe County accepted and deposited the fee and began its due diligence review.

¶ 52 Second, the language used by our General Assembly in the permit choice laws supports my conclusion that an application may be deemed "submitted" while the State is conducting its due diligence on the required State permit. For example, the permit choice law provides that applications for which the county seeks additional information will generally be reviewed under the version of the ordinance in place when the "incomplete" application was submitted, so long as the applicant is responsive regarding the shortcomings of its application:

> If . . . the applicant fails to respond to comments or provide additional information reasonably requested by the [county] for a period of six consecutive months or more, the application review is discontinued and the development regulations in effect at the time permit processing is resumed apply to the application.

N.C. Gen. Stat. § 143-755(b1)[1]. Also, the "Moratoria" law enacted in conjunction with Section 160D-108 provides that any proposed development "for which a special use permit application *has been accepted as complete*" is generally exempt from any intervening, temporary, permit-issuing moratorium that is adopted. N.C. Gen. Stat. § 160D-107(c) (emphasis added). This "has been accepted as complete" language, however, is not in Section 143-755. Had our General Assembly intended that an application "be accepted as complete" before the permit choice law in Section 143-755 be triggered, that body could have so stated. However, the permit choice law merely requires that the application be "submitted."

¶ 53 Finally, I believe that the majority's interpretation is not in harmony with our General Assembly's intent to provide a sense of certainty for

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1. Subsection (b1) was not added to Section 143-755 until 2019. However, the session law adding that subsection provides that the subsection "clarify[ies] and restate[s] the intent of existing law and appl[ies] to ordinances adopted before, on, and after the effective date." 2019 Session.Law 155, § 3.1.

The County does not argue that the subsection applies based on the State's *eight* month delay in issuing the air quality permit. If such argument had been made and I had concluded that the subsection applied, my vote would have been to remand for the Planning Board to make findings concerning whether the County was reasonable to require the State permit be provided within six months.

the developer in the process. Many developments require permits from more than one level of government. For instance, a development which involves removing an underground storage tank and stabilizing a stream bank might require – in addition to a development permit from the county where the project is located – a permit from the U.S. Army Corps of Engineers (to stabilize the stream) and a permit from our State's Department of Environmental Quality (to remove the storage tank). The majority's interpretation creates an imbalance between the competing interests. For example, assume an ordinance allows for asphalt plants located more than 1000 feet from a school. The county could thwart any attempt by a developer who must spend significant funds prior to seeking the county permit, simply by changing the distance requirement while the developer awaits its air quality permit from the State.

¶ 54 In sum, I do not think the phrase "submits a permit application" should be read in such an anti-development way as, I believe, the majority is reading it. Of course, it should not be read in a pro-development way. Rather, we should read it in a way that achieves the balance intended by our General Assembly. Perhaps an application left almost entirely blank should not be considered "submitted." But where an applicant has filled out the required application (often after much time and expense) sufficient for the county to evaluate the proposal and has paid its application fee, I believe the application is "submitted." The fact that a county might have follow up questions or requests for additional information does not change this result. Such applicant, at this stage, is entitled to the certainty afforded by our General Assembly.

B. Commercial Buildings

¶ 55 I disagree with the majority's holding that the nearby barn and the quarry constitute "commercial buildings" under Ashe County's ordinance.

¶ 56 The Planning Board reversed the Planning Director's determination regarding the character of these buildings. Under the Ashe County Code, the Planning Board conducts a *de novo* review of the Planning Director's findings. Specifically, the Code provides that the Planning Board has the authority to "uphold, modify, or overrule[] in part or in its entirety" any determination made by the Planning Director. Ashe County Code § 153.04(f) (2015). Any finding made by the Planning Board is binding in our review if supported by the evidence in the record.

¶ 57 The term "commercial building" is not defined in the Ashe County Code.

¶ 58 Our Supreme Court instructs that "[t]he basic rule [when construing an ordinance] is to ascertain and effectuate the intention of the municipal legislative body." *Westminster Homes v. Town of Cary Bd. of*

Adj., 354 N.C. 298, 303-04, 554 S.E.2d 634, 638 (2001). The Court further instructs that "[i]ntent is determined according to the same general rules governing statutory construction, that is, by examining (i) language, (ii) spirit, and (iii) goal of the ordinance." *Id.* at 304, 554 S.E.2d at 638. At the same time, the Court "has long held that governmental restrictions on the use of land are construed strictly in favor of the free use of real property." *Morris v. City of Bessemer*, 365 N.C. 152, 157, 712 S.E.2d 868, 871 (2011).

¶ 59 The two buildings at issue here are a quarry shed and a barn.

¶ 60 The quarry is owned by AM's parent. The quarry, itself, is obviously not a "building"; however, AM's parent does maintain a mobile shed as part of the quarry operation. The Planning Board, though, found that AM's parent would have moved the shed if that shed was deemed a "commercial building" and, on that basis, disagreed that the permit should have been denied because of the shed. Alternatively, the Planning Board concluded that the shed was not a "building", finding that the shed, "lacks a foundation, has no footers, and does not have running water." These findings are supported by the evidence. I agree with the Planning Board's interpretation that a movable shed not attached to the land should not be construed as a "building" within the meaning of the Code. In sum, I agree with both alternative reasons of the Planning Board regarding the shed.

¶ 61 The barn presents a closer question. The Planning Board concluded that the barn was not a "commercial building" based on its findings that "[t]he barn is not used to conduct business, is not used in connection with any commercial activity, has no parking or other access for anyone other than the property owner, has no road access, and does not have electricity or air conditioning" and that the "primary aim" for the barn's owners is not for "financial profit." These findings are all supported by the affidavit of the barn's owners (husband and wife).

¶ 62 The Planning Board also found that the County does not list the barn as a commercial building on the property tax card and that the barn is not located within a commercial district.

¶ 63 The owners, however, do state that they use their property for farming (where they also live) and that they do store farm equipment and materials in the barn.

¶ 64 The question then is whether the storing of farm equipment is enough to render the barn a "commercial building" in the context of a use restriction in an ordinance.

¶ 65 The "language" used in the ordinance is the term "commercial building," a term which is not defined. This term could be read broadly to include even a small shed where a teenager might store his lawn mower used sometimes to mow the lawns of neighbors for money. Or the term could be read narrowly to include only those buildings where commerce takes place.

¶ 66 The "spirit" and the "goal" of the Code are not served by construing "commercial building" to include the barn at issue here. For instance, the purpose of the ordinance as stated in the Code is to protect the "health, safety and general welfare" of those in "established residential and commercial areas in Ashe County." Ashe County Code, § 159.02 (2015). Further, the Code describes a "polluting industry" as "an industry which produces objectionable levels of noise, odors, [etc.] that may have an adverse effect on the health, safety or general welfare of the citizens of Ashe County." Ashe County Code, § 159.05. As no one works in the barn. No customers visit the barn. Nothing is stored there that is sold. The barn is not located in an established commercial area.

¶ 67 In sum, the language, spirit, and goal of the ordinance suggests that the barn is not a "commercial building" within the meaning of the ordinance. Alternatively, the term is, at best, ambiguous. There is a reasonable interpretation which would suggest that the barn is a commercial building, in that it stores equipment that is used, at least in part, in the owners' farming business. However, there is a reasonable interpretation which would suggest that the barn is not a commercial building, because it is an agricultural building where no commerce takes place. And based on our Supreme Court's jurisprudence, we must construe this ambiguity in favor of AM. I, therefore, conclude that the Planning Board, based on its findings, got it right concerning the barn.

C. Material Misrepresentation

¶ 68 The Planning Board found that AM did not make any material misrepresentations to the County in its application. The majority does not address this basis offered by the Planning Director when he denied AM the permit. The Planning Board made detail findings to support its ultimate finding on this issue. Given the Planning Board's discretion to substitute its judgment for that of the Planning Director, there is no basis for our Court to reverse the Board's determination on this issue.

III. Conclusion

¶ 69 I agree with the Planning Board's resolution on the issues of law which are before us. And I conclude that the Board's findings support its conclusions and the evidence supports those findings. Accordingly, my vote is to affirm Judge Bray's order.

ASHER v. HUNEYCUTT

[284 N.C. App. 583, 2022-NCCOA-517]

ROBERT ASHER, PLAINTIFF
v.
DAVID HUNEYCUTT, MICHAEL KISER AND TRACY KISER, DEFENDANTS

No. COA21-689

Filed 2 August 2022

1. Premises Liability—negligence per se—house guest fell down stairs—building code violations—actual or constructive knowledge by owner required

In an action for negligence per se, the trial court properly granted summary judgment in favor of defendants—the landlord owners of the house in which plaintiff, a guest of the tenant that lived in the house, was injured after falling down three steps in the garage—because plaintiff did not forecast any evidence that defendants had actual or constructive knowledge that the steps were not in compliance with the applicable building code. The violations were minor, not obvious, and neither a licensed home inspector hired by defendants prior to purchasing the house nor any of defendants' tenants reported any concerns about the steps.

2. Premises Liability—common law negligence—house guest fell down stairs—building code violations—breach of duty to exercise reasonable care

In an action for common law negligence, the trial court properly granted summary judgment in favor of defendants—the landlord owners of the house in which plaintiff, a guest of the tenant living in the house, was injured after falling down three steps in the garage—because plaintiff failed to demonstrate that defendants breached their duty to exercise reasonable care in the maintenance of the house for the protection of lawful visitors. Prior to purchasing the house, defendants hired a licensed home inspector who did not identify any code violations with the steps, other than an issue with the railing that defendants immediately fixed; defendants conducted a visual walkthrough inspection of the premises prior to each time they rented out the house; and none of defendants' tenants reported any concerns regarding the steps.

Appeal by plaintiff from order entered 17 March 2021 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 May 2022.

Green Mistretta Law, PLLC, by Robert A. Smith and Stanley B. Green, for plaintiff-appellant.

No brief filed for defendant-appellee David Huneycutt.

Martineau King PLLC, by Stephen D. Fuller and Joseph W. Fulton, for defendants-appellees Michael Kiser and Tracy Kiser.

ZACHARY, Judge.

¶ 1 Plaintiff Robert Asher appeals from the trial court's order granting Defendants Michael and Tracy Kiser's motion for summary judgment. After careful review, we affirm.

Background

¶ 2 In 2013, Defendants purchased a rental property in Charlotte, North Carolina (the "House"). The House has three points of entry, all of which require the use of steps: the front door has brick steps, the back porch has a set of steps, and the garage has three wooden steps leading into the House (the "Steps").

¶ 3 Prior to purchasing the House, Defendants hired a professional home inspection company to evaluate the condition of the House and identify any potential problems. Although the inspection revealed several items throughout the House that warranted repair, the only issue that the inspector noted concerning the "steps, stairways, balconies and railings" was that "[t]here [wa]s a little play or movement of the handrail for the steps located in the garage." The inspection company recommended that the "handrail be properly tighten[ed] or re-secured[,]" which Defendants did before renting the House to tenants. Defendant Michael Kiser also stained the Steps and the adjacent handrail, but otherwise Defendants made no alterations to the Steps.

¶ 4 Defendants rented the House to the Rushing family from 2013 to 2015. The Rushings reported no issues with the Steps or the handrail during their tenancy, and Sylvia Rushing described the Steps and handrail as "always in stable and safe condition." After the Rushing family moved out in November 2015, Defendants rented the House to David Huneycutt, who lived there for approximately two and a half years. Huneycutt similarly had no complaints regarding the Steps. At his deposition, Defendant Michael Kiser explained that he conducts a visual inspection while walking through the House with new tenants when they first move in, and performs this same walkthrough and visual inspection

process with the tenants upon the termination of a tenancy. Defendant Michael Kiser, like his tenants, also never observed any problem with the Steps.

¶ 5 On 21 May 2016, Plaintiff and his wife attended a graduation party hosted by Huneycutt at the House. Plaintiff's wife had been using a wheelchair for about a year and half at that time; she could only walk short distances due to a surgical procedure on her left foot. Having visited Huneycutt's home before, Plaintiff knew that his wife would need assistance entering and exiting the House. When they arrived, Huneycutt requested that Plaintiff and his wife use the Steps in the garage. Plaintiff's wife walked up the three Steps using only one foot, "which wore her out tremendously." Plaintiff later stated that he "had some concerns" about the condition of the Steps, but he did not voice his reservations that day.

¶ 6 When Plaintiff and his wife were ready to leave, Huneycutt asked that they exit through the garage rather than the front door to avoid disrupting the party. Then, without consulting Plaintiff or Plaintiff's wife, Huneycutt began maneuvering Plaintiff's wife down the Steps; he grabbed the legs of the wheelchair, tilted her back in the chair, and began moving her down one step at a time. Plaintiff, from the top step, grabbed the handles of the wheelchair in an attempt to stop Huneycutt, worried that his wife might get hurt. Upon realizing that he could not stop Huneycutt, Plaintiff grabbed his wife and put his arms around her head and neck, to "protect her from any injury going down the" Steps. When Huneycutt stopped moving the chair, Plaintiff lost his balance and fell down the Steps. He landed on a part of his wife's wheelchair, "and his left eye went into a cavity in the wheelchair brace." As a result of this fall, his optic nerve was severed, and Plaintiff lost all vision in his left eye.

¶ 7 Subsequent inspection by the parties' experts revealed that the Steps did not comply with the applicable provisions of the North Carolina Residential Building Code. Specifically, the variance among the Steps' heights was 1/4-inch greater, the threshold height from the floor was 1/4-inch higher, and the variance between each step's tread depth was 3/8-inches greater than the Code permitted; additionally, at least one tread had a 3.1% slope—1.1% greater than the maximum 2% slope that the Code permitted. *See* N.C. State Building Code, §§ 312.1, 314.2 (1997).[1]

1. The 1997 version of the North Carolina State Building Code is applicable in the instant case, as it was the version of the Code in effect at the time of the House's construction.

¶ 8 On 22 April 2019, Plaintiff and his wife filed a complaint[2] against Defendants and Huneycutt. Plaintiff asserted that Defendants were negligent *per se*, in that they leased a home with steps that violated the Building Code. He also alleged that Defendants were negligent because they breached their common-law duty as landlords to lease the House "in a habitable and reasonably safe condition . . . by failing to install and/or maintain a garage staircase that was reasonable to prevent foreseeable falls."

¶ 9 On 8 July 2019, Defendants filed a motion to dismiss, an answer, and crossclaims against Huneycutt. Defendants generally denied liability and asserted several affirmative defenses, including contributory negligence. On 16 September 2020, Defendants filed a motion for summary judgment.

¶ 10 This matter came on for hearing in Mecklenburg County Superior Court on 11 January 2021. On 17 March 2021, the trial court entered an order granting summary judgment in favor of Defendants, finding that "there is no genuine issue of material fact in dispute as to the claims against" Defendants. Although there remained claims pending against Huneycutt, the trial court certified the case for immediate appeal, stating that "there exists no just reason for delay" and that "this order is entered as a Final Judgment [as to Defendants] pursuant to N.C. R. Civ. P. 54(b)."

¶ 11 Plaintiff timely appealed pursuant to Rule 3(c)(2) of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 3(c)(2). Subsequently, Plaintiff voluntarily dismissed his claims against Huneycutt on 1 July 2021, and Defendants voluntarily dismissed their crossclaims against Huneycutt on 12 July 2021.

Grounds for Appellate Review

¶ 12 This Court chiefly entertains appeals from final judgments. *See* N.C. Gen. Stat. § 7A-27(b)(1)–(2) (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. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). By contrast, "[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. Because an

2. Plaintiff's wife voluntarily dismissed her claims without prejudice on 21 October 2021, and consequently was not a party to this lawsuit at the time of appeal.

interlocutory order is not yet final, with few exceptions, "no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge[.]" *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974).

¶ 13 Nonetheless, an interlocutory order disposing of less than all claims in an action may be immediately appealed if "the order affects some substantial right and will work injury to [the] appellant if not corrected before appeal from final judgment[,]" *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citation omitted); *see also* N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a), or if "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[,]" *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009); *see also* N.C. Gen. Stat. § 1A-1, Rule 54(b).

¶ 14 It is well settled that a trial court's "[c]ertification under Rule 54(b) permits an interlocutory appeal from orders that are final as to a specific portion of the case, but which do not dispose of all claims as to all parties." *Duncan v. Duncan*, 366 N.C. 544, 545, 742 S.E.2d 799, 801 (2013). Rule 54(b) provides, in relevant part, that

> [w]hen more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes.

N.C. Gen. Stat. § 1A-1, Rule 54(b). In other words, a proper Rule 54(b) certification of an interlocutory order requires: (1) that the case involve multiple parties or multiple claims; (2) that the challenged order finally resolve at least one claim against at least one party; (3) that the trial court certify that there is no just reason for delaying an appeal of the order; and (4) that the challenged order itself contain this certification. *See id.*

¶ 15 In the instant case, the trial court's order granting summary judgment in favor of Defendants is interlocutory, as it does not resolve all matters before the court. *See Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. Nevertheless, the trial court's Rule 54(b) certification is effective to create jurisdiction in this Court: at the time of the order, the case involved multiple parties (Plaintiff, Huneycutt, and Defendants) with multiple claims and crossclaims; the order on appeal finally resolved all claims

against Defendants (granting summary judgment in Defendants' favor); the trial court certified that "there exists no just reason for delay"; and Plaintiff appealed from the order containing this certification.

¶ 16 Hence, we conclude that this Court has jurisdiction over this matter and proceed to the merits of Plaintiff's appeal.

Discussion

¶ 17 On appeal, Plaintiff argues that the trial court erred by granting summary judgment in favor of Defendants because Plaintiff produced a sufficient forecast of evidence to establish a prima facie case of (1) negligence *per se*, and (2) common-law negligence. Plaintiff also contends that he "produced a sufficient forecast of evidence to surmount Defendants' affirmative defense of contributory negligence."

I. Standard of Review

¶ 18 Summary judgment is properly entered "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). "[T]he evidence presented to the trial court must be admissible at trial and must be viewed in a light most favorable to the non-moving party." *Patmore v. Town of Chapel Hill*, 233 N.C. App. 133, 136, 757 S.E.2d 302, 304 (citations omitted), *disc. review denied*, 367 N.C. 519, 758 S.E.2d 874 (2014). "If the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision." *Proffitt v. Gosnell*, 257 N.C. App. 148, 151, 809 S.E.2d 200, 204 (2017) (citation omitted).

¶ 19 Appellate courts review "decisions arising from trial court orders granting or denying motions for summary judgment using a de novo standard of review." *Cummings v. Carroll*, 379 N.C. 347, 2021-NCSC-147, ¶ 21. When reviewing de novo, "the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Blackmon v. Tri-Arc Food Sys., Inc.*, 246 N.C. App. 38, 41, 782 S.E.2d 741, 743 (2016) (citation omitted).

¶ 20 The burden of proof governing motions for summary judgment is well established. Initially, the moving party "bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002). The moving party may meet this burden "by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an

essential element of his claim[.]" *Id.* (citation omitted). Once the moving party makes the required showing, "the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial[.]" *Cummings*, 379 N.C. 347, 2021-NCSC-147, ¶ 21 (citation and internal quotation marks omitted). A "plaintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, summary judgment is proper." *Frankenmuth Ins. v. City of Hickory*, 235 N.C. App. 31, 34, 760 S.E.2d 98, 101 (2014) (citation omitted).

II. Analysis

A. Negligence per se

¶ 21 **[1]** Plaintiff first argues that the trial court erred by granting summary judgment for Defendants because he forecast evidence sufficient to establish a claim of negligence *per se*, in that Defendants "breached the statutorily prescribed standard of care" by failing to ensure the Steps' compliance with the Building Code. We disagree.

¶ 22 In order to successfully lodge a claim of negligence *per se*, a plaintiff must establish:

> (1) a duty created by a statute or ordinance; (2) that the statute or ordinance was enacted to protect a class of persons which includes the plaintiff; (3) a breach of the statutory duty; (4) that the injury sustained was suffered by an interest which the statute protected; (5) that the injury was of the nature contemplated in the statute; and, (6) that the violation of the statute proximately caused the injury.

Hardin v. York Mem'l Park, 221 N.C. App. 317, 326, 730 S.E.2d 768, 776 (2012) (citation omitted), *disc. review denied*, 366 N.C. 571, 738 S.E.2d 376 (2013).

¶ 23 However, proof that a building's owner violated the State Building Code, without more, is insufficient to establish negligence *per se*. *See Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 415, 395 S.E.2d 112, 114 (1990). Our Supreme Court explained that the building's owner "may not be found negligent *per se* for a violation of the Code unless: (1) the owner knew or should have known of the Code violation; (2) the owner failed to take reasonable steps to remedy the violation; and (3) the violation proximately caused injury or damage." *Id.* Accordingly, the plaintiff must demonstrate the owner's actual or constructive knowledge of the

Code violations. *See id.* at 415, 395 S.E.2d at 114–15 (concluding that summary judgment of the plaintiff's negligence *per se* claim was proper because the "plaintiff made no showing" that the defendants "knew or should have known of the violation of the Code").

¶ 24 Here, Plaintiff's forecast of evidence failed to support an essential element of his negligence *per se* claim—that Defendants "knew or should have known of the Code violation[.]" *Id.* at 415, 395 S.E.2d at 114. Although Plaintiff contends that "a reasonable inspection would have revealed the violations[,]" the record suggests otherwise. At his deposition, Defendant Michael Kiser stated that he was unaware of any safety issues with the Steps prior to Plaintiff's fall. The Steps were present when Defendants purchased the House, and Defendants did not alter them beyond staining the wood. Neither the Rushings nor Huneycutt—former tenants who were intimately familiar with the House—reported any problems with the Steps to Defendants.

¶ 25 Furthermore, the official home inspection conducted in 2013 revealed no problem with the Steps, except that "[t]here [wa]s a little play or movement of the handrail for the steps located in the garage[,]" which Defendants repaired before renting the House to the Rushings. The issues in question were not obvious, violating the Code by fractions of an inch; indeed, Defendants' expert could not visually identify any Code violations with regard to the Steps prior to measuring them. It follows, then, that it is not unreasonable for Defendants, who are neither construction nor carpentry professionals, to fail to notice the modest violations.

¶ 26 Accordingly, although the Steps violated provisions of the Code, *see* N.C. State Building Code, §§ 312.1, 314.2, Plaintiff cannot adequately demonstrate that Defendants "knew or should have known of the Code violation[s,]" *Lamm*, 327 N.C. at 415, 395 S.E.2d at 114. Plaintiff thus cannot establish that Defendants were negligent *per se* by violating the Code. In that Plaintiff's "forecast of evidence fail[ed] to support an essential element of the claim[,]" we conclude that the trial court appropriately granted summary judgment in favor of Defendants under this theory. *Wallen v. Riverside Sports Ctr.*, 173 N.C. App. 408, 411, 618 S.E.2d 858, 861, *disc. rev. dismissed*, 360 N.C. 180, 626 S.E.2d 840 (2005).

B. Common-Law Negligence

¶ 27 **[2]** Plaintiff next argues that the trial court erroneously granted summary judgment in favor of Defendants on Plaintiff's common-law negligence claim because he presented sufficient evidence establishing that Defendants breached their common-law duty of reasonable care.

Plaintiff asserts that because Defendants retained control over the Steps, they had a duty to inspect them and perform any necessary repairs, which Defendants breached, as evidenced by the Steps' noncompliance with the Code.[3] Again, we disagree.

¶ 28 Where a defendant has moved for summary judgment of a common-law negligence claim, the

> plaintiff must establish a prima facie case . . . by showing: (1) that [the] defendant failed to exercise proper care in the performance of a duty owed [to the] plaintiff; (2) the negligent breach of that duty was a proximate cause of [the] plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that [the] plaintiff's injury was probable under the circumstances.

Lavelle v. Schultz, 120 N.C. App. 857, 859–60, 463 S.E.2d 567, 569 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996).

¶ 29 Landowners in particular have a nondelegable "duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998) (eliminating the distinction between licensees and invitees), *reh'g denied*, 350 N.C. 108, 533 S.E.2d 467 (1999). Further, "a landlord is potentially liable for injuries to third persons if he has control of the leased premises. Similarly, a landlord owes a duty to third parties for conditions over which he retained control." *Holcomb v. Colonial Assocs., L.L.C.*, 358 N.C. 501, 508, 597 S.E.2d 710, 715 (citation and internal quotation marks omitted), *reh'g denied*, 359 N.C. 198, 607 S.E.2d 270 (2004).

¶ 30 The landowner's duty of reasonable care owed to lawful visitors

> requires that the landowner not unnecessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge. This duty includes an obligation to exercise reasonable care with regard to reasonably

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3. Plaintiff also argues that a "[v]iolation of the Code's standards is strong evidence of common law negligence[,]" citing *Collingwood v. General Electric Real Estate Equities, Inc.*, 324 N.C. 63, 376 S.E.2d 425 (1989). However, the *Collingwood* Court concluded that a landlord's *compliance* with a statutory standard is some evidence of due care; it did not address the converse. 324 N.C. at 68–69, 376 S.E.2d at 428. Here, Plaintiff argues that Defendants' *violation* of the Code definitively demonstrates a breach of duty. Therefore, Plaintiff's reliance on *Collingwood* is misplaced.

> foreseeable injury . . . . [P]remises liability and failure to warn of hidden dangers are claims based on a true negligence standard which focuses attention upon the pertinent issue of whether the landowner acted as a reasonable person would under the circumstances.

Shepard v. Catawba Coll., 270 N.C. App. 53, 64, 838 S.E.2d 478, 486 (2020) (citation omitted). "This duty also requires a landowner . . . to make a reasonable inspection to ascertain the existence of hidden dangers." *McCorkle v. N. Point Chrysler Jeep, Inc.*, 208 N.C. App. 711, 714, 703 S.E.2d 750, 752 (2010).

¶ 31 Therefore, to prove a defendant's negligence in a premises liability case, "a plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." *Burnham v. S&L Sawmill, Inc.*, 229 N.C. App. 334, 340, 749 S.E.2d 75, 80 (citation and internal quotation marks omitted), *disc. review denied*, 367 N.C. 281, 752 S.E.2d 474 (2013); *see also Harris v. Tri-Arc Food Sys. Inc.*, 165 N.C. App. 495, 500, 598 S.E.2d 644, 648, *disc. review denied*, 359 N.C. 188, 607 S.E.2d 270 (2004).

¶ 32 In *Harris*, the trial court granted summary judgment in favor of the defendant in a negligence action where the ceiling in the defendant's restaurant collapsed on the plaintiff due to a latent construction defect. 165 N.C. App. at 496, 598 S.E.2d at 646. The defendant last had the restaurant's ceiling inspected when the building inspector approved the building for occupancy, as "it was not a part of [the] defendant's procedures to regularly inspect the ceiling." *Id.* at 497, 598 S.E.2d at 646. However, the "defendant was not aware of any defect or condition existent in the construction of the ceiling." *Id.* Thus, although the plaintiff contended that the "defendant failed to conduct a reasonable inspection of the premises[,]" this Court concluded otherwise, reasoning that "the building was inspected and approved for occupancy by the building inspector and [the] plaintiff ha[d] failed to produce any evidence to support her allegation that regular inspections of the ceiling would have been necessary or reasonable under the circumstances." *Id.* at 500, 598 S.E.2d at 648.

¶ 33 In the present case, although Defendants owed a duty of reasonable care to Plaintiff as a lawful visitor on their property, Plaintiff cannot demonstrate that Defendants breached their duty by failing to notice and remedy the Steps' minor Code violations. Plaintiff is correct in his assertion that Defendants retained control over the House and the Steps within it: the lease agreement between Defendants and Huneycutt

provided that Defendants retained the right "to enter the Premises for the purpose of inspecting the Premises . . . [a]nd for the purposes of making any repairs[.]" Consequently, Defendants owed a duty of reasonable care to Plaintiff as a lawful visitor. *See*, *e.g.*, *Holcomb*, 358 N.C. at 508, 597 S.E.2d at 715 (concluding that a landlord-defendant owed a duty to a visitor-plaintiff when a tenant's dog bit the plaintiff, in that the landlord retained control over the dog because the landlord and tenant had "contractually agreed" in the lease that the tenant would remove any pet that the landlord deemed a nuisance).

¶ 34 Having established that Defendants owed Plaintiff a duty of reasonable care in the maintenance of their premises, the dispositive issue is whether Defendants, as landowners, "acted as a reasonable person would under the circumstances." *Shepard*, 270 N.C. App. at 64, 838 S.E.2d at 486 (citation omitted). The facts presented for summary judgment, construed in the light most favorable to Plaintiff, *see Patmore*, 233 N.C. App. at 136, 757 S.E.2d at 304, demonstrate that Defendants acted reasonably.

¶ 35 Plaintiff argues that Defendants breached their duty of reasonable care because they failed to notice "the unreasonably hazardous conditions and Code violations[,]" which "a reasonable inspection would have revealed[.]" In support of this contention, Plaintiff points to his expert's opinion that a person could have discovered the problems with the Steps "us[ing] nothing more than a tape measure or other simple tools to detect them—no specialized equipment or calculations would be needed (with the possible exception of the calculation of tread slope)." Accepting this as true, as we must, Plaintiff nevertheless fails to demonstrate that an owner's failure to measure the width and height of the steps and calculate the tread slope constitutes a breach of the owner's duty "to make a *reasonable* inspection to ascertain the existence of hidden dangers." *McCorkle*, 208 N.C. App. at 714, 703 S.E.2d at 752 (emphasis added).

¶ 36 Rather than measuring the Steps themselves, Defendants relied on a licensed home inspector's expertise and the feedback of those who regularly used the Steps. Before renting the House, Defendants hired a professional home inspection company to evaluate the condition of the House, thereby identifying all problems with the property. The inspector reported only one issue involving the Steps—the loose handrail—and Defendants remedied it swiftly.

¶ 37 Moreover, Defendants never received any complaints from the Rushings or Huneycutt about the Steps, and Sylvia Rushing explicitly stated in her affidavit that she "never had any concerns" about them. Defendant Michael Kiser also visually examined the Steps multiple

times while performing walkthrough inspections in the house before and after changes in tenancy, and he never detected any issues with the Steps. In light of the inspector's report, their tenants' accounts, and their own inspections of the Steps—none of which suggested the presence of the minor Code violations at issue—Defendants had no reason to suspect that the Steps contained "hidden hazards" that required repairs or warnings. *See Shepard*, 270 N.C. App. at 64, 838 S.E.2d at 486 (citation omitted).

¶ 38 Like the restaurant in *Harris*, the House in the case at bar was inspected by a professional inspector. 165 N.C. App. at 497, 598 S.E.2d at 646. And like the defendant in *Harris*, Defendants "w[ere] not aware of any defect or condition existent in the construction of the" Steps. *Id.* Furthermore, "[P]laintiff has failed to produce any evidence to support h[is] allegation" that, absent any reported or identified issues with the Steps, it "would have been necessary or reasonable under the circumstances" for Defendants to measure the Steps after the initial professional home inspection. *Id.* at 500, 598 S.E.2d at 648. Accepting Plaintiff's position would require landowners to double-check the work of their hired professionals, which would unreasonably mandate that landowners perform important safety tasks without the requisite expertise.

¶ 39 Defendants hired a professional inspector, inquired of their tenants about any issues with the property, and performed visual inspections during walkthroughs of the House. Plaintiff has failed to come forward with evidence that Defendants breached their duty "to make a reasonable inspection to ascertain the existence of hidden dangers." *McCorkle*, 208 N.C. App. at 714, 703 S.E.2d at 752. As such, Plaintiff cannot demonstrate that Defendants "negligently failed to correct the condition [of the Steps] after actual or constructive notice of its existence." *Burnham*, 229 N.C. App. at 340, 749 S.E.2d at 80 (citation omitted).

¶ 40 We therefore conclude that the trial court did not err in granting summary judgment in favor of Defendants on this claim. Having so determined, we need not reach Plaintiff's other arguments on appeal.

Conclusion

¶ 41 For the foregoing reasons, we conclude that the trial court did not err by granting summary judgment in favor of Defendants on Plaintiff's claims for negligence *per se* and common-law negligence. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges INMAN and JACKSON concur.

BERENS v. BERENS

[284 N.C. App. 595, 2022-NCCOA-518]

MICHAEL M. BERENS, PLAINTIFF
v.
MELISSA C. BERENS, DEFENDANT

No. COA21-436

Filed 2 August 2022

1. Child Custody and Support—modification—retroactive—payments not past due—prior mandate

Where the trial court retroactively reduced plaintiff-father's child support obligation—based on the fact that one of the parties' children had turned eighteen and graduated from high school—and ordered defendant-mother to pay back to plaintiff-father approximately $41,000, the trial court's order did not violate the plain language of N.C.G.S. § 50-13.10(a) because that section applies only to past-due child support obligations. Furthermore, the trial court did not violate a mandate from a previous Court of Appeals opinion in the matter, which in dicta stated that plaintiff-father "may now" file a motion to modify but did not require him to do so (where he had already filed a motion to modify the temporary child support order).

2. Child Custody and Support—relative ability to provide for children—total monthly income—calculation

The trial court's order modifying plaintiff-father's child support obligation was vacated and remanded as to the portions determining defendant-mother's monthly income where it was unclear from the order and the record how the trial court calculated the total monthly income of defendant, who worked as a real estate broker. Other portions of the order that defendant challenged—not increasing the amount of her reasonable monthly expenses, considering the availability of the children's money contained in their Uniform Transfers to Minors Act accounts to pay for their private school and car insurance, and making certain findings about 529 plans owned by defendant—were affirmed.

Appeal by Plaintiff from order entered 5 January 2021 by Judge Sean P. Smith in Mecklenburg County District Court. Heard in the Court of Appeals 27 April 2022.

James, McElroy & Diehl, P.A., by Gena Graham Morris and Preston O. Odom, III, for Plaintiff-Appellee.

Fox Rothschild LLP, by Troy D. Shelton and Connell and Gelb PLLC by Michelle D. Connell for Defendant-Appellant.

DILLON, Judge.

¶ 1 This appeal is the fifth to our Court in this nine-year old action between these parties concerning the dissolution of their marriage.

¶ 2 This appeal was taken by Defendant Melissa C. Berens ("Mother") from an order (the "2021 Modification Order") entered on 5 January 2021 modifying the obligation of Plaintiff Michael Berens ("Father") to pay child support for the minor children born to the marriage.

I. Background

¶ 3 Father and Mother married in 1989, had six children during the marriage, separated in July 2012, and divorced in December 2014.

¶ 4 In 2013, Father commenced this action, including a claim for child support.

¶ 5 In 2015, the trial court entered a *temporary* child support order, directing Father to pay monthly child support at a certain level.

¶ 6 In May 2017, a trial was held to establish *permanent* child support obligations. At the time of trial, three of the children were still minors. The trial court took the matter under advisement for 14 months, finally entering its permanent child support order in July 2018.

¶ 7 During these 14 months, one of the three minor children turned 18. Accordingly, in May 2018 – two months before the trial court entered its permanent order – Father moved to modify the 2015 temporary order (the order that was still in place), based on the change of circumstance that a child had reached adulthood.

¶ 8 In July 2018, while Father's motion was pending, the trial court entered its permanent order, based on the evidence presented 14 months prior, without taking into account that one of the children had turned 18 years old in the interim. In its 2018 permanent order, the trial court retroactively increased Father's child support obligation from 2013, which required Father to make a lump sum payment to account for the retroactive increase over the previous five years. Both parties appealed the 2018 permanent order, which was the fourth appeal to our Court in this matter.

¶ 9 In January 2020, we issued our opinion in that fourth appeal, affirming the 2018 permanent order. *Berens v. Berens*, 269 N.C. App. 474, 837

S.E.2d 215 (2020) (unpublished) ("*Berens IV*"). On the child support issue, we held, in part, that the trial court did not err by not taking into account that a child had turned 18 while the matter was under advisement, recognizing that "[Father] may now file a motion to modify support in light of another child reaching the age of majority." *Berens IV*, *10.

¶ 10 Eight months later in September 2020, the trial took up Father's May 2018 motion to modify the 2015 *temporary* child support order. On the day of trial, Father filed a supplement to his May 2018 motion to clarify that the order from which he was seeking modification was now the 2018 permanent order.

¶ 11 All the while, Father made the retroactive lump sum payment and continued paying his obligations as directed by the trial court in its July 2018 permanent order.

¶ 12 In January 2021, the trial court entered its 2021 Modification Order, determining that a change of circumstance had indeed occurred in May 2018 when one of the children turned 18 and graduated from high school. Based on this determination, the trial court retroactively reduced Father's child support obligation from June 2018. Thus, the trial court directed Mother to pay back $40,859.28 received from Father since June 2018. Mother timely appealed.

II. Analysis

¶ 13 Mother argues that the trial court erred in two ways, which we address in turn.

A. Modification Order

¶ 14 **[1]** Mother first argues that the trial court had no authority to change the child support payments *retroactively* from June 2018, based on N.C. Gen. Stat. § 50-13.10(a) (2021). She reasons that this statute does not allow a trial court to modify *any* child support obligation which accrued *before* Father filed his modification motion; that Father's motion to modify filed in May 2018 does not qualify as a motion which could trigger the trial court's authority since the motion was to modify the 2015 temporary order which had since been mooted by the 2018 permanent order; and that, therefore, the trial court's authority to modify could not extend to Father's monthly obligation which accrued prior to September 2020, when Father filed his supplemental motion. She concludes that, therefore, we should strike the portion of the 2021 Modification Order which directs her to repay Father $40,859.28 for the "overpayments" he made back to his May 2018 child support payment.

¶ 15 Father essentially argues that his motion to modify filed in May 2018 should be sufficient to trigger Section 50-13.10(a), notwithstanding that the motion was filed before the 2018 permanent order was entered.

¶ 16 We disagree with Mother for two reasons, addressed below.

1. The plain language of Section 50-13.10(a).

¶ 17 First, we so conclude based on a reason not argued by Father: The portion of Section 50-13.10(a) – which prohibits a trial court from retroactively modifying any child support obligation that arose prior to the filing of a motion to modify – does not apply. This statute only applies to "past due" obligations, and Father was not "past due" on any child support obligation.

¶ 18 Prior to the enactment of Section 50-13.10 in 1987, under our common law a trial court had the discretion to "retroactively modify child support arrearages when equitable considerations exist which would create an injustice if modification is not allowed." *Craig v. Craig*, 103 N.C. App. 615, 619, 406 S.E.2d 656, 658 (1991) (citations omitted). In its discretion, a trial court could modify child support obligations accruing before the filing of any motion. Our Supreme Court has essentially recognized this common law authority. Specifically, a case cited in *Craig* for this proposition was affirmed by our Supreme Court; namely, *Gates v. Gates*, 69 N.C. App. 421, 317 S.E.2d 402 (1984), *aff'd per curiam*, 312 N.C. 620, 323 S.E.2d 920 (1985). In *Gates*, we held that a trial court could *retroactively* reduce a parent's child support obligation from the time his minor child turned 18, where no motion had previously been filed, where "it would work an injustice to require [the supporting parent] to pay according to the letter of the [prior] Order[.]" *Id.* at 430, 317 S.E.2d at 408.

¶ 19 In 1987, our General Assembly enacted Section 50-13.10(a), which stripped a trial court of *some* discretion recognized under common law to modify child support obligations accruing prior to the filing of a motion:

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

> (1) Before the payment is due or
>
> (2) If the moving party is precluded by . . . other compelling reason from filing a motion before the payment is due, then promptly after the moving party is no longer so precluded.

Id. (underline and italics added). The plain language of this statute provides that only "past due" obligations which accrued after the date that the parent seeking modification files and gives notice of his motion may be modified (italicized portion). The statute, though, further provides that a "child support obligation" (without any reference to "past due" obligations) may, otherwise, be modified as "provided by law" (underlined portion), which includes our common law recognized in the precedent from our Court and our Supreme Court cited above.

¶ 20 There is nothing in the record before us which suggests that, at the time the 2021 Modification Order was entered, Father was "past due" in any payment he was required to make under prior orders. Accordingly, even if Father's May 2018 motion was mooted by our affirmance of the 2018 permanent order, the trial court was not prohibited under Section 50-13.10(a) from modifying Father's child support obligation accruing from the time that one of the children was emancipated. And the 2021 Modification Order otherwise supports the retroactive change under our case law: Mother was aware that her child had turned 18 and had graduated high school; Mother was aware in May 2018 that Father was seeking a reduction in his child support obligation based on this change of circumstance; and Mother would not be prejudiced by the retroactive change.

¶ 21 It could be argued that, notwithstanding the plain language of Section 50-13.10, we should consider the stated *purpose* of Section 50-13.10 to strip a trial court's common law authority to modify *any* child support obligation accruing prior to the filing and notice of a motion to modify, whether past due or not. Indeed, our Supreme Court has instructed that "[t]he primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute." *State v. Hooper*, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004). But that Court further instructs that "[t]he first step in determining a statute's purpose is to examine the statute's plain language" and that "[w]here the language of the statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Id.* Here, the plain language of the statute only abrogates a trial court's authority with respect to obligations that vested but which have not yet been paid.

¶ 22 It could be argued that our interpretation runs counter to our General Assembly's purpose in enacting Section 50-13.10 in 1987. Specifically, the title of the Act which codified Section 50-13.10 suggests that the Act's purpose was to bring our State into compliance with a federal requirement, enacted by Congress the prior year, in 1986, so that our State would be eligible to receive federal dollars to aid our State's efforts in protecting each child's right to receive support from his/her parents. *See* 42 U.S.C. §§ 651. The 1987 session law enacting Section 50-13.10 is entitled "An Act to Prohibit Retroactive Modification of Past Due Child Support Payments and to Give Vested Past Due Child Support the Judgment Effect *Required by Federal Law*." 1987 N.C. Sess. Laws Ch. 739 (emphasis added).

¶ 23 It is not clear, however, that the plain language of our statute would run afoul of the federal law for which it was adopted. The federal law at issue is known as Bradley Amendment, codified in 42 U.S.C. § 666(a)(9) (1986). This Amendment provides that for a state to receive the federal dollars, it must implement

> (9) Procedures which require that any payment or installment of support under **any child support order** …
>
> > (C) not [be] subject to retroactive modification by such State or by any other State;
> >
> > except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, **but only from the date that notice of such petition has been given**, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor.

Id. (emphasis added). It could be argued that the plain language of the Bradley Amendment requires a State desiring federal dollars to prohibit "any" child support obligation accruing prior to the filing of a petition from being modified, whether or not that "payment or installment" has already been paid. Under this interpretation, one might argue that we should then construe Section 50-13.10(a) contrary to its plain language by prohibiting a judge from modifying "any" payment (rather than just "past due" payments) accruing before the filing of the motion.

¶ 24 But there is strong evidence that Congress' *purpose* in enacting the Bradley Amendment was to prevent a participating State from modifying arrearages.[1]

¶ 25 In sum, to construe Section 50-13.10 as preventing trial courts from retroactively modifying even non-past due payments accruing before the filing of a motion, we would have to ignore the plain language of our statute and the purpose of the Bradley Amendment.

2. Mandate Rule

¶ 26 Mother argues that the trial court erred by issuing the Modification Order contrary to certain language in *Berens IV*, which she asserts amounts to a mandate.

¶ 27 Our Court reviews issues regarding the interpretation of its own mandate *de novo*. *State v. Watkins*, 246 N.C. App. 725, 730, 783 S.E.2d 279, 282 (2016).

¶ 28 The mandate rule instructs that "on remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court." *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962) (Parker, J., concurring). The mandate itself is limited to holdings made by this Court in response to issues presented on appeal; any other discussions made within the opinion is *obiter dicta*. *Id.* at 11, 125 S.E.2d at 306.

¶ 29 Mother's argument is mooted by our conclusion that Section 50-13.10's abrogation of a trial court's common law authority only applies to past due obligations. But even if Section 50-13.10 were applicable, the mandate rule did not bar the trial court's consideration of Father's 2018 motion, as that motion was not before our Court in *Berens IV*.

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1. For additional context, the U.S. Senate Report explains "[w]hat the Committee is seeking to prevent is the purposeful noncompliance by the noncustodial parent, because of his hope that his child support obligation will be retroactively forgiven" S. Rep. No. 348, p. 155 (1986). Further, the Congressional Research Service summarizes the Bradley Amendment's purpose as preventing "the retroactive State modification of child support **arrearages**… a state cannot modify **delinquent** child support obligations." Cong. Rsch. Serv., RS20642, The Bradley Amendment: Prohibition Against Retroactive Modification of Child Support Arrearages 1 (2000) (emphasis added). This purpose is appropriately reflected in legislation enacted in other States, which supplement "arrearage" and "due and unpaid" in place of "past due." See Alaska R. Civ. Proc. 90.3 ("Child support arrearage may not be modified retroactively"); and N.D. Cent. Code, 14-08.1-05 ("Any order directing payment or installment of money for the support of a child is, on and after the date it is due and unpaid [and] not subject to retroactive modification").

¶ 30 The language Mother cites in our *Berens IV* opinion states, "[Father] *may now file* a motion to modify support in light of another child reaching the age of majority." This sentence is not a mandate, but rather it is *dicta*.

¶ 31 There was no mandate in *Berens IV* which *required* Father to file a new motion. Accordingly, the trial court did not violate the mandate rule.

B. Sufficiency of the Evidence

¶ 32 **[2]** Mother makes several arguments concerning the trial court's calculation of Father's modified child support obligation.

¶ 33 Child support orders entered by a trial court are accorded substantial deference by appellate courts, and our review is limited to a determination of whether there was a clear abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Under this standard of review, the trial court's ruling "will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 777, 324 S.E.2d at 833.

¶ 34 Also, we note when a trial court is faced with a child support case falling outside the North Carolina Child Support Guidelines,[2] there is not one formula a court must follow to determine the reasonable needs of a child. *Bishop v. Bishop*, 275 N.C. App. 457, 463, 853 S.E.2d 815, 820 (2020). Instead, the judge has the opportunity to consider the interplay of factors of a particular case. *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 867 (1985). "Computing the amount of child support is normally an exercise of sound judicial discretion, requiring the judge to review all of the evidence before him. Absent a clear abuse of discretion, a judge's determination of what is a proper amount of support will not be disturbed on appeal." *Id.* at 69, 326 S.E.2d at 868.

¶ 35 In a case for child support, the trial court must make specific findings and conclusions. *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 708, 188-89 (1980). The purpose of this requirement is to allow a reviewing

2. Child support cases are outside the North Carolina Child Support Guidelines when the parties' incomes are above the income range addressed by the Guidelines or "when the trial court determines deviation from the Guidelines is necessary because 'after considering the evidence, the Court finds by the greater weight of the evidence that the application of the Guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate.' " *Kincheloe v. Kincheloe*, 278 N.C. App. 62, 68-69, 862 S.E.2d 28, 34 (2021) (quoting N.C. Gen. Stat. § 50-13.4(c)).

court to determine from the record whether a judgment and the legal conclusions which underlie it represent a correct application of the law. *Id*.

1. Mother's Reasonable Monthly Needs

¶ 36 Mother argues the trial court erred by not increasing the amount of her reasonable monthly expenses based on evidence that the monthly debt service on her home had greatly increased after she refinanced the mortgage sometime after the 2017 hearing on permanent child support. The trial court, though, found that Mother's decision to refinance was discretionary and unnecessary. As the factfinder, the trial court is the sole judge on credibility. Accordingly, we affirm the trial court's findings and conclusions in this regard.

2. UTMA Accounts

¶ 37 Mother contends the trial court erred by considering the availability of the children's money contained in their UTMA (Uniform Transfers to Minors Act) accounts to pay for the children's private school tuition and car insurance. The trial court provided that "the UTMA account balance in excess of $234,000.00 was considered in removing the claimed monthly expense for the children's Charlotte Latin School tuition and car insurance expenses."

¶ 38 Our General Assembly directs that the trial court calculating child support shall give "due regard to the estates, earnings, conditions, accustomed standard of living *of the child* and the parties" when making its calculations. N.C. Gen. Stat. § 50-13.4(c) (emphasis added).

¶ 39 Here, the children's UTMA accounts were funded largely by Father. The trial court already determined in its 2018 permanent child support order that the children's private school tuition was not to be included within the children's reasonable expenses, as it could be paid from the children's UTMA accounts. And this order was affirmed by our Court in *Berens IV*. We, therefore, conclude that the trial court did not abuse its discretion in its 2021 Modification Order in this regard.

3. 529 Plan Accounts

¶ 40 Mother argues that the trial court erred in making certain findings regarding the 529 Plans *owned by Mother*. Indeed, it is Mother who was awarded the funds in the 529 Plans as part of the equitable distribution of marital assets. She is free to do with the funds in those Plans as she sees fit. Of course, if she chooses to use the funds for something other than the educational expenses of her children, she may owe a tax penalty.

¶ 41 In any event, the trial court did not order Mother to use her funds currently in the 529 Plans to pay for the children's education. And it was otherwise appropriate for the trial court to give due regard to Mother's estate in setting the child support obligations of the parties.

4. Mother's Income

¶ 42 Mother's final contention is that the trial court erred by relying on Father's testimony regarding employment and investment income.

¶ 43 In a child support case falling outside the Guidelines, the trial court must determine the relative ability of the parties to provide for the children. *Smith*, 247 N.C. App. at 145-46, 786 S.E.2d at 21. Any order modifying child support should include specific findings to address each parent's financial position. *Crews v. Paysour*, 261 N.C. App. 557, 564, 821 S.E.2d 469, 474 (2018).

¶ 44 Child support obligations are determined by a party's actual income at the time the order is modified. *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997). "In orders of child support, the court should make findings of specific facts (e.g., incomes, estates) to support a conclusion as to the relative abilities of the parties to provide support." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468-469, 1978) (quoting N.C. Gen. Stat. § 50-13.4).

¶ 45 The trial court found that the reasonable monthly needs of the minor children to be $4,765.98 and that Father should pay child support of $2,836.64 monthly, or about 60% of these expenses. This makes Mother responsible for $1,929.64 monthly (or about 40%) of these expenses. The trial court found that Mother's monthly income "beginning October 1, 2020 is $17,992.15."

¶ 46 The trial court found that this number included $4,195 in monthly alimony paid to her by Father and $1,570 monthly income based on the trial court's finding that Mother earns 3% interest off her liquid assets. It is unclear from the Modification Order or from the evidence how the trial court arrived at the other $12,237 of monthly income. There was certainly evidence regarding the gross commissions earned by Mother as a real estate broker. However, there was evidence that some of these gross commissions were shared with other brokers and/or the brokerage company Mother worked under. Also, the amount of legitimate business expenses Mother incurred to earn those commissions is unclear. Father argues that his estimate of Mother's gross income was close to that offered in Mother's evidence. But it is clear that Father's estimate failed to take into account the reality that brokers split the brokerage

fee earned on the sale of a home with the brokerage firm they work for and with other brokers. We, therefore, vacate and remand this portion of the trial order establishing the child support obligations from 1 October 2020 going forward. On remand, the trial court is to make findings regarding Mother's other income and, based on those findings, determine the portion of the minor children's reasonable needs she should be responsible for.

III. Conclusion

¶ 47 We vacate the portions of the Modification Order determining Mother's monthly income as of 1 October 2020 and establishing Father's child support obligations from that date going forward. We remand for further findings and conclusions on those issues. On remand, the trial court may, in its discretion, hear additional evidence.

¶ 48 We, otherwise, affirm the remainder of the trial court's Modification Order.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

Judges ZACHARY and MURPHY concur.

GERALDINE M. CROMARTIE, Employee, Plaintiff
v.
GOODYEAR TIRE & RUBBER COMPANY, INC., Employer, LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

No. COA21-236

Filed 2 August 2022

1. Workers' Compensation—extent of disability—ripeness—maximum medical improvement

In a workers' compensation case, in which a tire manufacturing company (defendant) sought to terminate compensation payments to an employee (plaintiff) after paying her temporary disability benefits for eight years because of a work-related injury, the parties' dispute regarding the extent of plaintiff's disability was ripe for review by the Industrial Commission where competent evidence indicated that plaintiff's injury had reached "maximum medical improvement."

2. Workers' Compensation—total disability—lack of factual findings

After a tire manufacturing company (defendant) paid temporary disability benefits to an employee (plaintiff) for eight years following her work-related injury, the Industrial Commission's order denying defendant's application to terminate those payments was remanded because the Commission failed to make specific factual findings addressing whether plaintiff remained totally disabled—a critical issue affecting her right to continued compensation.

3. Workers' Compensation—disability—entitlement to compensation—suitability of alternative employment

In a workers' compensation case in which a tire manufacturing company (defendant) sought to terminate compensation payments to an employee (plaintiff) after paying her temporary disability for eight years because of a work-related injury and then offering her an alternative position, which she refused, the Industrial Commission—in an order denying defendant's application to terminate the payments—did not err in determining that the alternative position did not constitute "suitable employment" under the Worker's Compensation Act, which provides that an injured employee who refuses "suitable employment" is not entitled to compensation. Competent evidence supported the Commission's finding that the alternative position did not accommodate plaintiff's permanent work restrictions resulting from her injury, and any evidence to the contrary could not be reweighed on appeal.

Appeal by Defendants from opinion and award entered 24 November 2020 and order entered 23 December 2020 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 8 March 2022.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner and David P. Stewart, and Jay A. Gervasi, Jr., for Plaintiff-Appellee.

Young Moore and Henderson, P.A., by Angela Farag Craddock, for Defendants-Appellants.

INMAN, Judge.

¶ 1 A tire manufacturing company and its insurance carrier (collectively, "Defendants") appeal from an order of the Full Commission of the

North Carolina Industrial Commission (the "Full Commission") denying their application to terminate compensation payments to an employee after paying her temporary disability over the last eight years because she sustained an injury to her hand in the course of her employment. Defendants argue the Full Commission: (1) failed to address whether the employee presented competent evidence to support a finding of total disability as a result of her work injury; and (2) erred in concluding the alternative position was not suitable employment for the employee. After careful review of the record and our precedent, we remand the opinion and award of the Full Commission for additional findings.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 The record below discloses the following:

¶ 3 Plaintiff-Appellee Geraldine M. Cromartie ("Ms. Cromartie") had worked for Defendant-Appellant Goodyear Tire and Rubber Co. ("Goodyear") for over 16 years as a machine operator in Goodyear's tire production facility in Fayetteville, North Carolina when she injured her hand on 30 May 2014. While performing her duties as a machine operator, Ms. Cromartie sustained a severe laceration to her right hand, requiring sutures. She developed a painful raised scar that did not heal.

¶ 4 Ms. Cromartie initially received a medical recommendation to refrain from work until 11 July 2014, so she was placed off-duty and began receiving temporary total disability payments of $904.00 per week. Before her injury, Ms. Cromartie had worked up to 42 hours per week and earned an average weekly wage of $1,413.33. Ms. Cromartie returned to work in her machine operator position on schedule, with no restrictions.

¶ 5 After returning to work, Ms. Cromartie complained of continued pain and swelling from her scar. Goodyear sent Ms. Cromartie to Doctor James Post ("Dr. Post"). Dr. Post noted Ms. Cromartie experienced "knifelike pain" in the back of her right hand when she attempted to grip anything with that hand. He determined Ms. Cromartie had a "right thumb symptomatic hypertrophic scar with distal neuroma formation of the branch of the radial sensory nerve." Dr. Post recommended Ms. Cromartie return to work with restrictions—no lifting anything greater than five pounds and no forceful gripping for four weeks. On 21 July 2014, Goodyear placed Ms. Cromartie out of work because Goodyear could not accommodate her work restrictions. Goodyear reinstated Ms. Cromartie's temporary disability compensation at that time.

¶ 6 Ms. Cromartie returned to Dr. Post for treatment several times in August and September and on 11 September 2014, Dr. Post performed a

scar revision with excision procedure on Ms. Cromartie's right hand. Dr. Post recommended different work restrictions: no lifting anything greater than five pounds and no pushing or pulling greater than 40 pounds.

¶ 7 On 14 October 2014, Ms. Cromartie returned to a restricted duty assignment teaching safety courses at Goodyear to accommodate her work restrictions. On 3 December 2014, Dr. Post modified her work restrictions once more: no lifting greater than 15 pounds and no pushing or pulling greater than 40 pounds. He also ordered that Ms. Cromartie attend physical therapy sessions through 5 January 2015. Ms. Cromartie returned to work light duty on 3 February 2015. As of 3 March 2015, Dr. Post detected no significant improvement in Ms. Cromartie's symptoms, noted a diagnosis of "neuroma," and ordered she complete a functional capacity evaluation ("FCE").

¶ 8 On 14 April 2015, Lauri Jugan, PT, ("Ms. Jugan") conducted an FCE on Ms. Cromartie but was unable to determine Ms. Cromartie's functional capabilities because she had "failed to give maximum voluntary effort." On 21 April 2015, Dr. Post determined Ms. Cromartie had reached maximum medical improvement and rated her right upper extremity seven percent permanent partial disability. Noting the inconclusive FCE, Dr. Post assigned Ms. Cromartie permanent work restrictions of no lifting greater than 20 pounds and no repetitive forceful gripping or grasping. Ms. Cromartie continued working in the light duty position, and Goodyear did not offer her a different permanent position.

¶ 9 In May 2015, Goodyear and Ms. Cromartie entered into a Consent Agreement, approved by the Deputy Commissioner, authorizing a one-time evaluation with plastic surgeon Doctor Anthony DeFranzo ("Dr. DeFranzo") and requiring Ms. Cromartie to engage in a repeat FCE of her hand. Per the agreement, Defendants acknowledged Ms. Cromartie "sustained a compensable injury by accident to her right hand pursuant to [N.C. Gen. Stat. §] 97-18(b)." In August 2015, Dr. DeFranzo evaluated Ms. Cromartie, diagnosed her with complex regional pain syndrome, and suggested sedentary work with no lifting over 10 pounds.

¶ 10 On 30 September 2015, Ms. Jugan repeated the FCE on Ms. Cromartie, and determined, among other things, that Ms. Cromartie's right hand was limited to 20 pounds lifting, 30 pounds pulling, 39 pounds pushing, and 12.5 pounds lifting above the shoulder, demonstrating her capacity for a "[m]edium demand vocation."

¶ 11 On 3 November 2015, Goodyear sent Ms. Cromartie for an independent medical evaluation with Doctor Richard Ramos ("Dr. Ramos"). Dr. Ramos diagnosed her with neuropathic pain of her right hand and

symptoms of complex regional pain syndrome and suggested she would benefit from pain management medication. Goodyear reinstated temporary total disability compensation on 10 November 2015.

¶ 12 Ms. Cromartie continued treatment with Dr. Ramos and Dr. Post over the next two years. In June 2017, Dr. Post reaffirmed he could not offer Ms. Cromartie further medical treatment and maintained the same permanent work restrictions he had previously prescribed. In the same month, Dr. Ramos determined Ms. Cromartie was at maximum medical improvement and released her from his care.

¶ 13 Goodyear's job-matching contractor identified a position in compliance with Dr. Ramos's work restrictions for Ms. Cromartie: "Production Service Truck Carcasses" ("Carcass Trucker"). The position primarily consisted of driving a truck to deliver parts of tires, referred to as "carcasses," to and from building stations and storage over a 12-hour shift. In particular, the position required driving the truck for 12 hours, rarely lifting up to 25 pounds when carcasses fell from the trailer, and 30 pounds of force, which can be split between each hand by 15 pounds lifting and 15 pounds pushing, to replace the truck's battery.

¶ 14 In February 2018, Goodyear requested Dr. Ramos review and approve the position if he agreed the position was within Ms. Cromartie's work restrictions. On 1 March 2018, Dr. Ramos approved the position for Ms. Cromartie, and on 6 March 2018, Goodyear formally offered Ms. Cromartie a job as Carcass Trucker. She refused the offer. On 16 March 2018, Defendants filed a "Form 24 Application to Terminate or Suspend Payment of Compensation" with the Industrial Commission, asserting Ms. Cromartie unjustifiably refused suitable employment.

¶ 15 On 29 March 2018, Ms. Cromartie returned to Dr. DeFranzo, the plastic surgeon who had evaluated her three years earlier, with a Workers' Compensation Medical Status Questionnaire. Dr. DeFranzo assigned permanent restrictions of "light duty" and "sedentary" work that required Ms. Cromartie not to lift more than 10 pounds. On 26 April 2018, the Special Deputy Commissioner denied Defendants' Form 24 application, concluding Ms. Cromartie was justified in refusing the Carcass Trucker position in part because it did not fall within the sedentary work limitations assigned by Dr. DeFranzo. Defendants appealed the order denying suspension of Ms. Cromartie's benefits and contested Ms. Cromartie's disability.

¶ 16 Upon Goodyear's request, on 26 September 2018, Ms. Cromartie underwent an additional examination with Doctor Marshall Kuremsky ("Dr. Kuremsky"). Dr. Kuremsky "subjectively" believed Ms. Cromartie

could return to work without restrictions after confirmation from a third FCE and that she could perform the Carcass Trucker position. Based on Dr. Kuremsky's recommendation, Goodyear again offered Ms. Cromartie the position of Carcass Trucker on 2 October 2018. Ms. Cromartie again refused the position.

¶ 17 One month later, on 5 November 2018, Goodyear approved Ms. Cromartie's application for medical retirement. Ms. Cromartie was eligible for medical retirement because she had already qualified for Social Security Disability.

¶ 18 In February 2019, Defendants' appeal of the Special Deputy Commissioner's order came before the Deputy Commissioner for an evidentiary hearing. The Deputy Commissioner filed an opinion and award on 10 January 2020, concluding that Ms. Cromartie was disabled following her receipt of Social Security Disability benefits and Goodyear's negotiated pension disability plan. The Deputy Commissioner gave "great weight" to the medical opinion of Dr. DeFranzo, compared to the opinions of the other medical experts, and his recommendation that Ms. Cromartie should be limited to sedentary work and concluded the Carcass Trucker position was not suitable employment for Ms. Cromartie. Defendants appealed to the Full Commission.

¶ 19 Following a hearing on 16 June 2020, the Full Commission filed its opinion and award on 24 November 2020. The Full Commission afforded the greatest weight to the expert opinion of treating surgeon Dr. Post and found that (1) Ms. Cromartie had reached maximum medical improvement on 21 April 2015 and (2) her permanent work restrictions were those assigned by Dr. Post on that date, including no lifting over 20 pounds with her right arm and no repetitive forceful gripping or grasping with her right hand. The Full Commission found and then concluded that the Carcass Trucker position "is outside of [Ms. Cromartie]'s permanent restrictions because on its face, without any of the modifications explained . . . , the job requires lifting over 20 pounds." It further concluded the Deputy Commissioner properly denied Defendants' application to terminate compensation payments because Defendants failed to demonstrate Ms. Cromartie "has the ability to earn pre-injury wages in the same employment after reaching maximum medical improvement."

¶ 20 On 4 December 2020, Defendants filed a motion for reconsideration, asserting the Full Commission had failed to enter findings of fact and conclusions of law addressing the issue of whether Ms. Cromartie remained totally disabled. The Full Commission denied Defendants' motion on 23 December 2020. Defendants appeal the Full Commission's

opinion and award and its order denying their motion for reconsideration to this Court.

II. ANALYSIS

A. Standard of Review

¶ 21 In our review of an award from the Full Commission, we are limited to a determination of "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *McAuley v. N.C. A&T State Univ.*, 280 N.C. App. 473, 2021-NCCOA-657, ¶ 8 (citation omitted). "As long as the Commission's findings are supported by competent evidence of record, they will not be overturned on appeal." *Rackley v. Coastal Painting*, 153 N.C. App. 469, 472, 570 S.E.2d 121, 124 (2002). The Commission's "conclusions of law are reviewable *de novo*." *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 783 (2003) (citation omitted).

¶ 22 "[T]he Workers' Compensation Act should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions." *Booth v. Hackney Acquisition Co.*, 270 N.C. App. 648, 653, 842 S.E.2d 171, 175 (2020) (citation omitted).

B. Disability

¶ 23 **[1]** As an initial matter, Ms. Cromartie alleges the issue of her disability is not yet ripe. We disagree.

¶ 24 "[O]nce an injured employee reaches maximum medical improvement, either party can seek a determination of permanent loss of wage-earning capacity." *Pait v. Se. Gen. Hosp.*, 219 N.C. App. 403, 412, 724 S.E.2d 618, 625 (2012) (quotation marks and citation omitted). In *Pait*, this Court held that so long as competent evidence before the Commission indicated that the worker's condition had reached maximum medical improvement, "the parties' dispute as to the extent of plaintiff's disability and defendants' liability therefor was ripe for the Commission's hearing." *Id.*

¶ 25 In Finding of Fact 34, the Full Commission determined that Ms. Cromartie had reached maximum medical improvement more than seven years ago, in April 2015. The issue of Ms. Cromartie's disability became ripe for determination by the Commission on the date she reached maximum medical improvement. *See id.* We now address the merits of Defendants' arguments.

1. Insufficient Findings about Ms. Cromartie's Disability

¶ 26 **[2]** Defendants assert the Full Commission erred in failing to determine Ms. Cromartie's total disability status. We agree and remand this matter to the Commission to make necessary factual findings. The Full Commission, in its discretion, may make additional findings based on the record before it or receive additional evidence.

¶ 27 When reviewing workers' compensation claims, "[t]he Full Commission must make definitive findings to determine the critical issues raised by the evidence[.]" *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 61-62 (1998) (quotation marks and citation omitted). "[W]hile 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." *Powe v. Centerpoint Human Servs.*, 226 N.C. App. 256, 262, 742 S.E.2d 218, 222 (2013) (cleaned up). When "the question of [Plaintiff's] disability affects Plaintiff's right to compensation, the Commission is required to make explicit findings on the existence and extent of that disability when it is in dispute." *Id.* If the Full Commission fails to make specific findings of fact, we must remand the issue to the Commission for a determination. *See Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 708, 599 S.E.2d 508, 513 (2004) (remanding the issue of disability to the Commission "for the purpose of making adequate findings of fact").

¶ 28 Our General Statutes define disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2021). To support an award of disability compensation, an employee must prove:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). An employee may satisfy this burden in one of the following ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work

> related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted). Once the employee has established the existence and extent of disability, the burden shifts to the employer to demonstrate that it has offered the employee suitable employment. *See Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 361, 489 S.E.2d 445, 446-47 (1997).

¶ 29 Defendants compare this case to *Powe*. In *Powe*, the employer acknowledged that a compensable injury occurred and commenced payment of temporary total disability, but the employer disputed "the continuing status of Plaintiff's disability." 226 N.C. App. at 261-62, 742 S.E.2d at 222. Though the issue of disability was before the Full Commission, it made "insufficient factual findings" and "reached no conclusions on the disputed question of disability." *Id.* at 262, 742 S.E.2d at 222. We remanded the case to the Full Commission to enter "explicit findings on the existence and extent of [Plaintiff's] disability." *Id.* at 262, 264, 742 S.E.2d at 222-23.

¶ 30 In this case, like the employer in *Powe*, Goodyear has acknowledged that Ms. Cromartie had suffered a compensable injury and paid her temporary total disability. However, like the employer in *Powe*, throughout "every level" of litigation, *id.* at 262, 742 S.E.2d at 222, Defendants have disputed whether Ms. Cromartie remained totally disabled. Similar to the Full Commission in *Powe*, even though the critical issue of disability was before the Full Commission in this case, the Commission made no findings or conclusions about whether Ms. Cromartie remained disabled.[1] Since the question of Ms. Cromartie's disability affects her right

1. We note that while the Full Commission did not include explicit findings on the existence or extent of Ms. Cromartie's disability, the Deputy Commissioner did include findings and conclusions of law regarding Ms. Cromartie's disability in its decision:

to compensation, the Commission must make express findings about Ms. Cromartie's disability status. *See id.*

¶ 31 We remand to the Full Commission for it to enter "explicit findings on the existence and extent of [Ms. Cromartie's] disability[.]" *Id.*

2. Suitability of Alternative Employment Position

¶ 32 **[3]** Goodyear further asserts the Full Commission erred in determining the Carcass Trucker position was not suitable employment for Ms. Cromartie. We disagree.

¶ 33 We have defined suitable employment as "any job that a claimant is capable of performing considering [her] age, education, physical limitations, vocational skills and experience." *Griffin v. Absolute Fire Control, Inc.*, 269 N.C. App. 193, 200, 837 S.E.2d 420, 425 (2020) (citation omitted). "If an injured employee refuses suitable employment . . . , the employee shall not be entitled to any compensation[.]" N.C. Gen. Stat. § 97-32 (2021). The burden of proof is first on the employer "to show that an employee refused suitable employment." *Wynn v. United Health Servs./Two Rivers Health-Trent Campus*, 214 N.C. App. 69, 74, 716 S.E.2d 373, 379 (2011) (citation omitted). "Once the employer makes this showing, the burden shifts to the employee to show that the refusal was justified." *Id.* (citation omitted).

¶ 34 In its opinion and award, the Full Commission concluded, "Defendant-Employer's Production Service Truck Carcasses position, unless modified in several aspects, is not within Plaintiff's physical limitations. . . . and is therefore not suitable post-MMI employment." We hold the Full Commission's findings support its conclusion about the suitability of the Carcass Trucker position. *See McAuley*, ¶ 8.

¶ 35 Relying on Dr. Post's testimony and giving less weight to the testimony from other doctors, the Full Commission found by a preponderance of the evidence that "[Ms. Cromartie] reached [maximum medical

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> 5. . . . Based on the preponderance of the evidence, the undersigned concludes that Employee has met her burden of proving disability based upon the medical evidence in this as well as the fact that she qualified for Social Security Disability benefits and the defendant-employer's negotiated Pension Disability Plan, based upon the determination that she was "permanently incapacitated" and "totally disabled."

The Deputy Commissioner's findings and conclusions are, however, superseded by the Full Commission's findings and conclusions. *See Jenkins v. Piedmont Aviation Servs.*, 147 N.C. App. 419, 427, 557 S.E.2d 104, 109 (2001) ("The deputy commissioner's findings of fact are not conclusive; only the Full Commission's findings of fact are conclusive." (citation omitted)).

improvement] on April 21, 2015 and her permanent work restrictions are the restrictions assigned by Dr. Post on that date, including no lifting over 20 pounds with her right arm and no repetitive forceful gripping or grasping with her right hand." The Full Commission determined the demands of the Carcass Trucker position exceeded the restrictions prescribed by Dr. Post:

> [T]he Production Service Truck Carcasses position is outside of [Ms. Cromartie]'s permanent restrictions because on its face, without any of the modifications explained by Mr. Murray or Ms. Flantos, the job requires lifting over 20 pounds. Accordingly, the Full Commission further finds that [Goodyear's] March 16, 2018 Form 24 was properly disapproved because the job [Ms. Cromartie] refused was not within her restrictions.

¶ 36 These findings were supported by competent evidence. *See id.* The Carcass Trucker position required 12 hours of driving while gripping the steering wheel, occasionally lifting 25 pounds, and pushing or pulling 30 pounds total. During his testimony, Dr. Ramos noted the requirements of this position did not comply with Ms. Cromartie's permanent work restrictions. Both Dr. DeFranzo and Dr. Post testified that they did not approve the Carcass Trucker position because it did not comply with Ms. Cromartie's permanent work restrictions. Despite Goodyear's plea to the contrary, we cannot reweigh the evidence. *See Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) ("[T]his Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." (quotation marks and citation omitted)); *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) ("The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." (citation omitted)).

III. CONCLUSION

¶ 37 For the reasons set forth above, we remand to the Full Commission for further findings not inconsistent with this opinion.

REMANDED.

Judges MURPHY and ARROWOOD concur.

MELVA LOIS BANKS GRAY, AS ADMINISTRATRIX OF THE ESTATE OF STEVEN PHILIP WILSON, PLAINTIFF
v.
EASTERN CAROLINA MEDICAL SERVICES, PLLC, ET AL., DEFENDANTS

No. COA20-898

Filed 2 August 2022

1. Medical Malpractice—Rule 9(j) certification—expert—reasonable expectation of qualification—similar specialty and patients

In a medical malpractice action, where a deceased prison inmate's estate (plaintiff) alleged that two doctors and their medical practice provided deficient care to the inmate for pneumonia, the trial court erred in dismissing plaintiff's complaint for failure to substantively comply with Civil Procedure Rule 9(j) based on factual findings that impermissibly drew inferences against plaintiff and addressed whether plaintiff's Rule 9(j) expert qualified as an expert witness under Evidence Rule 702 rather than whether plaintiff could reasonably have expected her expert to qualify as such. Plaintiff's expert was a pulmonologist, was board certified in internal medicine and pulmonary disease, regularly treated pneumonia patients, and spent the year before the inmate's pneumonia treatment working in a specialty that included caring for pneumonia patients; thus, it was reasonable for plaintiff to expect that her expert qualified as one who practiced in a similar specialty to defendant-doctors—internal medicine practitioners who treated pneumonia patients—and had experience treating similar patients.

2. Nurses—medical malpractice action—Rule 9(j) certification—expert testimony—standard of care for nurses

In a medical malpractice action, where a deceased prison inmate's estate (plaintiff) alleged that five nurses (defendants) provided deficient care to the inmate for pneumonia, the trial court erred in dismissing plaintiff's complaint for failure to substantively comply with Civil Procedure Rule 9(j) based on factual findings that impermissibly drew inferences against plaintiff. Although plaintiff's expert—a pulmonologist who regularly treated pneumonia patients—did not work in the same type of setting as defendants did, the expert had experience supervising and working with nursing staff to treat pneumonia patients while practicing in a similar specialty to defendants; therefore, it was reasonable for plaintiff to

expect that her expert would qualify under Evidence Rule 702 to testify about the applicable standard of care for nurses treating pneumonia patients.

Appeal by Plaintiff from order entered 7 July 2020 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 3 November 2021.

The Duke Law Firm NC, by W. Gregory Duke, for Plaintiff-Appellant.

Batten Lee, PLLC, by Gary Adam Moyers and C. Houston Foppiano, for Defendants-Appellees Eastern Carolina Medical Services, PLLC, and Mark Cervi, M.D.

Walker, Allen, Grice, Ammons, Foy, Klick & McCullough, L.L.P., by Elizabeth P. McCullough, for Defendant-Appellee Gary Leonhardt, M.D.

Huff Powell & Bailey PLLC, by Barrett Johnson and Katherine Hilkey-Boyatt, for Defendants-Appellees Carol Lee Keech, aka Carol Lee Oxendine; Charles Ray Faulkner, R.N.; Kimberly Jordan, R.N.; and Jacqueline Lymon, L.P.N.

Michael, Best, & Friedrich, LLP, by Carrie E. Meigs and Justin G. May, for Defendant-Appellee Donna McLean.

COLLINS, Judge.

¶ 1 Melva Lois Banks Gray ("Plaintiff") brings this action for medical malpractice as Administratrix of the Estate of Steven Philip Wilson. Plaintiff argues that the trial court erred by dismissing her complaint for failure to substantively comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. Because Plaintiff could reasonably have expected her 9(j) expert to qualify as an expert witness under North Carolina Rule of Evidence 702, we reverse the trial court's order and remand for further proceedings.

I. Factual and Procedural History

¶ 2 Plaintiff seeks redress for the allegedly deficient medical care Steven Philip Wilson received while in the custody of the Pitt County Detention Center ("PCDC") between 22 September 2016 and 16 November 2017. Wilson was detained at the PCDC on 22 September 2016. He had been

diagnosed with pneumonia and prescribed antibiotics the week before he was detained. Wilson submitted at least nine Inmate Requests for Sick Call Visits between 23 September 2016 and 10 November 2016. Wilson was experiencing symptoms including coughing with mucus, congestion, fever, wheezing, lethargy, coarse breathing, flushed face, trouble sleeping, back pain, and elevated heart rate. He was prescribed an inhaler, over-the-counter pain medicine, and antibiotics. Wilson told medical staff that he was not feeling better, and progress reports indicate that his condition continued to worsen during those two months.

¶ 3 Wilson was transferred to the Greene County Jail on 10 November 2016. Upon his admission, Wilson had a heavy cough and complained that he was short of breath, winded, and that the left side of his rib cage hurt. He was transported to Lenoir Memorial Hospital on 11 November 2016. At Lenoir Memorial Hospital, Wilson was noted to be in moderate respiratory distress and was diagnosed with acute left-sided empyema and sepsis secondary to left-sided empyema. He was transported to Vidant Medical Center ("Vidant") where he stayed from 11 November 2016 until 16 November 2016.

¶ 4 At Vidant, Wilson was diagnosed with septic shock due to staphylococcus, necrotizing pneumonia, acute respiratory failure, and acute kidney failure. Wilson was intubated, placed on a ventilator, given a tracheostomy, and had his left lung surgically removed. Wilson was discharged from Vidant on 16 December 2016 and incarcerated with the North Carolina Department of Corrections ("NCDC"). He was released from the NCDC on 16 November 2017. Wilson died on 18 October 2018 from an apparently unrelated drug overdose.

¶ 5 Plaintiff commenced this action by filing a complaint on 19 June 2019. Plaintiff named as defendants Eastern Carolina Medical Services ("ECMS") and two physicians, Dr. Gary Leonhardt and Dr. Mark Cervi. PCDC contracted with ECMS to provide medical care to persons detained at PCDC. ECMS was responsible for, among other things, physician services rendered to inmates, and diagnostic examinations, medical treatment, and health care services for inmates. Dr. Leonhardt is a co-founder, owner, and staff physician at ECMS. He specializes in psychiatry and addiction medicine, practices as a general practitioner, and has experience in internal medicine. Dr. Cervi is a co-founder, director, and medical physician at ECMS. He specializes in internal medicine. Dr. Leonhardt and Dr. Cervi provided primary care to individuals detained at PCDC and supervised the ECMS medical staff during the time Wilson was an inmate at PCDC.

¶ 6 Plaintiff also named as defendants the following ECMS nurses who treated Wilson: Donna McLean, a nurse Practitioner ("NP"); Carol Keech, a licensed practical nurse ("LPN"); Charles Faulkner, a registered nurse ("RN"); Kimberly Jordan, an RN; and Jaqueline Lymon, a LPN.

¶ 7 Defendants moved to dismiss the complaint based on Plaintiff's failure to facially comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. Plaintiff filed a voluntary dismissal of that suit on 18 September 2019 and filed a new complaint against the same Defendants on that day. Plaintiff alleged ordinary negligence and professional negligence/medical malpractice resulting in personal injury to Wilson, and sought compensatory and punitive damages.

¶ 8 In her complaint, Plaintiff alleged the following, pursuant to Rule 9(j):

> Plaintiff specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care. In addition, should a Court later determine that the person who has reviewed the medical care and all medical records pertaining to the alleged negligence herein that are available to the Plaintiff after reasonable inquiry, and who is willing to testify that the medical care did not comply with the applicable standard of care, does not meet the requirements of Rule 702 of the North Carolina Rules of Evidence, the Plaintiff will seek to have that person qualified as an expert witness by motion under Rule 702(e) of the North Carolina Rules of Evidence, and Plaintiff moves the Court (as provided in Rule 9(j) of the [North Carolina] Rules of Civil Procedure) that such person be qualified as an expert witness under Rule 702(e) of the [North Carolina] Rules of Evidence.

¶ 9 All Defendants answered and filed motions to dismiss, asserting, in part, that Plaintiff's complaint should be dismissed for failing to comply with Rule 9(j). In response to Defendants' interrogatories, Plaintiff identified William B. Hall, M.D., ("Dr. Hall") as the Rule 9(j) expert who had reviewed the medical care and medical records pertaining to the alleged

negligence at issue, and who was willing to testify that the medical care did not comply with the applicable standard of care.

¶ 10 Dr. Hall is certified by the American Board of Internal Medicine in internal medicine, pulmonary disease, and critical care medicine. According to his curriculum vitae, during the year preceding Wilson's care at PCDC, Dr. Hall served as a pulmonary and critical care physician for UNC Rex Healthcare and the Medical Director at both Rex Pulmonary Specialists and Rex Pulmonary Rehab in Raleigh, North Carolina. According to Plaintiff's response to Dr. Leonhardt's interrogatory, Dr. Hall "engages in the active clinical practice of pulmonology, internal medicine, and general primary care and supervises medical staff on a daily basis." Dr. Hall supervises medical staff, including registered nurses, physician assistants, and certified medical assistants, and is responsible for reviewing patient charts; reviewing his medical staff's work, notes, and proposed plans; and addressing medical concerns raised by his staff.

¶ 11 Defendants deposed Dr. Hall on 6 March 2020 "solely for the purpose of determining his qualifications and whether the plaintiff could have reasonably expected him to qualify pursuant to Rule 9(j)." At the deposition, Dr. Hall testified that after medical school he completed a residency in internal medicine and practiced for one year as a hospitalist–an internal medicine physician who works at a hospital. After that year, he completed a fellowship in pulmonology and critical care medicine and has, since 2010, practiced as a specialist in pulmonary and critical care medicine at REX Pulmonary Specialists and REX Hospital. Dr. Hall testified, "there's a big overlap between the pulmonary and the -- and the internal medicine. . . . I don't usually see people as a primary care physician but I often will do things in my clinic that straddle over from pulmonary into primary care . . . ."

¶ 12 After Dr. Hall's deposition, on 2 April 2020, Dr. Leonhardt filed a second motion to dismiss, again asserting Plaintiff's failure to comply with Rule 9(j). ECMS and Dr. Cervi also filed on 1 June 2020 second motions to dismiss for Plaintiff's failure to comply with Rule 9(j).[1]

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1. Dr. Leonhardt also filed a Motion to Strike on 26 November 2019. Further, ECMS and Dr. Cervi filed a Motion to Dismiss Plaintiff's Claims for Punitive Damages on 17 January 2020. Dr. Leonhardt also filed an Objection and Motion to Strike Portions of Plaintiffs Memorandum of Law in Opposition to Defendants' Motions to Strike and Motions to Dismiss and Select Exhibits and Motion to Strike Affidavit of William B. Hall, M.D., on 19 June 2020.

¶ 13 The trial court held a hearing on 23 June 2020 on the various motions filed by Defendants. The trial courted entered an Order[2] on 7 July 2020 dismissing Plaintiff's complaint with prejudice. Because the statute of limitations as to all Defendants had run at the time of the hearing, the trial court dismissed the matter with prejudice for failure to comply with Rule 9(j). Plaintiff appealed.

II. Discussion

¶ 14 **[1]** Plaintiff first argues that the trial court erred by dismissing her complaint for failure to substantively comply with Rule 9(j). Specifically, Plaintiff argues that the trial court erroneously concluded that Plaintiff could not have reasonably expected Dr. Hall to qualify as an expert witness against Defendants pursuant to Rule 702.

A. Standard of Review

¶ 15 When a complaint that is facially valid under Rule 9(j) is challenged on the basis that the 9(j) certification is not supported by the facts, "the trial court must examine the facts and circumstances known or those which should have been known to the pleader at the time of filing, and to the extent there are reasonable disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage." *Preston v. Movahed*, 374 N.C. 177, 189, 840 S.E.2d 174, 183-84 (2020) (quotation marks and citations omitted).

> "When the trial court determines that reliance on disputed or ambiguous forecasted evidence was not reasonable, the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination."

Moore v. Proper, 366 N.C. 25, 32, 726 S.E.2d 812, 818 (2012) (citation omitted); *see also Preston*, 374 N.C. at 189, 840 S.E.2d at 184. "[B]ecause the

2. The full title of the Order is "Order on Defendant Gary Leonhardt's Motion to Dismiss and Motion to Strike, Second Motion to Dismiss, and Objection and Motion to Strike Portions of Plaintiff's Memorandum of Law in Opposition and Select Exhibits, and Order on Defendants Mark Cervi, M.D. and Eastern Carolina Medical Services, PLLC's Motions to Dismiss and Order on Defendant Donna McLean, D.N.P., F.N.P.-B.C.'s Motion to Dismiss and Order on Defendants Keech/Oxendine; Faulkner; Jordan; and Lymon's Motion to Dismiss."

evidence must be taken in the light most favorable to the plaintiff, the nature of these 'findings,' and the 'competent evidence' that will suffice to support such findings, differs from situations where the trial court sits as a fact-finder." *Preston*, 374 N.C. at 189-90, 840 S.E.2d at 184.

¶ 16 "Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review before filing of the action." *Vaughan v. Mashburn*, 371 N.C. 428, 434, 817 S.E.2d 370, 375 (2018) (quoting *Moore*, 366 N.C. at 31, 726 S.E.2d at 817) (emphasis omitted). The rule provides, in pertinent part:

> Any complaint alleging medical malpractice by a health care provider pursuant to [N.C. Gen. Stat. §] 90-21.11(2)a. in failing to comply with the applicable standard of care under [N.C. Gen. Stat. §] 90-21.12 shall be dismissed unless:
>
> > (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2020).

B. Defendants ECMS, Dr. Leonhardt, and Dr. Cervi

¶ 17 Rule 702(b) of the North Carolina Rules of Evidence provides that a person shall not give expert testimony on the appropriate standard of care in a medical malpractice action unless the person is a licensed health care provider and the person meets the criteria set forth in the following two-pronged test:

> (1) If the party against whom . . . the testimony is offered is a specialist, the expert witness must:
>
> > a. Specialize in the same specialty as the party against whom . . . the testimony is offered; or
> >
> > b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

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

N.C. Gen. Stat. § 8C-1, Rule 702(b) (2020).[3]

1. Rule 702(b)(1)a.: "Same Specialty"

¶ 18 The trial court found, and Plaintiff does not dispute, that Dr. Hall does not specialize in the same specialty as either Dr. Leonhardt or Dr. Cervi.

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3. We note that, because Dr. Leonhardt and Dr. Cervi were not acting as "specialists" in providing and/or supervising Wilson's treatment, it is not clear that Rule 702(b) should apply to these defendants. Dr. Leonhardt asserts he is a specialist in psychiatry and addiction medicine but—relevant to this case—holds himself out as an internal medicine consultant to PCDC. The trial court found that while Dr. Leonhardt "is a physician and specialist in psychiatry and addiction medicine," his "care as a specialist in psychiatry and addiction medicine was not alleged to be at issue in the complaint." Similarly, Dr. Cervi asserts he is a specialist in internal medicine but—relevant to this case—holds himself out as a primary care or family practice provider. The trial court found that "Dr. Cervi is an internal medicine physician and was providing primary care to inmates at PCDC during the applicable time period," and his "care as a specialist in internal medicine was not alleged to be at issue in the complaint[.]" Because Plaintiff did not raise the issue of the applicability of Rule 702(b) below or on appeal, we will analyze the facts and circumstances relevant to these defendants in light of Rule 702(b).

2. Rule 702(b)(1)b.: "Similar Specialty"

¶ 19 Plaintiff disputes the trial court's finding that Dr. Hall does not practice in a similar specialty as either Dr. Leonhardt or Dr. Cervi.

¶ 20 The test under Rule 9(j) is whether, at the time of filing the complaint it would have been reasonable for Plaintiff to expect Dr. Hall to qualify as an expert, not whether he would actually qualify, under Rule 702. *See Moore*, 366 N.C. at 31, 726 S.E.2d at 817 ("[T]he preliminary, gatekeeping question of whether a proffered expert witness is 'reasonably expected to qualify as an expert witness under Rule 702' is a different inquiry from whether the expert *will actually* qualify under Rule 702." (citing N.C. Gen. Stat. § 1A-1, Rule 9(j)(i))). "[T]he trial court must examine the facts and circumstances known or those which should have been known to the pleader at the time of filing, and to the extent there are reasonable disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage." *Preston*, 374 N.C. at 189, 840 S.E.2d at 183-84 (quotation marks and citations omitted).

¶ 21 Neither the trial court nor Defendant cited specific authority, of which Plaintiff knew or should have known, holding that a physician who is board certified in internal medicine, pulmonary disease medicine, and critical care medicine providing and supervising the care of a pneumonia patient is not practicing in a similar specialty to that of an internist or a general practitioner providing and supervising the care of a pneumonia patient. Furthermore, the trial court's findings of fact impermissibly draw inferences against Plaintiff.

¶ 22 In Finding 4, the trial court found, "Dr. Hall did not form any opinions as to any care Dr. Leonhardt provided as a primary care provider and/or general practitioner at the PCDC." Likewise, in Finding 5, the trial court found, "Dr. Hall [did not] form any opinions as to any care Dr. Cervi provided as an internal medicine specialist at the PCDC." However, Defendants repeatedly objected during Dr. Hall's Rule 9(j) deposition to any questions related to the opinions Dr. Hall formed as outside the scope of the deposition. Thus, Dr. Hall's deposition transcript does not reflect whether Dr. Hall formed any opinions and does not reflect that he had not formed any opinions.

¶ 23 The record evidence shows that Dr. Hall testified that he had been asked to provide opinions on the standard of care for the treatment of a pneumonia patient, the standard of care for the physicians supervising the medical staff, and the standard of care for the medical staff providing that treatment. This is corroborated by Plaintiff's responses to

Defendants' Rule 9(j) interrogatories. Dr. Hall further testified that his preliminary pre-suit review of the records was to review the course of care provided by the entire medical team to treat Wilson's pneumonia and determine whether that care met the standard. Dr. Hall articulated specific criticisms of Dr. Leonhardt's and Dr. Cervi's supervision of Wilson's treatment in his interrogatory answers, including as follows:

> When recurrent tachycardia, recurrent fever, and persistent cough was identified in examinations conducted on Steven Wilson, as a patient with a report of prior pneumonia, Steven Wilson should have received a chest x-ray (which was ordered and later cancelled by Pitt County Detention Center), routine labs, such as a complete blood count, and/or additional antibiotic treatment. Such additional treatment was necessary to determine the extent of Steven Wilson's condition and to prevent the deterioration of Steven Wilson's condition that led to necrotizing pneumonia. The failure of ECMS, ECMS agents, representatives, and/or employees, and Dr. Cervi, and Dr. Leonhardt to properly supervise the medical staff at PCDC, review the records and recurrent health concerns of Steven Wilson; identify the need, scheduling, administering, and coordinating of proper non-emergent and emergency medical care rendered to Steven Wilson; provide proper care during such sick calls to Steven Wilson; identify the need for and coordinate proper diagnostic tests and examinations for Steven Wilson; identify the need for and coordinate the administration of appropriate medications and consultations with specialty physicians for Steven Wilson; and identify the need for and coordinate an inpatient hospitalization for Steven Wilson fell below the standard of care.

Accordingly, Findings 4 and 5 impermissibly draw inferences against Plaintiff.

¶ 24 In Finding 14, the trial court found "Dr. Hall did not practice in a similar specialty as any of the defendants which included within it the primary care of patients during the applicable period." To the extent this constitutes a finding of fact it impermissibly draws inferences against Plaintiff. Dr. Hall testified that although his practice was not a primary care practice, his practice included elements of primary care as part of his treatment of patients.

¶ 25 To the extent this finding is more properly classified as a conclusion of law, it misapplies the law in two ways. First, under Rule 9(j), it is not whether Dr. Hall actually practices in a similar specialty but rather whether it was reasonable for Plaintiff to expect Dr. Hall to qualify as one practicing in a similar specialty. Second, under Rule 702(b)(1)b., the analysis is whether the proffered expert "[s]pecialize[s] in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and ha[s] prior experience treating similar patients." N.C. Gen. Stat. § 8C-1, Rule 702(b)(1)b.

¶ 26 Here, the record reflects the "procedure" at issue is the treatment provided to Wilson for pneumonia and whether the treatment provided, including the supervision of that treatment, met the standard of care. At this preliminary stage, the record reflects that Dr. Leonhardt and Dr. Cervi were physicians holding themselves out as internal medicine practitioners, albeit in a primary care practice. *See Formyduval v. Bunn*, 138 N.C. App. 381, 388, 530 S.E.2d 96, 101 (2000) ("Our case law indicates that a physician who 'holds himself out as a specialist' must be regarded as a specialist, even though not board certified in that specialty." (citations omitted)). In the course of their practice, they engaged in the practice of internal medicine–including, as it relates to this case, as supervising physicians responsible for the course of care for Wilson's pneumonia.

¶ 27 Dr. Hall is board certified in internal medicine, pulmonary disease medicine, and critical care medicine and specializes in pulmonary disease and critical care medicine. Dr. Hall's deposition testimony supports the inference that pulmonary disease medicine and critical medicine are sub-specialties of internal medicine. In his clinical practice, he regularly treats patients with pneumonia. Drawing all reasonable inferences in Plaintiff's favor from these facts, it was reasonable for Plaintiff to expect Dr. Hall, who is board certified in internal medicine and pulmonary disease and who regularly treats pneumonia patients, to be deemed similar in specialty to internal medicine practitioners who provided care for a pneumonia patient. *Cf. Sweatt v. Wong*, 145 N.C. App. 33, 38, 549 S.E.2d 222, 225 (2001) (general surgeon who was board certified in laparoscopic procedures and who practiced as an emergency room physician qualified as an expert against a general surgeon who performed laparoscopic surgery where both engaged in the same diagnostic procedures and the proffered expert had clinical diagnostic practice including with patients showing similar signs and symptoms as decedent); *Trapp v. Maccioli*, 129 N.C. App. 237, 240-41, 497 S.E.2d 708, 710-11 (1998) (reasonable to expect an emergency room physician who performed the same procedure to qualify as an expert against an anesthesiologist for purposes of Rule 9(j)). There is nothing in the record at this stage that would suggest

a pulmonologist would treat pneumonia in any manner different than an internist (or a psychiatrist/addiction specialist/internal medicine consultant) acting as a primary care physician—or even more precisely at this stage, that there would be any reasonable expectation on the part of a plaintiff that there would be any difference.

¶ 28 In Finding 15, the trial court made a finding identical to Finding 14, but with the added proviso that Dr. Hall did not practice "in a similar specialty as any of the defendants which included within it the primary care of patients *in a detention center or correctional setting* during the applicable period." (Emphasis added). Similarly, the trial court found in Finding 22 that "Dr. Hall has never cared for patients *in a detention or correctional setting* and did not care for such inmates during the applicable time period." (Emphasis added) The trial court's order does not explain the significance of this added proviso, but it appears the trial court intended this finding to relate to whether Dr. Hall had "prior experience treating similar patients."

¶ 29 Rule 702(b)(1)b. requires an expert witness who is not in the "same specialty" to have "prior experience treating similar patients" as the party against whom the testimony is offered. A "similar patient" in this context is a patient with similar medical conditions and treatment needs. Rule 9(j) does not require an expert witness to practice in the same, or even similar, setting. Nonetheless, Dr. Hall testified that he has experience treating inmates brought to the hospital for treatment and his practice was to treat them in the same manner as any other patient, notwithstanding the fact they may be handcuffed and under guard.

¶ 30 Moreover, to the extent the trial court's findings conflate the requirements of Rule 702(b) with the "same or similar community" standard of care under N.C. Gen. Stat. § 90-21.12, the relevant community in this case is Pitt County, North Carolina, or similar communities, as evidenced by Dr. Cervi's interrogatory to Dr. Hall:

> Explain in detail any and all opportunities you have had to learn the standard of care applicable to medical professionals or entities operating in Pitt County, North Carolina, or similar communities, and for each "similar community," identify the community and provide the details that make these communities similar.

In response, Dr. Hall verified that he is familiar with the standard of care within Pitt County and medical communities similarly situated to Pitt County, and specifically articulated the basis of his familiarity.

¶ 31 The trial court thus impermissibly drew inferences against Plaintiff by finding that Dr. Hall did not practice in a similar specialty to that of Dr. Leonhardt and Dr. Cervi.

3. Rule 702(b)(2)

¶ 32 Rule 702(b) is conjunctive and requires a proffered expert to meet the requirements laid out in subsections (b)(1) and (b)(2). Rule 702(b)(2)[4] requires an expert witness offering testimony against a specialist to have devoted a majority of their professional time "[d]uring the year immediately preceding the date of the occurrence that is the basis for the action" to "the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients" and/or the "instruction of students in . . . an accredited health professional school or accredited residency or clinical research program in the same specialty" as the party against whom the testimony is offered. N.C. Gen. Stat. § 8C-1, Rule 702(b)(2).

¶ 33 We have already concluded that it was reasonable for Plaintiff to expect Dr. Hall to be deemed similar in specialty to Dr. Leonhardt and Dr. Cervi. As the record shows, Dr. Hall spent the majority of his time since 2010, which includes the year preceding Wilson's care, in active clinical practice as a pulmonologist and critical care medicine specialist. Indeed, as the trial court found, "Dr. Hall is a physician and practices as a pulmonologist and critical care medicine specialist and the majority of his professional time has been spent practicing in those specialties since 2010." Accordingly, Dr. Hall devoted a majority of his professional time during the year immediately preceding the date of Wilson's care to "the active clinical practice of . . . a similar specialty which includes within its specialty the" care of pneumonia patients and has "prior experience treating similar patients." *Id.*

¶ 34 The trial court's conclusion that "Plaintiff could not have reasonably expected Dr. Hall to qualify as an expert witness against [Defendants ECMS, Dr. Leonhardt, and Dr. Cervi] pursuant to Rule 702(b)-(d) based on what she knew or should have known at the time of filing of the Complaint, and therefore, failed to substantively comply with Rule 9(j)" is not supported by the findings or the evidence. The trial court thus erred by dismissing Plaintiff's complaint against Defendants ECMS,

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4. We again note that because Dr. Leonhardt and Dr. Cervi were not acting as "specialists" in providing and/or supervising Wilson's treatment, it is not clear that the more stringent requirements set forth in Rule 702(b)(2)a. and b. apply in this case.

Dr. Leonhardt, and Dr. Cervi for failure to substantively comply with Rule 9(j)(1).

C. Defendants McLean, Keech, Faulkner, Jordan, and Lymon

¶ 35 **[2]** Plaintiff also argues that the trial court erred by dismissing her complaint against nurses McLean, Keech, Faulkner, Jordan, and Lymon for failure to comply with Rule 9(j).

¶ 36 North Carolina Rule of Evidence 702(d) sets forth the conditions a proffered expert must meet to testify to the standard of care against nurses. Rule 702(d) provides:

> Notwithstanding subsection (b) of this section, a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants licensed under Chapter 90 of the General Statutes, or other medical support staff.

N.C. Gen. Stat. § 8C-1, Rule 702(d) (2020).

¶ 37 The trial court found the following facts:

> 17. Dr. Hall did not supervise the primary care of patients provided by FNPs, RNs, and/LPNs during the applicable time period.
>
> 18. Dr. Hall did not know the qualifications of the nurse practitioner he supervised in his private practice of pulmonology.
>
> 19. Dr. Hall admitted that there are different types of nurse practitioners and that the training of nurse practitioners varies by type.
>
> 20. Dr. Hall did not practice family medicine or supervise a nurse practitioner in the practice of family medicine.

> 21. Dr. Hall has never supervised the primary care of patients provided by FNPs, RNs, and/LPNs in a detention or correctional setting, including during the applicable time period.

¶ 38 First, that Dr. Hall did not know the qualifications of the nurse practitioner he supervised and admitted there are different types of nurse practitioners with different training is immaterial to the inquiry before us.[5] The focus of the remainder of the trial court's findings in relation to Dr. Hall's experience supervising nursing staff and nurse practitioners is on the fact Dr. Hall did not practice in a family practice, general primary practice, or specifically in a detention center. The inference—again drawn against Plaintiff—is that these settings are so dissimilar from Dr. Hall's clinical and hospital practices, particularly as it relates to the course of treatment for pneumonia patients, that it would be unreasonable for Plaintiff to expect Dr. Hall to qualify as an expert. Accepting these practices may not be the *same*, there is nothing in the record to support the inference they are not *similar* for purposes of meeting the requirements of Rule 9(j). Defendants point to no authority to support their position that under the circumstances present in this case it would be unreasonable to expect Dr. Hall to qualify as an expert here.

¶ 39 To the contrary, the evidence at this preliminary stage reflects that Dr. Hall has experience regularly supervising nursing staff and working with nurse practitioners and others in both the clinical and hospital setting, including monitoring ongoing treatment of patients as a supervising physician, in addition to his role as the medical director of his clinical practice implementing and monitoring the procedures and overall standard of care. The question under Rule 702(d) is, by reason of his clinical practice, whether Dr. Hall has knowledge of the applicable standard of care for nursing staff and nurse practitioners. The evidence of record at this stage is that in his practice Dr. Hall regularly supervises nursing staff and works in conjunction with nurse practitioners to provide treatment for pulmonary conditions (of which pneumonia is one). Moreover, it is evident from his limited testimony that Dr. Hall, again based on his own clinical experience, is aware of different types of nursing providers and the roles they play in patient care which he oversees. From this, the proper inference to be drawn is that it is reasonable to expect Dr. Hall to qualify as an expert based on his clinical experience in a similar specialty which also includes within that specialty the treatment of pneumonia patients.

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5. Defendants cite no authority requiring a physician to identify specific credentials of individual nursing providers in order to survive dismissal under Rule 9(j).

¶ 40 The trial court's conclusion that "Plaintiff could not have reasonably expected Dr. Hall to qualify as an expert witness against the defendants pursuant to Rule 702(b)-(d) based on what she knew or should have known at the time of filing of the Complaint, and therefore, failed to substantively comply with Rule 9(j)" is not supported by the evidence, the properly drawn inferences in favor of Plaintiff therefrom, or the findings. The trial court thus erred by dismissing Plaintiff's complaint against Defendant nurses McLean, Keech, Faulkner, Jordan, and Lymon for failure to substantively comply with Rule 9(j)(1).

¶ 41 We do not reach Plaintiff's argument that the trial court erred by denying her pending motion to qualify Dr. Hall as an expert under Rule 9(j)(2) and Rule 702(e).

III. Conclusion

¶ 42 For the foregoing reasons, we reverse the trial court's order dismissing Plaintiff's complaint for failure to comply with the provisions of Rule 9(j) of the North Carolina Rules of Civil Procedure and remand to the trial court for further proceedings.

REVERSED AND REMANDED.

Judges HAMPSON and CARPENTER concur.

IN THE MATTER OF A.N.S., JR.

No. COA22-277

Filed 2 August 2022

Termination of Parental Rights—grounds for termination—neglect—father fatally shot child's mother in child's presence

The trial court properly terminated a father's parental rights to his son on the ground of neglect based on unchallenged findings that the father shot and killed the child's mother in the presence of the child and his stepsibling; that the father was subsequently convicted of first-degree murder and sentenced to life imprisonment without the possibility of parole; and that, due to the circumstances in which the child was removed from the father's care, the department of social services did not intend to develop a services agreement with the father.

IN RE A.N.S.

[284 N.C. App. 631, 2022-NCCOA-521]

Appeal by Respondent from order entered 29 December 2021 by Judge William B. Davis in Guilford County District Court. Heard in the Court of Appeals 12 July 2022.

Mercedes O. Chut for Guilford County Department of Health and Human Services.

Ward and Smith, P.A., by Mary V. Cavanagh, for Guardian ad litem.

Mary McCullers Reece for Respondent-Appellant Father.

COLLINS, Judge.

¶ 1 Respondent-Father appeals from the trial court's order terminating his parental rights to his minor child on the grounds on neglect and dependency. We affirm.

I. Background

¶ 2 Father is the biological father of Arthur,[1] a child born in December 2014. On 7 May 2018, Father shot and killed Arthur's mother in Arthur's presence; Father was charged with the first-degree murder of Arthur's mother. On 9 May 2018, based on the fatal shooting of Arthur's mother, the Guilford County Department of Social Services ("DSS") took nonsecure custody of Arthur and his stepsibling.[2] DSS filed a petition alleging Arthur and his stepsibling were abused, dependent, and neglected.

¶ 3 On 8 October 2018, the matter came on for an adjudication hearing; the trial court adjudicated Arthur and his stepsibling abused, neglected, and dependent. The trial court found that both children had witnessed Father fatally shoot Arthur's mother as she attempted to leave the family home while escorted by law enforcement. The trial court moved to the dispositional stage and relieved DSS of the obligation to make reasonable efforts to reunify Arthur with Father and suspended all contact between Father and Arthur. Arthur and his stepsibling were placed with maternal grandparents.

¶ 4 In May 2019, DSS filed a petition to terminate Father's parental rights based on the grounds of neglect and dependency. On 31 January 2020,

1. We use a pseudonym to protect the identity of the minor child. *See* N.C. R. App. P. 42.

2. While Arthur's stepsibling was part of the juvenile proceedings, this appeal does not concern his stepsibling.

Father was convicted of the first-degree murder of Arthur's mother and sentenced to life in prison without the possibility of parole. The hearing on the petition to terminate Father's parental rights was held on 10 May 2021. The trial court terminated Father's rights on the grounds of neglect and dependency and concluded that it was in Arthur's best interests to terminate Father's parental rights. Father timely appealed.

II. Discussion

¶ 5 In a termination of parental rights proceeding, the trial court must adjudicate the existence of any of the grounds for termination alleged in the petition. At the adjudication hearing, the trial court must "take evidence [and] find the facts" necessary to support its determination of whether the alleged grounds for termination exist. N.C. Gen. Stat. § 7B-1109(e) (2019). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5-6, 832 S.E.2d 698, 700 (2019) (citing N.C. Gen. Stat. § 7B-1109(f)).

¶ 6 When reviewing the trial court's adjudication of grounds for termination, we examine whether the trial court's findings of fact "are supported by clear, cogent and convincing evidence and [whether] the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). Any unchallenged findings are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citations omitted). The trial court's conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

¶ 7 The first ground for termination found by the trial court was neglect under N.C. Gen. Stat. § 7B-1111(a)(1). This subsection allows for parental rights to be terminated if the trial court finds that the parent has neglected their child to such an extent that the child fits the statutory definition of a "neglected juvenile." N.C. Gen. Stat. § 7B-1111(a)(1) (2019). A neglected juvenile is defined, in relevant part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2019).

¶ 8 "[E]vidence of neglect by a parent prior to losing custody of a child – including an adjudication of such neglect – is admissible in subsequent proceedings to terminate parental rights." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984).

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent. When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.

In re R.L.D., 375 N.C. 838, 841, 851 S.E.2d 17, 20 (2020) (ellipses, quotation marks, and citations omitted).

¶ 9 In its termination order, the trial court made the following relevant findings of fact:

> 2. The juveniles have been in the legal and physical custody of the Guilford County Department of Health and Human Services (hereinafter referred to as "the Department") a consolidated county human services agency, pursuant to Court Order continuously since May 7, 2018.
>
> . . . .
>
> 10. The conditions that led to the juveniles coming into custody include but are not limited to domestic violence in the presence of the juveniles; injurious environment; the juveniles witnessing the fatal shooting of their mother by [Father]; [Father] is charged with the mother's murder[.]
>
> 11. The juveniles were adjudicated abused, neglected, and dependent on August 27, 2018.
>
> . . . .
>
> 13. The Department has not developed a service agreement with nor does the Department intend to offer a service agreement to the [Father], due in pertinent part to the egregious circumstances that brought the juveniles into custody whereby [Father] fatally shot and killed the [Mother], in the presence of the juveniles and as ordered by the Court in the Pre-Adjudication, Adjudication and Disposition Order

> dated August 27, 2018, filed on October 8, 2018, which relieved the Department of making reasonable efforts of reunification with [Father]. In addition, [Father] has been charged and convicted of First Degree Murder in regard to the death of the mother, although as of January 31, 2020, the conviction is under appeal. Based on these facts, the Department did not have any services available that could be offered to [Father] in order to correct the conditions that brought the juveniles into custody with the Department.

¶ 10 Based upon these findings, the trial court concluded,

> 18. Grounds exist to terminate the parental rights of [Father], pursuant to N.C.G.S. § 7B-1111(a)(1), given that the parent abused and/or neglected the juveniles, there is ongoing neglect and a likelihood of the repetition of abuse and/or neglect.
>
> > a. [Father's] past abuse and neglect of the juvenile [Arthur] was proven as detailed in the Pre-Adjudication, Adjudication and Disposition Order dated August 27, 2018, filed on October 8, 2018, specifically exposing him to the trauma of domestic violence and the violent death of his mother. [Father's] behavior has deprived his child of contact with his father for the past two years and with his mother for the remainder of his life. His past actions and lack of regard for his child's well-being are indicative of a likelihood of repetition of neglect in the event that custody was returned to him.

¶ 11 Father does not challenge the findings of fact, and they are binding on appeal. *In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58. The findings amply support the trial court's conclusion of law that grounds exist to terminate Father's parental rights for neglecting Arthur. Arthur was removed from Father's care on 7 May 2018 because he watched Father fatally shoot his mother. Arthur was adjudicated abused, neglected, and dependent as a result. Since Arthur's adjudication, Father was convicted of the first-degree murder of Arthur's mother.[3] Furthermore,

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3. Although Father's conviction is pending appeal, a conviction for first-degree murder carries a mandatory sentence of life in prison without parole. N.C. Gen. Stat. § 14-17(a) (2019). Father appealed the trial court's denial of his *Batson* objection, and this

the Department has not and will not develop a service agreement with Father because of the egregious circumstances that brought Arthur into custody. Thus, Father has received no services while Arthur has not been in Father's care, and he will receive none in the future. These facts support the trial court's conclusion that: Father neglected Arthur; there is ongoing neglect; there is a likelihood of the repetition of neglect in that Father did not and likely will "not provide proper care, supervision, or discipline" of Arthur; and Arthur lived and would likely live "in an environment injurious to the juvenile's welfare" were he ever returned to Father's care. *See* N.C. Gen. Stat. § 7B-101(15).

¶ 12 Father argues that "[i]t is clear that the trial court deemed the event that led to the 2018 adjudication to be a sufficient ground for termination in and of itself." We disagree. Not only did the trial court consider Father's murder of Arthur's mother in front of Arthur and the resulting abuse, neglect, and dependency adjudication, the trial court also considered Father's subsequent murder conviction and the fact that Father has not and will not receive any DSS services which are designed to help an offending parent rectify the conditions that caused the child to be removed.

¶ 13 Father also argues that the trial court failed to consider the likelihood that Arthur will never be returned to his Father's care. Father cites *In re C.A.S.*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (unpublished), to support his argument that Arthur could not be neglected if Father is in prison. In *In re C.A.S.*, our Court reversed termination of parental rights based on abuse where there was "almost no probability of future abuse because father will be incarcerated for at least 15 years" and thus there was "not enough evidence to support the trial court's conclusion that there is a probability of repetition of abuse." *Id.* However, abuse and neglect are different grounds and Father cannot "provide proper care, supervision, or discipline" to Arthur if Father is in prison for life without the possibility of parole. *See* N.C. Gen. Stat. § 7B-101(15).

Court remanded the matter to the trial court for a *Batson* hearing in *State v. Smith*, 2021-NCCOA- 391. Upon remand, the trial court held a *Batson* hearing and denied Father's *Batson* objection; on 12 November 2021, Father appealed the denial of his *Batson* objection to this Court in COA22-307. The record was filed on 13 April 2022 and Father filed his brief on 8 June 2022. We again note that Father does not challenge the trial court's conclusion that he murdered Mother. Moreover, the standard of proof in a criminal trial is guilt beyond a reasonable doubt while the standard of proof in a termination of parental rights case is clear, cogent, and convincing evidence of grounds for termination.

III. Conclusion

¶ 14 The trial court did not err by terminating Father's parental rights based on the ground of neglect. We need not reach Father's argument that the trial court erred by terminating his parental rights based on the ground of dependency. *In re D.W.P.*, 373 N.C. 327, 340, 838 S.E.2d 396, 406 (2020). The trial court's order is affirmed.

AFFIRMED.

Chief Judge STROUD and Judge ARROWOOD concur.

IN THE MATTER OF R.A.F., R.G.F.

No. COA21-754

Filed 2 August 2022

1. Appeal and Error—notice of appeal—wrong appellate court identified—correct court fairly inferred—no prejudice to opposing party

Respondent-mother's appeal from an order terminating her parental rights did not warrant dismissal where, although her notice of appeal incorrectly designated the North Carolina Supreme Court as the court to which appeal was taken, it could be fairly inferred from her filings at the Court of Appeals that that was the court from which she sought relief, and there was no prejudice to the opposing parties who timely responded with their own filings. The Court of Appeals elected in its discretion to treat the purported appeal as a petition for writ of certiorari and granted review.

2. Termination of Parental Rights—parental right to counsel—parent absent from hearing—provisional counsel dismissed—inquiry by trial court

In a private termination of parental rights (TPR) action in which respondent-mother did not appear at the pretrial hearing, the trial court erred by dismissing respondent's provisional counsel on its own motion and proceeding with the adjudication and disposition stages without conducting an adequate inquiry into counsel's efforts to contact respondent or whether respondent had adequate notice of the pretrial and TPR hearing pursuant to N.C.G.S. § 7B-1108.1.

Judge INMAN concurring by separate opinion.

Judge TYSON dissenting.

Appeal by Respondent from order entered 15 July 2021 by Judge Mack Brittain in Henderson County District Court. Heard in the Court of Appeals 26 April 2022.

F.B. Jackson and Associates Law Firm, PLLC by James L. Palmer, for Petitioners-Appellees.

Peter Wood, for Respondent-Appellant.

WOOD, Judge.

¶ 1 Respondent-Mother ("Mother") appeals an order terminating her parental rights to her minor children, R.A.F. ("Ralph") and R.G.F. ("Reggie").[1] On appeal, Mother argues that the trial court abused its discretion when it removed her court-appointed counsel without a proper inquiry under N.C. Gen. Stat § 7B-1108.1 and erred by not appointing a guardian ad litem ("GAL") on behalf of her minor children. After careful review of the record and consideration, we vacate the trial court's order and remand for a new hearing.

I. Factual and Procedural Background

¶ 2 Mother and the children's father ("Father")[2] are the biological parents of Ralph and Reggie, who were born in July 2012 and November 2013, respectively. Since September 6, 2014, Ralph and Reggie have resided continuously with Petitioners ("Petitioners"), who are husband and wife and are step-maternal aunt and uncle to the children. Petitioners are also licensed foster parents. Following the Henderson County Department of Social Services ("DSS") taking custody of Ralph and Reggie pursuant to petitions filed alleging neglect, the trial court, on July 11, 2015, adjudicated both children to be neglected due to housing instability, income instability, and substance abuse by the parents. The children continued in foster care placement and remained with Petitioners. On October 5, 2015, Father was convicted of breaking into a motor vehicle, trespassing, and disturbing the peace and was incarcerated in South Carolina.

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1. We use pseudonyms to protect the children's identities and for ease of reading.

2. Father did not appeal the trial court's orders, and thus is not a party to this action.

¶ 3 At a review and permanency planning hearing on March 9, 2017, the trial court detailed the status of the requirements Mother needed to complete as a prerequisite to regain custody or placement of her children, Ralph and Reggie. In order for reunification to occur, Mother was required to: (1) obtain a substance abuse assessment and complete all recommendations from this assessment; (2) submit to random drug/alcohol screenings; (3) maintain a lifestyle free of controlled substances and alcohol; (4) demonstrate stable income sufficient to meet her family's basic needs; (5) obtain and maintain appropriate and safe housing; (6) not be involved with criminal activity; (7) pay child support; (8) cooperate with and ensure that her children have all medical, dental, developmental, and mental health evaluations and treatments; (9) provide the Social Worker with current contact information and ensure that if such information changes, the Social Worker is notified; and (10) maintain regular contact with her children, including "visiting with the juveniles as frequently as allowed by the Court and demonstrat[ing] the ability to provide appropriate care for the juveniles."

¶ 4 In reviewing these requirements for reunification, the trial court found that Mother had made some progress: she had completed her substance abuse classes; provided the social worker her current address; attended a child family team meeting in March 2017; assisted in scheduling doctor's appointments for her children; was employed full-time since September 2016; paid child support; attended all but three visits with her children; and acted appropriately during the visitations. However, there were several requirements Mother had not fulfilled. The trial court found Mother tested positive for marijuana intermittently during random drug screens conducted between 2015 and 2017; was convicted of possession of marijuana on both February 16, 2016 and April 18, 2016; and did not possess independent housing because she lived with her mother and stepfather.

¶ 5 At this hearing, the trial court granted custody of Ralph and Reggie to Petitioners, terminated the juvenile proceedings, and initiated a civil custody action pursuant to N.C. Gen. Stat. § 7B-911. The trial court found that Mother was "acting in a manner inconsistent with the health or safety of the juveniles," had not made adequate progress within a reasonable time as the children had been in DSS custody for twenty-one months, had not completed her reunification plan, and that the "compliance and actions of the [Mother and Father] are not sufficient to remedy the conditions which led to the juveniles' removal."

¶ 6 On April 3, 2017, the trial court entered a separate child custody order to initiate a civil action for custody. This order granted Mother

unsupervised visitation with her children every other weekend from Friday at 6 pm to Sunday at 5 pm. Mother was also permitted phone calls with her children as mutually agreed upon with Petitioners. The order granted Father one hour of supervised visitation per week upon his release from prison.

¶ 7 Four years later, on April 6, 2021, Petitioners filed petitions for the termination of Mother and Father's parental rights ("TPR"). Petitioners alleged that Mother had willfully neglected her children as she was unable to complete reunification requirements, did not exercise her visitation rights with her children, and did not provide proper care or supervision of her children. Petitioners also alleged that Mother had willfully abandoned her children for at least six months immediately preceding the filing of the petitions. On April 16, 2021, the Henderson County sheriff personally served Mother with the TPR petitions and summonses. On May 12, 2021, Father was served with the TPR summonses and petitions while in custody.

¶ 8 Mother was assigned Ms. Walker as her provisional court-appointed attorney at the time of the filing of the petitions. Mother called Ms. Walker and informed her she wanted to contest the TPR petitions. Ms. Walker filed separate motions for Extension of Time on May 4, 2021 (in 15J27) and on May 7, 2021 (in 15J26). Both motions were granted by the trial court and allowed Mother to file an answer or response to the respective petitions on or by June 9, 2021. Mother did not file an answer or other responsive pleading in either case.

¶ 9 On June 23, 2021, Petitioners filed a Notice of Hearing scheduling a hearing on the TPR petitions for July 15, 2021. A week before the TPR hearing, Mother sent a card to her children in which she wrote that "she was trying her best to get better, and to be better, and that she loved and missed them very much." The envelope listed a return address in Abbeville, South Carolina that was unknown to Petitioners.

¶ 10 Neither Mother nor Father appeared in court at the July 15, 2021 TPR hearing. The trial court conducted a pretrial hearing with Mother's provisional court-appointed attorney present. The trial court asked Ms. Walker if she had been in contact with Mother. Ms. Walker informed the trial court that Mother had contacted her when she was served. Ms. Walker explained that although Mother did not appear for her scheduled office appointment, she had contacted the office to "say she was in a treatment facility" for substance abuse. Ms. Walker further recounted that she spoke with the treatment facility and learned Mother had successfully graduated from the program, but Mother had not been in contact with her since. Ms. Walker stated that she had last heard from

Mother in April 2021. Thereafter, the trial court, on its own motion, released Ms. Walker from representing Mother in the termination action. In the TPR Order, the trial court found that "[t]he provisionally appointed attorneys for [Mother and Father] should be released, despite efforts by the respective attorneys to engage the Respondent parents in the participation of this proceeding."

¶ 11 During the pretrial hearing, the trial court found that all service and notice requirements had been met for Mother and Father. The trial court noted that "the appointment of a Guardian Ad Litem for the child[ren] was not needed or required as neither [Parent] has sought to contest the [TPR] Petition[s]." The court also stated that "there are no issues or pre-trial motions raised by any party" and "no responsive pleading has been submitted by [Mother] (although the court notes that a Motion and Order for extension of time in regards [sic] to the [Mother] appears in the court file[s])."

¶ 12 After the pretrial hearing, the trial court proceeded with the adjudication and disposition stages of the TPR hearing. The trial court heard testimony from one witness, Petitioner wife. Petitioner wife testified the children had lived with her and her husband since September 2014; the children were adjudicated neglected based upon Mother's housing instability, income instability, and substance abuse in 2015; and Mother had not exercised visitations with her children since July 2019. Petitioner wife also testified that Mother does not provide support for her children; is not involved in their education, extracurricular activities, or medical appointments; and had not shown any progress in correcting the conditions that led to her children's removal from her custody. Petitioner wife acknowledged that Mother sent a card to her children that arrived sometime earlier in July.

¶ 13 After this testimony, the court found by clear and convincing evidence that grounds existed to terminate Mother's parental rights based on willful neglect and willful abandonment because: Mother has not exercised her visitation rights with her children, has failed to follow through with telephone calls or visitation with her children, and has not offered any support for her children since July 2019. At the dispositional portion of the TPR hearing, the trial court determined that: (1) a strong bond exists between Petitioners, Reggie, and Ralph; (2) the likelihood Petitioners will adopt the children is high; and (3) it is in the best interests of the children to terminate Mother and Father's parental rights. On July 15, 2021, the trial court entered orders terminating Mother's parental rights to Reggie and Ralph. Mother filed a written notice of appeal on August 13, 2021.

II. Appellate Jurisdiction

¶ 14 **[1]** We note Mother's written notice of appeal was addressed to the "Honorable North Carolina Supreme Court" instead of to this Court. The record before us does not contain a notice of appeal to the North Carolina Court of Appeals. Rule 3(d) of our Rules of Appellate Procedure governs the content of a notice of appeal and provides: "[t]he notice of appeal . . . shall designate the judgment or order from which appeal is taken and the court to which appeal is taken." N.C. R. App. P. 3(d). "In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure" and "failure to follow the requirements thereof requires dismissal of an appeal." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 790-91 (2011) (first quoting *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000); then quoting *Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737 (1997)). Here, Mother failed to specify the Court of Appeals as the "court to which appeal is taken," per Rule 3(d). Notwithstanding, this court has previously held that "[m]istakes by appellants in following all the subparts of Appellate Procedure Rule 3(d) have not always been fatal to an appeal." *Stephenson v. Bartlett*, 177 N.C. App. 239, 242, 628 S.E.2d 442, 444 (2006). In *Stephenson*, we liberally construed the requirements of Rule 3(d) and permitted a plaintiff to proceed with an appeal to this Court, despite designating the North Carolina Supreme Court in its notice of appeal. *Id.* at 243, 628 S.E.2d at 444-45. We held that the plaintiffs' appeal to this Court could be "fairly inferred from plaintiffs' notice of appeal" so that the "notice achieved the functional equivalent of an appeal to this Court" and the defendants were not misled by the plaintiffs' mistake. *Id.* at 243, 628 S.E.2d at 444.

¶ 15 In the instant case, we can reasonably infer from which court Mother has sought relief from the timely filing of her Record on Appeal and her brief with this Court. Petitioners were not prejudiced by Mother's mistake and could reasonably infer Mother's intent as they, too, timely filed their brief with this Court. Therefore, Mother's mistake in failing to specify this Court in her appeal does not warrant dismissal of her appeal.

¶ 16 Additionally, this Court possesses the authority "pursuant to North Carolina Rules of Appellate Procedure 21(a)(1) to 'treat the purported appeal as a petition for writ of certiorari' and grant it in our discretion." *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2009) (quoting *State v. SanMiguel*, 74 N.C. App. 276, 277-78, 328 S.E.2d 326, 328 (1985)). We elect to do so here and review Mother's claims on their merits. *See Anderson v. Hollifield*, 345 N.C. 480, 484, 480 S.E.2d 661, 664 (1997).

III. Discussion

¶ 17 **[2]** On appeal, Mother first argues the trial court erred by releasing Mother's provisional court-appointed attorney on its own motion without conducting an inquiry into counsel's efforts to reach Mother pursuant to N.C. Gen. Stat. § 7B-1108.1. Second, Mother contends the trial court erred by not appointing a GAL for the children under N.C. Gen. Stat. § 7B-1108(b). Because we hold the issue of the trial court's releasing Mother's provisional court-appointed attorney without inquiring into counsel's attempts to communicate with Mother and whether Mother was given notice of the pre-trial and termination hearings to be dispositive of the outcome in this case, we need not address Mother's second argument.

A. Fundamentally Fair Procedures

¶ 18 Under North Carolina law, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures, with the existence of such procedures being an inherent part of the State's efforts to protect the best interests of the affected children by preventing unnecessary interference with the parent-child relationship." *In re K.M.W.*, 376 N.C. 195, 208, 851 S.E.2d 849, 859 (2020) (quoting *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397-98, *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992)). In TPR proceedings, parents are entitled to procedural safeguards which provide fundamental fairness, ensuring "a parent's right to counsel and right to adequate notice of such proceedings." *In re K.N.*, 181 N.C. App. 736, 737, 640 S.E.2d 813, 814 (2007); *see* N.C. Gen. Stat. §§ 7B-1101.1, 7B-1106 (2021). In fact, this court has "consistently vacated or remanded TPR orders when questions of 'fundamental fairness' have arisen due to failures to follow [such] basic procedural safeguards." *In re M.G.*, 239 N.C. App. 77, 83, 767 S.E.2d 436, 441 (2015) (citation omitted).

¶ 19 In order to adequately "protect a parent's due process rights in a termination of parental rights proceeding, the General Assembly has created a statutory right to counsel for parents involved in termination proceedings" and a statutory right for parents to be given notice of the termination hearing. *In re K.M.W.*, 376 N.C. 195, 208, 851 S.E.2d 849, 859 (2020); N.C. Gen. Stat. § 7B-1106(a)(1); *In re A.D.S.*, 264 N.C. App. 637, 824 S.E.2d 926, 2019 N.C. App. LEXIS 283 at *10 (2019) (unpublished). Additionally, a parent in a TPR proceeding "has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right." N.C. Gen. Stat. § 7B-1101.1(a) (2021); *In re L.C.*, 181 N.C. App. 278, 282, 638 S.E.2d 638, 641 (2007) ("Parents have a right to counsel in

all proceedings dedicated to the termination of parental rights." (cleaned up)). This Court has stated that, "after making an appearance in a particular case, an attorney may not cease representing a client without '(1) justifiable cause, (2) reasonable notice [to the client], and (3) the permission of the court.' " *In re M.G.*, 239 N.C. App. 77, 83, 767 S.E.2d 436, 440 (alteration in original) (quoting *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 305 (1965)).

¶ 20 "The determination of counsel's motion to withdraw is within the discretion of the trial court, and thus we can reverse the trial court's decision only for abuse of discretion." *Benton v. Mintz*, 97 N.C. App. 583, 587, 389 S.E.2d 410, 412 (1990) (citation omitted). However, "this general rule presupposes that an attorney's withdrawal has been properly investigated and authorized by the court," so that "[w]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion" and "must grant the party affected a reasonable continuance or deny the attorney's motion for withdrawal." *Williams and Michael v. Kennamer*, 71 N.C. App. 215, 217, 321 S.E.2d 514, 516 (1984). Therefore, before the trial court allows an attorney to withdraw or relieves an attorney "from any obligation to actively participate in a termination of parental rights proceeding when the parent is absent from a hearing, the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected." *In re D.E.G.*, 228 N.C. App. 381, 386-87, 747 S.E.2d 280, 284 (2013) (citing *In re S.N.W.*, 204 N.C. App. 556, 561, 698 S.E.2d 76, 79 (2010)).

¶ 21 The record presented for our review demonstrates that Mother was personally served with the TPR petitions and summonses on April 16, 2021 and was assigned Ms. Walker as her court-appointed attorney. After receiving the TPR petitions, Mother informed her attorney that she wanted to contest them. Subsequently, Ms. Walker filed separate motions for Extension of Time on May 4, 2021 (in 15J27) and on May 7, 2021 (in 15J26), which were granted by the trial court. Although Mother did not file an answer or other responsive pleading in either case, the record shows that on June 23, 2021, Petitioners' attorney sent notice of the pretrial hearing and TPR hearing scheduled for July 15, 2021, to Father's provisional attorney, Father, and Mother's provisional attorney, but did not send notice to Mother at her address on file. We can deduce from the record before us that Petitioners' attorney presumed Mother's counsel made an appearance in this case by her filing motions for extensions of time. This presumption provides a possible explanation for why Petitioners' attorney did not serve Mother with notice of the TPR hearing.

¶ 22 Section 7B-1101.1 requires that "[a]t the first hearing after service upon the respondent parent, the court shall dismiss the provisional counsel if the respondent parent: [d]oes not appear at the hearing." N.C. Gen. Stat. § 7B-1101.1(a)(1). This statute presumes that the respondent parent has been given notice of the hearing and, therefore, an opportunity to decide whether to participate in the proceedings. Section 7B-1108.1 details an additional procedure to ensure a parent the fundamental fairness for TPR proceedings: the trial court is required to conduct a pretrial hearing, which may be combined with the adjudicatory hearing on termination. N.C. Gen. Stat. § 7B-1108.1 (2021). At this pretrial hearing, the court is required to "consider the . . . [r]etention or release of provisional counsel," and "[w]hether all summons, service of process, and notice requirements have been met." N.C. Gen. Stat. § 7B-1108.1(a)(1), (3). It is undisputed that Mother did not appear at the July 15, 2021 TPR hearing. However, before relieving Mother's attorney from any obligation to participate in the TPR hearing, the trial court was required to "inquire into the efforts made by counsel to contact [Mother] in order to ensure that the parent's rights are adequately protected." *In re D.E.G.*, 228 N.C. App. at 386-87, 747 S.E.2d at 284.

¶ 23 Here, during the pretrial hearing, the trial court's inquiry consisted solely of asking Mother's attorney, "Ms. Walker, any contact from your client, ma'am?" Ms. Walker reported that Mother made initial contact after service; scheduled an appointment to meet but missed the appointment; and contacted Ms. Walker's office to report she was in a substance abuse treatment facility. Ms. Walker further reported that she had contacted the facility and learned Mother had successfully graduated from the treatment program. At the time of the hearing, Mother had not contacted Ms. Walker since graduating from the treatment program, so that it had been "probably April" since Ms. Walker had heard from Mother.

¶ 24 The record also establishes that the trial court made no inquiries concerning whether Mother had notice of the present TPR hearing as required by section 7B-1108.1(a)(3). A careful review of the record shows the TPR summons was served upon Mother on April 16, 2021, and the July 15 hearing was the first hearing following service of the TPR summonses and petitions on Mother. Notice of the July 15 hearing was filed on June 23, 2021 and was sent to Mother's provisional attorney, Father, and Father's provisional attorney by Petitioners. While it is undisputed Mother did not appear at the hearing, there is no evidence in the record that Mother *knew* about the hearing. In fact, Mother's appellate attorney points out in her brief that "[i]t is unclear if [Mother] understood what time court started." The record shows Petitioners did not mail notice of

the hearing to Mother, and notably, the trial court did not inquire whether Mother's provisional attorney had mailed a copy of the TPR notice of hearing to Mother's address of record.

¶ 25 Upon hearing Ms. Walker's report that it had "been probably April" since she heard from her client, the trial court should have inquired about what efforts Ms. Walker had made to contact Mother and whether Mother was sent notice of the pretrial and TPR hearing by her counsel. The trial court made no extended inquiry of Ms. Walker regarding whether Mother "understood what time court started[,]" whether Ms. Walker had a phone number for Mother, or if Ms. Walker attempted to reach her that day to notify her of the TPR hearing. Thus, there is no indication in the record that Mother learned about the termination hearing from either her attorney or by receipt of a notice of hearing. Although the trial court determined all service and notice requirements had been met and that Mother's provisional attorney should be released, "despite efforts by the respective attorney[] to engage [Mother] in the participation of this proceeding[,]" we hold the trial court erred as these findings were not supported by competent evidence.

¶ 26 We take issue with the dissent's contention that, "[a]s such, even if the purported appeal is properly before this Court, the burden is and remains on Mother to show both the trial court committed reversible error and prejudice she did not invite nor brought about the reasons to forfeit her parental rights. This she has not and cannot do." Our Supreme Court stated in *In re K.M.W.*, "we decline to adopt the . . . suggestion that we require a showing of prejudice as a prerequisite for obtaining an award of appellate relief in cases involving the erroneous deprivation of the right to counsel . . . in termination of parental rights proceedings." 376 N.C. at 213, 851 S.E.2d at 862 (citations omitted). This is because "[a]side from the fact that the effect of such a deprivation upon a parent involved in a termination proceeding can be quite significant, it is simply impossible for a reviewing court to know what difference the availability of counsel might have made in any particular termination proceeding." *Id.* at 213-14, 851 S.E.2d at 862-63. Therefore, Mother is not required to demonstrate prejudice in order to obtain appellate relief based upon a violation of her right to counsel.

¶ 27 We again note that Mother had "no opportunity to present evidence or argument" that she had not received notice of the TPR hearing because she was absent from the hearing and the trial court released Mother's provisional counsel, without adequately inquiring into counsel's efforts to contact Mother regarding the termination hearing date, so that no counsel was present for Mother during the TPR hearing. *In re K.N.*, 181

N.C. App. at 741, 640 S.E.2d at 817. While a parent may waive the right to counsel by non-participation in the termination proceeding, "the record before us raises questions as to whether [Mother] was afforded with the proper procedures to ensure that [her] rights were protected during the termination of [her] parental rights to the minor children." *In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79. Because of the trial court's lack of inquiry concerning whether Mother knew about the termination hearing and the efforts made by counsel to communicate with Mother, the trial court committed reversible error by not ensuring that Mother's substantial rights to counsel and to adequate notice of such proceedings were protected. *In re D.E.G.*, 228 N.C. App. at 386-87, 747 S.E.2d at 284; *In re K.N.*, 181 N.C. App. at 737, 640 S.E.2d at 814. Accordingly, we vacate and remand for a new hearing.

IV. Conclusion

¶ 28 For the reasons stated above, we conclude that the failure of the trial court to adequately inquire into Mother's provisional court-appointed attorney's efforts to contact Mother about the TPR hearing "raise questions as to the fundamental fairness of the procedures that led to the termination of [Mother's] parental rights." *In re K.N.*, 181 N.C. App. at 741, 640 S.E.2d at 817. Therefore, we vacate the order terminating Mother's parental rights to her children and remand for a new hearing.

VACATED AND REMANDED.

Judge INMAN concurs by separate opinion.

Judge TYSON dissents by separate opinion.

INMAN, Judge, concurring in the result.

¶ 29 I concur in the majority opinion that the notice of appeal in this matter was not fatally defective because this Court and Appellee could reasonably infer to which court Mother intended to appeal. I also concur in the decision to vacate the trial court's order relieving provisional counsel and terminating Mother's parental rights strictly because the trial court did not make adequate inquiry of counsel's efforts to notify Mother of the continued hearing date. I write separately to note that this case exemplifies the tension between a parent's right to due process and the best interest of a child who has been living with foster parents for more than four years. I do not take lightly the limbo in which children and foster parents are placed in order to protect the rights of parents

whose children have for years been adjudicated abused, neglected, and/or dependent. *See In re R.T.W.*, 359 N.C. 539, 544, 614 S.E.2d 489, 492-93 (2005) (recognizing that the General Assembly crafted our abuse, neglect, and dependency statutes to mediate the "potential tension between parental rights and child welfare"), *superseded by statute on other grounds as recognized by In re A.S.M.R.*, 375 N.C. 539, 542, 850 S.E.2d 319, 321 (2020).

TYSON, Judge, dissenting.

¶ 30 We all agree Mother's appeal is not properly before this Court and is subject to dismissal. N.C. R. App. P. 3(d) ("The notice of appeal . . . shall designate the judgment or order from which appeal is taken and the court to which appeal is taken[.]"). Several binding precedents clearly state: "In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure" and "failure to follow the requirements thereof requires dismissal of an appeal." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 790-791 (2011) (quoting *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000)); *see also Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737 (1997).

¶ 31 No Petition for Writ of Certiorari is pending before this Court. *See* N.C. R. App. P. 21. The majority's opinion asserts the defective notice of appeal together with Mother's arguments in her brief is a *de facto* Petition and "in our discretion" decides to "treat the purported appeal as a petition for writ of certiorari" and address the merits, citing N.C. R. App. P. 21(a)(1). As such, even if the purported appeal is properly before this Court, the burden is and remains on Mother to show both the trial court committed reversible error and prejudice and she did not invite nor brought about the reasons to forfeit her parental rights. This she has not and cannot do. It is not the role of this Court to create an appeal for appellant.

¶ 32 The majority's opinion "takes issue" with this longstanding precedent citing *In re K.M.W.*, 376 N.C. 376 N.C. 195, 208, 851 S.E.2d 849, 859 (2020). *In re K.M.W.* is a wholly inapposite opinion regarding a parent present at a TPR proceeding being required to proceed pro se by the trial court. *Id.* *In re K.M.W.* involves an appeal of right to our Supreme Court, and was based on an objection preserved for appellate review by operation of law. When the mother appeared, without an attorney, and the trial court did not conduct a colloquy, our Supreme Court held

this was reversible error. *Id.* at 215, 851 S.E.2d at 863. Here, Mother never appeared despite being personally served of the proceedings and communications with her counsel. The majority reviews Mother's arguments on a purported PWC. Nothing in the reasoning or holding of *In re K.M.W.* absolves Mother or this Court from long established requirements to grant a PWC or to shift or reduce her burdens on appeal. I respectfully dissent.

I. Jurisdiction

¶ 33 It is axiomatic that if an appellant has not properly given a notice of appeal, this Court is without jurisdiction to hear the appeal. *See State v. McMillian*, 101 N.C. App. 425, 427, 399 S.E.2d 410, 411 (1991). Rule 27(c) of the Rules of Appellate Procedure prohibits this Court from granting defendant an extension of time to file a notice of appeal since compliance with the requirements of Rules 3 and 4(a)(2) are jurisdictional and cannot simply be ignored by this Court. *See O'Neill v. Bank*, 40 N.C. App. 227, 230, 252 S.E.2d 231, 233-34 (1979).

¶ 34 "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[.]" N.C. R. App. P. 21(a). Our Appellate Rules specify the contents of a petition for a writ of certiorari:

> The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

N.C. R. App. P. 21(c).

¶ 35 Our Supreme Court recently reaffirmed the basis and rules for a Court to exercise its discretion to issue a writ of certiorari in *State v. Ricks*: "[T]he petition must show merit or that error was probably committed below. . . . A writ of certiorari is not intended as a substitute for a notice of appeal because such a practice would render meaningless the rules governing the time and manner of noticing appeals." *State v. Ricks*, 378 N.C. 737, 741, 2021-NCSC-116, ¶ 6, 862 S.E.2d 835, 839 (2021) (internal citations and quotation marks omitted).

¶ 36 The admittedly faulty notice of appeal and the contents of Mother's brief clearly do not meet the requirements set forth in Rule 21(c). "The North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.' " *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005). In order the correct the deficiencies in Mother's purported petition for writ of certiorari, the majority must also invoke the provisions of Rule 2 of the Rules of Appellate Procedure, which it fails to do. N.C. R. App. P. 2.

¶ 37 The authority to invoke Rule 2 and Rule 21 are discretionary. *See State v. McCoy*, 171 N.C. App. 636, 639, 615 S.E.2d 319, 321 (2005) (citations omitted). Mother's arguments do not show "merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). The plurality should decline "to take *two* extraordinary steps" to exercise its discretion to correct *post hoc* defects in a notice of appeal, use Mother's brief as the purported petition for writ of certiorari, to allow it, and fails to invoke Rule 2 to review the merits. *State v. Bishop*, 255 N.C. App. 767, 768, 805 S.E.2d 367, 369 (2017); *see Ricks*, 378 N.C. at 741, 2021-NCSC-116, ¶ 6, 862 S.E.2d at 839. "It is not the role of the appellate courts . . . to create an appeal for an appellant. . . . [T]he Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Viar*, 359 N.C at 402, 610 S.E.2d at 361.

II. Background

¶ 38 Ralph and Reggie were born in July 2012 and November 2013, respectively, and are now ten and eight years old. Ralph and Reggie have resided continuously with Petitioners since 6 September 2014. Petitioners are husband and wife, licensed foster parents, and are step-maternal aunt and uncle to the children.

¶ 39 On 11 July 2015 the trial court adjudicated both children as neglected due to housing instability, income instability, and substance abuse by both parents. After nearly six years, on 5 April 2021, Petitioners filed petitions to terminate Mother's parental rights. The Petitions alleged Mother: (1) had willfully neglected her children; (2) failed to complete reunification requirements; (3) did not exercise her visitation rights; (4) did not provide proper care or supervision; and, (5) had willfully abandoned her children for at least six months immediately prior to the filing of the Petitions.

¶ 40 On 16 April 2021, the Henderson County Sheriff personally served Mother with the TPR petitions and summonses. Ms. Walker had been

appointed as Mother's provisional court-appointed attorney at the time of the filing of the Petitions. Mother knew of her appointed counsel and called Ms. Walker to contest the TPR petitions. Mother's provisional attorney timely filed separate motions for an Extension of Time to Answer on 4 May 2021 and on 7 May 2021. Both motions were granted by the trial court and allowed Mother to file an answer or response to the respective petitions on or by 9 June 2021. Despite this grace, Mother did not provide or file answers nor other responsive pleading to contest either Petition, with which she had been served.

¶ 41 On 23 June 2021, Petitioners filed a Notice of Hearing scheduling a hearing on the TPR petitions for 15 July 2021. Mother's provisional court-appointed attorney was present in court. Mother failed to appear in court at the 15 July 2021 TPR hearing. The trial court asked Ms. Walker in open court whether she had contact with Mother.

¶ 42 Ms. Walker responded Mother had contacted her when she was personally served with the Petitions and Summons. Mother failed to appear for her scheduled office appointment, but had again contacted her office to "say she was in a treatment facility" for substance abuse. Ms. Walker contacted and spoke with the treatment facility Mother had provided and learned Mother had successfully graduated from the program. Ms. Walker stated she had last heard from Mother in April 2021. Mother did not inform counsel of her whereabouts after being discharged from treatment. This was her choice.

¶ 43 A week before the TPR hearing, Mother sent a card to her children at Petitioner's address in which she wrote that "she was trying her best to get better, and to be better, and that she loved and missed them very much." The envelope listed a return address in Abbeville, South Carolina that was previously unknown to either Petitioners or counsel.

¶ 44 During the pretrial hearing, the trial court found that all service and notice requirements had been met. The court noted that "the appointment of a Guardian Ad Litem for the child[ren] was not needed or required as neither Respondent has sought to contest the [TPR] Petition[s]." The court also stated "there are no issues or pre-trial motions raised by any party" and "no responsive pleading has been submitted by Mother (although the court notes that a Motion and Order for extension of time in regards [sic] to the Respondent Mother appears in the court file[s])."

¶ 45 The trial court, on its own motion and in its discretion, released Ms. Walker from continuing to represent Mother in the termination action. In

the TPR Order, the trial court found that "[t]he provisionally appointed attorney[] for [Mother] should be released, despite efforts by . . . attorney[] to engage [Mother] in the participation of this proceeding." These findings are not challenged and are binding upon appeal.

¶ 46 After the pretrial hearing, the court proceeded with the adjudication and disposition stages of the TPR hearing. The court heard testimony from Petitioner wife. She testified both children had lived with her and her husband since September 2014; the children were adjudicated neglected based upon Mother's housing instability, income instability, and substance abuse in 2015; and, Mother had not exercised any visitations with her children since July 2019.

¶ 47 Petitioner wife also testified, and the trial court found, Mother had failed to provide support for her children, is not involved in their education, extracurricular activities, or medical appointments, and failed to make progress in correcting the conditions that led to her children's removal from her custody. Petitioner wife acknowledged Mother had sent the card noted above to children, which had arrived a week earlier.

¶ 48 After this testimony, the court found grounds existed to terminate Mother's parental rights based on willful neglect and willful abandonment by clear and convincing evidence because: Mother has not exercised her visitation rights with her children for years, has failed to follow through with telephone calls or visitation with her children, and has not offered any support for her children since July 2019.

¶ 49 At the dispositional "best interests" portion of the TPR hearing, the trial court determined: (1) a strong bond exists between Petitioners and Reggie and Ralph; (2) the likelihood Petitioners will adopt the children is high; and, (3) it is in the best interests of the children to terminate Mother's parental rights. On 15 July 2021, the trial court entered orders terminating Mother's parental rights to Reggie and Ralph. Mother filed written notice of appeal to the Supreme Court on 13 August 2021.

III. Standard of Review

¶ 50 "The determination of counsel's motion to withdraw is within the discretion of the trial court, and thus we can reverse the trial court's decision only for abuse of discretion." *Benton v. Mintz*, 97 N.C. App. 583, 587, 389 S.E.2d 410, 412 (1990) (citation omitted). The trial court's "best interests" determination is also reviewed for abuse of discretion. *See In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

IV. Analysis

¶ 51 Mother was personally served with the TPR petitions and summonses on 16 April 2021 and was aware of appointment of Ms. Walker as her court-appointed attorney. After receiving the petitions, Mother informed Ms. Walker that she wanted to contest the TPR petitions. Ms. Walker scheduled an office appointment, which Mother failed to keep. Ms. Walker filed separate Extension of Time motions for each child on 4 May 2021 and on 7 May 2021, which were granted by the trial court. Mother failed to contact her appointed counsel to file an answer or other responsive pleading in either case. Petitioner's attorney sent notice of the pretrial hearing and TPR hearing on 23 June 2021, scheduled for 15 July 2021, to Ms. Walker who had made an appearance of record in this case by filing motions for an Extension of Time. The plurality opinion correctly notes, "after making an appearance in a particular case, an attorney may not cease representing a client without '(1) justifiable cause, (2) reasonable notice [to the client], and (3) the permission of the court.' " *In re M.G.* , 239 N.C. App. at 83, 767 S.E.2d at 440 (quoting *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 305 (1965)).

¶ 52 A client who fails to keep appointments, does not maintain contact and apprise counsel of means and an address to contact them and absents and secrets themselves is a "justifiable cause" to "cease representing a client." *Id.* There is no dispute Ms. Walker ably and zealously represented Mother within the conduct and constraints Mother imposed and she used reasonable investigations to seek and make contact with Mother. Ms. Walker appeared and was present at the hearing. Her continued representation was ceased with "the permission of the court." *Id.*

¶ 53 At this pretrial hearing, the court is statutorily required to "consider the . . . [r]etention or release of provisional counsel," and "[w]hether all summons, service of process, and notice requirements have been met." N.C. Gen. Stat. § 7B-1108.1 (a)(1), (3) (2021). N.C. Gen. Stat. § 7B-1101.1(a)(1) also requires: "At the first hearing *after service* upon the respondent parent, the court *shall dismiss* the provisional counsel if the respondent parent: [d]oes not appear at the hearing." N.C. Gen. Stat. § 7B-1101.1(a)(1) (emphasis supplied). The trial court found and concluded all service and notice requirements had been met and that Mother's provisional attorney should be released, "despite efforts by the respective attorney[] to engage the Mother . . . in the participation of this proceeding." This finding and conclusion is unchallenged and is binding on appeal.

¶ 54 The issue becomes whether Mother has argued and shown an abuse of discretion and reversible error in the trial court's decision. *Benton*, 97 N.C. App. at 587, 389 S.E.2d at 412. To grant Mother a further extension or a continuance or not also rests within the trial court's discretion. Whether another trial judge could have or even would have reached a different conclusion is not the issue. There is no burden on appeal resting on the Petitioner-appellee or the trial judge. It is solely on the Mother, who is before this Court only by discretionary grace, with no preserved challenges to the trial court's findings or conclusions. *Id.*

V. Conclusion

¶ 55 While a whole panoply of rights and protections for a parent are rightly preserved in the Constitutions and statutes and are available in the trough, you cannot force a recalcitrant and absent parent to partake and drink. As Judge Inman's concurrence correctly notes, courts cannot take "lightly the limbo in which children and foster parents are placed in order to protect the rights of parents whose children have for years been adjudicated abused, neglected, and/or dependent." *See In re R.T.W.*, 359 N.C. 544, 614 S.E.2d 489, 492 (recognizing that the General Assembly crafted our abuse, neglect, and dependency statutes to mediate the "potential tension between parental rights and child welfare").

¶ 56 The trial court's unchallenged findings and conclusions are based upon clear cogent and convincing evidence. Mother has shown no abuse of discretion in the trial court's failure to grant a continuance, further extensions, to release appointed counsel, or in its best interest determinations to terminate Mother's parental rights. Presuming, without agreeing, this appeal is even properly before this Court, the trial court's order is properly affirmed. I respectfully dissent.

IZZY AIR, LLC v. TRIAD AVIATION, INC.

[284 N.C. App. 655, 2022-NCCOA-523]

IZZY AIR, LLC, HUGH TUTTLE, AND LESLIE PAIGE TUTTLE, Plaintiffs
v.
TRIAD AVIATION, INC., Defendant

No. COA21-284

Filed 2 August 2022

Statutes of Limitation and Repose—borrowing provision—out-of-state plaintiffs—cause of action outside of state

In an action arising from the in-flight engine failure of plaintiffs' small aircraft after the engine had been overhauled by defendant, the trial court's order granting defendant's Rule 12(b)(6) motion to dismiss plaintiffs' complaint was affirmed because the borrowing provision of N.C.G.S. § 1-21 required application of South Carolina's three-year statute of limitations and thus barred plaintiffs' unfair and deceptive trade practices (UDTP) claim, where plaintiffs were residents of South Carolina, plaintiffs' lawsuit was filed after South Carolina's three-year statute of limitations had run, and the cause of action arose in South Carolina (under both the most significant relationship test and the lex loci approach).

Appeal by Plaintiffs from order entered 22 December 2020 by Judge John M. Dunlow in Alamance County Superior Court. Heard in the Court of Appeals 12 January 2022.

Crouse Law Offices, PLLC, by James T. Crouse, for Plaintiffs-Appellants.

Cranfill Sumner LLP, by Steven A. Bader, Susan L. Hofer, and Mica N. Worthy, for Defendant-Appellee.

COLLINS, Judge.

¶ 1 Plaintiffs Izzy Air, LLC, Hugh Tuttle, and Leslie Paige Tuttle appeal an order granting Defendant Triad Aviation, Inc.'s, Rule 12(b)(6) motion to dismiss Plaintiffs' complaint. We affirm the trial court's order.

I. Background

¶ 2 Sometime prior to 30 September 2016, Plaintiffs Hugh Tuttle and his wife Leslie Tuttle, residents of South Carolina and the owners of Izzy Air, LLC, a Delaware corporation, hired Defendant, an aircraft maintenance and repair service located in Burlington, North Carolina, to overhaul the

engine of a small aircraft owned and operated by Plaintiffs. Plaintiffs shipped the engine from South Carolina to Defendant's facility in North Carolina where it was repaired, overhauled, inspected, and tested.

¶ 3 Defendant provided Plaintiffs with a Limited Aircraft Engine Warranty ("Warranty") containing the following language pertinent to this appeal:

> TRIAD AVIATION, INC. warrants the . . . aircraft engine to be free from defects in materials and workmanship furnished by TRIAD for a period of one (1) year or 500 hours from the date of the first operation, or 30 days after delivery as follows.
>
> . . . .
>
> 8. This warranty covers only you, the original purchaser and gives you specific rights which vary from state to state. . . . . The work to which this [l]imited warranty applies is deemed to have been accomplished at Burlington, North Carolina, and *in the event of a dispute on this Warranty the laws of the State of North Carolina shall apply*. To exercise your rights under this Limited Warranty, you must give prompt notice to TRIAD by telephone call or letter fully describing such defect or failure.

(Emphasis added).

¶ 4 The Tuttles took the aircraft with the newly-serviced engine out for a flight in South Carolina on 30 September 2016. Hugh Tuttle piloted the plane and Leslie Tuttle was the sole passenger. Shortly after takeoff, the engine began "running rough," and "began cutting in and out." Hugh Tuttle declared an emergency and attempted to land at a nearby airport. Before the Tuttles made it to the airport, the engine failed. Hugh Tuttle was forced to make an emergency landing in a field. The plane was damaged beyond repair and the incident caused Plaintiffs "serious personal and psychological injuries."

¶ 5 Plaintiffs notified Defendant of the engine failure and emergency landing within a reasonable time after the incident and repeatedly notified Defendant thereafter. Despite these notifications and "despite having actual knowledge of the in-flight failure of [the] engine which it had overhauled and a claim made thereupon," Defendant "refused to honor the express warranty it provided on its work and parts supplied for [the] engine."

¶ 6 On 15 September 2020, Plaintiffs filed a second amended complaint against Defendant alleging a single cause of action for violation of North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. §§ 75-1.1 *et seq*. ("UDTP"). Defendant filed a Rule 12(b)(6) motion to dismiss, arguing that South Carolina's statute of limitations applied to Plaintiffs' claim pursuant to North Carolina's borrowing statute, N.C. Gen. Stat. § 1-21, and that Plaintiffs' UDTP claim was time-barred under South Carolina's three-year statute of limitations. After a hearing on Defendant's motion to dismiss, the trial court granted the motion with prejudice by written order entered 22 December 2020. Plaintiffs timely appealed.

II. Discussion

¶ 7 Plaintiffs argue that the trial court erred by granting Defendant's Rule 12(b)(6) motion to dismiss.

A. Standard of Review

¶ 8 "In considering a motion to dismiss under Rule 12(b)(6), the Court must decide whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (quotation marks and citations omitted). On appeal, we review de novo a trial court's grant of a motion to dismiss pursuant to Rule 12(b)(6). *Id.*

B. Analysis

¶ 9 The dispositive issue on appeal is whether the borrowing provision of N.C. Gen. Stat. § 1-21 requires application of South Carolina's three-year statute of limitations and thus bars Plaintiffs' UDTP claim.

¶ 10 "Our traditional conflict of laws rule is that matters affecting the substantial rights of the parties are determined by lex loci, the law of the situs of the claim, and remedial or procedural rights are determined by lex fori, the law of the forum." *Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 853-54 (1988). "Ordinary statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover." *Id.* at 340, 368 S.E.2d at 857.

¶ 11 However, "[o]ur General Assembly provided a legislative exception to the traditional rule by enacting a statute containing a limited 'borrowing provision.' " *George v. Lowe's Cos.*, 272 N.C. App. 278, 280, 846 S.E.2d 787, 788 (2020) (quoting *Laurent v. USAir, Inc.*, 124 N.C. App. 208, 211, 476 S.E.2d 443, 445 (1996)). "Pursuant to N.C. Gen. Stat. § 1-21, where a

claim arising in another jurisdiction is barred by the laws of that jurisdiction, and the claimant is not a resident of North Carolina, the claim will be barred in North Carolina as well:" *id.*,

> [W]here a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State for the enforcement thereof, except where the cause of action originally accrued in favor of a resident of this State.

N.C. Gen. Stat. § 1-21 (2020). South Carolina Code § 39-5-150 provides that no action under the South Carolina Unfair Trade Practices Act may be brought more than three years after discovery of the unlawful conduct that is the subject of the suit. S.C. Code § 39-5-150 (2020).

¶ 12 In this case, it is undisputed that Plaintiffs were not residents of North Carolina at any relevant time; they were residents of South Carolina. It is also undisputed that Plaintiffs' lawsuit was filed on 15 June 2020, after the three-year statute of limitations for an unfair trade practices claim in South Carolina had run. *See id.* Accordingly, we must only determine whether Plaintiffs' UDTP "cause of action arose outside of this State," N.C. Gen. Stat. § 1-21, such that the borrowing provision applied.

1. Contract's Choice of Law Provision

¶ 13 Plaintiffs argue that because the parties agreed in the Warranty that North Carolina law would apply in the event of a dispute on the Warranty, North Carolina's four-year statute of limitations under N.C. Gen. Stat. § 75-16.2 applies to their UDTP claim; thus, the claim is not time barred. We disagree.

¶ 14 "[P]arties to a business contract may agree in the business contract that North Carolina law shall govern their rights and duties in whole or in part . . . ." N.C. Gen. Stat. § 1G-3 (2020). In this case, the operative portion of the Warranty states, "in the event of a dispute on this Warranty the laws of the State of North Carolina shall apply." By its plain terms, this provision dictates that North Carolina law governs a warranty dispute; this provision does not dictate that North Carolina law governs all litigation between the parties.

¶ 15 As neither an intentional breach of contract nor a breach of warranty, standing alone, is sufficient to maintain a UDTP claim, *Mitchell v. Linville*, 148 N.C. App. 71, 74, 557 S.E.2d 620, 623 (2001), the Warranty's choice-of-law provision does not specifically apply to Plaintiffs' UDTP

claim. Conversely, the provision is not sufficiently broad to encompass Plaintiffs' UDTP claim. *See Lambert v. Navy Fed. Credit Union*, 2019 U.S. Dist. LEXIS 138592, at *17 (E.D. Va. Aug. 14, 2019) (holding that the choice of law language in the parties' contract was "sufficiently broad" to preclude plaintiff's North Carolina UDTP claim). Accordingly, North Carolina law, and specifically its four-year statute of limitations, does not apply to Plaintiffs' UDTP claim by virtue of the terms of the Warranty.

¶ 16 Nonetheless, even if the choice-of-law provision in the Warranty were construed to apply to Plaintiffs' UDTP claim, North Carolina's four-year statute of limitations would not automatically apply. Applying "the laws of the State of North Carolina" to Plaintiffs' UDTP claim would nonetheless necessitate a determination of whether the borrowing provision of N.C. Gen. Stat. § 1-21 requires the application of South Carolina's three-year statute of limitations to Plaintiffs' UDTP claim.

2. Where the Cause of Action Arose

¶ 17 Plaintiffs further argue that "the acts and events that form the basis for Plaintiffs' [UDTP] claim occurred in North Carolina" not South Carolina; because the cause of action did not arise outside of this State, the borrowing statute does not apply. We disagree.

¶ 18 In ascertaining whether Plaintiffs' UDTP action arose outside of this State, we are guided by our Court's choice-of-law analysis in the context of UDTP claims. Our North Carolina Supreme Court has not addressed the proper choice-of-law test for UDTP claims, and there is a split of authority in our Court on the appropriate rule to be applied. *Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 15, 598 S.E.2d 570, 580 (2004). Under the most significant relationship test, the court looks to "the law of the state having the most significant relationship to the occurrence giving rise to the action." *Andrew Jackson Sales v. Bi-Lo Stores, Inc.*, 68 N.C. App. 222, 225, 314 S.E.2d 797, 799 (1984) (citations omitted). Under the lex loci approach, "[t]he law of the State where the last act occurred giving rise to [the] injury governs [the] Sec. 75-1.1 action." *United Va. Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 321, 339 S.E.2d 90, 94 (1986) (citation omitted); *see also Shaw v. Lee*, 258 N.C. 609, 610, 129 S.E.2d 288, 289 (1963) (explaining that "the law of the state where the injuries were sustained" governs the claim).

¶ 19 Plaintiffs argue that under both the most significant relationship test and the lex loci choice of law analysis, Plaintiffs have alleged facts sufficient to show that the claim arose in North Carolina and thus, that the borrowing statute does not apply.

¶ 20 Defendant, on the other hand, argues that "[n]o choice of law analysis need be done" because "[o]ur appellate courts have twice applied the borrowing statute to cases involving airplane accidents [and i]n both cases, the courts ruled that the claims arose in the state where the accident occurred." Defendant argues, in the alternative, that lex loci is the proper test to apply but that under either the most significant relationship test or lex loci, Plaintiffs' claim arose in South Carolina.

¶ 21 We disagree with Defendant that no choice of law analysis need be done. As it was undisputed in both *Laurent v. USAir, Inc.* and *Broadfoot v. Everett*, 270 N.C. 429, 154 S.E.2d 522 (1967), cited by Defendant, that the causes of action arose outside of this State, this Court did not analyze where the cause of action arose. We agree with Defendant's analysis, however, that under both the most significant relationship test and the lex loci choice of law analysis, Plaintiffs' claim arose in South Carolina.

¶ 22 Under the most significant relationship test, the individual plaintiffs reside in South Carolina, Plaintiffs shipped the engine to Defendant from South Carolina, the airplane accident occurred in South Carolina, Plaintiffs sustained their injuries in South Carolina, and Plaintiffs' alleged efforts to notify Defendant of the accident occurred in South Carolina. While North Carolina is not without connection to the occurrence giving rise to the action, South Carolina has the more significant relationship.

¶ 23 Under the lex loci approach, Plaintiffs sustained their injuries in South Carolina and the last act giving rise to Plaintiffs' claim occurred in South Carolina when Plaintiffs' airplane engine failed in South Carolina and they were forced to attempt an emergency landing in South Carolina. Thus, under the lex loci approach, Plaintiffs' claim "arose" in South Carolina.

¶ 24 As Plaintiffs' UDTP cause of action arose in South Carolina and Plaintiffs failed to file this action before South Carolina's three-year statute of limitation ran, this failure bars their claim not only in South Carolina, but also in North Carolina, pursuant to N.C. Gen. Stat. § 1-21. *See Stokes v. Wilson & Redding Law Firm*, 72 N.C. App. 107, 113, 323 S.E.2d 470, 475 (1984) ("[A]fter the cause of action has been barred in the jurisdiction where it arose, only a plaintiff, who was a resident of this State at the time the cause of action originally accrued, has the right to maintain an action in the courts of this State." (citation omitted)).

3. Substantial aggravating circumstances

¶ 25 Even if we were to apply North Carolina procedural law, including its four-year statute of limitations, to this claim, Plaintiffs have failed to state a UDTP claim under North Carolina substantive law.

¶ 26 North Carolina's Unfair and Deceptive Trade Practices Act declares as unlawful "unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1(a) (2020). " '[C]ommerce' includes all business activities[.]" *Id.* § 75-1.1(b) (2020). In order to survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead facts sufficient to show: "(1) an unfair or deceptive act or practice, (2) in or affecting commerce, (3) which proximately caused injury to plaintiffs." *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000) (citing N.C. Gen. Stat. § 75-1.1(a)). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Walker v. Fleetwood Homes of N.C., Inc.*, 362 N.C. 63, 72, 653 S.E.2d 393, 399 (2007) (citation omitted). "A practice is deceptive if it has the capacity or tendency to deceive." *Id.* (brackets and citation omitted).

¶ 27 "Neither an intentional breach of contract nor a breach of warranty, however, constitutes a violation of Chapter 75." *Mitchell*, 148 N.C. App. at 74, 557 S.E.2d at 623 (citations omitted).

> [A]ctions for unfair or deceptive trade practices are distinct from actions for breach of contract, and a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C. [Gen. Stat.] § 75-1.1. Substantial aggravating circumstances must attend the breach in order to recover under the Act. A violation of Chapter 75 is unlikely to occur during the course of contractual performance, as these types of claims are best resolved by simply determining whether the parties properly fulfilled their contractual duties.

Id. at 75, 557 S.E.2d at 623-24 (quotation marks, brackets, and citations omitted) (holding that plaintiff's allegations regarding defendants' deficient construction of a home and defendants' failure to properly address such deficiencies, "while certainly supportive of the conclusion that defendants breached the implied warranty of habitability, do not indicate 'substantial aggravating circumstances attending the breach' as to transform defendants' actions into a Chapter 75 violation").

¶ 28 In this case, Plaintiffs alleged in pertinent part:

> 5. . . . The engine failure and subsequent forced landing caused serious personal and psychological injuries to Plaintiffs HUGH TUTTLE and PAIGE TUTTLE and caused the total economic loss of aircraft N39686.

. . . .

8. Defendant TRIAD failed to properly overhaul, repair, test, inspect and certify Engine L-5575-61A in accordance with applicable policies, practices, laws and regulations, and in accordance with all warranties and representations, and in violation of the contract between the parties, causing engine L-5575-61A to fail prematurely and without warning, causing the total loss of aircraft N39686. . . .

9. Defendant TRIAD'S acts, and/or omissions, by and through its agents, employees, servants and/or officials, acting within the course and scope of their authority, included failing to comply with standards, practices and FAR's, which are intended to ensure that aircraft engines, including Engine L-5575-61A, and its component parts, are properly overhauled, assembled and tested . . . resulting in damages in excess of Twenty-Five Thousand Dollars ($25,000.00):

. . . .

10. Defendant TRIAD, within a reasonable time after the occurrence and breach complained of, was notified of the failure of the product and its breaches and has been repeatedly so informed since that initial notification. Despite these notifications, TRIAD has refused to honor the express warranty it provided on its work and parts supplied for engine L-5575-61A.

. . . .

14. Defendant TRIAD's acts and practices as alleged in paragraphs 1 through 13 were deceptive and unfair to consumers in North Carolina, and therefore violate N.C. Gen. Stat. § 75-1.1 (a).

15. Defendant TRIAD's unfair and deceptive business practices include, but are not limited to:

a. Misrepresentations regarding the airworthiness, fitness, and merchantability of the overhauled engine it manufactured, in which engine defects and faulty parts were hidden and unknowable, which endangered not only the pilot and

other occupants of N39686 but also unsuspecting persons on the ground;

b. Failing to honor the provisions of its warranties, express and implied, over a lengthy time, despite having actual knowledge of the in-flight failure of engine L-5575-61A which it had overhauled and a claim made thereupon.

c. Unfair in that it offended established public policy as set forth in the Federal Aviation Regulations and general aviation good practices and the laws of North Carolina.

d. Other willful, wanton, reckless, intentional and unscrupulous and wrongful acts as set forth in this Complaint.

16. Plaintiffs IZZY AIR, HUGH TUTTLE and LESLIE PAIGE TUTTLE relied upon the representations made by Defendant TRIAD that Engine L-5575-61A was properly overhauled, airworthy, merchantable, and safe for its intended use, and upon the warranty issued by TRIAD.

17. As a direct and proximate result of the facts set forth in paragraphs 1 through 16 above, Plaintiffs IZZY AIR, HUGH TUTTLE and LESLIE PAIGE TUTTLE have sustained personal and psychological injuries, property and other economic damages in excess of twenty-five thousand dollars ($25,000.00), including, but not limited to, pre-impact fear and terror, bodily injuries, future medical costs, total loss of Aircraft N39686, loss of income, increased insurance costs, increased aircraft operational costs, and other damages as will be demonstrated at the trial of this matter.

¶ 29 Plaintiffs essentially allege that Defendant failed to perform the overhaul of the engine in a workmanlike manner and then failed to honor the provisions of its Warranty.[1] The facts alleged, while arguably

1. Plaintiffs allege facts in their appellate brief in support of their UDTP claim that were not alleged in their Second Amended Complaint. We do not consider facts alleged beyond the four corners of the complaint and the attached Warranty. *See Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, 251 N.C. App. 771, 775, 796 S.E.2d 120, 123

sufficient to state a claim for breach of the Warranty, do not indicate "substantial aggravating circumstances attending the breach as to transform [D]efendants' actions into a Chapter 75 violation." *Mitchell*, 148 N.C. App. at 76, 557 S.E.2d at 624 (quotation marks omitted); *see Walker*, 362 N.C. at 71-72, 653 S.E.2d at 399-400 (concluding that the jury's findings that "defendant failed to perform repairs completely and in a workmanlike and competent manner, and that defendant repeatedly failed to respond promptly to plaintiffs' complaints regarding those repairs" were alone insufficient "to reach conclusions of law required under § 75-1.1 as to whether defendant's actions were deceptive, immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers").

¶ 30 Lacking any allegations of "substantial aggravating circumstances," Plaintiffs have failed to state a claim for unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1.

¶ 31 Citing Rule 15 of our Rules of Civil Procedure, Plaintiffs argue further that they "should be allowed to amend their complaint to cure any defects or conduct discovery to obtain information to support their complaint and overcome any [m]otion [t]o [d]ismiss." However, Plaintiffs have had ample opportunity to file a sufficient complaint and have failed to do so. Plaintiffs' first suit named the wrong party. Plaintiffs then dismissed, re-filed, and amended the complaint twice. Moreover, there was no motion before the trial court to amend the second amended complaint. Accordingly, the trial court did not err by not allowing Plaintiffs to amend their complaint.

4. Equity

¶ 32 Finally, Plaintiffs argue that "equity requires that the court deny application of North Carolina's 'borrowing statute,' " arguing that Defendant induced Plaintiffs to delay filing their claim and thus, caused them to untimely file their action. We disagree.

¶ 33 Plaintiffs failed to plead facts sufficient to support a conclusion that Defendants are equitably estopped from asserting statute of limitations as a defense. *Compare Teague v. Randolph Surgical Assocs., P.A.*, 129 N.C. App. 766, 772, 501 S.E.2d 382, 387 (1998) (holding that defendant's "offer to discuss settlement or possible arbitration was not of such a nature as to reasonably lead plaintiffs to believe that defendants would not assert any defenses they might have, including the statute of limitations,

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(2017) ("At the motion to dismiss stage, the trial court (and this Court) may not consider evidence outside the four corners of the complaint and the attached contract." (citation omitted)).

in the event settlement was not accomplished"), *with Duke Univ. v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 693 (1987) (holding that "[t]he actions and statements of [defendant's] attorney caused [plaintiff] to reasonably believe that it would receive its payment for services rendered . . . and such belief reasonably caused [plaintiff] to forego pursuing its legal remedy against [defendant]").

¶ 34 Moreover, as explained above, even if we apply North Carolina's statute of limitations, Plaintiffs have failed to state a UDTP claim. Accordingly, the trial court did not err by allowing Defendant's motion to dismiss.

III. Conclusion

¶ 35 The trial court did not err by dismissing Plaintiffs' action for failure to state a claim under Rule 12(b)(6). Accordingly, we affirm the order of the trial court.

AFFIRMED.

Judges MURPHY and CARPENTER concur.

KODY H. KINSLEY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, PLAINTIFF
v.
ACE SPEEDWAY RACING, LTD., AFTER 5 EVENTS, LLC, 1804-1814 GREEN STREET ASSOCIATES LIMITED PARTNERSHIP, JASON TURNER, AND ROBERT TURNER, DEFENDANTS

No. COA21-428

Filed 2 August 2022

1. Appeal and Error—notice of appeal—timeliness—certificate of service—actual notice

Plaintiff's notice of appeal from the trial court's order denying plaintiff's motion to dismiss defendant's counterclaims was timely filed where plaintiff did not receive effective service initiating the thirty-day period to file a notice of appeal, and so the thirty-day period began when plaintiff actually received the trial court's denial order in the mail.

2. Constitutional Law—North Carolina—fruits of their own labor clause—COVID-19 orders—closure of business facilities—sovereign immunity

A racetrack and its owners (defendants) sufficiently pled their counterclaim that the Secretary of the N.C. Department of Health and Human Services (plaintiff) had deprived defendants of their constitutional right to the fruits of their own labor by issuing an order, pursuant to the authority of an executive order that had been issued in response to COVID-19, demanding that defendants abate further mass gatherings at their racetrack—interfering with defendants' lawful operation of their business and their right to earn a living. Therefore, sovereign immunity could not bar defendants' counterclaim.

3. Constitutional Law—North Carolina—equal protection—COVID-19 orders—closure of business facilities—sovereign immunity

A racetrack and its owners (defendants) sufficiently pled their counterclaim that the Secretary of the N.C. Department of Health and Human Services (plaintiff) had deprived defendants of their constitutional right to equal protection by selectively enforcing an executive order prohibiting mass gatherings, which the governor had issued in response to COVID-19, in bad faith for the invidious purpose of silencing defendants' lawful expression of discontent with the governor's actions. Therefore, sovereign immunity could not bar defendants' counterclaim.

Appeal by Plaintiff from order entered 12 January 2021 by Judge John M. Dunlow in Alamance County Superior Court. Heard in the Court of Appeals 8 March 2022.

Solicitor General Ryan Y. Park, by Assistant Solicitor General Nicholas S. Brod and Solicitor General Fellow Zachary W. Ezor, and Attorney General Joshua H. Stein, by Assistant Attorney General John P. Barkley, for Plaintiff-Appellant.

Kitchen Law, PLLC, by S.C. Kitchen, for Defendants-Appellees.

Jeanette K. Doran for amicus curiae North Carolina Institute for Constitutional Law.

GRIFFIN, Judge.

¶ 1 This case makes us consider the use of overwhelming power by the State against the individual liberties of its citizens and how that use of power may be challenged. The people of North Carolina recognized the importance of this balance in ratification of our Constitution in 1868. The challenged act here involves the closing of a business by a cabinet secretary. Plaintiff Kody H. Kinsley,[1] in his official capacity as Secretary of the North Carolina Department of Health and Human Services, issued an order of abatement to close a racetrack. The Secretary issued the abatement order only after the Governor's use of an executive order and his direct request to local law enforcement to close the track failed.

¶ 2 Amidst the onset of the COVID-19 pandemic, the Governor issued executive orders placing restrictions on the rights of the people of North Carolina to gather. The Secretary appeals from the trial court's order denying his motion to dismiss two counterclaims brought by Defendants Ace Speedway Racing, Ltd, its affiliates, and its owners. Ace's counterclaims propose that the Governor's orders were enforced upon them without justification and without equal protection of law. Ace's counterclaims are constitutional claims alleging (1) executive orders issued by the Governor in response to the COVID-19 pandemic were an unlawful infringement on Ace's right to earn a living as guaranteed by our Constitution's fruits of labor clause, and (2) the Secretary's enforcement actions against Ace under the executive order constituted unlawful selective enforcement. The Secretary argues Ace failed to present colorable constitutional claims, and therefore failed to overcome the Secretary's sovereign immunity from suit.

¶ 3 In this appeal, we are asked to decide whether Ace has presented colorable constitutional claims for which our courts could provide a remedy. We hold that Ace pled each of its constitutional claims sufficiently to survive the Secretary's motion to dismiss. We affirm the trial court's order.

I. Factual and Procedural Background

¶ 4 Ace operates ACE Speedway in Alamance County as a racetrack, hosting car races with a maximum audience seating capacity of around 5,000 people. To feasibly host a race and pay its staff of roughly forty-five employees, Ace needs "around a thousand fans" to attend each race.

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1. Secretary Mandy K. Cohen originally filed this appeal in her capacity as Secretary of the North Carolina Department of Health and Human Services. She has since been succeeded by Secretary Kinsley. We substitute Secretary Kinsley as party to this appeal in accordance with N.C. R. App. P. 38(c).

¶ 5 In March 2020, the COVID-19 virus began spreading across the United States. State governments across the country began to impose restrictions on their citizens' right to gather, conduct public activities, and engage in in-person means of commerce. On 20 May 2020, pursuant to emergency directive authority granted by N.C. Gen. Stat. § 166A-19.30, Governor Roy Cooper issued Executive Order 141 decreeing, in relevant part, that "mass gatherings" were temporarily prohibited in North Carolina. Exec. Order No. 141, 34 N.C. Reg. 2360 (May 20, 2020). Order 141 defined "mass gatherings" as "an event or convening that brings together more than ten (10) people indoors or more than twenty-five (25) people outdoors at the same time in a single confined indoor or outdoor space, such as an auditorium, stadium, arena, or meeting hall." *Id.*

¶ 6 The mass gathering prohibition in Order 141 nullified Ace's ability to hold economically feasible racing events at ACE Speedway. On 22 May 2020, the Burlington Times-News published an article featuring statements from Defendant Jason Turner, an owner of ACE Speedway, regarding the restrictions in Order 141 and his plans to nonetheless hold races at ACE Speedway. The article quoted Turner as follows:

> I'm going to race and I'm going to have people in the stands. . . . And unless they can barricade the road, I'm going to do it. The racing community wants to race. They're sick and tired of the politics. People are not scared of something that ain't killing nobody. It may kill .03 percent, but we deal with more than that every day, and I'm not buying it no more.

Ace followed through on Turner's statement and began to hold races during the summer of 2020.

¶ 7 Ace held its first race of the season at ACE Speedway on 23 May 2020. The event drew an audience of approximately 2,550 spectators. On 15 May 2020, a week before the first race, Ace met with local health and safety officials. Ace and the local officials agreed upon health precautions for its events, including contact tracing, temperature screenings, social distancing in common areas, and reduced and distanced audience seating arrangements. With each of its health precautions in place, Ace held races on May 23, May 30, and June 6, hosting over 1,000 spectators at each event.

¶ 8 On 30 May 2020, before that afternoon's race, the Governor's office requested that Alamance County Sheriff Terry Johnson personally ask Ace to stop holding racing events in violation of Order 141. The Sheriff relayed the Governor's message and informed Ace that they could face

sanctions if they did not comply. After Ace held the race on May 30, the Sheriff publicly stated that he would not take any further actions to enforce Order 141. On 5 June 2020, the Governor's office sent a letter to the Sheriff and Ace, once again advising that Ace was conducting racing events in violation of Order 141 and potentially subject to sanctions. Ace held its third race on June 6, the following day.

¶ 9 On 8 June 2020, the Secretary issued an order demanding that Ace abate further mass gatherings at ACE Speedway. This Abatement Order explained that Ace had "operated openly in contradiction of the restrictions and recommendations in [Order 141,]" and, therefore, "immediate action" was necessary to prevent "increased exposure to thousands of people attending races at ACE Speedway, and thousands more who may be exposed to COVID-19 by family members, friends, and neighbors who have attended or will attend races at ACE Speedway." The Abatement Order instructed Ace to close its facilities until the expiration of Order 141, or until such time as Ace developed a plan to host events in full compliance with Order 141's mass gathering restrictions. The Abatement Order also required Ace to "notify the public by 5:00 p.m. on [9 June 2020] that its upcoming races and other events . . . [were] cancelled[,]" and to notify DHHS by 5:00 p.m. on June 9 that it had complied. Ace declined to close its facilities or provide timely notice to the public and DHHS as required by the Abatement Order.

¶ 10 On 10 June 2020, the Secretary filed a complaint, motion for temporary restraining order, and motion for preliminary injunction seeking to enforce the terms of the Abatement Order. On 11 June 2020, Judge D. Thomas Lambeth, Jr., entered an order granting the Secretary's temporary restraining order and "enjoined [Ace] from taking any action to conduct or facilitate a stock car race or other mass gathering at ACE Speedway[.]" On 10 July 2020, following a hearing on the matter, Judge Lambeth entered an order granting the Secretary's motion for preliminary injunction and enjoining Ace "from taking any action prohibited by the Abatement Order[.]"

¶ 11 On 25 August 2020, Ace filed its answer to the Secretary's complaint and its own counterclaims, including the two constitutional claims at issue in this appeal: (1) infringement upon Ace's right to earn a living and (2) selective enforcement of Order 141 against Ace.

¶ 12 On 4 September 2020, the Governor issued Executive Order 163, which replaced Order 141 and loosened Order 141's mass gathering restrictions to allow a total of fifty people in outdoor gatherings. The Secretary voluntarily dismissed his complaint in this matter against Ace

because the terms of the Abatement Order were moot and no longer enforceable as written. Ace did not dismiss its counterclaims.

¶ 13 On 2 December 2020, the Secretary moved to dismiss Ace's counterclaims, arguing that each counterclaim was barred by sovereign immunity from suit. The trial court heard arguments on the justiciability of each claim. In January 2021, Judge John M. Dunlow entered an order (the "Denial Order") denying the Secretary's motion to dismiss each of Ace's constitutional claims.[2] The Secretary filed notice of appeal from the Denial Order on 17 February 2021.

II. Analysis

¶ 14 The matter before us on appeal is whether the trial court erred by denying the Secretary's motion to dismiss Ace's two constitutional counterclaims on grounds of sovereign immunity from suit.

A. Timeliness of Appeal

¶ 15 **[1]** We first address the timeliness of the Secretary's appeal from the denial of his motion to dismiss Ace's counterclaims. Ace moves to dismiss the Secretary's appeal on grounds that the Secretary's notice of appeal was untimely because he failed to comply with the terms of Rule 3(c) of the North Carolina Rules of Appellate Procedure.

¶ 16 "The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (citation omitted). Rule 3(c) dictates that a party to a civil action "must file and serve a notice of appeal . . . within thirty days after entry of judgment [or order] if the party has been served with a copy of the judgment [or order] within the three-day period [after the order is entered]." N.C. R. App. P. 3(c)(1). Alternatively, if service was not made within three days, the party must file and serve a notice of appeal "within thirty days after service upon the party of a copy of the judgment." N.C. R. App. P. 3(c)(2). Effective service of a court document must include a certificate of service showing "the date and method of service or the date of acceptance of service and shall show the name and service address of each person upon

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2. On 12 November 2020, Ace amended its counterclaims to assert three additional counterclaims. Following the hearing on justiciability, the trial court dismissed each additional counterclaim. Ace does not appeal the dismissal of these three counterclaims.

On 11 February 2021, Ace filed a motion for entry of default judgment against the Secretary. The trial court entered default judgment against the Secretary, but, following a hearing on the matter, allowed the Secretary's motion to set aside default.

whom the paper has been served." N.C. R. Civ. P. 5(b1). In the absence of properly effected service, the thirty-day period within which the party must file its appeal begins to run from the date the party obtained actual notice of the order. *Brown v. Swarn*, 257 N.C. App. 417, 421, 810 S.E.2d 237, 239 (2018) ("[W]here evidence in the record shows that the appellant received actual notice of the [order] more than thirty days before noticing the appeal, the appeal is not timely.").

¶ 17 Here, the record shows that the trial court entered the Denial Order on either 15 or 19 January 2021. The file stamp on the Denial Order is unclear and difficult to read. The record includes a certificate of service for the Denial Order filed on 15 January 2021. However, the trial court determined during the hearing to set aside entry of default against the Secretary that the package mailed to the Secretary containing the Denial Order did not include a copy of the certificate of service. The record does not indicate that the Secretary ever received the certificate of service for the Denial Order. Without a certificate of service, the Secretary never received effective service initiating the thirty-day period to file notice of appeal. Instead, the Secretary received actual notice of the Denial Order when he received the mailed package. Therefore, the thirty-day period to file notice of appeal from the Denial Order was tolled until February 4, only thirteen days before the Secretary filed a timely notice of appeal. This Court has jurisdiction over the Secretary's appeal.

¶ 18 The Secretary moved to dismiss Ace's claims under Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing the basis of sovereign immunity for each. The trial court denied the Secretary's motion in full. Nonetheless, the Secretary's arguments on appeal contend only that Ace failed to adequately plead its constitutional claims. We will therefore consider only whether Ace has properly pled claims for relief under Rule 12(b)(6). N.C. R. Civ. P. 12(b)(6) (allowing a party to defend a claim by contending the claimant "[f]ail[ed] to state a claim upon which relief can be granted").

¶ 19 An appeal from the denial of a motion to dismiss is interlocutory, and ordinarily not ripe for immediate appellate review unless the appeal affects a substantial right. *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). "This Court has consistently held that the denial of a [Rule 12(b)(6)] motion to dismiss based upon the defense of sovereign immunity affects a substantial right and is thus immediately appealable." *Richmond Cnty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 586, 739 S.E.2d 566, 568 (2013) (citation, brackets, and

quotation marks omitted). The Secretary's appeal is properly before this Court, and Ace's motion to dismiss the Secretary's appeal is denied.[3]

B. Review of Constitutional Claims and Sovereign Immunity

¶ 20 "This Court reviews a trial court's decision to grant or deny a motion to dismiss based upon the doctrine of sovereign immunity using a de novo standard of review." *State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 2021-NCSC-163, ¶ 23. "When reviewing a [Rule 12(b)(6)] motion to dismiss, an appellate court considers whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Deminski on behalf of C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 2021-NCSC-58, ¶ 12. (citations and quotation marks omitted). North Carolina's rules of pleading require that a complaint "state enough to give the substantive elements of a *legally recognized claim*." *New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 2022-NCSC-9, ¶ 32.

¶ 21 "As a general rule, the doctrine of governmental, or sovereign[,] immunity bars actions against . . . the state, its counties, and its public officials sued in their official capacity." *Bunch v. Britton*, 253 N.C. App. 659, 666, 802 S.E.2d 462, 469 (2017) (citation omitted). However, our Courts have "held that the doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights of our Constitution." *Id.* (summarizing the North Carolina Supreme Court's holding in *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 786, 413 S.E.2d 276, 292 (1992). "[W]hen there is a clash between . . . constitutional rights and sovereign immunity, the constitutional rights must prevail." *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 786, 413 S.E.2d 276, 292 (1992).

> [T]his Court has long held that when public officials invade or threaten to invade the personal or property rights of a citizen in disregard of law, they are not relieved from responsibility by the doctrine of sovereign immunity even though they act or assume to act under the authority and pursuant to the directions of the State.

Id.

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3. The Secretary also filed a petition for writ of certiorari in the event that his appeal was deemed untimely. We dismiss the Secretary's petition as moot.

C. Fruits of Their Labor Clause

¶ 22 **[2]** Ace's first constitutional claim alleges infringement of its "inalienable right to earn a living" under Article I, sections 1 and 19 of the North Carolina Constitution. Article I states:

> Section 1. The equality and rights of persons.
>
> We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, *the enjoyment of the fruits of their own labor*, and the pursuit of happiness.
>
> . . .
>
> Sec. 19. Law of the land; equal protection of the laws.
>
> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. Const. art. 1, §§ 1, 19 (emphasis added). The right to "enjoyment of the fruits of their own labor" joined the enumeration of each North Carolina citizen's inalienable rights as part of revisions to the Constitution in 1868. *See* N.C. Const. of 1868. The drafters believed that, in the wake of slavery, no man could truly be free in this state without the right to both liberty and to reap the benefits of what he sowed. *See* Albion W. Tourgée, An Appeal to Caesar 244 (1884). North Carolinians have long valued and recognized the dignity of work.

¶ 23 With this in mind, the addition of a right to the fruits of one's labor to the North Carolina Constitution sought to increase the floor of protections granted by similar provisions in the United States federal constitution. U.S. Const. amend. XIV, § 1 (protecting citizens' rights to "life, liberty, or property" with due process of law). Since then, our courts have construed North Carolina citizens' right to the "fruits of their labor" to be synonymous with their "right to earn a living" in whatever occupation they desired. *See State v. Harris*, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1940) ("[T]he power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in

it"). "The right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare." *Roller v. Allen*, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957). " 'The right to conduct a lawful business or to earn a livelihood is regarded as fundamental.' " *Id.*, 245 N.C. at 518–19, 96 S.E.2d at 584 (citation omitted). "Arbitrary interference with private business and unnecessary restrictions upon lawful occupations are not within the police powers of the State." *State v. Warren*, 252 N.C. 690, 693, 114 S.E.2d 660, 663–64 (1960).

¶ 24 To effectively plead government intrusion on a constitutional right, the claimant's pleadings must show: (1) a state actor violated the claimant individual's constitutional rights; (2) the claim alleged substantively presents a "colorable" constitutional claim; and (3) no adequate state remedy exists apart from a direct claim under the Constitution. *Deminski*, 2021-NCSC-58, ¶¶ 15–18.

¶ 25 Here, Ace's first claim alleged:

> 124. This counterclaim is brought against the [Secretary] in [his] official capacity as [he] was acting at all time relevant hereto as the Secretary of the North Carolina Department of Health and Human Services.
>
> 125. The [Abatement Order] is based on a violation of the Mass Gathering limits imposed by [Order 141] which required [Ace] to cease operating.
>
> 126. [Order 141 and the Abatement Order] deprive [Ace] of [its] inalienable right to earn a living as guaranteed by Art. I, sec. 1 and 19, of the North Carolina Constitution.
>
> . . .
>
> 129. [Order 141] and the [Secretary's Abatement Order] based on [Order 141] are unconstitutional as applied to [Ace] as neither the [Secretary] nor the Governor of the State possess the authority to deprive [Ace] of [its] right to pursue an ordinary vocation and earn a living.
>
> 130. The [Secretary] does not have sovereign immunity as this counterclaim is brought directly

> under the Declaration of Rights of the North Carolina Constitution.
>
> 131. [Ace does] not have an adequate state remedy, and therefore, there is a direct cause of action against the [Secretary] for the violation of [Ace's] rights as guaranteed by Art. I, sec. 1 and 19, of the North Carolina Constitution.

¶ 26 Ace pled that its rights were violated by the Secretary in his official capacity as a state actor. Ace also pled its lack of an alternative, adequate state remedy through which it could seek relief. We agree that Ace has no other avenue to seek relief for the Secretary's allegedly improper enforcement apart from a direct action under the Constitution.

¶ 27 Ace has also pled a colorable, though admittedly novel, claim for government intrusion on its right to earn a living. It is well-established that the fruits of their labor clause applies when our government, most often the legislature, enacts a scheme of legislation or regulation that purports to protect the public from undesirable actors within occupations. *See Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 65, 366 S.E.2d 697, 699 (1988) (concerning legislation regarding manufacture of goods for military use); *Warren*, 252 N.C. at 695, 114 S.E.2d at 665 (1960) (concerning licensure legislation for real estate brokers); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949) (concerning legislation creating licensure requirements for photographers). Likewise, our courts have more recently held that the clause also applies when a government employer denies a state employee due process with respect to the terms and procedures of his or her employment. *See Mole' v. City of Durham*, 279 N.C. App. 583, 2021-NCCOA-527, ¶ 29, *disc. rev. granted*, *Mole' v. City of Durham*, 868 S.E.2d 851 (N.C. 2022); *Tully v. City of Wilmington*, 370 N.C. 527, 535–36, 810 S.E.2d 208, 215 (2018) ("Article I, Section 1 also applies when a governmental entity acts in an arbitrary and capricious manner toward one of its employees by failing to abide by promotional procedures that the employer itself put in place."). It naturally follows that actions taken by other non-legislative state actors, whether elected officials or unelected bureaucrats, may run afoul of a citizen's right to the fruits of his own labor when they arbitrarily interfere with occupations, professions, or the operation of business.

¶ 28 The core principle behind the fruits of their labor clause is that government " 'may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.' " *Cheek v. City of*

Charlotte, 273 N.C. 293, 296, 160 S.E.2d 18, 21 (1968) (quoting *Lawton v. Stell*, 152 U.S. 133, 137 (1894)). The present case involves enforcement action taken under the authority of an executive order issued by the Governor, rather than laws promulgated by the legislature. The intended purpose of the Governor's order was not to regulate a particular occupation or business enterprise, but the direct and intended purpose of the Abatement Order was to cease the operation of a business. It cannot be denied that the scope and breadth of the Abatement Order restricted or otherwise interfered with the lawful operation of a business serving the public.

¶ 29 The Secretary argues that Ace's first claim should be decided at the 12(b)(6) stage as a matter of law. To this end, the Secretary contends that this Court may take judicial notice of factual data surrounding the COVID-19 pandemic at the time the Abatement Order was issued, which will unequivocally support the Secretary's decisions. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 182, 594 S.E.2d 1, 16 (2004) (stating this Court may consider all matters before the state actor as well as matters of which it may take judicial notice when reviewing constitutionality). We disagree. Ace pled that the Abatement Order was the foundational authorization to force Ace to cease operating its racetrack and that the was Order unconstitutional as applied to Ace. An examination of the facts surrounding the COVID-19 pandemic at a later stage of trial may show that Ace's precautionary measures to manage contact tracing of its attendees; install plexiglass, touchless thermometers, six-feet distance markers, and screening booths; and to initiate vigilant cleaning procedures—all in consult with local health officials—were sufficient to combat the spread of COVID-19 within an open-air racetrack in Alamance County. Presuming these facts in favor of Ace as the non-movant, the reasonableness of an "imminent hazard" as justification for the Secretary's actions can be questioned. We hold that Ace adequately pled that the Secretary, through his Abatement Order, deprived Ace of its constitutional right to the fruits of one's own labor and, therefore, sovereign immunity cannot bar Ace's claim. *Deminski*, 2021-NCSC-58, ¶ 21.

D. Selective Enforcement

¶ 30 **[3]** Ace's second constitutional claim alleges that the Secretary's Abatement Order, levied against Ace and no other speedways, ran afoul of Article 1, section 19's decree that "[n]o person shall be denied the equal protection of the laws[.]" N.C. Const. art. 1, § 19. Through its second claim, Ace once again sufficiently pleads a constitutional challenge to the Secretary's method of enforcing Order 141.

¶ 31 Selective enforcement of the law by the State is barred by an individual's right to equal protection when enforcement is based upon an arbitrary classification. *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995) (citations omitted). "Such arbitrary classifications include prosecution due to a defendant's decision to exercise his statutory or constitutional rights." *Id.* (citing *United States v. Goodwin*, 457 U.S. 368, ___ (1982)); *Roller*, 245 N.C. at 518, 96 S.E.2d at 854 (stating right to earn a living is a constitutional right). Our Supreme Court has set out the two-part test for selective enforcement as (1) a singling out of the defendant for (2) discriminatory, invidious reasons:

> The generally recognized two-part test to show discriminatory selective prosecution is (1) the defendant must make a *prima facie* showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not; (2) upon satisfying (1) above, 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. Howard, 78 N.C. App. 262, 266–67, 337 S.E.2d 598, 601–02 (1985) (citations omitted). "Mere laxity in enforcement does not satisfy the elements of a claim of selective or discriminatory enforcement in violation of the equal protection clause." *Grace Baptist Church of Oxford v. City of Oxford*, 320 N.C. 439, 445, 358 S.E.2d 372, 376 (1987). Rather, the claimant must show that a state actor applied the law with "a pattern of conscious discrimination" evidencing administration "with an evil eye and an unequal hand." *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886)) (some citations omitted).

¶ 32 Ace's claim alleged:

> 136. Many speedways in addition to ACE Speedway have been conducting races with fans in attendance without any enforcement action by the [Secretary].
>
> 137. [Ace was] singled out by the Governor for enforcement after comments . . . made by Defendant Robert Turner[] were made public.
>
> 138. The Governor took the unusual step of having a letter sent to the Sheriff of Alamance County directing him to take action against [Ace].

> 139. [Ace is] informed and believe that no other [s]peedway has been the subject of an Order of Abatement of Imminent Hazard by the [Secretary].
>
> 140. [Ace is] informed and believe[s] that the [Abatement Order] was issued by the [Secretary] . . . due to the statements of Defendant Robert Turner and not because a true Imminent Hazard exists.
>
> 141. The issuance of the [Abatement Order] violates the equal protection rights of [Ace] as guaranteed by Article I, Section 19 of the North Carolina Constitution.
>
> 142. The [Secretary] does not have sovereign immunity as this counterclaim is brought directly under the Declaration of Rights of the North Carolina Constitution.
>
> 143. [Ace does] not have an adequate state remedy, and therefore, there is a direct cause of action against the [Secretary] for the violation of [Ace's] rights as guaranteed by Art. I, sec. 19, of the North Carolina Constitution.

¶ 33 Ace once again pleads that its rights were violated by the Secretary in his official capacity as a state actor, and that it has no avenue for redress other than an action under the Constitution.

¶ 34 With respect to whether Ace's substantive claim is colorable, the Secretary argues that Ace failed to plead both (1) that it was "singled out" for prosecution while "similarly situated" to other raceways, and (2) that the Secretary acted invidiously in "bad faith." The Secretary's argument places special emphasis on Ace's failure to track specific language in pleading its claim. We have held that a party need not use magic words to plead the substantive elements of its claim. *See Feltman v. City of Wilson*, 238 N.C. App. 246, 253–54, 767 S.E.2d 615, 621 (2014); *see also State v. Dale*, 245 N.C. App. 497, 504, 783 S.E.2d 222, 227 (2016) ("This notice pleading has replaced the use of 'magic words' and allows for a less exacting standard, so long as the defendant is properly advised of the charge against him or her."). A pleading is sufficient "if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may

need to prepare for trial." *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970) ("Under the 'notice theory' of pleading contemplated by [N.C. R. Civ P.] 8(a)(1), detailed fact-pleading is no longer required.").

¶ 35 The Secretary's argument fails. Ace pled "enough to give the substantive elements of a *legally recognized claim*" for selective enforcement. *See Stein*, 2022-NCSC-9, ¶ 32. Ace effectively pled that it was among a class of "many speedways" that similarly conducted races with fans in attendance during the period where such actions were banned by Order 141. Ace further pled that Governor Cooper and the Secretary "singled out" Ace for enforcement by directing the Sheriff to take action against Ace and, when that failed, by issuing the Abatement Order against Ace alone. Finally, Ace's complaint pled its belief that it was singled out for enforcement in response to Defendant Turner's statements to the press "and not because a true Imminent Hazard exist[ed,]" as the Secretary asserted in the Abatement Order. These pleadings, taken as true, sufficiently allege bad faith enforcement of Order 141 against Ace alone.

¶ 36 The Secretary contends that Ace's pled discriminatory reason for his enforcement of Order 141—retaliation for statements made to the press critiquing Order 141—is insufficient to plead selective enforcement. The Secretary cites *State v. Davis*, 96 N.C. App. 545, 550, 386 S.E.2d 743, 745 (1989), for support. In *Davis*, following his conviction for tax-related offenses, the defendant argued on appeal that he was selectively prosecuted based upon "invidious discrimination" because he belonged to a political group that routinely and openly protested personal income tax laws. *Id.* at 548–49, 386 S.E.2d at 744. This Court ruled that the defendant's evidence at trial failed to show more than a tenuous relationship between his association with the anti-tax political group and the State's decision to prosecute him instead of any number of other citizens who failed to file their tax returns. Therefore, the defendant could not show he was "singled out" for prosecution. *Id.* at 549, 386 S.E.2d at 744–45.

¶ 37 Further, and most relevant to the present case, the Court held that the defendant presented "a feckless argument that the statutes he was charged under [were] unconstitutional as applied to him because selection for his prosecution was impermissibly based on an attempt to suppress his first amendment right of free speech." *Id.* at 549, 386 S.E.2d at 745. Even assuming that the defendant was singled out for his vocal protest of income taxes, the Court found no invidiousness or bad faith because "such prosecutions, predicated in part upon a potential deterrent effect, serve a legitimate interest in promoting more general tax compliance." *Id.* at 550, 386 S.E.2d at 745.

¶ 38 The facts of *Davis* are similar to the facts of the present case. Ace pleads that it was selected for enforcement by the Secretary because its owner was outspokenly critical of Order 141. The Secretary asserts that Ace must fail for the same reason the defendant's argument failed in *Davis*: regardless of possible alternative reasons for enforcement, singling out outspoken individuals has a strong deterrent effect upon those who are similarly situated and choose similar courses of action.

¶ 39 The present case must be distinguished from *Davis* based upon the relevant stage of the proceedings. The Court in *Davis* reached its holding following appellate review of evidence admitted during a full trial, and after determining that any effort to reduce the defendant's speech was, at most, an equal and alternative purpose to deterrence of criminal conduct. Here, we are tasked only with determining whether Ace has sufficiently pled the substantive elements of its claim. Ace has pled that the Secretary acted based solely upon an effort to silence its opposition to Order 141, and not based upon any alternative, legitimate state interest. The resolution of this question is not before us at this time. Ace has sufficiently pled that the Secretary singled its racetrack out for enforcement in bad faith for the invidious purpose of silencing its lawful expression of discontent with the Governor's actions. Therefore, sovereign immunity cannot bar Ace's claim.

III. Conclusion

¶ 40 We hold that Ace pled colorable claims for infringement of its right to earn a living and for selective enforcement of the Governor's orders sufficient to survive the Secretary's motion to dismiss.

AFFIRMED.

Judges CARPENTER and GORE concur.

STATE v. JOYNER

[284 N.C. App. 681, 2022-NCCOA-525]

STATE OF NORTH CAROLINA
v.
RANDALL LEE JOYNER

No. COA21-83

Filed 2 August 2022

1. Constitutional Law—Confrontation Clause—criminal trial—unavailable witness' testimony from prior civil hearing—implicit waiver

In a prosecution for obtaining property by false pretenses and exploitation of an elderly person while in a business relationship, where an elderly woman (who died before defendant's criminal trial) had previously obtained a civil no-contact order against defendant after he charged her thousands of dollars for home repair work he never performed, the trial court did not violate defendant's right to confront his accuser under the Confrontation Clause by admitting the woman's testimony from the hearing on the no-contact order, along with the order itself. Defendant had a meaningful opportunity to cross-examine the woman at the civil hearing on the same facts and issues raised in his criminal trial, but because he implicitly waived that opportunity by choosing not to appear at the hearing, he could not now allege a confrontation rights violation.

2. Evidence—hearsay—criminal trial—unavailable witness' testimony from prior civil hearing—Rule 804(b)(1)

In a prosecution for obtaining property by false pretenses and exploitation of an elderly person while in a business relationship, where an elderly woman had previously obtained a civil no-contact order against defendant after he charged her thousands of dollars for home repair work he never performed, the trial court properly admitted the woman's testimony from the hearing on the no-contact order under the hearsay exception described in Evidence Rule 804(b)(1). The woman died before defendant's trial, and was therefore "unavailable" for purposes of Rule 804(b)(1); further, her testimony was admissible under the Rule where the no-contact hearing dealt with the same facts and issues raised in defendant's criminal trial, meaning that defendant had an "opportunity and similar motive" to develop her testimony at that hearing by direct, cross, or redirect examination.

3. Evidence—admissibility—civil no-contact order—criminal trial involving similar issues—plain error analysis

In a prosecution for obtaining property by false pretenses and exploitation of an elderly person while in a business relationship, where an elderly woman had previously obtained a civil no-contact order against defendant after he charged her thousands of dollars for home repair work he never performed, the trial court did not commit plain error when it admitted the no-contact order into evidence. The court did not violate N.C.G.S. § 1-149 by admitting the order because the State had offered it to show that the issues raised in the no-contact hearing and defendant's criminal trial were the same rather than to prove any fact alleged in the order. Further, even if the court had erred, the State provided ample evidence that defendant committed the charged crimes, and therefore the order's admission did not have a probable impact on the jury's verdict.

4. Evidence—civil no-contact order—criminal trial on similar issues—no due process violation

In a prosecution for obtaining property by false pretenses and exploitation of an elderly person while in a business relationship, where an elderly woman had previously obtained a civil no-contact order against defendant after he charged her thousands of dollars for home repair work he never performed, the trial court did not violate defendant's due process rights by admitting the no-contact order into evidence, including language in the order stating that the woman "suffered unlawful conduct by the [d]efendant." The order was properly admitted to show that the issues raised in the no-contact hearing and defendant's criminal trial were the same; further, defendant had the opportunity to object to the order's admission at trial, did object, and was overruled.

5. Discovery—criminal case—motion to inspect, examine, and photograph crime scene—no due process rights violation

In a prosecution for obtaining property by false pretenses and exploitation of an elderly person while in a business relationship, where defendant performed minor home repair work for an elderly woman, lied to her about nonexistent damage to her home, and then charged her thousands of dollars for extra repair work he never performed, the trial court did not violate defendant's federal due process rights by denying his motion to inspect, examine, and photograph the crime scene (the woman's home). First, there is no general constitutional right to discovery in a criminal case. Second, although the North Carolina Supreme Court previously held that a

criminal defendant seeking exculpatory evidence had a due process right to inspect a crime scene, defendant's case was distinguishable in that he had first-hand knowledge of the woman's house and the work he performed there, meaning that he did not need to examine the house to find exculpatory evidence.

Appeal by Defendant from judgments entered 5 February 2020 by Judge Leonard L. Wiggins in Edgecombe County Superior Court. Heard in the Court of Appeals 30 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Llogan R. Walters, for the State.

Jason Christopher Yoder, for the Defendant.

WOOD, Judge.

¶ 1 Randall Joyner ("Defendant") appeals from judgments for conviction of obtaining property by false pretenses and exploitation of a disabled or elderly person while in a business relationship. On appeal, Defendant argues the trial court erred 1) by admitting Margaret Meeks's ("Meeks") former testimony and a no-contact order into evidence and 2) by denying his motion to allow him to inspect, examine, and photograph the crime scene. After a careful review of the record and applicable law, we discern no error.

I. Factual and Procedural Background

¶ 2 On November 10, 2018, Defendant approached Meeks at her home and offered to perform home improvement work. At the time, Meeks was 88 years of age and lived alone. Meeks agreed and hired Defendant to do some painting and to clean out the gutters at her home. Defendant began work the same day. Defendant said he saw "something laying in the gutter" which appeared to be rotten wood. Defendant took pictures and showed both the pictures and the "rotten wood" to Meeks, explaining to her that she needed to have her roof repaired. After seeing the photos and rotten wood, Meeks hired Defendant to repair her roof.

¶ 3 That same day, Defendant presented Meeks with a "Contractors Invoice" itemizing the needed roof work, totaling $1,500.00. The "Description of Work Performed" section of the invoice, stated, in relevant parts:

[1.] Remove shingles on left front of home.

> [2.] Remove drip edge on left front of home.
>
> [3.] Remove rotten sheeting on left front of home.
>
> [4.] Remove shingles in valley on left front of home.
>
> . . .
>
> [5.] Install new shingles where removed.
>
> [6.] Install new sheeting where removed.

Meeks paid $750.00 upfront towards the invoice.

¶ 4 After Defendant had finished working on her roof, Meeks contacted Defendant again, requesting him to return to her home to fix an issue with her toilet. Upon arrival, Defendant inspected Meeks's toilet. He concluded the toilet was broken and was causing water damage underneath her house. At the time, Defendant did not have a plumber's license. On November 13, 2018, Defendant presented a second invoice to Meeks for the proposed work on her bathroom in the amount of $2,200.00. Under its "Description of Work Performed" section, Defendant represented that he would:

> [1.] Remove installation where needed under bathroom.
>
> [2.] Disconnect and remove leaking plumbing pipe.
>
> [3.] Cut and install plywood subfloor under bathroom where needed.
>
> . . .
>
> [5.] Install new sewer line where removed.
>
> [6.] Install new installation under bathroom[.]

Meeks paid the full amount of the second invoice to Defendant up front, and he left Meeks's home to obtain construction materials for the second project.

¶ 5 Officer D.L. Bailey of the Tarboro Police Department ("Officer Bailey") was monitoring traffic that afternoon in the vicinity of Meeks's home. Officer Bailey recognized and performed a routine license plate check on Defendant's vehicle. Officer Bailey concluded Defendant "wasn't operating on an active license" and initiated a traffic stop. During the traffic stop, Defendant explained he was doing repair work in the area, at the end of Brandon Avenue. Officer Bailey did not have any knowledge about who specifically lived in the area of Brandon

Avenue but was aware it was "predominantly an elderly neighborhood." After Officer Bailey finished Defendant's traffic stop, he looked into Defendant's criminal history and discovered Defendant had previous charges for obtaining property by false pretenses, defrauding the elderly, and breaking and entering.

¶ 6 Because of Defendant's criminal history and his statement to Officer Bailey that he was working on repairs to a house at the end of Brandon Avenue, Officer Bailey decided to visit the house and inquire about the work Defendant was performing. During his inquiry, Meeks told Officer Bailey that Defendant had been performing roof and flooring work for her. Meeks also stated she was "not really able to tell what's going on . . . [and] just paid the bills."

¶ 7 After speaking with Meeks, Officer Bailey contacted the town's building inspector Alan Davis ("Davis"), to get a professional opinion about whether Defendant had performed the work as represented to Meeks. That same day, Davis came to Meeks's house and inspected underneath her house. Davis did not discover "any rot on the structural [area of the house or], the floor joist[,] . . . [and] did not see anything wrong with the water lines, the supply or drain waste." Furthermore, Davis flushed Meeks's toilet and "didn't see any water leaking . . . or anything . . . that would suggest a water leak." Defendant returned to Meeks's house during Officer Bailey's investigation and was taken into custody.

¶ 8 After Defendant was taken into custody, Meeks asked Wayne Scott, later qualified by the trial court as an expert in roofing repair and insulation, to inspect the roof of her house. Scott reported that he did not see any evidence new shingles had been installed, rotten wood had been removed, or any work had been done to prevent damage. Although Scott did observe minimal work had been performed on Meeks's roof, he estimated the value of the work to be $300.00.

¶ 9 On November 16, 2018, Defendant's mother went to Meeks's home, presented a pre-drafted affidavit, and had Meeks sign it. This pre-drafted affidavit stated:

> This statement is in reference to the work I hired Mr. Randall L. Joyner to do. Mr. Joyner cleaned my gutters. Mr. Joyner kindly informed me of some rotten wood that he noticed on my roof. Mr. Joyner showed me the rotten wood that he was referring to. I asked Mr. Joyner to fix it. Mr. Joyner and I agreed on a price. I saw the rotten wood that Mr. Joyner removed

> and I saw the new wood he replaced along with my shingles.

The pre-drafted affidavit Defendant's mother presented to Meeks misspelled her name as "Weeks." The pre-drafted affidavit was subsequently notarized.

¶ 10 On January 14, 2019, Defendant was indicted for obtaining property by false pretenses and exploitation of an older adult or disabled adult while in a business relationship. Afterwards, Meeks filed an action for a civil no-contact order against Defendant. Defendant was properly served with a complaint for and a notice of the hearing for the civil no-contact order but chose not to appear. Defendant's attorney noted that Defendant "didn't really care" that the court had conducted the no-contact order hearing in Defendant's absence. On March 11, 2019, the district court entered a civil no-contact order against Defendant, prohibiting him from communicating with Meeks. On September 16 and September 23, 2020, Defendant filed motions with the trial court seeking permission to inspect Meeks's property. The trial court denied Defendant's motions on October 1, 2019. Seven days later, on October 8, 2019, Meeks passed away. Thereafter, the trial court entered an order permitting Meeks's testimony from the hearing for the civil no-contact order to be admitted at Defendant's criminal trial.

¶ 11 Defendant's criminal trial was held February 3 to February 5, 2020. The jury found Defendant guilty of obtaining property by false pretenses and exploitation of an older adult by a person in a business relationship. The trial court imposed an active sentence of 15 to 27 months for the offense of obtaining property by false pretenses and 15 to 27 months for exploitation of an older adult by a person in a business relationship upon Defendant to be served consecutively. Defendant gave notice of appeal in open court.

II. Discussion

¶ 12 Defendant raises multiple issues on appeal; each will be addressed in turn.

A. Confrontation Clause

¶ 13 **[1]** Defendant first argues the trial court erred by admitting Meeks's former testimony from the civil court hearing on the no-contact order and the no-contact order because it violated his constitutional right to cross-examine and confront his accuser. We disagree.

¶ 14 We review an alleged violation of a defendant's constitutional right to confrontation *de novo*. *State v. Glenn*, 220 N.C. App. 23, 25, 725 S.E.2d

58, 60–61 (2012); *see State v. Hurt*, 208 N.C. App. 1, 6, 702 S.E.2d 82, 87 (2010). "Under a *de novo* review, the Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 92, 614 S.E.2d 351, 353 (2005) (internal brackets omitted) (citing *In re Greens of Pine Glen*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

¶ 15 The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *see Pointer v. Texas*, 380 U.S. 400, 405, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923, 927 (1965) ("[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."). Courts have generally acknowledged "an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant." *Barber v. Page*, 390 U.S. 719, 722, 88 S. Ct. 1318, 1320, 20 L. Ed. 2d 255, 258 (1968); *see Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369, 158 L. Ed. 2d 177, 197 (2004) ("Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."); *State v. Graham*, 303 N.C. 521, 523, 279 S.E.2d 588, 590 (1981); *State v. Tate*, 187 N.C. App. 593, 600, 653 S.E.2d 892, 897 (2007).

¶ 16 When determining if prior testimony is admissible as an exception to the Confrontation Clause, we look to see "(1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (2004) (citation omitted); *see State v. Brigman*, 171 N.C. App. 305, 309, 615 S.E.2d 21, 23 (2005).

¶ 17 Defendant does not dispute Meeks's prior testimony "was testimonial in nature" or that the "the declarant was unavailable." *Clark*, 165 N.C. App. at 283, 598 S.E.2d at 217. Instead, he simply argues he did not have a meaningful opportunity to cross-examine Meeks because the only issue presented at the no-contact hearing was whether Defendant had been stalking Meeks, not the criminal charges at issue in this case. We disagree with Defendant's argument.

¶ 18 In examining the third prong of the *Clark* test, we note the "main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Davis v. Alaska*, 415 U.S. 308,

315–16, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347, 353 (1974) (emphasis omitted); *accord State v. Jones*, 89 N.C. App. 584, 587, 367 S.E.2d 139, 142 (1988), *overruled in part on other grounds by State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000). In *State v. Ross*, we addressed whether the defendant had a meaningful opportunity to cross-examine a witness at a probable cause hearing when the various charges against the defendant had yet to be joined. *State v. Ross*, 216 N.C. App. 337, 345, 720 S.E.2d 403, 408 (2011). We held the trial court did not err by admitting the witness's testimony because the charges addressed at the probable cause hearing were the same as those on which the jury ultimately found the defendant guilty. *Id.* at 345–46, 720 S.E.2d at 409. In other words, the defendant's "motive to cross-examine" the witness at the probable cause hearing was the "same as his motive at trial." *Id.* at 345, 720 S.E.2d at 409.

¶ 19 Therefore, when the trial court provides a defendant with the opportunity to cross-examine a witness, and the defendant in turn waives this opportunity, he may not later argue his right to confrontation has been violated. *See Brookhart v. Janis*, 384 U.S. 1, 4, 86 S. Ct. 1245, 1247, 16 L. Ed. 2d 314, 317 (1966); *State v. Moore*, 275 N.C. 198, 209, 166 S.E.2d 652, 660 (1969); *State v. Harris*, 181 N.C. 600, 605, 107 S.E. 466, 468 (1921). For a waiver of one's right to confrontation to be effective, it "must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.' " *Brookhart*, 384 U.S. at 4, 86 S. Ct. at 1247, 16 L. Ed. 2d at 317 (quotation omitted). A defendant may waive his right to confrontation expressly or may waive his right implicitly by conduct.

¶ 20 Justice Alito's concurrence in the recent case of *Hemphill v. New York* provides several examples of ways in which a defendant can impliedly waive his right to confrontation. A defendant may impliedly waive his right when he "engages in a course of conduct that is incompatible with a demand to confront adverse witnesses" such as by being "disorderly, disruptive, and disrespectful of the court." *Hemphill v. New York*, 142 S. Ct. 681, 694, 211 L. Ed. 2d 534, 549 (2022) (Alito, J., concurring) (quoting *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 1060, 25 L. Ed. 2d 353, 359 (1970)). A defendant may impliedly waive his right when he "fail[s] to object to the offending evidence." *Id.* (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314, n. 3, 129 S. Ct. 2527, 2534, 174 L. Ed. 2d 314, 323 (2009)); *see also State v. Calhoun*, 189 N.C. App. 166, 168, 657 S.E.2d 424, 426 (2008). Further, a defendant may impliedly waive his right when he introduces incomplete evidence that opposing counsel may further develop under the evidentiary rule of completeness regardless of the evidence's testimonial nature. *Hemphill*, 142 S. Ct. at 695, 211 L. Ed. 2d at 549. In any of these examples, the defendant would not need

to make an explicit waiver of his rights. Instead, "the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." *Id.* at 694, 211 L. Ed. 2d at 549 (quoting *Berghuis v. Thompkins*, 560 U.S. 370, 385, 130 S. Ct. 2250, 2262, 176 L. Ed. 2d 1098, 1113 (2010)).

¶ 21 The same is true when a defendant chooses not to cross-examine a witness. It is important to remember that the *Crawford* test may be met by merely providing the defendant an *opportunity* to cross-examine the accusing witness. *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 294, 88 L. Ed. 2d 15, 19 (1985). To hold otherwise, "defendants could require exclusion of prior [testimonial] statements . . . by refusing to cross-examine" witnesses who would not later be available. Christopher B. Mueller, *Cross-Examination Earlier or Later: When is it Enough to Satisfy Crawford?*, 19 Regent U. L. Rev., 319, 334 (2007). A defendant may have a legitimate, tactical reason for not wanting to cross-examine a witness or not attending a hearing. Yet, even then, if a defendant chooses not to cross-examine a witness but has been provided an opportunity to do so, the defendant's right to confront his accuser is preserved, and *Crawford* is not transgressed. *See generally* Kenneth H. Hanson, *Waiver of Constitutional Right of Confrontation*, 39 J. Crim. L. & Criminology, 55, 57 (1948) ("Since the accused was afforded but failed to take advantage of an opportunity to meet the witnesses who testified against him, he had waived his constitutional privilege.").

¶ 22 Here, Defendant was properly served with notice of the hearing on the civil no-contact order but did not "care" to appear at the hearing. The no-contact order demonstrates that the same issues presented at the hearing were the issues subsequently presented at Defendant's criminal trial. These are the same issues and facts from which the jury ultimately found Defendant guilty of obtaining property by false pretenses and exploitation of an elderly person while in a business relationship in his criminal trial. As such, Defendant's "motive to cross-examine" Meeks at the no-contact hearing "would have been the same as his motive at trial." *Ross*, 216 N.C. App. at 345, 720 S.E.2d at 409. Thus, Defendant was provided with a meaningful opportunity to cross-examine Meeks at the hearing on the civil no contact order. He chose not to cross-examine Meeks when he did not attend the hearing. He may not now allege a violation of his right to confrontation. He has impliedly waived that right. Therefore, we adopt the reasoning of Justice Alito in *Hemphill* and hold the trial court did not violate Defendant's right to confrontation when it allowed Meeks's prior testimony and the no-contact order into evidence.

B. Hearsay

¶ 23 **[2]** Defendant next contends Meeks's prior statements were inadmissible hearsay under N.C. Gen. Stat. § 8C-1, Rule 804(b)(1). "This Court reviews a trial court's ruling on the admission of evidence over a party's hearsay objection *de novo*." *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015) (citing *State v. Miller*, 197 N.C. App. 78, 87, 676 S.E.2d 546, 552 (2009)); *see State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293 (2011). "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(c) (2021). Generally, hearsay is inadmissible at trial unless an exception to Rule 801(c) applies. *Hicks*, 243 N.C. App. at 639, 777 S.E.2d at 348.

¶ 24 Such a hearsay exception exists when a declarant is unavailable. N.C. Gen. Stat. § 8C-1, Rule 804 (2021). A witness is considered "unavailable" if the witness is "unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." N.C. Gen. Stat. § 8C-1, Rule 804(a)(4). An unavailable witness's former testimony is admissible when the testimony was

> given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

N. C. Gen. Stat. § 8C-1, Rule 804(b)(1).

¶ 25 In the present case, Meeks was unavailable under Rule 804(a)(4) because she died prior to Defendant's criminal trial. Concerning Rule 804(b)(1), as our analysis above indicates, the no-contact hearing dealt with the same issues and facts that were the subject of Defendant's criminal trial. Because of this, Defendant had a similar opportunity to ask Meeks questions regarding the facts and issues that were the subject of his criminal trial at the civil hearing. Thus, we conclude Defendant had "a similar motive to develop [Meeks's] testimony by direct, cross, or redirect examination" at the civil hearing on the no-contact order as he would have possessed at the criminal trial. N.C. Gen. Stat. § 8C-1, Rule 804(b)(1). Accordingly, we hold the trial court did not violate Rule 804(b)(1) by admitting Meeks's prior testimony at trial.

C. N.C. Gen. Stat § 1-149

¶ 26 **[3]** Defendant next contends the trial court's admission of the no-contact order violated N.C. Gen. Stat. § 1-149. We disagree.

¶ 27 Defendant concedes he did not object to the admission of the no-contact order under N.C. Gen. Stat. § 1-149 and therefore waived his right to appeal pursuant to N.C. Gen. Stat. § 1-149. *State v. Young* 368 N.C. 188, 209, 775 S.E.2d 291, 305 (2015) ("[W]e hold that . . . N.C.G.S. § 1-149 is not a 'mandatory' statute the violation of which is cognizable on appeal despite the absence of an objection in the trial court."). Because Defendant waived his right to appeal this argument, we must analyze his argument under the plain error standard of review. *See State v. Koke*, 264 N.C. App. 101, 107, 824 S.E.2d 887, 891 (2019) ("Where a defendant fails to preserve errors at trial, this Court reviews any alleged errors under plain error review."). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (cleaned up); *see also State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

¶ 28 In relevant parts, N.C. Gen. Stat. § 1-149 states, "No pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it." N.C. Gen. Stat. § 1-149 (2021). N.C. Gen. Stat. § 1-149 is not solely limited to the contents of a pleading. *Young*, 368 N.C. at 205, 775 S.E.2d at 302. Rather, our Supreme Court has "reviewed the admissibility of any evidence relating to civil pleadings or judgments utilizing the standard set out in N.C.G.S. § 1-149." *Id.* Thus, as a general rule, Section 1-149 "requires the exclusion of any evidence relating to the allegations and determinations made in the course of civil litigation 'as proof of a fact admitted or alleged in it.' " *Id.* at 205, 775 S.E.2d at 302 (quoting N.C. Gen. Stat. § 1-149 (2013)).

¶ 29 Notwithstanding this, a party is not completely barred from seeking to admit a civil judgment in a criminal case because "a party's decision to seek the admission of a civil judgment in a criminal case does not 'necessarily use the pleading as proof of any fact therein alleged.' " *Id.* at 208, 775 S.E.2d at 304 (quoting *State v. McNair*, 226 N.C. 462, 464, 38 S.E.2d 514, 516 (1946)). Instead, the extent to which a civil pleading is admissible at a criminal trial "hinges on the purpose for which the challenged evidence is offered." *Id.* (citation omitted). Thus, the ultimate question before a trial court is whether the civil pleading is "relevant for

some purpose other than proving the same facts found, admitted, or alleged in the civil proceeding in question." *Id.* at 207, 775 S.E.2d at 304.

¶ 30 In the present case, the trial court admitted the no-contact order at Defendant's criminal trial and permitted the witness to read the following portion aloud:

> The plaintiff has suffered unlawful conduct by the defendant in that: The defendant performed work without being hired then had plaintiff pay him with checks . . . under duress. Defendant has been charged with felonies related to the actions. Victim lives alone at the end of a street. She was born in 1930 and has difficulty hearing. The defendant has previously contacted the victim. . . . The defendant is not to be within 500 feet of . . . . The defendant is to have no communication with the victim by any means to include telephonic, social media, and third parties.

After the trial court admitted the no-contact order into evidence, the State asked questions pertaining to Meeks's prior testimony to illustrate that the issues addressed in the civil hearing on the no-contact order were similar to the issues before the trial court. *See McNair*, 226 N.C. at 464, 38 S.E.2d at 516 ("To offer an allegation in a pleading simply as evidence of its existence, or that it was made, is not necessarily to use the pleading as proof of any fact therein alleged."). Accordingly, we hold the trial court did not violate N.C. Gen. Stat. § 1-149 by admitting the no-contact order.

¶ 31 Assuming *arguendo* the admission of the no-contact order violated N.C. Gen. Stat. § 1-149, this error nonetheless does not rise to the level of plain error. Davis testified there were no issues with rot damage or the water line and there was no evidence of water leaks underneath Meeks's house. Scott inspected Meeks's roof and testified Defendant did not perform the roof work he represented to Meeks. Specifically, Scott testified he found no evidence that new shingles were installed, rotten wood was removed, or of any work being done to prevent damage. Scott concluded the value of the work Defendant had performed on Meeks's roof was $300.00, not $1,500.00 as charged by Defendant. Moreover, Defendant was not licensed to perform the plumbing work he had undertaken. He also had a prior judgment entered against him for obtaining property by false pretenses, which the trial court allowed into evidence over his objection. The trial court also received into evidence Meeks's former testimony and the body camera footage from Officer Bailey's investigation.

¶ 32 We conclude, after a careful review of the record, the admission of the no-contact order did not have a probable impact on the jury's determination of Defendant's guilt. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. The trial court did not commit plain error by admitting the no-contact order.

D. Due Process

¶ 33 **[4]** Next, Defendant argues the trial court violated his due process rights by admitting the no-contact order when it contained the phrase "[t]he plaintiff has suffered *unlawful conduct* by the [d]efendant . . . ." We are unpersuaded.

¶ 34 The Due Process Clause prohibits any state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. An individual must be afforded due process when "a State seeks to deprive [him or her] of a protected liberty or property interest." *Wake Cnty. ex rel. Carrington v. Townes*, 53 N.C. App. 649, 650, 281 S.E.2d 765, 767 (1981). "[T]he touchstone of due process is the presence of fundamental fairness in any judicial proceeding adversely affecting the interests of an individual." *Id.* at 651, 281 S.E.2d at 767. When determining whether a defendant's due process rights were violated, we apply a *de novo* standard of review. *Stetser v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 14, 598 S.E.2d 570, 579 (2004).

¶ 35 We find no evidence here tending to indicate that the admission of the no-contact order violated Defendant's due process rights. Defendant had the opportunity to object to the admission of the no-contact order, did object to its entry at trial, and subsequently was overruled. As discussed *supra*, the no-contact order was introduced to establish that the issues from the no-contact hearing mirrored those in Defendant's criminal trial. Therefore, we hold the trial court did not violate Defendant's due process rights by admitting the no-contact order.

E. Constitutional Right to Inspect and Photograph the Crime Scene

¶ 36 **[5]** Lastly, Defendant argues the trial court violated his due process rights under the Sixth and Fourteenth Amendments of the United States Constitution by denying his motion to inspect, photograph, and examine the crime scene. We disagree.

¶ 37 The United States Supreme Court has established "[t]here is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 846, 51 L. Ed. 2d. 30, 42 (1977); *accord State v. Cook*, 362 N.C. 285, 290, 661 S.E.2d 874, 877 (2008). As

such, "a state does not violate the Due Process Clause of the Federal Constitution when it fails to grant pretrial disclosure of material relevant to defense preparation but not exculpatory." *State v. Cunningham*, 108 N.C. App. 185, 195, 423 S.E.2d 802, 808 (1992) (citation omitted). In North Carolina, a defendant's right to discovery is conferred by our general statutes, and, thus, "[c]onstitutional rights are not implicated in determining whether the State complied with these discovery statutes." *Cook*, 362 N.C. at 290, 661 S.E.2d at 877.

¶ 38 Defendant only alleges his Sixth and Fourteenth Amendment rights were violated. Because Defendant did not allege a violation of any North Carolina statutes, we need not address this issue on appeal.

¶ 39 Although we are bound by federal courts' decisions regarding the Due Process Clause, *see Cunningham*, 108 N.C. App. at 195, 423 S.E.2d at 808, in *State v. Brown*, our Supreme Court held a criminal defendant has a due process right to inspect the crime scene under limited circumstances. *State v. Brown*, 306 N.C. 151, 165, 293 S.E.2d 569, 579 (1982). In *Brown*, the defendant murdered a mother and daughter. When the bodies were discovered, the police promptly secured, cordoned off, and controlled the crime scene. *Id.* at 163, 293 S.E.2d at 578. The defendant made "pre-trial discovery motions and motions . . . during trial" to "search for exculpatory evidence[,]" but the trial court denied each motion. *Id.* at 162–63, 293 S.E.2d 577–78. The defendant ultimately received the death penalty for both murders. *Id.* at 161, 293 S.E.2d at 577. On appeal, our Supreme Court held that denying the defendant an opportunity to undertake a limited inspection of the premise under police supervision was "a denial of fundamental fairness and due process." *Id.* at 163–64, 293 S.E.2d at 578. Notwithstanding, the Court emphasized, "[O]ur holding is limited to the particular facts of this case and our holding is in no way to be construed to mean that police or prosecution have any obligation to preserve a crime scene for the benefit of a defendant's inspection." *Id.* at 164, 293 S.E.2d at 578.

¶ 40 Defendant relies heavily on *Brown* in his brief. However, the facts in this case are distinguishable from those in *Brown*. Unlike the defendant in *Brown*, Defendant was convicted of obtaining property by false pretenses and exploitation of an older adult while in a business relationship. Moreover, while the defendant in *Brown* requested to search the crime scene in an attempt to find exculpatory evidence, Defendant did the repair work in question here himself. Consequently, Defendant had first-hand knowledge of the work he performed on Meeks's house and did not need to examine the house in order to find exculpatory evidence. Because of these factors and because our Supreme Court clearly stated

the holding in *Brown* "is limited to the particular facts" of that case, we decline to extend the holding in *Brown* to this case. *Id.* Defendant did not have a constitutional right to examine Meeks's house. Thus, we hold the trial court did not err by denying Defendant's motion to inspect, examine, and photograph the house.

III. Conclusion

¶ 41 For the foregoing reasons, we hold the trial court did not err by admitting Meeks's former testimony, admitting the no-contact order, or denying Defendant's motion to inspect, examine, and photograph Meeks's house. We hold defendant received a fair trial, free from error.

NO ERROR.

Judges DIETZ and MURPHY concur.

STATE OF NORTH CAROLINA
v.
WILLIAM McDOUGALD

No. COA21-286

Filed 2 August 2022

1. Sentencing—violent habitual felon status—mandatory life without parole—predicate juvenile-age conviction—effective assistance of counsel

Where defendant received a mandatory sentence of life without parole (LWOP) for attaining violent habitual felon status—based on prior convictions that included a kidnapping he committed when he was sixteen years old—and sixteen years later filed a motion for appropriate relief, the trial court did not err by determining that defendant had received effective assistance of counsel. Defendant failed to overcome the strong presumption that his trial counsel's performance was reasonable, and evidence showed that counsel met with him months before trial to discuss the State's plea offer and that defendant understood at the time of trial that he was facing LWOP. Further, even assuming counsel's performance was deficient, there was no prejudice because no evidence suggested that defendant would have accepted the plea deal.

2. Sentencing—violent habitual felon status—mandatory life without parole—predicate juvenile-age conviction—Eighth Amendment

Where defendant received a mandatory sentence of life without parole (LWOP) for attaining violent habitual felon status—based on prior convictions that included a kidnapping he committed when he was sixteen years old—and later filed a motion for appropriate relief, the trial court did not err by determining that the use of defendant's juvenile-age conviction as a predicate offense for violent habitual felon status was permissible under the Eighth Amendment. The recidivist statute did not punish defendant for his juvenile-age offense; rather, it mandated an enhanced punishment for his latest crime, which was committed when he was an adult.

3. Sentencing—violent habitual felon status—life without parole—proportionality—Eighth Amendment

Defendant's mandatory sentence of life without parole for attaining violent habitual felon status—based on his latest conviction, for second-degree kidnapping—was not disproportionate under the Eighth Amendment, in accordance with longstanding precedent.

Appeal by Defendant from Order entered 26 November 2019 by Judge C. Winston Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 8 February 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

Christopher J. Heaney for defendant-appellant.

Juvenile Law Center, by Marsha L. Levick, Aryn Williams-Vann, Katrina L. Goodjoint, and Riya Saha Shah, and Phillips Black, Inc., by John R. Mills, for amici curiae.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 William McDougald (Defendant) appeals from an Order denying his Motion for Appropriate Relief (MAR). Relevant to this appeal, the Record before us tends to reflect the following:

¶ 2 On 12 October 2001, a jury returned a verdict finding Defendant guilty of second-degree kidnapping, misdemeanor breaking or entering,

and assault on a female. Defendant had two prior convictions including: a guilty plea to second-degree kidnapping, a class E felony, with judgment entered on 16 May 1984 when Defendant was sixteen years old; and a no contest plea to one count of second-degree sexual offense (class H felony), two counts of common law robbery (class D felonies), and one count of armed robbery (a class D felony) with judgment entered on 1 February 1988. Due to these prior felonies, a jury found Defendant guilty of violent habitual felon status on 14 November 2001. On the same day, as required by the violent habitual felon statute, the trial court imposed the mandatory sentence of life without parole (LWOP). Defendant appealed from the Judgment and this Court found no error by Opinion entered on 20 May 2008. *See State v. McDougald*, 190 N.C. App. 675, 661 S.E.2d 789 (2008) (unpublished).

¶ 3 Subsequently, on 26 June 2017, Defendant filed a MAR in Harnett County Superior Court asserting the mandatory sentence of LWOP for violent habitual felons, as applied to him, violated Defendant's Eighth Amendment rights where one of the predicate violent felony convictions was obtained when Defendant was a juvenile and that the LWOP sentence was disproportionate. On 22 May 2018, Defendant amended his MAR to also include claims of ineffective assistance of trial counsel during plea negotiations and ineffective assistance of appellate counsel. Defendant requested the trial court to vacate his convictions for second-degree kidnapping and violent habitual felon status.

¶ 4 On 9 August 2019, the trial court held a hearing on the MAR including both the Eighth Amendment and ineffective assistance of counsel claims. Prior to the hearing, the parties stipulated the trial court could determine the Eighth Amendment claims as a matter of law without the introduction of evidence. Defendant elected to abandon his claim for ineffective assistance of appellate counsel during the hearing.

¶ 5 In support of his ineffective assistance of trial counsel claim, Defendant called Mark Key (Key), his trial attorney, to testify. Key testified Defendant's file was destroyed as part of a routine purge, and to prepare for this hearing, Key tried to remember "as much as I could" by reviewing the trial transcript and the time sheet Key kept during Defendant's trial. Based on this time sheet from 2001, Key testified he visited Defendant on 25 April 2001 and told Defendant the prosecutor was offering a plea deal in which Defendant would serve a sentence of approximately twelve to thirteen years. At the time of this meeting, Defendant had not yet been indicted for violent habitual felon status; however, the charge was pending. Key testified he did not explain or mention the mandatory punishment of LWOP for the pending violent

habitual felon status charge during this meeting. Defendant rejected the plea deal. Thereafter, the State obtained a superseding indictment for violent habitual felon status on 14 May 2001. Key testified he did not meet with Defendant to discuss the potential consequences of a conviction for violent habitual felon status until the morning of the trial on the substantive felonies, 1 October 2001. At this time, Key told Defendant there was a potential punishment of LWOP depending on the outcome of the trial but was "not sure [he] told [Defendant] it was mandatory [LWOP]." Key admitted Defendant might not have understood what he meant.

¶ 6 Defendant also called Attorney Michael G. Howell (Howell) who had almost twenty years of experience representing clients facing the death penalty and LWOP in North Carolina. Howell testified Key's performance was "deficient" because Key failed to "fully explain[] to [Defendant] on 25 April 2001 the full ramifications of the plea offer and the rejection of it[,]" including exposure to mandatory LWOP sentence.

¶ 7 On 26 November 2010, the trial court entered an Order denying the MAR. The Order makes the following relevant Findings of Fact:

> 11. On October 1, 2001, Defendant stated during a colloquy with Judge Bowen before trial began that Mr. Key "on several occasions he [Key] brought-he told me that the DA brought up . . . habitual felony charges on me."
>
> 12. Defendant further stated during the same colloquy, "First time I seen him (Mr. Key) when I got down here to Superior Court, second time, third time, and fourth time I seen him when I was offered a plea bargain."
>
> 13. Defendant further stated on the record on October 1, "Then I came back here, which was today and [Key tells me] . . . If you don't go to trial you can take the plea bargain for thirteen years and a half . . . ."
>
> 14. Defendant also stated on the record on October 1, "I'm already facing my life with no parole in prison."
>
> 15. At no time during his colloquy with the court on October 1st did Defendant express a desire to accept the plea offer of thirteen and one-half years which had been tendered by the State. There is no credible evidence before the court that Defendant expressed

to anyone, including his lawyer or the court, at any time prior to his conviction and final sentencing that he wished to accept such plea offer or any plea offer that was made by the State.

19. On November 14, 2001 the trial court denied Defendant's Motion to Dismiss indictment. Judge Bowen found in the order denying the Motion to Dismiss that "defendant and [his[counsel were well aware of the Violent Habitual Felon indictment . . . far in advance of the trial of the underlying felony" on October 1, 2001.

23. Eighteen years have passed since the events at issue. Mr. Key did not have a perfect or complete recollection of all his statements to his client.

25. The Defendant was informed that he was subject to a sentence of life without parole. The credible evidence does not establish the Defendant was not informed by Mr. Key well in advance of the first day of his trial, October 1, 2001, that he faced a mandatory sentence of life imprisonment without parole as a violent habitual felon.

27. The credible evidence does not establish that Defendant lacked a full and informed understanding well in advance of October 1, 2001, of the impact of the violent habitual felon charge, of its potential consequences and of the consequences of rejecting the plea arrangement which had been offered by the State. The credible evidence does not establish that the defense counsel failed to fully, timely, and competently advise Defendant on these issues. The credible evidence does not establish that defense counsel's representation was objectively unreasonable in any way.

28. The prior convictions used to establish Defendant's status as a violent habitual felon were as follows: (1) Second Degree Kidnapping, date of offense March 14, 1984, conviction date May 16, 1984 and (2) Second Degree Sexual Offense, offense date November 3, 1987 and conviction date February 1, 1988.

> 29. Defendant's date of birth was February 24, 1968. Defendant was sixteen years of age at the time he committed and was convicted of the predicate offense of Second Degree Kidnapping in 1984. Defendant was over the age of eighteen when convicted of the second predicate felony of Second Degree Sexual offense in 1988.
>
> 33. The credible evidence does not establish that the frequency, content or timing of attorney Mark Key's communications with Defendant were objectively unreasonable. The credible evidence does not establish that the methods Mr. Key used to communicate with Defendant about his case were objectively unreasonable.
>
> 34. The credible evidence does not demonstrate a reasonable probability that but for any error or insufficiency in the frequency, timing, content or methods of communication used by attorney Key with Defendant that the outcome of the case would have been any different or that Defendant would have accepted a plea to a sentence of less than life without parole.

The Order also makes the following relevant Conclusions of Law:

> 2. Defendant's sentence of life without parole was not imposed for conduct committed before Defendant was eighteen years of age in violation of *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 132 S. Ct. 2455 (2012), or *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Defendant's sentence did not violate the constitutional prohibitions against mandatory sentences of life without parole for juveniles. Defendant's sentence is therefore not unconstitutional as applied to the Defendant.
>
> 3. No inference of disproportionality arises from a comparison of the gravity of the offense and the severity of the sentence in question.
>
> 4. As applied to Defendant, a sentence of life without parole is not grossly disproportionate to the conduct punished.

> 5. Defendant's sentence does not violate the Eighth Amendment to the Constitution of the United States.
>
> 7. Defendant has failed to prove, by a preponderance of the evidence, that the performance of his trial counsel, Mark Key, was objectively unreasonable or deficient.
>
> 8. In addition, and in the alternative, the Defendant has failed to establish that there is a reasonable probability that but for any unprofessional error committed by Mr. Key the result of the proceeding would have been any different.
>
> 9. There is no reasonable probability that Defendant would have accepted the plea offer made by the State but for any unprofessional error by attorney Key.

¶ 8 On 20 November 2020, Defendant filed a Petition for Writ of Certiorari in this Court seeking review of the 26 November 2019 Order denying his MAR. This Court allowed Defendant's Petition for Writ of Certiorari in an Order entered 6 January 2021 to permit appellate review of the trial court's Order.

Issues

¶ 9 The issues on appeal are whether: (I) the trial court erred in concluding Key acted reasonably and without prejudice during plea negotiations; (II) the trial court erred in upholding a mandatory LWOP sentence that relies, in part, on a conviction for a violent felony committed while Defendant was a juvenile; and (III) the trial court erred in concluding Defendant's sentence is not disproportionate.

Analysis

¶ 10 This Court reviews a trial court's order denying a MAR to determine "whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Hyman*, 371 N.C. 363, 382, 817 S.E.2d 157, 169 (2018) (quotation marks and citation omitted). "[T]he trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quotation marks and citation omitted). Unchallenged findings of fact are "presumed to be supported by competent evidence and are binding on appeal." *Hyman*, 371 N.C. at 382, 817 S.E.2d at 169. We review

conclusions of law de novo. *Id.* Under de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (quotation marks and citations omitted).

I. Ineffective Assistance of Counsel

¶ 11 **[1]** Defendant contends the trial court erred by concluding Key acted reasonably during plea negotiations and by concluding Key's conduct did not prejudice Defendant and, therefore, did not provide Defendant ineffective assistance of counsel. To prevail on a claim for ineffective assistance of counsel, a defendant must satisfy a two-part test:

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

State v. Banks, 367 N.C. 652, 655, 766 S.E.2d 334, 337 (2014) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). *See also Hill v. Lockhart*, 474 U.S. 52, 57, 88 L. Ed. 2d 203, 209 (1985) (applying the two-part *Strickland* test to ineffective-assistance claims arising out of the plea process).

A. Reasonableness of Key's Performance

¶ 12 Defendant contends Key's testimony, his contemporaneous timesheet, Defendant's affidavit, and the trial transcript, shows Key did not adequately inform Defendant he was subject to mandatory LWOP prior to the morning of 1 October 2001, and a reasonable attorney would have explained the potential consequences of rejecting the plea deal prior to the morning before trial on the underlying felony. Thus, Defendant contends Key's performance was constitutionally deficient.

¶ 13 In the context of pleas, "deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *Hill*, 474 U.S. at 57, 88 L. Ed. 2d at 209 (citing *Wiggins v. Smith*, 539 U.S. 510, 521, 156 L. Ed. 2d 471, 484 (2003)). "An attorney's failure to inform his client of a plea bargain offers amounts to ineffective assistance unless counsel effectively proves that he did inform his client of the offer or provides an adequate explanation for not

advising his client of the offer." *State v. Simmons*, 65 N.C. App. 294, 299, 309 S.E.2d 493, 497 (1983). Moreover, "[a] defense attorney in a criminal case has a duty to advise his client fully on whether a particular plea to a charge is desirable, but the ultimate decision on what plea to enter remains exclusively with the client." *Id.*

¶ 14 Nevertheless, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694-695. Moreover, "because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and defendants have the burden of overcoming this presumption. *Id.*

¶ 15 Here, the trial court's Findings indicate Defendant failed to meet his burden to overcome the "strong presumption" Key's performance was reasonable. For example, the trial court found: the evidence did not establish Defendant lacked a full and informed understanding well in advance of trial of the impact of the violent habitual felon charge including its potential consequences and the consequences of rejecting the plea deal; the evidence did not establish Key failed to fully, timely, and competently advise Defendant of the desirability of the plea deal; and the evidence did not establish Key's performance was objectively unreasonable in any way. Moreover, although Howell testified that a reasonable attorney would have informed Defendant he was facing mandatory LWOP, Key could not remember whether "[he] told [Defendant] it was mandatory [LWOP]" and was not sure Defendant understood the full ramifications. Indeed, Key's incomplete or imperfect recollection of all his statements to his client in addition to the passage of eighteen years and the destruction of Key's case file including a complete record of written communications with Defendant and file notes¬—as found by the trial court—prevented the trial court from "reconstruct[ing] the circumstances of counsel's challenged conduct and [] evaluat[ing] the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694-695.

¶ 16 Furthermore, a review of the Record shows Key met with Defendant on 25 April 2001, before the trial on 1 October 2001, to discuss the plea offer with Defendant, and at the very least, informed Defendant he was facing the potential of LWOP depending on the outcome of the trial. Indeed, Defendant acknowledged he knew he was "facing my life with no parole in prison" in discussions with the trial court on 1 October 2001. Thus,

the evidence supports the trial court's Findings that Defendant was informed of the plea deal before trial, knew of the possibility of LWOP, and Key fully, timely, and competently advised Defendant of the desirability of the plea deal. Based on these Findings, the trial court did not err by determining Key's performance was not objectively unreasonable.

B. Prejudicial Effect of Key's Performance

¶ 17 Since the trial court properly concluded Key's performance was not objectively unreasonable, we do not need to reach the issue of whether Key's performance was prejudicial. *See State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985) (quoting *Strickland*, 466 U.S. at 697, 80 L. Ed. 2d at 690) ("[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one."). Nevertheless, for purposes of reviewing each of the arguments presented upon Defendant's MAR, and assuming arguendo Key's performance was constitutionally deficient, Defendant also contends the evidence—as reflected in Key's testimony and Defendant's affidavit—establishes that if Key had ensured Defendant "understood [the] violent habitual felon status and its mandatory punishment, he would have taken [the] plea . . ." Thus, Defendant argues the trial court erred in concluding, in the alternative, Key's performance did not otherwise prejudice Defendant.

¶ 18 "The second, or 'prejudice,' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 58-59, 88 L. Ed. 2d at 210. To show prejudice from ineffective assistance of counsel where a plea offer has been rejected,

> defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. *Cf. Glover v. United States*, 531 U.S. 198, 203, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001)

("[A]ny amount of [additional] jail time has Sixth Amendment significance").

Missouri v. Frye, 566 U.S. 134, 147, 182 L. Ed. 2d 379, 392 (2012). Moreover, "[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Lee v. United States*, 137 S. Ct. 1958, 1967, 198 L. Ed. 2d 476, 487 (2017). "Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.*

¶ 19 Here, the trial court found Defendant never expressed to anyone a desire to accept the plea deal; knew he faced a sentence of LWOP, but still declined to accept a plea bargain; and the evidence did not demonstrate a reasonable probability Defendant would have accepted a plea. Thus, evidence in the Record supports the trial court's Findings. In turn, those Findings support the determination Defendant had not established he was prejudiced by Key's allegedly deficient performance. Therefore, the trial did not err in concluding Defendant failed to establish his ineffective assistance of counsel claim. *See Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826. Consequently, the trial court did not err in denying Defendant's MAR based on a claim of ineffective assistance of counsel.

II. Application of the Violent Habitual Felon Status Law

¶ 20 **[2]** Defendant contends the application of the violent habitual felon status law—and specifically its mandatory LWOP sentence—violates the prohibition against cruel and unusual punishment contained in the Eighth Amendment of the United States Constitution. Specifically, Defendant contends the trial court's reliance on an offense committed while Defendant was under the age of eighteen as a predicate offense in sentencing Defendant to mandatory LWOP violates the constitutional constraints embodied in *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), which prohibits the imposition of mandatory LWOP sentences on juvenile offenders.

¶ 21 The Eighth Amendment to the United States Constitution states "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted[,]" U.S. Const. amend. VIII, and is made applicable to the States by the Fourteenth Amendment. *Id.* amend. XIV. The Constitution of North Carolina similarly states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." N.C. Const. art. I, § 27. "To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society." *Graham v. Florida*,

560 U.S. 48, 58, 176 L. Ed. 2d 825, 835 (2010). "The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances." *Id*. However, generally punishments are "challenged not as inherently barbaric but as disproportionate to the crime." *Id*. Indeed, "the basic precept of justice [is] that punishment for crime should be graduated and proportioned to the offense." *Kennedy v. Louisiana*, 554 U.S. 407, 419, 171 L. Ed. 2d 525, 538 (citations and quotations omitted), *opinion modified on denial of reh'g*, 554 U.S. 945, 171 L. Ed. 2d 932 (2008).

> The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.

Graham, 560 U.S. at 59, 176 L. Ed. 2d at 836.

¶ 22 Generally, the second line of analysis is applied in the death penalty context; however, the Supreme Court applied a categorical ban on mandatory sentences of LWOP for juvenile offenders in *Graham* and *Miller*. The Court reasoned this categorical rule was necessary because "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471, 183 L. Ed. 2d at 418. Moreover, "because juveniles have diminished culpability and greater prospects for reform . . . they are less deserving of the most severe punishments." *Id*. (quoting *Graham*, 560 U.S. at 68, 176 L. Ed. 2d at 841). Thus, the *Miller* Court held mandatory LWOP for juveniles was violative of the Eighth Amendment as

> [i]t prevents taking into account the family and home environment that surrounds [the juvenile]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. . . . Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. *See*, *e.g.*, *Graham*, 560 U.S., at 78, 130 S. Ct. 2011, 176 L. Ed. 2d 825 ("[T]he features that distinguish juveniles from adults also put them at a

> significant disadvantage in criminal proceedings"); *J.D.B. v. N.C.*, 564 U.S. 261, 269, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Id. at 477–478, 183 L. Ed. 2d at 423. Nevertheless, the *Miller* Court did not preclude a sentence of LWOP for juveniles so long as the court considers a youthful offender's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences" before imposing a LWOP sentence. *Id.*

¶ 23 Here, Defendant asserts a categorical challenge to the sentencing practice of using juvenile convictions as a predicate offense for violent habitual felon status. Categorical challenges are subject to the following analysis:

> The Court first considers objective indicia of society's standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Graham, 560 U.S. at 61, 176 L. Ed. 2d at 837 (quotation marks and citations omitted).

¶ 24 North Carolina defines a violent habitual felon as "any person who has been convicted of two violent felonies . . . . '[C]onvicted' means the person has been adjudged guilty of or has entered a plea of guilty or no contest to the violent felony charge, and judgment has been entered thereon . . . ." N.C. Gen. Stat. § 14-7.7(a) (2021). "For purposes of this Article, 'violent felony' includes . . . Class A through E felonies." N.C. Gen. Stat. § 14-7.7(b)(1) (2021).

> A person who is convicted of a violent felony and of being a violent habitual felon must, upon conviction (except where the death penalty is imposed), be sentenced to life imprisonment without parole. . . . The

> sentencing judge may not suspend the sentence and may not place the person sentenced on probation.

N.C. Gen. Stat. § 14-7.12 (2021). This Court upheld the constitutionality of this legislation—colloquially known as the three-strikes law—more than twenty years ago in *State v. Mason*. *See State v. Mason*, 126 N.C. App. 318, 321, 484 S.E.2d 818, 820 (1997) (concluding the reasoning in *State v. Todd*, 313 N.C. 110, 118, 326 S.E.2d 249, 253 (1985), affirming the constitutionality of the habitual felon statute, N.C. Gen. Stat. §§ 14-7.1 through 14-7.6, "equally applies to the violent habitual felon statute."), *cert. denied*, 354 N.C. 72, 553 S.E.2d 208 (2001). In *State v. Todd*, our Supreme Court determined the habitual felon law does not deny a defendant due process and equal protection, freedom from ex post facto laws, freedom from cruel and unusual punishment, and freedom from double jeopardy because "these challenges have been addressed and rejected by the United States Supreme Court." *State v. Todd*, 313 N.C. 110, 117, 326 S.E.2d 249, 253 (1985). Indeed, the United States Supreme Court has repeatedly held recidivist laws do not violate the Eighth Amendment because:

> the enhanced punishment imposed for the later offense 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.' *Gryger v. Burke*, 334 U.S. 728, 732, 92 L. Ed. 1683, 68 S. Ct. 1256 (1948). *See also Spencer v. Texas*, 385 U.S. 554, 560, 17 L. Ed. 2d 606, 87 S. Ct. 648 (1967); *Oyler v. Boles*, 368 U.S. 448, 451, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962); *Moore v. Missouri*, 159 U.S. 673, 677, 40 L. Ed. 301, 16 S. Ct. 179 (1895) (under a recidivist statute, 'the accused is not again punished for the first offence' because " 'the punishment is for the last offence committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself' ").

Witte v. United States, 515 U.S. 389, 400, 132 L. Ed. 2d 351, 364 (1995).

¶ 25 Moreover, although the question of whether a juvenile-age conviction may count towards a three-strikes law that mandates a sentence of LWOP appears to be an issue of first impression in our state, a review of laws in other jurisdictions reveals North Carolina was not alone in its enactment of such a law. Indeed, between 1993 and 1995, twenty-four

states enacted 'three strikes and you're out' laws with most of these laws mandating life sentences without the possibility of release. *See* John Clark et al., U.S. Dep't of Justice, NCJ 165369, Three Strikes and You're Out: A Review of State Legislation 1 (Research in Brief 1997). Courts in several of these states have recognized the counting of juvenile-age convictions as "strikes" where the defendant was charged and/or tried as an adult[1] even when the punishment under the three-strikes law is mandatory LWOP. *See*, *e.g.*, *State v. Ryan*, 249 N.J. 581, 600–601, 268 A.3d 313, 322 (N.J. 2022); *McDuffey v. State*, 286 So. 3d 364 (Fla. 1st DCA 2019); *Wilson v. State*, 2017 Ark. 217, 521 S.W.3d 123, 128 (Ark. 2017); *Vickers v. State*, 117 A.3d 516, 519–20 (Del. 2015); *State v. Standard*, 351 S.C. 199, 569 S.E.2d 325, 326, 328–29 (S.C. 2002); *State v. Teas*, 10 Wn. App. 2d 111, 447 P.3d 606, 619–20 (Wash. Ct. App. 2019), *review denied*, 195 Wn. 2d 1008, 460 P.3d 182 (Wash. 2020); *Commonwealth v. Lawson*, 2014 PA Super 68, 90 A.3d 1, 6-8 (Pa. Super. Ct. 2014). *Cf.* Tenn. Code Ann. § 40-35-120(e)(3) (providing that juvenile-age convictions in adult court count as predicate offenses so long as the conviction resulted in a custodial sentence).

¶ 26 In permitting juvenile-age convictions to count towards three strikes laws, these courts have concluded the reasoning of *Miller* is inapplicable in the case of an adult who commits a third violent felony. *See*, *e.g.*, *Ryan*, 249 N.J. at 601, 268 A.3d at 322. In support of this conclusion, these courts generally rely on the basic principle embodied in United States Supreme Court precedent that under recidivist statutes, the defendant is not punished for the first offense, but rather the punishment is a "stiffened penalty for the latest crime, which was considered to be an

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1. The separate issue of whether a juvenile delinquency adjudication may be used as a predicate offense under a "Three Strikes Law" is more unsettled with the majority of jurisdictions preventing the use of juvenile adjudications in calculating prior offenses because juveniles in juvenile court have their cases adjudicated without a jury. Thus, these state courts reason, counting these offenses towards violent habitual felon status implicates *Apprendi*. *See Vanesch v. State*, 343 Ark. 381, 390, 37 S.W.3d 196, 2001 (Ark. 2001) (disallowing juvenile delinquency adjudications as predicate offenses for state's three strikes law); *Fletcher v. State*, 409 A.2d 1254, 1256 (Del. 1979) (same); *Paige v. Gaffney*, 207 Kan. 170, 170, 483 P.2d 494, 495 (Kan. 1971) (same); *State v. Brown*, 879 So. 2d 1276, 1288-90 (La. 2004) (same); *Commonwealth v. Thomas*, 1999 PA Super 301, ¶ 2, 743 A.2d 460, 461 (Pa. Super. Ct. 1999) (same); *State v. Ellis*, 345 S.C. 175, 179, 547 S.E.2d 490, 492 (S.C. 2001) (same); *State v. Maxey*, 2003 WI App 94, ¶ 14, 663 N.W.2d 811, 814 (Wis. Ct. App. 2003) (same). *But see People v. Davis*, 15 Cal. 4th 1096, 1100, 938 P.2d 938, 940–42 (Cal. 1997) (allowing juvenile adjudications to count as strikes under the state's three strikes law); *Williams v. State*, 994 So. 2d 337, 339–40 (Fl. Ct. App. 2008) (same); *Lindsay v. State*, 102 S.W.3d 223, 226–27 (Tex. Ct. App. 2003) (same). Nevertheless, this issue is not before us and we do not decide it.

aggravated offense because it is a repetitive one." *See, e.g.*, *id.* (quoting *Witte*, 515 U.S. at 400, 132 L. Ed. 2d at 364 (1995)).

¶ 27 Here, applying these general principles as found in United States Supreme Court precedent, North Carolina Supreme Court precedent, and in the persuasive precedent from other jurisdictions, the application of the violent habitual felon statute to Defendant's conviction of second-degree kidnapping, committed when Defendant was thirty-three years old, did not increase or enhance the sentence Defendant received for his prior second-degree kidnapping conviction, committed when Defendant was sixteen. Rather, the violent habitual felon statute, and resulting LWOP sentence, applied only to the last conviction for second-degree kidnapping. *See State v. Wolfe*, 157 N.C. App. 22, 37, 577 S.E.2d 655, 665 (2003) ("Because defendant's violent habitual felon status will only enhance his punishment for the second-degree murder conviction in the instant case, and not his punishment for the underlying voluntary manslaughter felony, there is no violation of the ex post facto clauses."). As the Fourth Circuit explained in addressing whether violent felony convictions as a juvenile could be used towards a sentencing enhancement under the federal Armed Career Criminal Act:

> In this case, Defendant is not being punished for a crime he committed as a juvenile, because sentence enhancements do not themselves constitute punishment for the prior criminal convictions that trigger them. *See Rodriquez*, 553 U.S. at 385–86, 128 S. Ct. 1783. Instead, Defendant is being punished for the recent offense he committed at thirty-three, an age unquestionably sufficient to render him responsible for his actions. Accordingly, *Miller*'s concerns about juveniles' diminished culpability and increased capacity for reform do not apply here.

United States v. Hunter, 735 F.3d 172, 176 (4th Cir. 2013).

¶ 28 Indeed, in this case, the trial court relied on these very principles in concluding: "Defendant's sentence of [LWOP] was not imposed for conduct committed before Defendant was eighteen years of age in violation of *Graham* . . ., *Miller* . . . or *Montgomery* . . . ." Thus, consistent with this analysis, the trial court correctly further determined "Defendant's sentence did not violate the constitutional prohibitions against mandatory sentences of [LWOP] for juveniles." Therefore, the trial court, in turn, did not err by ultimately concluding "Defendant's sentence is therefore not unconstitutional as applied to Defendant." Consequently, the trial court did not err by denying Defendant's MAR on this ground.

III. Disproportionality of Mandatory Life Without Parole

¶ 29 **[3]** Defendant finally contends the trial court erred in concluding Defendant's LWOP sentence is not disproportionate under the Eighth Amendment.

> Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

State v. Ysaguire, 309 N.C. 780, 786, 309 S.E.2d 436, 440–441 (1983). Moreover, "[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *Id*. Indeed, our Court has previously "determined that the General Assembly 'acted within permissible bounds in enacting legislation designed to identify habitual criminals and to authorize enhanced punishment as provided.' " *Mason*, 126 N.C. App. at 321, 484 S.E.2d at 820 (quoting *Todd*, 313 N.C. at 118, 326 S.E.2d at 253). Thus, in accordance with our decision in *Mason*, the trial court did not err in concluding Defendant's sentence of LWOP for second-degree kidnapping is not disproportionate under the Eighth Amendment. Therefore, the trial court did not err in denying Defendant's MAR on this basis.

Conclusion

¶ 30 Accordingly, for the foregoing reasons, the trial court's Order denying Defendant's MAR is affirmed.

AFFIRMED.

Judges GORE and WOOD concur.

STATE OF NORTH CAROLINA
v.
TROY LOGAN PICKENS

No. COA20-515

Filed 2 August 2022

1. Evidence—other crimes, wrongs, or acts—prior sexual assaults of a child—similarity to charged crime—unfair prejudice

In a prosecution for rape of a child and related sexual offenses, the trial court properly admitted testimony under Evidence Rule 404(b) of defendant's prior sexual assaults of a different child. The prior assaults were sufficiently similar to the charged crimes where, in both cases, the victims were middle-school-aged girls of small build; defendant used his position as a middle school teacher to access, exercise authority over, and assault each girl; defendant first encountered both girls at the school during school hours; he sexually assaulted the girls in a similar manner while pulling his pants and underwear half-way down each time; and he used threats to discourage both girls from reporting the assaults. Further, the court gave the appropriate limiting instruction to the jury and did not abuse its discretion in determining that any danger of unfair prejudice did not substantially outweigh the probative value of the testimony.

2. Sentencing—improper consideration—defendant's exercise of right to demand jury trial

After defendant was convicted of raping a child and other related sexual offenses, his sentences were vacated and remanded for re-sentencing because the record indicated that the trial court, in deciding to impose consecutive sentences, improperly considered defendant's exercise of his constitutional right to demand a trial by jury. Specifically, the court mentioned during the sentencing hearing defendant's choice to plead not guilty right before announcing that it would impose consecutive active prison terms.

Judge MURPHY dissenting.

Appeal by Defendant from judgments entered 1 November 2019 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 19 October 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence, for the State-Appellee.

Michael E. Casterline for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Troy Logan Pickens appeals from judgments entered upon jury verdicts of guilty of one count of first-degree rape of a child and two counts of first-degree sexual offense with a child. Defendant argues that the trial court erred by admitting certain Rule 404(b) evidence and erred in sentencing. We find no error in the admission of the challenged evidence. We conclude that the trial court improperly considered Defendant's exercise of his constitutional right to demand a trial by jury in deciding to impose consecutive sentences. Defendant's convictions remain undisturbed, and the matter is remanded to the trial court for resentencing.

I. Procedural History and Factual Background

¶ 2 Defendant was indicted on one count of first-degree rape of a child and two counts of first-degree sexual offense with a child. The State filed a pretrial notice of Rule 404(b) evidence, giving notice to Defendant "of the State's intent to introduce at the trial of the above cases evidence of other crimes, wrongs, or acts as evidence of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake, entrapment or accident." Defendant filed a motion in limine "to preclude the State from introducing any evidence that the Defendant committed sexual assault in Durham, North Carolina."

¶ 3 The trial began on 21 October 2019. At trial, relevant evidence tended to show that on 1 July 2015, Defendant was hired as the chorus teacher at Durant Middle School in Raleigh. At the end of July, eleven-year- old Ellen began sixth grade at that school. Ellen[1] was around 4'10" tall, weighed between 60-65 pounds, and "had not yet reached puberty[.]"

A. Ellen's Testimony

¶ 4 While Ellen attended Durant Middle School, she would leave during class around lunchtime each day, walk through the school to get a dose of her prescribed Ritalin from the school nurse, and return to class.

1. We use pseudonyms to protect the identity of both juvenile witnesses in this case. *See* N.C. R. App. P. 42(b).

One day, a month or two after she had started the school year, she saw Defendant while she was walking in the sixth-grade hallway to get her medication. She knew who Defendant was because some of her friends had chorus with him, but she did not have him as a teacher. He motioned her over. She asked him, "What do you need?" Defendant replied, "Be quiet." He grabbed the back of her shirt and walked her into an empty restroom. He took her into the handicapped stall at the end of the restroom and told her to take her clothes off. He then unbuttoned his pants and told her to touch his penis. When she did not do so, he grabbed her hand and put it on his penis. He then told her to stroke it and moved her hand. He threatened to hurt her or her family if she told. After five minutes or less, she left the restroom and went back to class.

¶ 5 The next time Ellen encountered Defendant in the hallway, he grabbed her again by her shirt and her ponytail, and the same series of events occurred in the same bathroom stall: he forced her to undress and stroke his penis, and he threatened her if she told. Then he told her to bend over the toilet. She felt pressure as he tried twice to put his penis in her vagina before telling her she was too small. He then put his penis in her anus.

¶ 6 The next time Ellen encountered Defendant in the hallway, he took her into the handicapped stall, told her to undress and stroke his penis, and then told her to defecate in the toilet. After she did, he told her to pick her feces out of the toilet. Saying, "Open up you filthy slut," he put her feces in her mouth. Feces were also smeared on the wall of the stall. He told her to bend over and had anal intercourse. He also touched her chest and her vagina.

¶ 7 This sequence of events happened every other day for a couple of weeks. Ellen described him cussing under his breath and muttering "whore" and "slut." She also described occasions when Defendant had forced her to perform fellatio. She once tried to stop him and he threw her, slamming her leg against the toilet. When each episode was over, Ellen would wash her hands, rinse out her mouth, and go back to class.

B. Kathleen's 404(b) Testimony

¶ 8 The State called Kathleen as a Rule 404(b) witness. After voir dire of Kathleen, the trial court orally denied Defendant's motion to exclude Kathleen's testimony.

¶ 9 Kathleen testified before the jury, essentially as she had in voir dire, as follows: Defendant had been her chorus teacher at Neal Middle School in Durham when Kathleen was in the seventh grade. One day,

she and her classmates had been watching a movie in Defendant's class. When it was time to leave and everyone was getting up to go, Defendant came over to her, put his hands on her waist, and moved them down towards her bottom. It made her uncomfortable, and she ran out of the classroom.

¶ 10 In the eighth grade, she again took chorus from Defendant. He wanted her to participate in an extracurricular performance which required practice at a different school. She did not want to be involved because none of her friends were participating, but Defendant called her mother, and her mother told him Kathleen would participate. Kathleen's mother had a medical condition, so Defendant volunteered to give Kathleen rides to the practice.

¶ 11 On 2 February 2015, the day after Kathleen turned 14, she was riding to the final practice with Defendant. He told her he needed to stop at his apartment, and he told her to come inside with him. They sat on his couch and watched a cartoon while they ate. After putting the dishes in the sink, he came back and touched her leg. Kathleen asked him not to touch her. He continued touching her leg, then pulled her up by her left arm and pulled her into his bedroom as she resisted. Kathleen – who was then 5' 2" tall and weighed 100 pounds – testified that he threw her down on the bed. As she lay on her back, Defendant took off her pants and underwear, pulled his own pants half-way down, then put his penis into her vagina. She asked him to stop and was crying, but he did not stop. After a few minutes, he moved away from Kathleen and went into the bathroom.

¶ 12 Kathleen put her clothes on. When Defendant came back into the room, he apologized to her and told her that if she told anyone, it would happen again. He then took her to practice and later gave her a ride home.

¶ 13 At the conclusion of the trial for sexually assaulting Ellen, Defendant was found guilty on all charges.

II. Analysis

A. Rule 404(b) Evidence

¶ 14 **[1]** Defendant argues that the trial court erred in admitting Kathleen's testimony under Rule 404(b) because it was not similar to the crime charged and was unduly prejudicial.

¶ 15 The trial court's determination as to whether the evidence of other crimes, wrongs, or acts falls within the scope of Rule 404(b) is a question

of law, which we review de novo on appeal. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

¶ 16 Under North Carolina Rule of Evidence 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019). Such evidence "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." *Id.* "Generally, Rule 404 acts as a gatekeeper against 'character evidence,' " *State v. Pabon*, 380 N.C. 241, 2022-NCSC-16, ¶ 60 (quoting N.C. Gen. Stat. § 8C-1, Rule 404(a)), and evidence admitted under Rule 404(b) "should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused," *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (citation omitted).

¶ 17 Notwithstanding this important protective role, our North Carolina Supreme Court has repeatedly held that "Rule 404(b) state[s] a clear general rule of inclusion." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990); *see Al-Bayyinah*, 356 N.C. at 153-54, 567 S.E.2d at 122 (quoting *Coffey* for this same proposition). Accordingly, relevant evidence of a defendant's past crimes, wrongs, or acts is generally admissible for any one or more of the purposes enumerated in Rule 404(b)'s non-exhaustive list, "subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54 (emphasis in original); *see Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159 (noting that Rule 404(b)'s list "is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime" (quotation marks and citation omitted)).

¶ 18 "[T]he rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 123 (citations omitted). Prior acts are sufficiently similar under Rule 404(b) "if there are some unusual facts present in both crimes that would indicate that the same person committed them." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (quotation marks and citation omitted). "While these similarities must be specific enough to distinguish the acts from any generalized commission of the crime, 'we do not require that they rise to the level of the unique and bizarre.' " *Pabon*, 380 N.C. 241, 2022-NCSC-16, ¶ 63 (quoting *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 156) (brackets omitted).

¶ 19 Regarding temporal proximity, "a greater lapse in time between the prior and present acts generally indicate[s] a weaker case for admissibility under Rule 404(b)," *id.*, but "remoteness for purposes of 404(b) must be considered in light of the specific facts of each case[,] . . . [and t]he purpose underlying the evidence also affects the analysis." *Id.* (quotation marks, citations, brackets, and ellipsis omitted). "Evidence of a prior bad act generally is admissible under Rule 404(b) if it constitutes substantial evidence tending to support a reasonable finding by the jury that the defendant committed the similar act." *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123 (quotation marks, emphasis, and citations omitted).

¶ 20 "With respect to prior sexual offenses, we have been very liberal in permitting the State to present such evidence to prove any relevant fact not prohibited by Rule 404(b)." *State v. White*, 331 N.C. 604, 612, 419 S.E.2d 557, 561 (1992). As our Supreme Court noted,

> our decisions, both before and after the adoption of Rule 404(b), have been "markedly liberal" in holding evidence of prior sex offenses "admissible for one or more of the purposes listed [in Rule 404(b)] . . . ."

Coffey, 326 N.C. at 279, 389 S.E.2d at 54 (quoting 1 Henry Brandis, Jr., Brandis on North Carolina Evidence § 92 (3d ed. 1988)).

¶ 21 In this case, the assaults of Ellen took place in or around August or September of 2015 and the alleged assault of Kathleen took place in February of 2015. Defendant does not contest that this six-to-seven month time frame does not meet the temporal proximity requirement under Rule 404(b). Therefore, the sole issue before this Court is whether the 404(b) evidence was sufficiently similar to the acts at issue.

¶ 22 Here, the sexual assaults described by Ellen and the alleged sexual assault described by Kathleen contained key similarities. Most significantly, in both cases, Defendant used his position as a middle school teacher to gain access to, exercise authority over, and ultimately assault diminutive, middle-school-aged girls. In both cases, Defendant first encountered the girl during school hours inside the middle school where he worked as a choral teacher. Ellen and Kathleen were both middle school students and were similar in age when they were assaulted: Ellen was 11 years old, and Kathleen had just turned 14 years old. The girls were similar in build when they were assaulted: Ellen was around 4'10" tall and weighed approximately 60-65 pounds while Kathleen was 5'2" tall and weighed 100 pounds. In each case, Defendant grabbed the girl and pulled her to the isolated area where he assaulted her. Defendant

also ignored each girl's tears. Also, in each case, Defendant pulled his pants and underwear half-way down. Defendant similarly sexually assaulted each girl: Defendant attempted to put his penis in Ellen's vagina but, when he was not able to, he put his penis in her anus. Defendant put his penis in Kathleen's vagina. Each assault lasted a brief period of time. In each case, Defendant used threats after the sexual assault to discourage reporting. Based on all these points of commonality, we conclude that Kathleen's testimony was sufficiently similar to the offenses charged to be relevant and admissible for the proper purpose of showing Defendant's intent, motive, plan, and design. *See State v. Houseright*, 220 N.C. App. 495, 500, 725 S.E.2d 445, 449 (2012) (404(b) witness's testimony as to her sexual encounter with defendant "was admissible for the purpose of showing defendant's plan or intent to engage in sexual activity with young girls" where the 404(b) witness testified that defendant engaged in sexual conduct with her when she was 13 or 14 years old; the indictments alleged that defendant engaged in sexual activity with the victim over a period of years when she was 13 to 15 years old; and defendant's conduct with the 404(b) witness took place within the same time period as the offenses alleged in the indictments); *State v. Smith*, 152 N.C. App. 514, 527, 568 S.E.2d 289, 297-98 (2002) (404(b) witness's testimony was "relevant to show absence of mistake and a common plan or scheme, specifically that defendant took advantage of young girls in situations where he had parental or adult responsibility for them. . . . [and] was also admitted to show defendant's unnatural attraction to young girls" where defendant was charged with sexual misconduct with a 12-year-old which consisted of rubbing her breast and digitally penetrating her vagina, and the 404(b) witness testified that when she was 15 years old, defendant had sexual intercourse with her and performed oral sex on her without her consent).

¶ 23 To be sure, there are differences between the acts and their attendant circumstances. However, "[o]ur case law is clear that near identical circumstances are not required[;] rather, the incidents need only share 'some unusual facts' that go to a purpose other than propensity for the evidence to be admissible." *Beckelheimer*, 366 N.C. at 132, 726 S.E.2d at 160 (citations omitted).

¶ 24 In his brief, Defendant analogizes this case to *State v. Watts*, 246 N.C. App. 737, 783 S.E.2d 266 (2016), *modified in part and aff'd by* 370 N.C. 39, 802 S.E.2d 905 (2017), where a divided panel of this Court awarded a new trial, holding that the trial court erred by admitting certain 404(b) evidence. However, contrary to Defendant's assertion, our North Carolina Supreme Court did not affirm *Watts* based on the Court

of Appeals' majority's analysis and conclusion. Instead, the Supreme Court modified the Court of Appeals' majority opinion and affirmed the decision to award a new trial based on the trial court's failure to deliver a limiting instruction concerning the admitted 404(b) evidence. 370 N.C. at 41, 802 S.E.2d at 907.

¶ 25 In *Watts*, the Court of Appeals' majority held that evidence of a prior sexual assault was inadmissible in the sexual assault case before it under Rule 404(b) where "both instances involved the sexual assault of minors, the minors were alone at the time of the assaults, [the] defendant was an acquaintance of the minors, [the] defendant used force, and [the] defendant threatened to kill each minor and the minors' families." 246 N.C. App. at 747, 783 S.E.2d at 273. The majority found "these similarities [were not] unusual to the crimes charged" and held "the [] differences are significant and undermine the findings of similarity by the trial court." *Id.* at 747-48, 783 S.E.2d at 273-74.

¶ 26 Upon the State's appeal to the Supreme Court, the Supreme Court, on its own motion, ordered the parties to "submit supplemental briefs addressing the issues of whether the trial court erred by failing to deliver a limiting instruction concerning the testimony delivered by [the 404(b) witness] pursuant to N.C.G.S. § 8C-1, Rule 404(b) and, if so, whether any error that the trial court may have committed constituted prejudicial error or plain error, depending upon the position taken by the party." *State v. Watts*, No. 132A16, 2017 N.C. LEXIS 1028 (2017) (unpublished). In its opinion modifying and affirming the lower appellate court, the Supreme Court held:

> Our General Statutes provide that "when evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, *shall* restrict the evidence to its proper scope and instruct the jury accordingly." N.C.G.S. § 8C-1, Rule 105 (2015) (emphasis added). "Failure to give the requested instruction must be held prejudicial error for which [a] defendant is entitled to a new trial." *State v. Norkett*, 269 N.C. 679, 681, 153 S.E.2d 362, 363 (1967); *cf. State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991) (failure to give a limiting instruction not requested by a defendant is not reviewable on appeal); *State v. Jones*, 322 N.C. 406, 368 S.E.2d 844 (1988) (same). Accordingly, because defendant was prejudiced by the trial court's failure to give the requested limiting instruction, we affirm, as modified

> herein, the opinion of the Court of Appeals that reversed defendant's convictions and remanded the matter to the trial court for a new trial.

370 N.C. at 41, 802 S.E.2d at 907. Consequently, the Supreme Court impliedly, if not explicitly, held that the challenged 404(b) evidence was admissible.

¶ 27 In the present case, the unusual facts present in both the sexual assaults described by Ellen and the alleged sexual assault described by Kathleen are even more marked than the unusual facts present in *Watts*. Accordingly, the Rule 404(b) evidence was sufficiently similar and not too remote in time and the trial court did not err by admitting it.

B. Rule 403

¶ 28 As the trial court did not err under Rule 404(b) by admitting the challenged evidence, we must review the trial court's Rule 403 determination for abuse of discretion. *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008).

¶ 29 Pursuant to Rule 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2019). It is well settled "[w]hile all evidence offered against a party involves some prejudicial effect, the fact that evidence is prejudicial does not mean that it is necessarily unfairly prejudicial." *State v. Rainey*, 198 N.C. App. 427, 433, 680 S.E.2d 760, 766 (2009) (citations omitted). Rather, "[t]he meaning of 'unfair prejudice' in the context of Rule 403 is an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *Id.* (quotation marks and citation omitted). Furthermore, "[t]he party who asserts that evidence was improperly admitted usually has the burden to show the error and that he was prejudiced by its admission." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001) (quotation marks and citation omitted). Thus, Defendant must carry the burden of proving the evidence was unfairly prejudicial.

¶ 30 Here "a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to defendant and was careful to give a proper limiting instruction to the jury." *State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998). The trial court first heard Kathleen's testimony outside the presence of the jury, then heard arguments from

the attorneys and ruled on its admissibility, stating that "the probative value of the evidence outweighs any undue prejudice that is caused by the admission of these acts[.]" Moreover, the trial court gave the appropriate limiting instruction. Given the similarities between Ellen's and Kathleen's accounts, and the trial court's careful handling of the process, we conclude that it was not an abuse of discretion for the trial court to determine that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. *Whaley*, 362 N.C. at 160, 655 S.E.2d at 390. The trial court thus properly admitted the 404(b) evidence here.

C. Sentencing

¶ 31 **[2]** Defendant next argues that the trial court considered impermissible factors before imposing consecutive sentences.

> A sentence within statutory limits is "presumed to be regular." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). Where the record, however, reveals the trial court considered an improper matter in determining the severity of the sentence, the presumption of regularity is overcome. *Id.* It is improper for the trial court, in sentencing a defendant, to consider the defendant's decision to insist on a jury trial. *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990). Where it can be reasonably inferred the sentence imposed on a defendant was based, even in part, on the defendant's insistence on a jury trial, the defendant is entitled to a new sentencing hearing. *Id.*

State v. Peterson, 154 N.C. App. 515, 517, 571 S.E.2d 883, 885 (2002).

¶ 32 At the sentencing hearing, the trial court addressed those in the court room, and specifically Defendant, in part, as follows:

> It would be difficult for an adult to come in here and testify in front of God and the country about what those two girls came in here and testified about. It would be embarrassing. It would be embarrassing to testify about consensual sex in front of a jury or a bunch of strangers. *And in truth, they get traumatized again by being here, but it's absolutely necessary when a defendant pleads not guilty. They didn't have a choice and you, Mr. Pickens, had a choice.*

(Emphasis added). Immediately after this statement, the trial court sentenced Defendant to three consecutive active prison terms of 300 to 420 months.

¶ 33 We conclude that it is apparent from the trial court's remarks that the trial court improperly considered Defendant's exercise of his constitutional right to demand a trial by jury. As the trial court's decision to impose three consecutive sentences was, at least partially, based on Defendant's decision to plead not guilty, this case must be remanded for re-sentencing. *State v. Hueto*, 195 N.C. App. 67, 78, 671 S.E.2d 62, 69 (2009) (citing *Boone*, 293 N.C. at 711-13, 239 S.E.2d at 465 (1977)).

¶ 34 In reaching this result, we are cognizant that a trial court may, in its discretion, impose consecutive sentences. *See* N.C. Gen. Stat. § 15A-1340.15(a) (2019) ("This Article does not prohibit the imposition of consecutive sentences."). Indeed, "[t]he trial judge may have sentenced defendant quite fairly in the case at bar[.]" *Boone*, 293 N.C. at 712, 239 S.E.2d at 465 (quotation marks omitted). Nonetheless, we also conclude there is a clear inference that a greater sentence was imposed because Defendant did not plead guilty. *See id.* We vacate Defendant's sentence and remand to the trial court for resentencing.

III. Conclusion

¶ 35 We find no error in the admission of the challenged Rule 404(b) evidence. We conclude that the trial court improperly considered Defendant's exercise of his constitutional right to demand a trial by jury in deciding to impose three consecutive sentences. We vacate Defendant's sentence and remand to the trial court for resentencing.

NO ERROR IN PART; VACATED AND REMANDED FOR RESENTENCING.

Judge ZACHARY concurs.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

¶ 36 While I do not disagree with the Majority's analysis of the Rule 403 or resentencing issues in ¶¶ 28-34, those issues would be rendered moot by my resolution of the Rule 404(b) issue. I would hold that the trial court erred in admitting evidence of a prior sexual assault under Rule 404(b) and that Defendant was prejudiced to the degree required for him

to be entitled to a new trial, and I would not reach the remaining issues. Therefore, I respectfully dissent.

¶ 37 Rule 404(b) allows a jury to consider evidence of prior bad acts when the evidence is admitted for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake, entrapment, or accident. However, before applying Rule 404(b), the prior bad act must be shown to be sufficiently similar and in sufficient temporal proximity to the offense charged. Here, the trial court erred by admitting evidence of Defendant's alleged prior sexual assault of a minor where it was not sufficiently similar to the sexual assault for which Defendant was on trial.

BACKGROUND

¶ 38 Defendant Troy Logan Pickens was indicted for first-degree rape of a child and two counts of sexual offense with a child by an adult based on allegations of the victim, Cindy.[1] At the time of the alleged offenses, Defendant was a chorus teacher at Cindy's middle school.

¶ 39 Prior to trial, on 4 October 2019, the State filed a notice of intent to offer Rule 404(b) evidence, prompting Defendant to file a motion in limine in response on 11 October 2019. Correctly assuming the State was referring to a prior allegation that Defendant sexually assaulted Wilma, a former student in Defendant's chorus class, in 2015, Defendant argued that the differences between the crimes were so significant as to make the Rule 404(b) evidence inadmissible. Defendant further argued that, even if the evidence had probative value, the probative value would be far outweighed by the danger of unfair prejudice, confusing the issues, and misleading the jury, necessitating exclusion under Rule 403.

¶ 40 On 21 October 2019, the trial court denied Defendant's motion to exclude the State's proffered Rule 404(b) evidence. The trial court did not issue an order with explicit findings of fact or conclusions of law; instead, the trial court orally ruled on Defendant's motion in limine regarding the Rule 404(b) evidence, stating:

> Well, I don't know that the -- I think the temporal proximity in this case exists. I think that this -- the fact that he was a teacher on both of these occasions, even though he wasn't a teacher of one of the -- well, the victim in this case, that it was the fact that

1. Pseudonyms are used for all relevant persons throughout this opinion to protect the identities of the juveniles and for ease of reading.

> he was a teacher that gave him access to the victim in each case, the fact that he or it's alleged that on each case he grabbed the girls by one arm and pulled them where he wanted to go, that he -- that both these girls, by their description, seem to be girls who were relatively small in stature and, therefore, to some extent, physically helpless and that they are sufficiently similar so as to be admissible and that they -- the probative value of the evidence outweighs any undue prejudice that is caused by the admission of these acts, and they certainly are relevant, and they do tend to indicate evidence of intent, motive, plan, and design, and that, therefore, this Court finds that they are admissible in the trial of this case, and, therefore, the motion to prohibit that admissibility of this evidence is denied, and the exception is noted for the record.

A. Assaults of Cindy

¶ 41 According to the testimony at trial, in July 2015, Cindy began middle school at eleven years old. While in school, Cindy took daily prescription medication around lunch time that the staff members at Cindy's middle school were authorized to administer. She typically took her medication around 12:10 p.m. Defendant had a planning period from 12:15 p.m. to 1:00 p.m.

¶ 42 According to Cindy's testimony, about one to two months into the school year, she saw Defendant in the hallway when she was out of her class to take her medication. Defendant motioned for Cindy to approach him, told her "[b]e quiet," grabbed the back of her shirt, and took her to a handicapped stall inside the sixth-grade girls' restroom. Defendant told Cindy to take off her clothes, he unbuttoned his pants, and told her to stroke his penis. At some point, Defendant stopped and Cindy left the bathroom to go back to class. Defendant threatened to hurt Cindy or her family if she told anyone about the incident. As a whole, this encounter occurred over the course of five minutes or less.

¶ 43 Cindy also testified about another assault with Defendant that occurred after she saw him again in the hallway. Defendant again grabbed Cindy by the back of her shirt—and, this time, also by her ponytail—and took her to the handicapped stall of the bathroom. He told her to get undressed again, pulled his pants down partially, made her stroke his penis, told Cindy to bend over and tried to put his penis in Cindy's vagina

twice. Defendant stated something along the lines of "you're too small" and "I thought this would be a problem," then put his penis in Cindy's anus. This encounter occurred over the span of about five minutes.

¶ 44 Cindy testified that on another day, Defendant stopped Cindy in the hallway on the way to get her medication and again took her to the bathroom. This time, Defendant instructed Cindy to defecate in the toilet, pick up the feces, and then Defendant put the feces in Cindy's mouth while saying "you filthy slut." He again threatened to hurt her family if she did not comply. Either Defendant or Cindy smeared feces on the wall in the process, and Defendant again put his penis in Cindy's anus. Defendant also touched Cindy's chest and vagina with his hand. This occurred over five to seven minutes.

¶ 45 According to Cindy's testimony, she would see Defendant in the hallway every other day.[2] She testified that Defendant continued to sexually assault Cindy, including one occasion when Cindy tried to resist and Defendant threw her into the wall or toilet and another occasion where Defendant hit her across the face. Defendant allegedly sexually assaulted Cindy repeatedly over the course of a couple weeks, with multiple instances of Defendant calling Cindy a "whore" or "slut," Defendant making Cindy put his penis in her mouth, Defendant putting his penis in Cindy's anus, and Defendant making Cindy eat her feces. At the time of these incidents, Cindy was shorter than five feet tall, and was "pretty small."[3]

¶ 46 Almost two years later, in April 2017, Cindy first reported these incidents to a third party when she text messaged her mother something along the lines of "Mom, [Defendant] hurt me, touched me in ways that he shouldn't have." Cindy told her mother at this time because one of her friends had stated that Defendant had been arrested for hurting another girl and she had confirmed Defendant's arrest on Google.

B. Assault of Wilma

¶ 47 Additionally, at Defendant's trial for sexually assaulting Cindy, Wilma, a former student of Defendant, testified that Defendant sexually

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2. Based on the testimony, it is unclear if the sexual assaults occurred every other day.

3. To help gauge the meaning of "pretty small," later testimony reflects that, in the aftermath of the sexual assault, when Cindy was twelve years old, she developed severe food aversions and was eventually admitted to a hospital for treatment related to Avoidant Restrictive Food Intake Disorder. At the time of her admission, she weighed about fifty-nine pounds and was four feet ten inches tall.

assaulted her in 2015, when she was fourteen years old. Her testimony regarding the sexual assault was admitted as Rule 404(b) evidence over Defendant's objections, and a limiting instruction was given prior to the testimony describing the sexual assault.[4] According to Wilma's testimony, starting in seventh grade, at another middle school, Wilma had been in chorus class with Defendant as her teacher. Defendant took particular interest in Wilma and three of her friends as they were good singers. Near the end of seventh grade, after watching a movie in the classroom and while students were getting up and leaving the classroom, Defendant placed his hands on Wilma's waist and moved them down towards her buttocks. In response, Wilma ran out of the room.

¶ 48 Wilma took chorus with Defendant in eighth grade as well. That year, Defendant asked Wilma to join a singing and dancing performance held at a local high school. Wilma indicated she was not interested, but Defendant called Wilma's mother. Her mother, believing that Wilma was interested in participating, told Defendant that Wilma would participate. The practices for the performance took place at the high school, and Defendant arranged with Wilma's mother to drive Wilma from the middle school to the high school. No other students joined Defendant and Wilma on their drives to the high school.

¶ 49 Wilma testified that, in 2015, while Defendant was driving her to the last practice at the high school, he stopped by his apartment because he said he wanted to change clothes. Initially, Wilma indicated she would stay in the car, but Defendant encouraged her to come up to the apartment. Once in the apartment, Defendant made himself and Wilma a sandwich, and Wilma watched television on the couch. After they finished eating, Defendant began to touch Wilma's thigh, to which Wilma

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4. The limiting instruction stated:

> When evidence has been received tending to show that at an earlier time, [] [D]efendant may have done or participated in other crimes, wrongs, or acts, this evidence may not be considered by you as proof of the character of [] [D]efendant in order to show that he acted in conformity therewith.
>
> If you believe [] [D]efendant committed or participated in these other crimes, wrongs, or acts, you may consider them for one purpose only, and that is whether they constitute proof of one or more of the following things: Motive, opportunity, intent, plan, scheme, or system as to the charges against him in this case. You may not consider them for any other purpose and you may not convict [] [D]efendant of the crimes charged because of any evidence he participated in or committed any other crimes, wrongs, or acts at an earlier time.

responded by moving his hand and asking him not to do so. Defendant continued to touch her thigh, then pulled Wilma by her arm into his bedroom, where he threw Wilma onto the bed, removed her pants and underwear, pulled his pants down, and put his penis in her vagina. When asked how long this lasted, Wilma testified "it wasn't long." After Defendant stopped, he went to the bathroom and, upon returning to the bedroom, apologized to Wilma and "said that if [she were] to tell anyone, it would happen again."[5]

C. Sentencing

¶ 50 Following the conclusion of the trial for sexually assaulting Cindy, Defendant was found guilty on all charges.

¶ 51 At the sentencing hearing, the trial court stated:

> To say the facts of this case are egregious is putting it mildly. The facts of this case are among the worst I've ever seen, and I've seen a lot of cases, thousands as a prosecutor, thousands as a judge. One of the things that one has to understand -- I was thinking about this earlier -- is that children the age of 11, unless they are really in an usual environment, have no idea about sex acts. They just don't. I mean, I'm sure – I've seen girls who were pregnant at that age, but they shouldn't have been, but were raped. They weren't consensual acts.
>
> The Legislature did something several years ago when they enacted this structured sentencing that I totally agreed with and I advocated for for ten years before they did it, and that was to make -- send a clear message that there was a difference between a violent crime and crimes against -- and nonviolent crimes, crimes against property, because the effect is totally different. I mean, just seeing these children testify in this case was just evidence to anyone who opened their eyes who had listened to it as to how damaged these children were by their experience. I don't -- given the number of women out here in the world, I don't understand why some people choose

5. At the time, Wilma was fourteen years old, weighed one hundred pounds, and was five feet two inches tall.

> underage girls, but it's wrong. It's morally wrong. It's legally wrong, and there's no justification for it.
>
> It would be difficult for an adult to come in here and testify in front of God and the country about what those two girls came in here and testified about. It would be embarrassing. It would be embarrassing to testify about consensual sex in front of a jury or a bunch of strangers. And in truth, they get traumatized again by being here, but it's absolutely necessary when a defendant pleads not guilty. They didn't have a choice and you, Mr. Pickens, had a choice.
>
> All right. If you'll stand up, Mr. Pickens. I assume this was a B1 felony in 2015. In this case, [] [D]efendant, Troy Logan Pickens, having been convicted by a jury -- found guilty by a jury in count one, guilty of first-degree rape of a child, the Court makes no findings in aggravation or mitigation because the prison time -- prison sentence is required by law under 14-27.23.

Immediately after these statements, the trial court sentenced Defendant to three consecutive active sentences of 300 to 420 months. Defendant timely appealed.

ANALYSIS

¶ 52 On appeal, Defendant argues "[t]he trial court erred in admitting testimony under Rule 404(b) which was not similar to the crime charged and was unfairly prejudicial." He also argues he "is entitled to a new sentencing hearing because the trial court considered impermissible factors before imposing consecutive sentences." The trial court committed prejudicial error in admitting the challenged testimony under Rule 404(b). As a result, I do not address the sentencing issue, and would vacate the judgement and remand for a new trial.

A. Rule 404(b) Evidence

¶ 53 Defendant contends the trial court erred by admitting Rule 404(b) evidence regarding his prior sexual assault as the events were not sufficiently similar and the probative value of the evidence was outweighed by the prejudice to Defendant under Rule 403. I would resolve this challenge on the basis of Rule 404(b) and, as a result, do not reach the Rule 403 issue.

¶ 54 Our Supreme Court has held:

> Though this Court has not used the term de novo to describe its own review of 404(b) evidence, we have consistently engaged in a fact-based inquiry under Rule 404(b) while applying an abuse of discretion standard to the subsequent balancing of probative value and unfair prejudice under Rule 403. For the purpose of clarity, we now explicitly hold that when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 158-59 (2012) (citation omitted).

¶ 55 Rule 404(b) establishes that

> [e]vidence of other crimes, wrongs, or 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). Rule 404(b)

> state[s] a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also is relevant for some

> purpose *other than* to show that [the] defendant has the propensity for the type of conduct for which he is being tried.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (marks and citation omitted). "Though it is a rule of inclusion, Rule 404(b) is still constrained by the requirements of similarity and temporal proximity." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (marks and citation omitted). Additionally, "North Carolina courts have been consistently liberal in admitting evidence of similar sex offenses in trials on sexual crime charges." *State v. Jacob*, 113 N.C. App. 605, 608, 439 S.E.2d 812, 813 (1994).

¶ 56 As Defendant has only challenged the Rule 404(b) evidence on the basis of similarity, I address only similarity and not temporal proximity. *See* N.C. R. App. P. 28(a) (2022) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Additionally, I address only "the purposes identified by the trial court below in admitting the testimony into the evidence at trial"—in this case, intent, motive, plan, and design.[6] *State v. Watts*, 246 N.C. App. 737, 745, 783 S.E.2d 266, 272 (2016), *aff'd as modified per curiam*, 370 N.C. 39, 802 S.E.2d 905 (2017) (refusing to address purposes that the trial court did not identify for the admissibility of Rule 404(b) evidence).

1. Similarity

¶ 57 Our Supreme Court has held:

> Under Rule 404(b) a prior act or crime is "similar" if there are some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both. However, it is not necessary that the similarities between the two situations rise to the level of the unique and bizarre. Rather, the similarities simply must tend to support a reasonable inference that the same person committed both the earlier and later acts.

State v. Stager, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991) (marks and citations omitted). Our Supreme Court has also previously found a

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6. I note that, although the trial court denied the motion in limine and allowed the Rule 404(b) evidence for the purposes of intent, motive, plan, and design, the trial court's limiting instruction mentioned the purposes of motive, opportunity, intent, plan, scheme, or system. I rely on the purposes articulated in the trial court's ruling on the motion in limine.

prior act not to be sufficiently similar where the only similarities between the prior act and the crime charged were common to most occurrences of that type of crime. *See State v. Al-Bayyinah*, 356 N.C. 150, 155, 567 S.E.2d 120, 123 (2002) ("The [S]tate failed to show, however, that sufficient similarities existed between the [prior] robberies and the present robbery and murder beyond those characteristics inherent to most armed robberies, i.e., use of a weapon, a demand for money, immediate flight."); *see also Watts*, 246 N.C. App. at 747, 783 S.E.2d at 273 ("Like our Supreme Court in *Al–Bayyinah*, we do not find these similarities[—that both instances involved the sexual assault of minors, the minors were alone at the time of the assaults, [the] defendant was an acquaintance of the minors, [the] defendant used force, and [the] defendant threatened to kill each minor and the minors' families—]unusual to the crimes charged. Moreover, we think the trial court's broad labelling of the similarities disguises significant differences in the sexual assaults.").

¶ 58 In *Watts*, we addressed the similarity between two alleged sexual assaults of minors by an adult defendant. *Watts*, 246 N.C. App. at 747-48, 783 S.E.2d at 273-74. The trial court had allowed Rule 404(b) evidence of a prior sexual assault where "both instances involved the sexual assault of minors, the minors were alone at the time of the assaults, [the] defendant was an acquaintance of the minors, [the] defendant used force, and [the] defendant threatened to kill each minor and the minors' families." *Id.* at 747, 783 S.E.2d at 273. However, we found "these similarities [were not] unusual to the crimes charged" and held "the [] differences are significant and undermine the findings of similarity by the trial court." *Id.* at 747-48, 783 S.E.2d at 273-74. The relevant differences included a six-year difference in the age of the minors; the circumstances of the sexual assaults differing significantly, with one occurring where the minor requested to stay with the defendant and was taken to his home with consent of the minor's mother and the other occurring by forcible entry into the minor's apartment; the relationships differing significantly, where one minor viewed the defendant like a grandfather and the other minor knew the defendant but did not have a close relationship with him; and the method differing significantly, with the defendant using a razor knife in one sexual assault and strangulation without the use of a weapon in the other. *Id.* We went on to grant the defendant a new trial as the lack of similarity between the events rendered the trial court's admission of the Rule 404(b) evidence erroneous. *Id.*

¶ 59 I find *Watts* to be controlling on the facts *sub judice*. Here, regarding similarity, the trial court stated:

> I think that this -- the fact that he was a teacher on both of these occasions, even though he wasn't a teacher of one of the -- well, the victim in this case, that it was the fact that he was a teacher that gave him access to the victim in each case, the fact that he or it's alleged that on each case he grabbed the girls by one arm and pulled them where he wanted to go, that he -- that both these girls, by their description, seem to be girls who were relatively small in stature and, therefore, to some extent, physically helpless and that they are sufficiently similar so as to be admissible . . . .

¶ 60 Although I find the differences between the alleged sexual assaults to be more significant for the Rule 404(b) purposes under which the evidence was admitted, the trial court correctly identified some general similarities between these events.[7] First, Defendant had access to and authority over Cindy and Wilma by virtue of Defendant's career as a teacher. Second, Cindy and Wilma were middle school aged girls.[8] Third, Defendant did not fully remove his pants during the sexual assaults. Fourth, the sexual assaults occurred over a short period of time. Fifth, in both instances, at least some of the acts occurred at a middle school. Sixth, Wilma and Cindy were both of relatively small stature.[9] Although

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7. Similarities common to most instances of the offense that were present here include the use of threats after the sexual assaults to discourage reporting, that Defendant was in control during each sexual assault, that Defendant attempted to put his penis in Cindy's vagina and Defendant put his penis in Wilma's vagina, that Defendant removed Cindy and Wilma's pants and underwear, and that Defendant used force to take Cindy and Wilma to a more private location where the sexual assault took place. As a result of these aspects being common to sexual assaults in general, I do not find that they rendered this offense and the prior act sufficiently similar. *See Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123.

I also note that, if there were something unusual to any of these aspects, such as the *content* of a threat or the *manner* that Cindy and Wilma's clothes were removed, those similarities could contribute to there being an unusual similarity. However, here, there were no unusual similarities of this kind between the sexual assaults.

8. Cindy was eleven and Wilma was fourteen. This difference in age is arguably sufficient to constitute a difference rather than a similarity. Indeed, it is not uncommon for an eleven-year-old child to be characterized as elementary school aged rather than middle school aged.

9. There is not clear evidence on what Cindy's approximate height and weight were at the time of the sexual assault. If we were to use Cindy's height and weight about eight months after the alleged sexual assault, there would have been a four-inch height difference and potentially as much as a forty-pound weight difference between Cindy and Wilma at the times of the sexual assaults. This also could more properly constitute a difference.

these similarities could contribute to a conclusion of unusual similarity in another case when considered in conjunction with other supporting similarities, I do not believe that these facts reflect an unusual similarity such that they evidence a similar intent, motive, plan, or design under these circumstances.

¶ 61 Instead, under *Watts*, I believe these features are insufficient to establish unusual similarity. In *Watts*, the similarities referred to by the trial court concerned general characteristics of the crimes that, although meaningful, were held insufficient to establish an unusual similarity between the events, especially where "the trial court's broad labelling of the similarities disguise[d] significant differences in the sexual assaults." *Watts*, 246 N.C. App. at 747, 783 S.E.2d at 273. Here, considering the general nature of the similarities identified by the trial court, along with the significant differences between the sexual assaults, the trial court erred in finding there was an unusual similarity justifying the admittance of the Rule 404(b) evidence to show a similar intent, motive, plan, or design.

¶ 62 The specifics of the alleged assaults were remarkably distinct. First, the way Defendant knew Wilma and Cindy differed—Defendant knew Wilma by virtue of being her chorus teacher for seventh and eighth grade, whereas Defendant did not know Cindy prior to sexually assaulting her.

¶ 63 Second, the manner in which the sexual assaults were brought about differed. Defendant manufactured the opportunity to isolate Wilma and sexually assault her by inviting her to participate in a performance, then following up with her mother knowing she did not intend to participate and offering to drive her. Defendant's opportunity to sexually assault Cindy was incidental, with Cindy already walking to get her medication daily around noon.

¶ 64 Third, the progression of the actions differed significantly. Defendant's attempted grooming behavior began by getting to know Wilma through the chorus class and showing a preference for her, then inappropriately touching her waist, then creating an opportunity for him to spend time alone with her, and then sexually assaulting her. With Cindy, Defendant immediately sexually assaulted her by making her undress and touch his penis, then progressed to more extreme actions. Defendant's interactions with Cindy *began* with sexual assault, whereas those with Wilma *escalated* to sexual assault.

¶ 65 Fourth, the locations of the actions committed differed significantly. Although Defendant touched Wilma's waist at school, Defendant

sexually assaulted her at his home in a bed. With Cindy, the sexual assaults occurred exclusively in a school bathroom. It is important that Defendant did not sexually assault Wilma at the school, as there is a significant methodological difference between a single sexual assault in a private place and repeated sexual assaults in a public restroom.

¶ 66 Fifth, the actions alleged widely differed. With Wilma, Defendant groped her legs and forcibly put his penis in her vagina. With Cindy, Defendant made her touch his penis, touched her breasts and vagina, attempted to put his penis in her vagina, forced her to put his penis in her mouth, made her defecate and eat her feces, and put his penis in her anus.

¶ 67 Finally, the frequency of the actions significantly differed. With Wilma, there were two instances of inappropriate conduct and one instance of sexual assault. With Cindy, the sexual assaults recurred over the course of a couple weeks, occurring at least five times and potentially occurring as often as every other day during this time period.[10]

¶ 68 The differences between Defendant's sexual assaults on Wilma and Cindy significantly undermine a finding that the events were sufficiently similar to show Defendant's intent, motive, plan, and design. Indeed, the plan or design for these events significantly differed in that Defendant's sexual assault on Wilma resulted from gradually escalating attempted grooming behavior towards a student in his class, ending in a single incidence of sexual assault outside of the school, whereas his sexual assault on Cindy resulted from a sudden attack on a student unknown to Defendant that recurred at the school over the course of two weeks with increasing depravity. Furthermore, the extreme differences between the specific acts that Defendant committed during the sexual assaults demonstrates there was not a similar intent, motive, plan, or design. The only similarity in Defendant's intent or motive would be in the general purpose to sexually assault a middle school aged girl, which does not alone rise to the level of an unusual similarity.

¶ 69 "Comparing the alleged prior sexual assault to the alleged sexual assault for which [the] defendant is now on trial, [I would] hold the above differences are significant and undermine the findings of similarity by the trial court." *Watts*, 246 N.C. App. at 748, 783 S.E.2d at 274. The prior bad act was not sufficiently similar to the Defendant's alleged actions for which he was on trial. As a result, the trial court erred by admitting

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10. Cindy testified to the specific details of at least five separate instances of sexual assault.

Wilma's testimony under Rule 404(b) as it was not sufficiently similar and was only relevant to show "[D]efendant's character or propensity to commit a sexual assault [on a minor]." *Watts*, 246 N.C. App. at 748, 783 S.E.2d at 274.

2. Prejudice

¶ 70 I must also consider whether this error was prejudicial. A preserved error is prejudicial "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2021). I conclude there is a reasonable possibility that the jury would have reached a different verdict if this evidence had not been admitted. There were no witnesses to Defendant's sexual assaults of Cindy, and there was no physical evidence of Defendant's guilt. As a result, the credibility of Cindy's testimony was essential to the jury's guilty verdict. Furthermore, there was evidence that might undermine Cindy's testimony, such as her assertion that she was using crutches due to an injury caused by Defendant when she met with the principal of her school, which was undermined by her mother's denial of Cindy having used crutches that day; accusations that the principal of the middle school yelled at her, called her vulgar names, and broke her wrist, which were undermined by the counselor who was present for the whole meeting; expert evidence that Cindy "scored extremely high on confusion between reality and imagining things"; and Cindy's parents' suspicions of a prior sexual trauma.

¶ 71 In light of the facts of this case, the erroneous admission of Defendant's alleged sexual assault on Wilma created a reasonable possibility that the jury would have reached a different verdict if this evidence had not been admitted. The erroneous admission of the Rule 404(b) evidence was prejudicial to Defendant. Defendant is entitled to a new trial, and I would not reach Defendant's other arguments on appeal. *See Watts*, 246 N.C. App. at 748, 783 S.E.2d at 274 (granting a new trial where we held Rule 404(b) evidence was improperly admitted and was prejudicial, and noting that our holding disposed of the case on appeal).

CONCLUSION

¶ 72 The trial court committed prejudicial error by admitting evidence of a prior sexual assault under Rule 404(b), entitling Defendant to a new trial.

STATE OF NORTH CAROLINA
v.
RODNEY RANDELL WENTZ

No. COA22-125

Filed 2 August 2022

Sentencing—plea agreement—sentence different from plea agreement—right to withdraw guilty plea

The trial court erred by imposing a sentence inconsistent with defendant's plea agreement without informing defendant of his right to withdraw his guilty plea pursuant to N.C.G.S. § 15A-1024, where the plea agreement contained a specific, consolidated sentence for multiple convictions in the presumptive range of 77-105 months but the trial court entered two separate, consecutive sentences (of 77-105 months and 67-93 months).

Appeal by Defendant from judgment entered 5 September 2019 by Judge J. Carlton Cole in Pasquotank County Superior Court. Heard in the Court of Appeals 10 May 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Defendant Rodney Randell Wentz ("Defendant") appeals the trial court's denial of his motion to withdraw his guilty plea pursuant to N.C. Gen. Stat. § 15A-1024, alleging that the sentence imposed by the trial court was inconsistent with the sentence outlined in his plea agreement with the State. After careful review, we vacate the trial court's judgment and remand for further proceedings.

I. Factual and Procedural Background

¶ 2 Between February 5 and February 19, 2019, Defendant and his daughter[1] committed three break-ins and stole several items including

1. Defendant's daughter is not the subject of this appeal.

watches, televisions, jewelry, money, a safe, a wallet, and a 9-millimeter handgun magazine from several residences in Elizabeth City, North Carolina. Investigators determined Defendant and his daughter were staying at a local hotel, searched their room, and found a .22 caliber Gecado revolver among Defendant's belongings. Police also recovered several of the items stolen during the break-ins from Defendant's vehicle.

¶ 3 On April 22, 2019, a grand jury returned indictments charging Defendant with three counts each of breaking and entering, larceny after breaking and entering, possession of stolen goods, and one count each of larceny of a firearm, possession of a stolen firearm, possession of a firearm by a felon, and being a habitual felon due to three prior felony convictions.

¶ 4 On September 5, 2019, Defendant entered into a plea agreement with the State. Defendant agreed to enter an *Alford* plea to one count of possession of a firearm by a felon, three counts of felony breaking and entering, and to admit his status as a habitual felon. In exchange, the State agreed to dismiss the remaining charges. Additionally, the plea agreement stated: "The State does not oppose consolidating the offenses for sentencing. The Defendant is to receive an active sentence in the ~~aggrivated~~ [sic] range. The State will dismiss the related charges." Beneath the stricken word "aggrivated [sic]" was handwritten, "Presumptive 77-105 months."

¶ 5 On September 5, 2019, the parties brought their negotiated plea agreement before the trial court. The trial court read aloud the plea agreement and Defendant stated he understood, accepted, and entered the plea voluntarily, fully understanding what he was doing. After hearing the State's factual basis for the charges, the trial court turned to sentencing. The trial court noted, "the plea agreement says the State does not oppose the Court consolidating the offenses, but I'm not inclined to do that. What I would do is sentence him separately [for the Class C and Class D felonies]." Upon the trial court's statement, Defendant made a motion to withdraw the plea, contending he had "entered into this plea with the expectation that he would receive a sentence of 77 to 105 months."

¶ 6 In response, the trial court stated the plea agreement did not reflect Defendant's interpretation of it because the language provided that "the State does not oppose the matters being consolidated." The trial court determined that it would not consolidate the matters and that it was in its discretion to allow Defendant to withdraw his plea prior to entering sentence. The trial court observed,

> [i]f at the time of sentencing, the judge decides to impose a sentence other than that provided for in the negotiated plea arrangement, the defendant must be allowed to withdraw his or her plea[2] . . . . However, the Court may allow the defendant to withdraw a guilty plea prior to sentencing for a fair and just reason. I'm not inclined to allow him to withdraw it . . . .

After denying Defendant's motion to withdraw the guilty plea, the trial court sentenced him to 77 to 105 months for the charge of possession of a firearm by a felon, followed by 67 to 93 months for the three breaking and entering convictions. Defendant received 188 days of credit for time served awaiting trial. Defendant gave oral notice of appeal.

II. Appellate Jurisdiction

¶ 7 Pursuant to N.C. Gen. Stat. § 15A-1444(e) and our decision in *State v. Dickens*, Defendant is entitled to appellate review of the denial of his motion to withdraw his *Alford* plea as a matter of right. N.C. Gen. Stat. § 15A-1444(e) (2019); *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980).

III. Analysis

¶ 8 Defendant's sole argument on appeal is that the trial court violated N.C. Gen. Stat. § 15A-1024 and erred in imposing a sentence inconsistent with the sentence set out in Defendant's plea agreement without allowing Defendant to withdraw his *Alford* plea. We agree.

1. Standard of Review

¶ 9 As noted in *State v. Wall*, to determine "whether there was any proper reason for the trial court to have granted defendant's motion to withdraw his plea after a sentence is imposed, we look to the statutory provisions governing such a motion. Our General Assembly has created a clear right for a defendant to withdraw a plea at the time sentence is imposed if that sentence differs from that contained in the plea agreement" through N.C. Gen. Stat. § 15A-1024. 167 N.C. App. 312, 314, 605 S.E.2d 205, 207 (2014).

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2. We note that the trial court is reciting the first sentence of N.C. Gen. Stat. § 15A-1024 (2019).

2. N.C. Gen. Stat. § 15A-1024's Application to the Plea Agreement

¶ 10 "Although a plea agreement occurs in the context of a criminal proceeding, it remains contractual in nature." *State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993) (citation omitted). A plea agreement "is markedly different from an ordinary commercial contract" as it involves the waiver of fundamental constitutional rights, including the right to a jury trial. *State v. Blackwell*, 135 N.C. App. 729, 731, 522 S.E.2d 313, 315 (1999). Due to the serious contractual nature of a plea bargain, a "constant factor [in the plea-bargaining process] is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Rodriguez*, 111 N.C. App. at 144, 431 S.E.2d at 790 (quoting *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L. Ed. 2d 427, 433 (1971)). Due process mandates strict adherence to any plea agreement to ensure "the defendant [receives] what is reasonably due in the circumstances." *Id.*

¶ 11 "There is no absolute right to have a tendered guilty plea accepted" by the trial court. *State v. Wallace*, 345 N.C. 462, 465, 480 S.E.2d 673, 675 (1997). The trial court judge may initially accept "a plea arrangement when it is presented to him[,] . . . [hear] the evidence[,] and at the time for sentencing [determine] that a sentence different from that provided for in the plea arrangement must be imposed." *State v. Williams*, 291 N.C. 442, 446, 230 S.E.2d 515, 517-18 (1976).

¶ 12 To ensure a defendant receives the benefit of a plea bargain, N.C. Gen. Stat. § 15A-1024 provides that a defendant must be informed and permitted to withdraw his plea when the sentence imposed by the trial court differs from what was agreed to under the terms of the plea agreement:

> If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

N.C. Gen. Stat. § 15A-1024; *State v. Marsh*, 265 N.C. App. 652, 654, 829 S.E.2d 245, 247 (2019). Once a trial court decides to impose a different sentence, the trial court should: (1) inform the defendant of the decision to impose a sentence other than that provided in the plea agreement;

(2) inform the defendant that he can withdraw his plea; and (3) if the defendant chooses to withdraw his plea, grant a continuance until the next session of court. *State v. Rhodes*, 163 N.C. App. 191, 195, 592 S.E.2d 731, 733 (2004). "Where a court fails to inform a defendant of [his] right to withdraw a guilty plea pursuant to N.C. Gen. Stat. § 15A-1024, the sentence must be vacated, and the case remanded for re-sentencing." *State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006) (citing *Rhodes*, 163 N.C. App. at 195, 592 S.E.2d at 733). This Court's "precedent is clear that *any* change by the trial judge in the sentence that was agreed upon by the defendant and the State . . . requires the judge to give the defendant an opportunity to withdraw his guilty plea." *Marsh*, 265 N.C. App. at 655, 829 S.E.2d at 247 (emphasis added).

¶ 13 The State contends that the trial court's sentencing was not inconsistent with the plea agreement because the plea agreement's plain language does not require Defendant's offenses to be consolidated for sentencing. The State argues the plea agreement's language, "the State does not oppose consolidating the offenses for sentencing," possesses a similar effect as the plea agreement in *State v. Blount*. 209 N.C. App. 340, 346, 703 S.E.2d 921, 926 (2011). In *Blount*, the plea agreement between the State and defendant included the following language: "The State shall not object to punishment in the mitigated range of punishment." *Id.* This court determined that the terms of the plea agreement did not "provide for a mitigated-range sentence — only that the State would 'not object' to such a sentence." *Id.* We held there was "no agreed-upon sentence" between defendant and the State "for the trial court to reject." *Id.* Drawing a parallel between the plea agreement in *Blount* and the plea agreement here, the State contends that it agreeing "not to oppose a particular sentence did not compel the trial court to impose that sentence." However, the plea agreement in this case is distinguishable from that in *Blount*.

¶ 14 Because a plea agreement involves a waiver of fundamental constitutional rights, "the right to due process and basic contract principles require strict adherence" to the terms of the agreement. *Rodriguez*, 111 N.C. App. at 145, 431 S.E.2d at 790. Furthermore, "this strict adherence 'require[s] holding the [State] to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements.' " *Blackwell*, 135 N.C. App. at 731, 522 S.E.2d at 315 (quoting *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986)). Thus, "when a prosecutor fails to fulfill promises made to the defendant in negotiating a plea bargain, the defendant's constitutional rights have been violated and he

is entitled to relief." *Rodriguez*, 111 N.C. App. at 145, 431 S.E.2d at 790 (quoting *Northeast Motor Co. v. N.C. State Board of Alcoholic Control*, 35 N.C. App. 536, 538, 241 S.E.2d 727, 729 (1978)).

¶ 15 In this case, the plea agreement includes a specific, agreed-upon sentence between Defendant and the State: "The Defendant is to receive an active sentence in the ~~aggrivated~~ [sic] range," a sentence intended to be in the presumptive range of "77-105 months." Defendant "quite reasonably interpreted this to mean that the State promised" that in exchange for his *Alford* plea, he would receive an active sentence in the presumptive range of "77-105 months." *See Blackwell*, 135 N.C. App. at 731, 522 S.E.2d at 315. Thus, the plea agreement laid out an agreed-upon sentence for the trial court to either accept or reject. *See Blount*, 209 N.C. App. at 346, 703 S.E.2d at 926.

¶ 16 The State's argument focuses on the plea agreement's language of "[t]he State does not oppose" to justify the trial court's discretion in not consolidating Defendant's convictions into one judgment. The State contends that this choice of words in the plea agreement placed Defendant "on notice that consolidation was not guaranteed." However, the strict adherence to the plea agreement requires construing any ambiguities in the agreement against the State as its drafter. *Blackwell*, 135 N.C. App. at 731, 522 S.E.2d at 315 (quoting *Harvey*, 791 F.2d at 300). When reading the provisions of the plea agreement together "as a whole", it was reasonable for Defendant to rely upon the consolidation of his offenses for sentencing as part of the inducement for Defendant's *Alford* plea. *See Rodriguez*, 111 N.C. App. at 144, 431 S.E.2d at 790. Simply put, Defendant did not waive his constitutional rights and bargain for the State's interpretation of the plea agreement. Moreover, a "defendant should not be forced to anticipate loopholes that the State might create in its own promises." *Blackwell*, 135 N.C. App. at 731, 522 S.E.2d at 315.

¶ 17 At sentencing, the trial court clearly articulated its discretion to impose something other than a consolidation of Defendant's sentences. While the trial court sentenced Defendant to 77 to 105 months for the charge of possession of a firearm by a felon, it imposed an alternative sentence of 67 to 93 months for the three breaking and entering convictions and ordered both sentences to run consecutively.

¶ 18 In *State v. Carriker*, this Court held that the trial court erred by denying the defendant's motion to withdraw her plea after ordering the defendant to surrender her nursing license, a sentence that was not included in the plea agreement. 180 N.C. App. at 471, 637 S.E.2d at 558. Here, as in *Carriker*, the trial court imposed an additional sentence from

that specified in the plea agreement. *Id.* The trial court's subsequent sentencing of 67 to 93 months was contrary to the inducement Defendant bargained for in his plea agreement with the State. Our Court has held that *any* change by the trial court in the sentence that was agreed upon by the defendant and the State requires the trial court judge to give the defendant an opportunity to withdraw his guilty plea. *Marsh*, 265 N.C. App. at 655, 829 S.E.2d at 247. The record before us reveals the trial court "failed to inform defendant of [his] right to withdraw [his] plea after determining to impose a sentence other than as provided in the plea arrangement." *Carriker*, 180 N.C. App. at 471, 637 S.E.2d at 558; *Wall*, 167 N.C. App. at 317, 605 S.E. 2d at 209. In fact, the trial court denied Defendant's motion to withdraw his plea.

¶ 19 We conclude the two separate sentences imposed by the trial court are different from the presumptive sentence of 77-105 months that Defendant bargained for in his plea agreement. *Marsh*, 265 N.C. App. at 656, 829 S.E.2d at 248; *see State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002) ("A plea agreement is treated as contractual in nature[.]"). Because the trial court denied Defendant his right to withdraw his guilty plea as required by N.C. Gen. Stat. § 15A-1024, we vacate and remand to the trial court for proceedings not inconsistent with the statute. *Carriker*, 180 N.C. App. at 471, 637 S.E.2d at 558.

IV. Conclusion

¶ 20 For the reasons stated, we hold the trial court was required to inform Defendant of his right to withdraw his guilty plea pursuant to N.C. Gen. Stat. § 15A-1024. Accordingly, we vacate the trial court's judgment and remand this matter for further proceedings. Because Defendant was entitled to withdraw his plea once the trial court imposed a sentence inconsistent with the plea agreement, on remand, we conclude Defendant is no longer bound by the plea agreement. *Marsh*, 265 N.C. App. at 656, 829 S.E.2d at 248.

VACATED AND REMANDED.

Judges INMAN and ARROWOOD concur.

VISIBLE PROPERTIES, LLC, PETITIONER
v.
THE VILLAGE OF CLEMMONS, RESPONDENT

No. COA21-398

Filed 2 August 2022

1. Zoning—billboards—digital—off-premises—harmonization of ordinance provisions—free use of property

Petitioner's proposed digital billboard was not prohibited by local zoning ordinances where, after the appellate court harmonized the numerous applicable zoning provisions and construed ambiguous provisions in favor of the free use of property, the sign-specific regulation controlled the permissible locations of off-premises signs and did not prohibit the proposed billboard on the property where petitioner sought to install it.

2. Zoning—billboards—digital—no special definitions—ambiguous—free use of property

Petitioner's proposed digital billboard—which would display a static image that would change every six to eight seconds to a different image—was not prohibited by local zoning ordinances where provisions prohibiting "moving and flashing signs" and "electronic message boards," for which no special definitions were provided in the ordinance, were ambiguous and therefore had to be construed in favor of the free use of property.

Appeal by petitioner from order entered 23 December 2020 by Judge Eric Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 23 February 2022.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, Jonathan H. Dunlap, and Brian D. Gulden, for petitioner-appellant.

Blanco Tackabery & Matamoros, P.A., by Elliot A. Fus and Chad A. Archer, for respondent-appellee.

DIETZ, Judge.

¶ 1 Visible Properties, LLC wants to erect a digital billboard on property bordering a highway in Clemmons. The zoning board of adjustment

denied Visible's request on the ground that the zoning ordinances did not permit digital billboards. The trial court, on certiorari review, affirmed.

¶ 2 Our task on appeal is to determine if the zoning board and the trial court properly interpreted the language of the ordinances.

¶ 3 This is not as easy as it sounds. Determining which zoning provisions apply requires so much cross-referencing it is almost dizzying. There is a general provision that permits off-premises signs such as billboards on the property at issue; a separate overlay district regulation that, by omission, does not permit off-premises signs on the property; and a sign-specific ordinance that permits off-premises signs on the property and states that it supersedes other regulations concerning signs. Then, there is a separate provision stating that, in the event of a conflict among different provisions, the most restrictive provision prevails.

¶ 4 Similarly, the zoning ordinances prohibit "moving and flashing signs" and "electronic message boards." But, in light of the examples of "moving and flashing signs" in the ordinance, and the descriptions of billboards in other portions of the ordinance as either "signs" or "billboards" (not "message boards"), there are reasonable interpretations of these provisions that both cover the type of digital billboard proposed by Visible, and that do not.

¶ 5 In the end, we are guided by two overarching principles governing construction of zoning ordinances—first, that we should strive to harmonize provisions and avoid conflicts whenever possible; and second, that we should construe ambiguous provisions in favor of the free use of property. Applying those principles here, we hold that the sign-specific regulation controls the permissible locations of signs and permits Visible's proposed billboard on the property. We further hold that the prohibitions on "moving and flashing signs" and "electronic message boards" are open to multiple reasonable interpretations, are therefore ambiguous, and must be construed in favor of Visible's proposed use of the property. We therefore reverse the trial court's order and remand for entry of an order reversing the Board of Adjustment's decision.

Facts and Procedural History

¶ 6 Visible Properties, LLC is a North Carolina company that owns and operates outdoor advertising signs and billboards throughout the state.

¶ 7 In June 2019, Visible applied to the Village of Clemmons for a zoning permit to construct a billboard with digital technology at 2558 Lewisville-Clemmons Road. The permit requested construction of a "10' x 30' Outdoor Advertising Structure with Digital changeable copy"

that would be categorized as a "Ground (off premises freestanding)" sign. The proposed digital billboard would not contain any moving or scrolling text or images, nor any flashing lights or images, but would change the static image displayed on the billboard every six to eight seconds using digital technology.

¶ 8 Officials with the Village of Clemmons denied the permit on the grounds that "the structure is a 'Sign, Ground (Off-Premises),' which is not listed as a permitted use in the South Overlay District in which the Property is located" and that the structure is prohibited by the sign regulations regarding "moving and flashing signs" and "electronic message boards."

¶ 9 Visible appealed to the Clemmons Zoning Board of Adjustment. The Board met in December 2019 and conducted an evidentiary hearing where it considered the application materials, testimony, and evidence presented. In January 2020, the Board entered a written decision affirming the staff decision to reject Visible's permit application. Visible petitioned for a writ of certiorari, which the trial court granted. In December 2020, the trial court affirmed the Board of Adjustment's decision. Visible timely appealed.

Analysis

¶ 10 Visible challenges the trial court's legal determination that the proposed digital billboard was prohibited by various provisions of the zoning ordinances. In this type of administrative review, challenging the interpretation of zoning ordinances, the trial court sits as an appellate court and reviews this legal question *de novo*. *Fort v. Cty. of Cumberland*, 235 N.C. App. 541, 548, 761 S.E.2d 744, 749 (2014). On appeal, this Court also applies a *de novo* standard of review and examines whether the trial court committed an "error of law in interpreting and applying the municipal ordinance." *Four Seasons Mgmt. Servs., Inc. v. Town of Wrightsville Beach*, 205 N.C. App. 65, 76, 695 S.E.2d 456, 463 (2010).

¶ 11 Zoning ordinances are interpreted "to ascertain and effectuate the intent of the legislative body." *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 138, 431 S.E.2d 183, 187 (1993). "The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances." *Four Seasons Mgmt. Servs.*, 205 N.C. App. at 76, 695 S.E.2d at 463. But, as discussed in more detail below, when there is ambiguity in a zoning regulation, there is a special rule of construction requiring the ambiguous language to be "construed in favor of the free use of real property." *Morris Commc'ns Corp. v. City of Bessemer*, 365 N.C. 152, 157, 712 S.E.2d 868, 871 (2011).

I. Permitted uses at the property location

¶ 12 **[1]** Visible first challenges the trial court's determination that the zoning ordinances prohibited the use of off-premises signs on the property at issue in this case. Specifically, the trial court determined that a provision creating the "Lewisville Clemmons Road (South Overlay District)"—an overlay district in which this property is located—did not permit off-premises signs. Moreover, the trial court determined that, to the extent other provisions in the ordinances permitted off-premises signs on the property, the "Conflicting Provisions" section of the ordinances required the court to apply "the more restrictive limitation or requirements," which in this case is the overlay district provision.

¶ 13 To address this argument, we must examine the series of use restrictions, corresponding tables, and numerous cross-references that address the use of off-premises signs on property within the Village of Clemmons.

¶ 14 We begin with the general provision of the ordinances governing permissible uses of property. This general provision is found in Section B.2-4 and is titled "Permitted Uses." The first section of this general provision is entitled "Table B.2.6" and explains that the corresponding table "displays the principal uses allowed in each zoning district and references use conditions." Village of Clemmons, N.C., Unified Development Ordinances, § B.2-4.1 (UDO).

¶ 15 Table B.2.6 is included in the ordinances following this section. In a grid format, the table lists particular uses of property and then indicates whether that use is permitted in each zoning district.

¶ 16 Under the heading "Business and Personal Services" in Table B.2.6, there is an entry for "Signs, Off-Premises." UDO, Table B.2.6. This entry indicates that off-premises signs generally are permissible in the zoning district in which this property is located. This entry in the table also references a separate use condition located in Section B.2-5.67. That subsection, titled "Signs, Off-Premises," then cross-references another section, discussed below, stating that "All signs must comply with the provisions of Section B.3-2." UDO, § B.2-5.67.

¶ 17 A later subsection of the ordinances states that these general provisions in Table B.2.6 may be subject to additional restrictions in other subsections, including two that are relevant to our analysis—a section governing overlay districts and the section, referenced above, governing signs:

> **2-4.5 OTHER DEVELOPMENT REQUIREMENTS OF THE ZONING ORDINANCE**
>
> (A) Additional Development Requirements. In addition to the regulation of uses pursuant to Section B.2-4 and the use conditions of Section B.2-5, the following additional development requirements of this Ordinance may apply to specific properties and situations.
>
> . . .
>
> (2) Section B.2-1.6 Regulations for Overlay and Special Purpose Districts
>
> . . .
>
> (6) Section B.3-2 Sign Regulations

Id. § B.2-4.5.

¶ 18 We begin with the first of these two additional development requirements, concerning overlay and special purpose districts. This provision creates a special district referred to as "Lewisville Clemmons Road (South Overlay District)." *Id.* § B.2-1.6(E). This overlay district includes the property at issue in this case.

¶ 19 In an introductory section titled "Vision," this overlay district provision explains that it is intended "to promote the redevelopment of the area into a mixed use commercial/office/residential." *Id.* § B.2-1.6(E)(A). This provision further explains that it is "intended to foster development that improves traffic/safety, intensifies land use and economic value, to promote a mix of uses, to enhance the livability of the area, to enhance pedestrian connections, parking conditions, and to foster high-quality buildings and public spaces that help create and sustain long-term economic vitality." *Id.*

¶ 20 Another provision in the Lewisville Clemmons Road (South Overlay District) section states that its "standards apply to sites (including principal and accessory buildings) that are within the Lewisville-Clemmons Road Corridor Overlay district unless otherwise specified herein, and apply to all permitted uses allowed within the district." *Id.* § B.2-1.6(E)(C).

¶ 21 Finally, for purposes of this appeal, the operative provision of the Lewisville Clemmons Road (South Overlay District) section lists the permissible uses of property in the overlay district. *Id.* § B.2-1.6(E)(D). In a section titled "Permitted Uses," the ordinance states that the "overlay

district provisions apply to any base zoning district set forth in this chapter that exists within the defined overlay area." *Id.*

¶ 22 The provision then includes a list of use categories corresponding to some (but not all) of the use categories listed in Table B.2.6, discussed above. Within those use categories, this provision again lists some, but not all, of the particular uses listed under those categories in Table B.2.6. Relevant to this case, the "Permitted Uses" provision includes the "Business and Personal Services" category. This is the use category from Table B.2.6 (the general use provision) that addressed the use of off-premises signs. In this more specific overlay provision, the Business and Personal Services category lists *some* uses contained in Table B.2.6 under that category heading, but does not list "Signs, Off-Premises" as a permitted use:

> The overlay district provisions apply to any base zoning district set forth in this chapter that exists within the defined overlay area. The following permitted uses are allowed for this proposed geographic area by use category:
>
> . . .
>
> 3. **Business and Personal Services.** Banking and Financial Services, Bed and Breakfast, Building Contractors General, Car Wash, Funeral Home, Health Services Misc., Hotel/Motel, Kennel, Medical Lab, Medical Offices, Motor Vehicle, Leasing/Rental, Repair/Maintenance, Body/Paint Shop, Office Misc., Professional Office, Service Personal, Services, Business A/B, Veterinary Services

Id. § B.2-1.6(E)(D)(3).

¶ 23 Finally, we address the last, and most specific, of the relevant provisions—the additional development requirements contained in Section B.3-2 that govern signs. This provision contains lengthy rules specific to various forms of signs and lists their permitted uses and locations:

> **3-2 SIGN REGULATIONS**
>
> **(B) Permitted Signs**
>
> . . .
>
> **(2) Application of Table of Permitted Districts for Signs.** *The following signs shall be permitted*

> *in the zoning districts as indicated in Table B.3.6*, and shall comply with all regulations of the applicable district *unless otherwise regulated by specific regulations of this section.*
>
> . . .
>
> **(C) Off-Premises Ground Signs**
>
> **(1) Zoning Districts.** *Ground signs (off-premises) are permitted only in the districts as shown in Table B.3.6 and only along designated roads which are not identified as view corridors listed in Section B.3-2.1(C)(2).*
>
> **(2) View Corridors.** *No off-premises sign shall be permitted in any view corridor as described below* [Table B.3.7 titled "View Corridors"] and shown on the View Corridor Map located in the office of the Planning Board.

Id. § B.3-2.1(B)(2), (C) (emphasis added).

¶ 24 Importantly, this sign provision operates differently from other portions of the ordinances governing uses of property. Specifically, as the emphasized language above indicates, this sign provision contains its own, more specific restrictions for where signs may be located and states that these more specific restrictions, where applicable, supersede other portions of the ordinances.

¶ 25 These more specific restrictions take two forms relevant to this case. First, Table B.3.6, which accompanies and is referenced by this "Sign Regulations" ordinance, includes a category for "Off-Premises Signs" and indicates that off-premises signs are permitted only in specific zoning districts. The property at issue in this case is located in a zoning district where off-premises signs are permitted under this table.

¶ 26 Second, Table B.3.7, which also accompanies and is referenced by this "Sign Regulations" ordinance, contains a list of the "view corridors" mentioned in this subsection of the ordinance. These view corridors are specific areas of various streets and highways where off-premises signs are prohibited despite otherwise being permitted in the more general table, Table B.3.6. Importantly, there are portions of Lewisville-Clemmons Road, on which this property is located, that are in these view corridors. But this particular property is not in a view corridor and thus off-premises signs are permitted on the property under both Table B.3.6 and Table B.3.7.

¶ 27 After walking through this dizzying sequence of provisions, tables, and internal cross-refences, we are left with this: A general provision that permits off-premises signs on this property; a more specific overlay provision that supersedes the general (or "base zoning district") regulations and, by omission, does not permit off-premises signs on this property; and an even more specific sign provision that permits off-premises signs on this property and further states that, where something is "regulated by specific regulations of this section" those specific regulations supersede other regulations of the applicable district.

¶ 28 In defending the Board of Adjustment's ruling, the Village of Clemmons contends that the overlay district provision should control because, at best, these three provisions are conflicting. The Village points to a separate section of the zoning ordinances establishing a rule of construction for conflicting provisions. It provides that where "a conflict exists between any limitations or requirements in this Ordinance, the more restrictive limitation or requirements shall prevail." *Id.* § B.1-7.1. Thus, the Village argues, the conflict between these provisions must be resolved by applying the most restrictive zoning requirements within the conflicting provisions, which is the overlay district provision that prohibits off-premises signs on the property.

¶ 29 We agree that our State's case law approves of this sort of rule-of-construction language and that, if we determined there is a conflict among different provisions of the ordinance, we must apply this rule of construction in favor of the most restrictive provision. *See Westminster Homes Inc. v. Town of Cary*, 354 N.C. 298, 305–06, 554 S.E.2d 634, 639 (2001).

¶ 30 But we cannot reach that step unless we first determine that there is a conflict. And, in examining that question, we are guided by two common law principles governing interpretation of zoning ordinances. First, when interpreting provisions of a law that are all part of the same regulatory scheme, we should strive to find a reasonable interpretation "so as to harmonize them" rather than interpreting them to create an irreconcilable conflict. *McIntyre v. McIntyre*, 341 N.C. 629, 634, 461 S.E.2d 745, 749 (1995). In other words, even in the presence of this conflicting provisions criteria in the ordinances, we will first seek a reasonable interpretation that has no internal conflicts because we must presume that the drafters would not intend to create regulations that are internally inconsistent and conflicting. *See Taylor v. Robinson*, 131 N.C. App. 337, 338–39, 508 S.E.2d 289, 291 (1998).

¶ 31 Second, when interpreting zoning regulations, which are "in derogation of common law rights," and faced with more than one reasonable

interpretation of the regulations, we should choose the reasonable interpretation that favors "the free use of property." *Cumulus Broad., LLC v. Hoke Cty. Bd. of Comm'rs*, 180 N.C. App. 424, 427, 638 S.E.2d 12, 15 (2006).

¶ 32 With these common law principles in mind, we hold that there is a reasonable interpretation of these provisions that harmonizes them to avoid conflicts. We adopt that interpretation, consistent with the principle that laws should not be construed to be conflicting when there is a reasonable interpretation that contains no internal conflicts. *McIntyre*, 341 N.C. at 634, 461 S.E.2d at 749. Under that interpretation, the specific, express limitation on off-premises signs contained in the Sign Regulations portion of the ordinance supersedes the other two ordinances and controls the use of off-premises signs on this property. UDO § B.3-2.1. This is so both because these sign-specific rules directly apply to the use at issue and because these sign-specific rules state that other zoning restrictions do not apply if the use is "regulated by specific regulations of this section." *Id.*

¶ 33 Under these sign-specific regulations, off-premises signs are permitted at the property on which Visible desires to install its digital billboard. We therefore reject the Village of Clemmons's argument and hold that the trial court erred by affirming the Board of Adjustment's determination that the off-premises sign was precluded by the zoning regulations in the Lewisville Clemmons Road (South Overlay District) provision.

II. Prohibited signs regulation

¶ 34 **[2]** We next turn to the alternative ground on which the Board of Adjustment relied, concerning the permissible types of off-premises signs.

¶ 35 Visible applied for approval of a digital billboard described as an "outdoor advertising structure with digital changeable copy." The digital billboard would display a static image like a traditional billboard, without any moving or scrolling images, video, blinking or flashing lights, or other animation. But, unlike a traditional billboard, the static image displayed on the billboard would change every six to eight seconds to a different image. Thus, the digital billboard would be capable of rotating through a series of different images over time.

¶ 36 The Village of Clemmons contends that this type of digital billboard is prohibited by two provisions of the Sign Regulations section of the ordinance, one addressing "Moving and Flashing Signs" and the other addressing "Electronic message boards." These two prohibitions are found in Section B.3-2.1(A)(3) of the Village's zoning ordinances:

3-2.1 SIGN REGULATIONS

(A) General Requirements

. . .

(3) Prohibited Signs. The following signs or use of signs is prohibited.

(a) Flashing Lights. Signs displaying intermittent or flashing lights similar to those used in governmental traffic signals or used by police, fire, ambulance, or other emergency vehicles.

(b) Use of Warning Words or Symbology. Signs using the words stop, danger, or any other word, phrase, symbol, or character similar to terms used in a public safety warning or traffic signs.

(c) Temporary, Nonpermanent Signs. Temporary, nonpermanent signs, including over-head streamers, are not permitted in any zoning district, unless otherwise specified in these regulations.

(d) Moving and Flashing Signs (excludes electronic time, temperature, and electronic fuel pricing). Moving and flashing signs, excluding electronic time, temperature, and message signs, are not permitted in any zoning district. This includes pennants, streamers, banners, spinners, propellers, discs, any other moving objects; strings of lights outlining sales areas, architectural features, or property lines; beacons, spots, searchlights, or reflectors visible from adjacent property or rights-of-way.

(e) Exterior exposed neon signs are prohibited.

(f) Electronic message boards are prohibited.

UDO, § B.3-2.1(A)(3) (emphasis added).

¶ 37 As noted above, when interpreting these provisions, we apply the same principles of construction used to interpret statutes. *Morris Commc'ns Corp.*, 365 N.C. at 157, 712 S.E.2d at 872. The terms "Moving and Flashing Signs" and "Electronic message boards" are not given special definitions in the ordinance and we therefore assume that the

drafters "intended to give them their ordinary meaning determined according to the context in which those words are ordinarily used." *Id.*

¶ 38 We begin with the provision addressing "Moving and Flashing Signs." The parties present two fully contradictory interpretations of this provision, both based on what (in that party's view) is the plain and ordinary meaning of the words used in the provision. The Village of Clemmons contends that Visible's digital billboard unquestionably is a "Moving and Flashing Sign" because the static image would change frequently and thus, by its nature, "moves" in the sense that the image displayed on the sign changes to something else.

¶ 39 The Village also argues that this is the only logical interpretation of the provision, in light of the exclusion of electronic time, temperature, and message boards contained in the provision, because if "moving and flashing" only referred to "scrolling text, animation or blinking like 'Rudolph's nose' " and not "a sign that electronically changes its content on a periodic basis," then there would be no need to separately exclude electronic time, temperature, and message signs—signs that, like digital billboards, typically do not move or flash, but instead change their image over time to reflect the updated information.

¶ 40 There are a number of problems with the Village's argument. First, in ordinary English usage, moving means "marked by or capable of movement" and flashing means "to give off light suddenly or in transient bursts." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003). Neither of these adjectives squarely describe Visible's proposed digital billboard, which is not capable of movement and has no sudden or transient display of lights.

¶ 41 Second, the exclusion of "electronic time, temperature, and message signs" does not compel an interpretation that includes digital billboards within the definition of moving and flashing signs. Likewise, a contrary interpretation does not render this exclusion superfluous. After all, there could be categories of electronic time, temperature, and message signs that have images in motion (a ticking clock) or are flashing (an electronic sign flashing the phrase "slow down") that the drafters reasonably intended to exempt from this prohibition.

¶ 42 Indeed, another provision in the sign ordinances permits "electronic digital fuel pricing" signs at convenience stores but states that "electronic prices shall not be allowed to flash, blink or move at any time." UDO, § B.3-2.1(G)(3). Notably, this provision recognizes that the terms "moving" and "changing" are different, because the provision then explains that the "digital technology shall solely be used to display the

numerical price of fuel and shall only be *changed* when the price of fuel is modified." *Id.* (emphasis added). This demonstrates that the drafters understood some electronic signs can contain moving or flashing features and that "moving" or "flashing" is this context is not the same as the information on the sign changing over time.

¶ 43 Finally, there are specific examples listed after the general term "Moving and Flashing Signs" and all of these examples—things such as pennants, banners, spinners, beacons, spotlights, and searchlights—are capable of either physically moving or shining light in a sudden or intermittent way. This reinforces the notion that the words "moving" and "flashing" are used in their ordinary meaning. *See Jeffries v. Cty. of Harnett*, 259 N.C. App. 473, 493, 817 S.E.2d 36, 49 (2018).

¶ 44 To be sure, we are not suggesting that it is *unreasonable* to interpret the prohibition on "Moving and Flashing Signs" as applying to a digital billboard like the one proposed by Visible. But that interpretation is not the *only* reasonable one. Visible also asserts an alternative, reasonable interpretation of this provision—one in which a digital billboard capable of changing its static image is not considered a moving or flashing sign and instead, in ordinary English usage, would be described as something else, such as a digital sign or electronic sign, or perhaps, more specifically, a digital or electronic sign capable of changing the information displayed over time.

¶ 45 When there are two or more reasonable interpretations of a law, the law is ambiguous. *JVC Enters., LLC v. City of Concord*, 376 N.C. 782, 2021-NCSC-14, ¶ 10. And, as discussed above, when that ambiguous law is a zoning regulation, we should adopt the reasonable interpretation that favors "the free use of property." *Cumulus Broad.*, 180 N.C. App. at 427, 638 S.E.2d at 15. Accordingly, we reject the Village of Clemmons's argument and hold that the trial court erred by affirming the Board of Adjustment's determination that the proposed digital billboard was prohibited because it unambiguously fell within the definition of a "Moving and Flashing Sign" under the zoning ordinances.

¶ 46 We next turn to the provision prohibiting "Electronic message boards." Again, the phrase "Electronic message board" is not defined in the ordinance. And unlike the prohibition on "Moving and Flashing Signs," this provision contains no explanatory context. The Village of Clemmons correctly contends that Visible's proposed digital billboard is "electronic." The Village also correctly asserts that the ordinary meaning of a "message board" is a "a board or sign on which messages or notices are displayed." *Merriam-Webster's Collegiate Dictionary* (11th

ed. 2003). Combining these two definitions, the Village asserts that any electronic sign displaying any form of message—including any form of electronic billboard—unambiguously fits the definition of an "Electronic message board."

¶ 47 There are several problems with this argument. First, the ordinance contains a definition of the word "sign." That definition is essentially the same as this broad definition of message board advanced by the Village:

> **SIGN.** Any form of publicity which is visible from any public way, directing attention to an individual, business, commodity, service, activity, or product, by means of words, lettering, parts of letters, figures, numerals, phrases, sentences, emblems, devices, designs, trade names or trademarks, or other pictorial matter designed to convey such information . . .

UDO, § A.1-3.

¶ 48 Throughout the zoning ordinances, a board on which a message is displayed is consistently referred to as a "sign" or a "billboard." *See generally*, UDO, § A.1-3 (defining "sign"); UDO, § B.2-5.70 (prohibiting "signs" and "billboards" on transmission towers); UDO, § B.3-2.1 (providing use criteria for "off-premises signs"). Thus, if the intent of this provision was to prohibit all digital signs and billboards, one would expect the drafters to use the term "sign" or "billboard," not a separate term—"message board"—that is undefined and appears nowhere else in the ordinance.

¶ 49 Moreover, in ordinary English usage, one would not look at a looming roadside billboard and describe it as a "message board." It is a sign or a billboard. Similarly, in ordinary usage, there is a narrower category of signs that could be described as "electronic message boards"—things such as the mobile electronic signs seen near road construction, or the digital message boards often affixed beneath a business's name or logo and listing business hours or product offerings. Visible included an example of this type of electronic message board in the record. In ordinary English usage, one would not describe these types of electronic message boards as "billboards."

¶ 50 Simply put, this provision, too, has more than one reasonable interpretation. It is ambiguous. As with the "Moving and Flashing Signs" provision, we must resolve this ambiguity in favor of the reasonable interpretation that permits the free use of property. *Cumulus Broad.*, 180 N.C. App. at 427, 638 S.E.2d at 15. Accordingly, we again reject the Village

of Clemmons's argument and hold that the trial court erred by affirming the Board of Adjustment's determination that the proposed digital billboard was prohibited because it unambiguously fell within the definition of an "Electronic message board" under the zoning ordinances.

¶ 51 We conclude by noting that our holding today does not impact the authority of municipalities, through zoning ordinances, to restrict or prohibit digital billboards like the one proposed by Visible. But the drafters of zoning ordinances that restrict property rights have a responsibility to provide clear rules on which property owners can rely. This is so because zoning regulations are not intended to be a system of murky, ambiguous rules where the permitted uses of property ultimately depend on the interpretive discretion of government bureaucrats.

¶ 52 Here, for example, the zoning ordinances could include a prohibition on "digital billboards" or "electronic billboards," terms that are widely used and readily understood, or more specifically prohibit digital or electronic billboards that change the displayed information over time. Similarly, the ordinances could include within the overlay district regulations a statement that those rules supersede any other regulations otherwise applicable within the overlay district, including the sign regulations.

¶ 53 The convoluted, conflicting, ambiguous provisions at issue in this case did not do so and instead yielded competing reasonable interpretations. When that occurs, we will resolve this interpretive competition in favor of the free use of property.

Conclusion

¶ 54 We reverse the trial court's order and remand this matter for entry of an order reversing the Board of Adjustment's decision.

REVERSED AND REMANDED.

Judges DILLON and GRIFFIN concur.

WALKER v. WAKE CNTY. SHERIFF'S DEP'T

[284 N.C. App. 757, 2022-NCCOA-530]

WESLEY WALKER, PLAINTIFF
v.
WAKE COUNTY SHERIFF'S DEPARTMENT; GERALD M. BAKER, IN HIS OFFICIAL CAPACITY AS WAKE COUNTY SHERIFF; ERIC CURRY (INDIVIDUALLY); WESTERN SURETY COMPANY; WTVD, INC., WTVD TELEVISION, LLC; SHANE DEITERT, DEFENDANTS

No. COA21-661

Filed 2 August 2022

1. Libel and Slander—defamation—qualified privilege defense—assault charge communicated to media—wrongly linked to defendant's employment as nurse

In a defamation suit brought by plaintiff against defendant (the sheriff's office)—for responding by email to a media inquiry regarding an assault charge against plaintiff, in which defendant wrongly linked the charge to plaintiff's employment as a certified nursing assistant even though the alleged victim was plaintiff's stepfather and not a nursing patient—the trial court improperly granted defendant's motion for judgment on the pleadings where defendant failed to establish that it was entitled to the defense of qualified privilege or public official immunity and where plaintiff sufficiently alleged actual malice by defendant.

2. Libel and Slander—defamation—news report on assault charge—wrongly linked to defendant's employment as nurse—fair report privilege defense

In a defamation suit brought by plaintiff against a news organization for reporting that plaintiff's arrest for assault was linked to plaintiff's employment as a certified nursing assistant, which plaintiff alleged led to his being fired from his job, the news report met the test of substantial accuracy and was therefore not actionable as defamation under the fair report privilege. The news broadcast was a nearly verbatim recitation of an email response from the sheriff's office stating that the assault charge was related to plaintiff's employment.

Appeal by Plaintiff from orders entered 25 November 2020 and 7 May 2021 by Judge Vince M. Rozier, Jr., in Wake County Superior Court. Heard in the Court of Appeals 10 May 2022.

John M. Kirby for Plaintiff-Appellant.

Essex Richards, P.A., by Jonathan E. Buchan and Natalie D. Potter, for Defendants-Appellees WTVD, Inc., WTVD Television, LLC, and Shane Deitert.

Poyner Spruill LLP, by J. Nicholas Ellis, for Defendants-Appellees Gerald M. Baker, Eric Curry, and Western Surety Company.

COLLINS, Judge.

¶ 1 Plaintiff appeals from the trial court's orders discontinuing his defamation action against Wake County Sheriff Gerald M. Baker, Wake County Sheriff's Office Public Information Officer Eric Curry, and Western Surety Company ("Sheriff Defendants")[1] and WTVD, Inc., WTVD Television, LLC, and Shane Deitert ("WTVD Defendants"). Plaintiff argues that Sheriff Defendants were not entitled to the defense of qualified privilege and WTVD Defendants were not entitled to the defense of fair report privilege. We reverse the trial court's order granting judgment on the pleadings in favor of Sheriff Defendants and affirm the trial court's order dismissing Plaintiff's claims against WTVD Defendants.

I. Background

¶ 2 On 26 March 2019, a magistrate issued a warrant for Plaintiff's arrest upon finding probable cause that Plaintiff "unlawfully and willfully did assault and strike Darry L. Chavis by striking the victim in the face with a close [sic] fist." (Original capitalization omitted). Plaintiff was arrested pursuant to this warrant on 14 August 2019. At the time, Plaintiff was employed as a certified nursing assistant with Capital Nursing in Raleigh.

¶ 3 At 7:08 a.m. the next morning, Ed Crump, an employee of defendants WTVD, Inc., and WTVD Television, LLC, emailed Curry. Crump wrote in the subject line, "Assault case…" and wrote in the body, "Just asking for a quick check to make sure this charge isn't related to this guy's job. He lists his employer as Capital Nursing. I'm guessing it's domestic but if it's related to a client from Capital Nursing I'm interested in more details." Crump also included a copy of the online record for Plaintiff's arrest. Curry responded at 11:38 a.m., "Related to his employer."

¶ 4 During the 6:00 p.m. news that evening, WTVD broadcast the following report:

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1. Plaintiff voluntarily dismissed the action against the Wake County Sheriff's Office prior to entry of the orders on appeal.

> New at 6:00 a Wake County man who works with the elderly is facing an assault charge. Wesley Walker works for Capital Nursing. According to the warrant Walker hit the victim in the face with a closed fist.
>
> The Sheriff's Office telling us the charge is related to his job. We've reached out to Capital Nursing but so far they have refused to comment.

¶ 5 Plaintiff brought this defamation suit on 13 August 2020, alleging in pertinent part:

> 10. On or about August 15, 2019, the Defendant Eric Curry, as an employee of the Defendant Wake County Sheriff's Department, published information regarding the Plaintiff to the WTVD Defendants, consisting of an allegation that the Plaintiff was charged criminally with assaulting a resident of Capital Nursing and/or of assaulting a person in connection with the Plaintiff's employment with Capital Nursing, and reported that the alleged victim was a Mr. Darry Chavis.
>
> 11. Upon information and belief, Defendant Shane Deitert, employed by the WTVD Defendants attempted to investigate this false allegation.
>
> 12. Upon information and belief, Defendant Deitert called Capital Nursing and spoke with a staff member of Capital Nursing regarding this allegation.
>
> 13. Upon information and belief, said staff at Capital Nursing informed Defendant Deitert that there was no resident by the name of Darry Chavis at Capital Nursing and that this incident did not occur at Capital Nursing.
>
> 14. Upon information and belief, Defendant Deitert then sent a message to Capital Nursing through the Capital Nursing website, but Capital Nursing does not constantly monitor messages sent through its website and this email was not detected by Capital Nursing until the evening of August 15, 2019.
>
> 15. Shane Deitert specifically notified the Plaintiff's employer that the Plaintiff has "been charged with striking a patient, Darry L Chavis."

16. Neither Shane Deitert nor any other persons employed by Defendant WTVD attempted to contact the Plaintiff to confirm the allegations.

17. Upon information and belief, Shane Deitert, acting in concert with others employed at WTVD, made a decision to publish this unfounded allegation and instructed and directed others to publish these unfounded allegations.

18. On August 15, 2019, during the 6:00 pm newscast, the WTVD Defendants, by and through their employees including but not limited to Shane Deitert, published a story on the widely broadcast local news program, alleging that the Plaintiff, "who works with the elderly," was charged with assault, consisting of hitting a victim in the face with a closed fist, and that the charge was related to the Plaintiff's job and that the Plaintiff assaulted a resident with a closed fist.

. . . .

28. As a direct result of this false broadcast, the Plaintiff lost his job with Capital Nursing.

. . . .

31. The reality is that Darry Chavis is the Plaintiff's step-father, and Mr. Chavis filed false, fraudulent and malicious charges against the Plaintiff.

32. Although the charges by Darry Chavis were wholly false, and have been dismissed, they had absolutely nothing to do with the Plaintiff's employment with Capital Nursing, nothing to do with the Plaintiff's profession, and nothing to do with any residents of Capital Nursing.

33. The story as published by the Defendants contains not only false and defamatory statements, but contains nefarious and defamatory innuendo and suggestion (including but not limited to that the Plaintiff works with the elderly, clearly suggesting that the Plaintiff assaulted an elderly patient and/or that the Plaintiff was a threat to elderly patients).

34. The false information published by the Defendants directly affected the Plaintiff and pertained to the Plaintiff in his profession, in that they alleged that this incident occurred in connection with the Plaintiff's employment, and it is highly defamatory to allege that a CNA, entrusted with the care of elderly, disabled, and/or feeble patient[s], would commit an assault in connection with his employment as a CNA.

35. The aforementioned statements of the Defendants were defamatory and impugned the Plaintiff's character and impugned the Plaintiff's trade and profession in ways including but not limited to the safety of patients under the Plaintiff's care.

36. The Plaintiff's reputation has been damaged as a result of the Defendants' defamatory and unfair conduct described herein.

37. The Defendants Capitol Broadcasting [sic] and Deitert were negligent in their handling, reporting, investigation and publication of the aforementioned story in that they failed to adequately investigate said report; ignored information from Capital Nursing which directly refuted the allegations, failed to adequately investigate the allegations with the Plaintiff and with Capital Nursing; failed to contact the Plaintiff to obtain his version of events; failed to postpone airing of the story until the story could be properly verified, especially in view of the gravity of the allegations and the lack of any emergent conditions warranting release of the story prior to adequate confirmation and that the Plaintiff is not a public figure; failed to investigate and/or contact the alleged victim (Darry Chavis), which would have revealed that the Plaintiff and the alleged victim were related and that these allegations did not pertain to the Plaintiff's employment; transmitted an inquiry to Capital Nursing through its website knowing that said means of contacting a nursing facility would not yield a prompt response; failed to adhere to journalistic standards; chose to run this story for its sensational appeal in order to increase ratings, while

ignoring the negative impact of this story on the Plaintiff; and in other particulars to be adduced in discovery and through trial.

38. The statements of the Defendants, that the Plaintiff had committed an infamous crime, tends to impeach, prejudice, discredit and reflect unfavorably upon the Plaintiff in his trade or profession, and tends to subject the Plaintiff to ridicule, contempt or disgrace.

39. The Defendants wrote and caused to be printed false and defamatory statements pertaining to the Plaintiff.

40. The Defendants published these statements.

41. These statements were false.

42. The Defendants intended the statements to charge the Plaintiff with having committed an infamous crime, to impeach the Plaintiff in his trade and profession, and to subject the Plaintiff to ridicule, contempt and disgrace.

43. The persons other than the Plaintiff to whom the statements were published reasonably understood the statement to charge the Plaintiff with having committed an infamous crime, to impeach the Plaintiff in his trade and profession, and to subject the Plaintiff to ridicule, contempt and disgrace.

44. At the time of the publication, the Defendants knew the statements were false and/or failed to exercise ordinary care in order to determine whether the statements were false.

¶ 6 Sheriff Defendants answered and moved to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted under N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (2), and (6). Sheriff Defendants alleged that Curry's email to Crump was absolutely and qualifiedly privileged and that governmental immunity, public official immunity, and Plaintiff's own negligent, intentional, and willful or wanton conduct barred Plaintiff's claims. Sheriff Defendants subsequently moved for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c).

¶ 7 WTVD Defendants moved to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6). WTVD Defendants contended that the alleged defamatory statement was protected by the fair report privilege because it "was a substantially accurate summary of a written statement by a government official[.]"

¶ 8 The trial court entered separate orders granting WTVD Defendants' motion to dismiss for failure to state a claim on 25 November 2020 ("WTVD Order") and Sheriff Defendants' motion for judgment on the pleadings on 7 May 2021 ("Sheriff's Order"). In the Sheriff's Order, the trial court concluded that the claims against Sheriff Defendants should be dismissed because "the statements of Curry alleged in the Complaint are protected by qualified privilege[.]"

¶ 9 Plaintiff appealed both orders to this Court.

II. Discussion

A. Sheriff's Order

¶ 10 **[1]** Plaintiff first argues that the trial court erred by granting Sheriff Defendants' motion for judgment on the pleadings because they are not entitled to the defense of qualified privilege.

¶ 11 "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." N.C. Gen. Stat. § 1A-1, Rule 12(c) (2021). "Judgment on the pleadings is a summary procedure and the judgment is final." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citation omitted). "Therefore, each motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits." *Id.* A party seeking judgment on the pleadings must show that "no material issue of fact[] exists and that [the party] is clearly entitled to judgment" as a matter of law. *Id.* (citation omitted) In considering a motion for judgment on the pleadings, the

> court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Id. (citations omitted). "Judgments on the pleadings are disfavored in law." *Bigelow v. Town of Chapel Hill*, 227 N.C. App. 1, 3, 745 S.E.2d 316, 319 (2013) (quotation marks and citations omitted). This Court reviews a trial court's order granting a motion for judgment on the pleadings de novo. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005).

¶ 12 Generally, "to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002) (citation omitted).

1. Qualified Privilege

¶ 13 "Qualified privilege is a defense for a defamatory publication[.]" *Clark v. Brown*, 99 N.C. App. 255, 262, 393 S.E.2d 134, 138 (1990).

> A defamatory statement is qualifiedly privileged when made (1) on subject matter (a) in which the declarant has an interest, or (b) in reference to which the declarant has a right or duty, (2) to a person having a corresponding interest, right or duty, (3) on a privileged occasion, and (4) in a manner and under circumstances fairly warranted by the occasion and duty, right or interest.

Id. (citation omitted). Furthermore, "the defense of privilege is based upon the premise that some information, although defamatory, is of sufficient public or social interest to entitle the individual disseminating the information to protection against an action" for defamation. *Boston v. Webb*, 73 N.C. App. 457, 461, 326 S.E.2d 104, 106 (1985).

¶ 14 Sheriff Defendants have failed to establish that, based solely on the pleadings and as a matter of law, qualified privilege precludes liability for Curry's email to Crump. The pleadings do not establish that Curry's email was made on a privileged occasion or that Curry's email, although defamatory, was of "sufficient public or social interest" to entitle Curry to protection against Plaintiff's defamation action. *See id.* (holding that dismissal pursuant to Rule 12(b)(6) was improper where "the public's interest in the matter . . . remain[ed] to be determined"). Furthermore, the pleadings do not establish that the circumstances warranted Curry to communicate that the assault charge against Plaintiff was related to Plaintiff's employer in the manner Curry did–with no context or supporting detail, just hours after Crump's inquiry. *See id.* (holding that

dismissal pursuant to Rule 12(b)(6) was improper where the defendant's "right to relay [the information] as he did remain[ed] to be determined").

¶ 15 Sheriff Defendants cite *Averitt v. Rozier*, 119 N.C. App. 216, 458 S.E.2d 26 (1995), as an example of a case in which qualified privilege applied. However, Sheriff Defendants do not explain how *Averitt* is similar to the present case, and we find no relevant similarities. In *Averitt*, this Court held that statements made by a sheriff's detective to a potential witness and an alleged victim during an ongoing criminal investigation were protected by the qualified privilege and affirmed summary judgment in the detective's favor. *Id.* at 219-20, 458 S.E.2d at 29. The facts in the present case are quite dissimilar from those in *Averitt*, and Sheriff Defendants have failed to demonstrate their entitlement to judgment as a matter of law on the defense of qualified privilege at this early stage. Judgment on the pleadings was improper.

¶ 16 Additionally, even assuming arguendo that qualified privilege applies, Plaintiff has alleged actual malice sufficient to defeat Sheriff Defendants' motion for judgment on the pleadings. "[A] qualified privilege may be lost by proof of actual malice on the part of the defendant." *Long v. Vertical Techs., Inc.*, 113 N.C. App. 598, 602, 439 S.E.2d 797, 800 (1994); *see also Averitt*, 119 N.C. App. at 219, 458 S.E.2d at 29 ("If the plaintiff cannot show actual malice, the qualified privilege becomes an absolute privilege, and there can be no recovery even though the statement was false."). This inquiry is sometimes described as whether the declarant lost the qualified privilege by abusing it. *See, e.g.*, *Harris v. Procter & Gamble Mfg. Co.*, 102 N.C. App. 329, 331, 401 S.E.2d 849, 850 (1991) ("Even though a qualified privilege may provide a defense to a defamation action, if this privilege is found to be abused, it ceases to exist."). In a qualified privilege case,

> [a]ctual malice may be proven by evidence of ill-will or personal hostility on the part of the declarant . . . or by a showing that the declarant published the defamatory statement with knowledge that it was false, with reckless disregard for the truth or with a high degree of awareness of its probable falsity.

Clark, 99 N.C. App. at 263, 393 S.E.2d at 138 (quoting *Kwan-Sa You v. Roe*, 97 N.C. App. 1, 12, 387 S.E.2d 188, 193 (1990)).

¶ 17 Here, Plaintiff alleged that Curry

> published information regarding the Plaintiff to the WTVD Defendants, consisting of an allegation that

> the Plaintiff was charged criminally with assaulting a resident of Capital Nursing and/or of assaulting a person in connection with the Plaintiff's employment with Capital Nursing, and reported that the alleged victim was a Mr. Darry Chavis.

Plaintiff alleged that this information was false; that Sheriff Defendants "intended the statements to charge the Plaintiff with having committed an infamous crime, to impeach the Plaintiff in his trade and profession, and to subject the Plaintiff to ridicule, contempt and disgrace"; and that "[Sheriff] Defendants knew the statements were false . . . ." In reviewing Sheriff Defendants' motion for judgment on the pleadings, we must take these allegations as true and construe them in the light most favorable to Plaintiff. *See Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499. Doing so, Plaintiff has alleged actual malice sufficient to defeat Sheriff Defendants' motion for judgment on the pleadings asserting the defense of qualified privilege.

2. Public Official Immunity

¶ 18 Though the trial court granted judgment on the pleadings based on the qualified privilege, Sheriff Defendants argue that, in the alternative, the Sheriff's Order should be affirmed because Plaintiff's claim against Curry is barred by the doctrine of public official immunity. We address this argument as Sheriff Defendants raised it below and "[i]f 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." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

¶ 19 "Public official immunity precludes a suit against a public official in his individual capacity and protects him from liability as long as the public official '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[.]' " *Green v. Howell*, 274 N.C. App. 158, 165, 851 S.E.2d 673, 679 (2020) (quoting *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976)). "A[] [public] employee, on the other hand, is personally liable for negligence in the performance of his or her duties proximately causing an injury." *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999) (quotation marks and citations omitted).

¶ 20 Our Supreme Court has "recognized several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official

exercises discretion, while public employees perform ministerial duties." *Id.* (citations omitted). "[A] defendant seeking to establish public official immunity must demonstrate that all three of [these] factors are present." *McCullers v. Lewis*, 265 N.C. App. 216, 222, 828 S.E.2d 524, 532 (2019) (citation omitted); *see also Baznik v. FCA US, LLC*, 280 N.C. App. 139, 2021-NCCOA-583, ¶ 6 (same).

¶ 21 Sheriff Defendants contend that Curry, as Public Information Officer for the Wake County Sheriff's Office, is a public official. In their appellate brief in support of this argument, Sheriff Defendants characterize Curry's position as follows:

> Curry serves as the chief spokesman for the Sheriff Baker. He manages relationships with members of the media and the county's communication partners, maintains media accounts of the sheriff's office, creates press releases for its events, and handles public records requests received from the media and other members of the public. These are not ministerial tasks but rather discretionary acts involving personal deliberation, decision-making, and exercising judgment.

Sheriff Defendants argue that these qualities demonstrate that Curry exercises both discretion and a portion of the sovereign power. However, the pleadings do not support Sheriff Defendants' assertions regarding the nature of Curry's position and its duties.

¶ 22 These assertions might be appropriately considered if presented in an affidavit in support of a motion for summary judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 56(b) (2022) (providing that a "party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof"). But for the purpose of the instant motion for judgment on the pleadings, Sheriff Defendants have failed to show that, regarding the issue of public official immunity, no material issue of fact exists and that they are entitled to judgment as a matter of law. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499.

B. WTVD Defendants' Motion to Dismiss

¶ 23 **[2]** Plaintiff next argues that the trial court erred by granting WTVD Defendants' motion to dismiss. Plaintiff argues that WTVD Defendants are not entitled to the fair report privilege.

¶ 24 A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must

be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "[T]he well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (quotation marks and citation omitted). "A motion to dismiss pursuant to Rule 12(b)(6) should not be granted unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Isenhour*, 350 N.C. at 604-05, 517 S.E.2d at 124 (quotation marks, emphasis, and citation omitted). We review a trial court's order granting a Rule 12(b)(6) motion to dismiss de novo. *USA Trouser, S.A. de C.V. v. Williams*, 258 N.C. App. 192, 195, 812 S.E.2d 373, 376 (2018).[2]

¶ 25 The fair report privilege "exists to protect the media from charges of defamation." *LaComb v. Jacksonville Daily News Co.*, 142 N.C. App. 511, 512, 543 S.E.2d 219, 220 (2001).

> Courts in other jurisdictions have articulated the privilege protecting the media when reporting on official arrests:
>
> > Recovery is further foreclosed by the privilege a newspaper enjoys to publish reports of the arrest of persons and the charges upon which the arrests are based, as well as other matters involving violations of the law. This privilege remains intact so long as the publication is confined to a substantially accurate statement of the facts and does not comment upon or infer probable guilt of the person arrested.
>
> Substantial accuracy is therefore the test to apply when a plaintiff alleges defamation against a member of the media reporting on a matter of public interest, such as an arrest.

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2. Though the WTVD Order states that the trial court considered exhibits filed by WTVD Defendants, WTVD Defendants' motion was not converted into a motion for summary judgment because each of the exhibits was a document referenced in Plaintiff's complaint. *See Holton v. Holton*, 258 N.C. App. 408, 419, 813 S.E.2d 649, 657 (2018) ("[A] document that is the subject of a plaintiff's action that he or she specifically refers to in the complaint may be attached as an exhibit by the defendant and properly considered by the trial court without converting a Rule 12(b)(6) motion into one of summary judgment.").

Id. at 513, 543 S.E.2d at 221 (quoting *Piracci v. Hearst Corporation*, 263 F. Supp. 511, 514 (D. Md. 1966)). The substantial accuracy test "does not require absolute accuracy in reporting. It does impose the word substantial on the accuracy, fairness and completeness. It is sufficient if [the statement] conveys to the persons who read it a substantially correct account of the proceedings." *Desmond v. News & Observer Publ'g Co.*, 241 N.C. App. 10, 26, 772 S.E.2d 128, 140 (2015) (quotation marks, brackets, and citation omitted).

¶ 26 Here, WTVD's 15 August 2019 broadcast stated that Plaintiff was "facing an assault charge," "[a]ccording to the warrant [Plaintiff] hit the victim in the face with a closed fist," and "[t]he Sheriff's Office telling us the charge is related to [Plaintiff's] job." This broadcast was not merely substantially accurate, it was an almost verbatim recitation of information in the arrest warrant and Curry's email to Crump. The warrant for Plaintiff's arrest charged Plaintiff with committing simple assault for "unlawfully and willfully . . . assault[ing] and strik[ing] Darry L. Chavis by striking the victim in the face with a close [sic] fist." (Original capitalization omitted). When Crump inquired whether this charge was related to Plaintiff's employment with Capital Nursing, Curry responded, "Related to his employer."

¶ 27 Plaintiff contends that the broadcast was not "substantially accurate" because Crump's initial email to Curry indicated that WTVD "had some awareness that the assault charge may not be related to" Plaintiff's employment. Plaintiff underscores that on the morning of 15 August, Crump wrote to Curry, "I'm guessing it's domestic but if it's related to a client from Capital Nursing I'm interested in more details." But Curry responded that the charge was related to Plaintiff's employer, and that evening WTVD accurately reported that "[t]he Sheriff's Office telling us the charge is related to [Plaintiff's] job." Crump's initial belief that the charge may have been unrelated to Plaintiff's employment does not defeat the application of the fair report privilege. *See Orso v. Goldberg*, 665 A.2d 786, 789 (N.J. App. Div. 1995) (stating that the fair report privilege "protect[s] the media publisher even though the publisher does not personally believe the defamatory words he reports to be true").

¶ 28 Plaintiff also asserts that the fair report privilege is inapplicable because Curry's email was "an extremely flimsy basis on which to report that the Plaintiff assaulted a resident" at Capital Nursing. While we agree that Curry's email was an extremely flimsy basis upon which to make a report, contrary to Plaintiff's assertion, WTVD Defendants did not report that Plaintiff had assaulted a resident at Capital Nursing. Instead, WTVD Defendants accurately reported the charge as described

in the warrant and Curry's statement that the charge was related to Plaintiff's employer.

¶ 29 Lastly, Plaintiff argues that the fair report privilege is inapplicable because WTVD "had positive information that the assault charge was not related to the Plaintiff's employment." Plaintiff contends that this information consists of statements by an agent for Capital Nursing "that (1) there was no resident by the name of Darry Chavis at Capital Nursing and (2) that this incident did not occur at Capital Nursing." Plaintiff's argument is unavailing because the substantial accuracy test requires us to consider whether WTVD's reporting was accurate by comparison to the warrant and Curry's email, not by comparison to the events as they transpired. *See LaComb*, 142 N.C. App. at 514, 543 S.E.2d at 221 (determining whether a newspaper article was substantially accurate by reference to the relevant arrest warrants); *see also Yohe v. Nugent*, 321 F.3d 35, 44 (1st Cir. 2003) ("To qualify as 'fair and accurate' for purposes of the fair report privilege, an article reporting an official statement need only give a 'rough-and-ready' summary of the official's report; it is not necessary that the article provide an accurate recounting of the events that actually transpired."); *Oparaugo v. Watts*, 884 A.2d 63, 82 n.14 (D.C. 2005) (substantial accuracy "is judged by comparing the publisher's report with the official record"); *Goss v. Houston Cmty. Newspapers*, 252 S.W.3d 652, 655 (Tex. App. 2008) ("[T]he accuracy of the publication is determined not by comparing it to the actual facts but to the law enforcement statement upon which the publication is based.").

¶ 30 Because WTVD's broadcast satisfied the substantial accuracy test, it is not actionable as defamation under the fair report privilege. The trial court did not err by granting WTVD Defendants' motion to dismiss.

III. Conclusion

¶ 31 Sheriff Defendants have not demonstrated that the qualified privilege they assert defeats Plaintiff's defamation claim as a matter of law. Accordingly, the trial court erred by granting Sheriff Defendants' motion for judgment on the pleadings. Because the fair report privilege applied to WTVD's broadcast, the trial court did not err in dismissing Plaintiff's claims against WTVD Defendants.

REVERSED AND REMANDED IN PART; AFFIRMED IN PART.

Judges ARROWOOD and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 AUGUST 2022)

CLEAN N DRY, INC. v. EDWARDS 2022-NCCOA-531 No. 21-771	Johnston (20CVS3321)	Affirmed
HILL v. DURRETT 2022-NCCOA-532 No. 21-460	Mecklenburg (17CVD1275)	Affirmed
IN RE D.C. 2022-NCCOA-533 No. 22-145	Durham (11JT111) (11JT112) (17JT91) (17JT92)	Affirmed
IN RE D.E.G. 2022-NCCOA-534 No. 22-159	Onslow (21JT64)	Affirmed
IN RE D.L.B. 2022-NCCOA-535 No. 22-140	Guilford (18JT17) (18JT18)	Affirmed
IN RE F.C.H. 2022-NCCOA-536 No. 22-72	Guilford (20JT641)	Reversed
IN RE J.M.L. 2022-NCCOA-537 No. 22-182	Gaston (20JT102) (20JT103)	Affirmed
IN RE J.T. 2022-NCCOA-538 No. 22-177	Forsyth (19JT107)	Affirmed
IN RE L.C. 2022-NCCOA-539 No. 22-12	Mecklenburg (18JT577) (18JT578)	Affirmed.
IN RE N.G. 2022-NCCOA-540 No. 21-764	Pender (20JA21)	Affirmed in Part, Vacated in Part, and Remanded
IN RE P.A.B. 2022-NCCOA-541 No. 22-44	Person (19J27)	Vacated and Remanded

IN RE S.S. 2022-NCCOA-542 No. 21-705	Mecklenburg (18JT410)	Affirmed
IN RE T.M. 2022-NCCOA-543 No. 21-676	Stokes (19JA92) (19JT92)	Affirmed in part, Vacated in part, and Remanded
SMITH v. GREENWALD 2022-NCCOA-544 No. 21-802	Wake (20CVD9071)	Dismissed
STATE v. CHRISTENSON 2022-NCCOA-545 No. 21-723	Madison (19CRS50136)	No Error
STATE v. SCHALOW 2022-NCCOA-546 No. 19-215-2	Henderson (16CRS901-907) (18CRS133-138)	No Error

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

the child's maternal grandparents—rather than granting co-guardianship to both couples as requested by the child's mother—where its unchallenged findings of fact were supported by competent evidence, and where those findings in turn supported the court's conclusion that this arrangement was in the best interests of the child. **In re R.J.P., 53.**

Neglect—injurious environment—DSS cases with older siblings—death of sibling via suspected neglect—presence of other factors required—An adjudication of a minor daughter as neglected was vacated and remanded where the court based its ruling solely on findings regarding the department of social services' prior involvement with the daughter's siblings and the circumstances surrounding the death of the child's infant brother, including a finding that the brother's autopsy could not rule out accidental asphyxiation as a cause of death where his parents had left him in an unsafe sleeping environment. Crucially, the court made no finding that the daughter suffered or faced a substantial risk of suffering any physical, mental, or emotional impairment, and the court did not otherwise enter findings showing the presence of other factors indicating a present or future risk to the daughter of being neglected. **In re G.C., 313.**

CHILD CUSTODY AND SUPPORT

Child support—calculation of gross income—ordinary and necessary expenses —The trial court did not abuse its discretion in calculating a father's monthly gross income for purposes of determining his child support obligation where the father argued that the court failed to deduct a pest control expense and various mortgage payments from his business receipts as "ordinary and necessary expenses" of operating his three businesses. The record showed that the father failed to produce any competent evidence of which expenses were truly business expenses; the court found that his testimony on the matter was evasive, misleading, and lacked credibility; and, at any rate, mortgage payments do not constitute "ordinary and necessary expenses" under the Child Support Guidelines. Further, the court was not required to deduct the father's prior temporary child support and equitable distribution payments from his monthly gross income where the Guidelines do not permit such deductions. **Britt v. Britt, 359.**

Child's reasonable needs—competent evidence—post-separation support affidavit in separate hearing—An order requiring defendant-father to pay nearly $6,200 per month in child support to plaintiff-mother was vacated and remanded where the findings of fact concerning the child's reasonable needs for shelter, clothing, electricity, and utilities were not supported by competent evidence—and plaintiff-mother's post-separation support (PSS) affidavit, which was introduced in a separate hearing for PSS on the same day but not introduced in the child support hearing, could not be considered competent evidence in support of the findings in the child support order. In addition, the findings concerning the child's reasonable needs did not support the award of child support and gave no indication of any methodology applied in reaching the award. **Jain v. Jain, 69**.

Contempt order—failure to make payments—clerical errors—Rule 60 motion— The trial court did not abuse its discretion in a child custody and support matter by granting plaintiff's Rule 60(a) motion to correct clerical errors in an order holding defendant in contempt for failure to make required payments to plaintiff. The intent of the contempt order was clear, and the correction of the calculation of the purge amount was faithful to that intent. **Bossian v. Bossian, 208.**

CHILD CUSTODY AND SUPPORT—Continued

Contempt order—Rule 59 motion—payments to other parent—In a child custody and support matter, where defendant had been found in civil contempt for failure to make required payments to plaintiff, the trial court did not err by denying defendant's Rule 59 motion for relief from the contempt order where the parties' out-of-court agreement could not modify the child support order, there was sufficient evidence about defendant's ability to pay, there was no abuse of discretion in the trial court's award of attorney fees to plaintiff, and the dental work for which defendant was required to reimburse plaintiff was reasonable and medically necessary. **Bossian v. Bossian, 208.**

Custody—constitutionally protected parental status—voluntarily ceding custody to nonparent—In a custody dispute between a child's maternal grandmother (plaintiff) and father (defendant), the trial court properly awarded primary physical custody to plaintiff where the court's findings—supported by clear and convincing evidence—showed that defendant acted inconsistently with his constitutionally protected status as a parent. Specifically, the court found that, because the child's mother frequently stayed away for extended periods due to substance abuse, plaintiff had been the child's primary caretaker for most of the child's life; defendant knew his child was in plaintiff's care because of the mother's drug use and criminal issues, but took no steps to obtain custody of the child; defendant consistently failed to pay his child support obligation in full; and defendant rarely visited the child or otherwise made any effort to exercise his parental rights until plaintiff filed the custody action. **Drum v. Drum, 272.**

Grandparent—standing to seek custody—A grandmother had standing under N.C.G.S. § 50-13.1(a) to file an action seeking custody of her minor granddaughter, whom she had raised for eight years since the child was a baby, where she intended to show that the child's father was either unfit or had acted inconsistently with his constitutionally protected status as a parent. **Drum v. Drum, 272.**

Modification—out-of-court agreement—contempt—willfulness—In a child custody and support matter, where defendant had been found in civil contempt for failure to make required payments to plaintiff, the trial court did not err by denying defendant's Rule 59 motion seeking relief from the contempt order because the parties' out-of-court agreement could not modify the child support order. The appellate court also rejected defendant's argument regarding his purported lack of willfulness because defendant was an experienced civil trial lawyer and there was no ambiguity concerning whether he was required to make the child support payments. **Bossian v. Bossian, 208.**

Modification—retroactive—payments not past due—prior mandate—Where the trial court retroactively reduced plaintiff-father's child support obligation—based on the fact that one of the parties' children had turned eighteen and graduated from high school—and ordered defendant-mother to pay back to plaintiff-father approximately $41,000, the trial court's order did not violate the plain language of N.C.G.S. § 50-13.10(a) because that section applies only to past-due child support obligations. Furthermore, the trial court did not violate a mandate from a previous Court of Appeals opinion in the matter, which in dicta stated that plaintiff-father "may now" file a motion to modify but did not require him to do so (where he had already filed a motion to modify the temporary child support order). **Berens v. Berens, 595.**

Motion to modify custody—substantial change in circumstances—best interest evidence disallowed—abuse of discretion—In a hearing addressing a father's

EASEMENTS—Continued

portions of the Subject Property, but none of the maps depicted the entire Subject Property being used as a golf course, and in some instances, the maps did not clearly distinguish between areas labeled as a golf course and other areas labeled for future development. Thus, the plat maps relied on by plaintiffs when they purchased their lots were insufficient to show a clear intention by the subdivision's developer to restrict the Subject Property for the benefit of the lot owners in the manner asserted by plaintiffs. **Cape Homeowners Ass'n, Inc. v. S. Destiny, LLC, 237.**

ESTATES

Surviving spouse—elective share—total net estate—property held jointly by decedent and another with right of survivorship—statute amended—In an estate dispute between a decedent's wife and his son, the superior court's order was vacated and remanded where, after the clerk of court awarded the wife an elective share of the decedent's estate, the superior court (hearing the son's appeal) entered an order reducing the amount of the elective share on grounds that the clerk had incorrectly determined under N.C.G.S. § 30-3.2(3f)(c) what portion of three bank accounts—jointly held by the decedent and his son with right of survivorship—should be included in the value of the decedent's total net estate. Because the General Assembly amended section 30-3.2(3f)(c) between the entry of the clerk's order and the superior court's review of respondent's appeal, the clerk's factual findings and legal conclusions were not based on "good law" when the superior court reviewed the clerk's order; therefore, the superior court should have remanded the matter to the clerk with instructions to apply the amended statute to the case. **In re Est. of Gerringer, 32.**

EVIDENCE

Admissibility—civil no-contact order—criminal trial involving similar issues—plain error analysis—In a prosecution for obtaining property by false pretenses and exploitation of an elderly person while in a business relationship, where an elderly woman had previously obtained a civil no-contact order against defendant after he charged her thousands of dollars for home repair work he never performed, the trial court did not commit plain error when it admitted the no-contact order into evidence. The court did not violate N.C.G.S. § 1-149 by admitting the order because the State had offered it to show that the issues raised in the no-contact hearing and defendant's criminal trial were the same rather than to prove any fact alleged in the order. Further, even if the court had erred, the State provided ample evidence that defendant committed the charged crimes, and therefore the order's admission did not have a probable impact on the jury's verdict. **State v. Joyner, 681.**

Civil no-contact order—criminal trial on similar issues—no due process violation—In a prosecution for obtaining property by false pretenses and exploitation of an elderly person while in a business relationship, where an elderly woman had previously obtained a civil no-contact order against defendant after he charged her thousands of dollars for home repair work he never performed, the trial court did not violate defendant's due process rights by admitting the no-contact order into evidence, including language in the order stating that the woman "suffered unlawful conduct by the [d]efendant." The order was properly admitted to show that the issues raised in the no-contact hearing and defendant's criminal trial were the same; further, defendant had the opportunity to object to the order's admission at trial, did object, and was overruled. **State v. Joyner, 681.**

SEXUAL OFFENSES—Continued

right to a unanimous verdict in his trial for taking indecent liberties with a child (N.C.G.S. § 14-202.1) where the State presented evidence that defendant committed multiple acts with the underage victim but the trial court did not require the jury to specify which act or acts constituted the crime, since the commission of any one of a number of acts is sufficient to meet the element of improper sexual conduct and the jury did not have to agree on the qualifying act. **State v. Langley, 344.**

STATUTES OF LIMITATION AND REPOSE

Borrowing provision—out-of-state plaintiffs—cause of action outside of state—In an action arising from the in-flight engine failure of plaintiffs' small aircraft after the engine had been overhauled by defendant, the trial court's order granting defendant's Rule 12(b)(6) motion to dismiss plaintiffs' complaint was affirmed because the borrowing provision of N.C.G.S. § 1-21 required application of South Carolina's three-year statute of limitations and thus barred plaintiffs' unfair and deceptive trade practices (UDTP) claim, where plaintiffs were residents of South Carolina, plaintiffs' lawsuit was filed after South Carolina's three-year statute of limitations had run, and the cause of action arose in South Carolina (under both the most significant relationship test and the lex loci approach). **Izzy Air, LLC v. Triad Aviation, Inc., 655.**

Renewal of judgment—amended pursuant to Rule 52(b)—validity of original judgment undisturbed—Plaintiff's action (filed 9 August 2019) attempting to renew a judgment against defendant was time-barred by the applicable ten-year statute of limitations (N.C.G.S. § 1-47(1)) where the limitations period began to accrue on the date when the original judgment was entered (20 July 2009), not on the date when the subsequent amended judgment was entered (29 September 2009, *nunc pro tunc* to 20 July 2009) pursuant to Civil Procedure Rule 52(b), which added twenty paragraphs to the findings and conclusions but did not recalculate damages or otherwise make any changes to the relief afforded to the plaintiff. Further, plaintiff failed to show the existence of any statutory tolling provision affecting the applicable ten-year statute of limitations in the action. **K&S Res., LLC v. Gilmore, 78.**

TERMINATION OF PARENTAL RIGHTS

Best interests of the child—consideration of dispositional factors—weighing of evidence—The trial court did not abuse its discretion in determining that termination of respondent-father's parental rights in his daughter was in the child's best interests, where the court considered and entered written findings addressing each dispositional factor in N.C.G.S. § 7B-1110, the findings were supported by competent evidence, and the court properly determined the weight of the evidence and the reasonable inferences to be drawn from it. **In re L.M.B., 41.**

Best interests of the children—catchall dispositional factor—limited Spanish-language services—children's potential loss of language and culture—The trial court did not abuse its discretion in determining that termination of a mother's parental rights in her three sons was in the children's best interest, where the court properly considered all the statutory dispositional factors, including—under the "catchall" factor listed in N.C.G.S. § 7B-1110(a)(6)—the limited availability of Spanish-language services available to the mother (who only spoke Spanish, her native language) throughout the case and how terminating her rights could cause the children to lose exposure to their mother's language and culture. The court made sufficient factual findings regarding the catchall factor and was not required to reach

TERMINATION OF PARENTAL RIGHTS—Continued

the opposite best interests determination that it did based on this factor alone. **In re A.H.G., 297.**

Grounds for termination—failure to make reasonable progress—sufficiency of findings and evidence—The termination of a mother's parental rights in her three sons was affirmed where clear, cogent, and convincing evidence supported the trial court's findings of fact, which in turn supported the court's conclusion that the mother had failed to make reasonable progress in correcting the conditions leading to the children's removal. Specifically, the court found that although the mother had made some progress in her family services case plan, she inconsistently engaged in individual therapy, failed to acknowledge her sons' previous sexual abuse by a renter in the home or to properly manage their inappropriate sexual behaviors (which the two older brothers began exhibiting after the abuse), showed little progress in learning to properly discipline her children, and had no plan for maintaining safe boundaries between the children at home given the inappropriate behaviors occurring between them. **In re A.H.G., 297.**

Grounds for termination—failure to pay a reasonable portion of the cost of care—findings of fact—"in kind" contributions—The trial court properly terminated respondent-parents' parental rights in their daughter on the ground of willful failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(3)), where the court's uncontested findings of fact showed that respondent-mother was employed throughout most of the case and received unemployment benefits when she lost her job, while respondent-father received disability payments and also was briefly employed. Although respondent-parents did provide their daughter with clothing, toys, diapers, and other items, the trial court was not required to consider these "in kind" contributions as a form of child support where there was no agreement in place allowing for these items to offset respondent-parents' support obligation. **In re L.M.B., 41.**

Grounds for termination—neglect—father fatally shot child's mother in child's presence—The trial court properly terminated a father's parental rights to his son on the ground of neglect based on unchallenged findings that the father shot and killed the child's mother in the presence of the child and his stepsibling; that the father was subsequently convicted of first-degree murder and sentenced to life imprisonment without the possibility of parole; and that, due to the circumstances in which the child was removed from the father's care, the department of social services did not intend to develop a services agreement with the father. **In re A.N.S., 631.**

Grounds for termination—neglect—likelihood of future neglect—willful failure to complete case plan—The trial court properly terminated a mother's parental rights in her three sons on the ground of neglect where the evidence showed that, after the children had been removed from the mother's care and adjudicated neglected or dependent on three separate occasions, the mother willfully failed to complete her family services case plan (particularly the components centering on disciplining her children and managing inappropriate sexual behaviors the children began exhibiting as a result of past sexual abuse), which supported the court's conclusion that there was a high probability of future neglect if the children were returned to the mother's care. **In re A.H.G., 297.**

Parental right to counsel—parent absent from hearing—provisional counsel dismissed—inquiry by trial court—In a private termination of parental rights (TPR) action in which respondent-mother did not appear at the pretrial hearing, the trial court erred by dismissing respondent's provisional counsel on its own motion

ZONING—Continued